APPENDIX

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6920

JOHN W. OREM; SHER OREM,

Plaintiffs - Appellants,

v.

MATTHEW W. GILLMORE, individually,

Defendant - Appellee,

and.

JOHN DOE, individually,

Defendant.

Appeal from the United States District Court for the Northern District of West Virginia, at Martinsburg. Gina M. Groh, Chief District Judge. (3:18-cv-00050-GMG-RWT)

Submitted: April 29, 2020 Decided: May 11, 2020

Before MOTZ, AGEE, and THACKER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

John Hague Bryan, Union, West Virginia, for Appellant. Michael D. Mullins, Charleston, West Virginia, Tracey B. Eberling, Katherine M. Moore, STEPTOE & JOHNSON PLLC,

Martinsburg, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

John and Sher Orem appeal the district court's order granting Matthew Gillmore's motion for summary judgment in the Orems' 42 U.S.C. § 1983 (2018) action.* In their complaint, the Orems alleged that Gillmore performed an unreasonable, warrantless search of their home, in violation of the Fourth Amendment; falsely arrested John Orem, in violation of the Fourth Amendment; and infringed on their right to privacy, in violation of the Fourteenth Amendment. We affirm the grant of summary judgment on all claims.

We review an order granting summary judgment de novo, "drawing reasonable inferences in the light most favorable to the non-moving party." *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 407 (4th Cir. 2015) (internal quotation marks omitted). "Summary judgment is proper 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* at 408 (quoting Fed. R. Civ. P. 56(a)). The relevant inquiry is whether the evidence "presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *McAirlaids, Inc. v. Kimberly-Clark Corp.*, 756 F.3d 307, 310 (4th Cir. 2014) (internal quotation marks omitted).

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* The district court dismissed Defendant John Doe without prejudice, finding that it did not appear that the Orems could identify him. The Orems do not challenge this ruling in their opening brief and thus have waived the issue on appeal. *See Abdul-Mumit v. Alexandria Hyundai, LLC*, 896 F.3d 278, 290 (4th Cir.) ("[C]ontentions not raised in the argument section of the opening brief are abandoned." (internal quotation marks omitted)), *cert. denied*, 139 S. Ct. 607 (2018).

On the Orems' first claim—that Gillmore performed an unreasonable, warrantless search of their home—the district court found that Gillmore is entitled to qualified immunity. "Qualified immunity shields officials from civil liability [under § 1983] so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Adams v. Ferguson*, 884 F.3d 219, 226 (4th Cir. 2018) (internal quotation marks omitted). "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he or she is doing violates that right." *Id.* (brackets and internal quotation marks omitted). To overcome the shield of qualified immunity, there need not have been "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal quotation marks omitted). We conclude that, under the circumstances of this case, the reasonableness of Gillmore's warrantless search is not "beyond debate." Accordingly, the district court did not err in determining that Gillmore is entitled to qualified immunity on this claim.

On the Orems' second claim—that Gillmore violated John Orem's Fourth Amendment rights by arresting him without a warrant or probable cause—the district court granted summary judgment on the ground that the claim is barred by the statute of limitations. Here, the district court erred. "The Supreme Court has directed that we apply a state's statute of limitations governing general personal injury actions when considering § 1983 claims." *Battle v. Ledford*, 912 F.3d 708, 713 (4th Cir. 2019). In West Virginia, general personal injury actions have a two-year statute of limitations. W. Va. Code § 55-

2-12(b) (2019). John Orem was arrested on August 2, 2016, and the Orems filed the subject § 1983 action on April 9, 2018. The false arrest claim was therefore timely.

However, this Court is not bound by the district court's reasoning and "may affirm on any basis fairly supported by the record." *Lawson v. Union Cty. Clerk of Court*, 828 F.3d 239, 247 (4th Cir. 2016) (internal quotation marks omitted). "[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). "Probable cause is not a high bar, and it must be assessed objectively based on a totality of the circumstances, including common-sense conclusions about human behavior." *United States v. Jones*, 952 F.3d 153, 158 (4th Cir. 2020) (internal quotation marks omitted). "In assessing the totality of the circumstances, it is appropriate to consider specifically: an officer's practical experience and the inferences the officer may draw from that experience." *United States v. Humphries*, 372 F.3d 653, 657 (4th Cir. 2004).

Even if Gillmore did not have probable cause to arrest John Orem on the circumstances present in this case, the question is certainly not "beyond debate." *Mullenix*, 136 S. Ct. at 308 (internal quotation marks omitted); *see also Branch v. Gorman*, 742 F.3d 1069, 1072 (8th Cir. 2014) ("Qualified immunity applies if there is . . . arguable probable cause," which "exists even where an officer mistakenly arrests a suspect believing it is based in probable cause if the mistake is objectively reasonable" (internal quotation marks omitted)). We therefore conclude that the district court did not err in granting summary

judgment on this claim because, as with the Orems' unreasonable search claim, Gillmore is entitled to qualified immunity.

In their final claim, the Orems alleged that Gillmore violated their Fourteenth Amendment right to privacy through a variety of actions, including taking and disseminating a photograph of John Orem handcuffed to a bench in the police barracks, notifying the media about details of John Orem's medical emergency and arrest, and delaying John Orem's arraignment to give the media time to arrive at the courthouse. As the district court found, each of these allegations is mere speculation with no evidentiary support. Accordingly, the district court did not err in granting Gillmore summary judgment on this claim. *See Dash v. Mayweather*, 731 F.3d 303, 311 (4th Cir. 2013) (providing that, to survive summary judgment, "the nonmoving party must rely on more than conclusory allegations, mere speculation, the building of one inference upon another, or the mere existence of a scintilla of evidence").

We therefore affirm the district court's order. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

JOHN W. OREM, and
SHER OREM,

Plaintiffs,

v. **CIVIL ACTION NO.: 3:18-CV-50 (GROH)**

MATTHEW D. GILLMORE, individually,
and JOHN DOE, individually,

Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Now before the Court is Defendant Matthew D. Gillmore's Motion for Summary Judgment [ECF No. 36], filed on May 3, 2019. The Plaintiffs filed an untimely response in opposition on May 28, 2019. ECF No. 37. Defendant Gillmore filed a reply in support of his motion on June 11, 2019. ECF No. 38. Accordingly, this matter has been fully briefed and is now ripe for review. For the following reasons, Defendant Gillmore's Motion for Summary Judgment is granted.

I. Factual and Procedural Background

This action stems from an August 2, 2016, arrest of Plaintiff John Orem. The background of that arrest is as follows.

On the morning of August 2, 2016, Plaintiff Sher Orem called 9-1-1 to report that her husband, Plaintiff John Orem, was unresponsive on their bathroom floor. When the dispatcher answered the call, Mrs. Orem explained, "I think my husband has overdosed. I just found him on the bathroom floor." ECF No. 36-2 at 2. Mrs. Orem informed the

dispatcher that Mr. Orem was unconscious, not breathing, and turning purple. Id. at 3-9. As a result of the 9-1-1 call and Mrs. Orem's statement that she believed her husband had overdosed, emergency medical services ("EMS") and West Virginia State Police Troopers were dispatched to the Orem home. ECF No. 36-4 at 6.

When EMS personnel arrived, they confirmed that Mr. Orem had "no pulse." ECF No. 36-2 at 11. After performing chest compressions, EMS personnel were able to locate a pulse and began "try[ing] to find the underlying reason that [Mr. Orem was] unconscious." ECF No. 36-4 at 7. At that time, EMS personnel decided to administer Narcan because they "were told that the patient [was] prescribed Percocet" and "found upon a physical exam that [Mr. Orem's] pupils were pinpoint which [is] consistent with an Opioid overdose." Id. Furthermore, Mr. Orem's "respiratory effort was still insufficient to sustain life, the pupils were constricted, [and] skin was sweaty." Id. at 8. Based on this information, EMS personnel determined that they should "administer Narcan based on a possible Opioid overdose." Id.

Approximately two minutes after the Narcan was administered, Mr. Orem regained consciousness. Id. at 9-10. By that time, Defendant Gillmore, a West Virginia State Trooper, had arrived on the scene. Id. EMS personnel told Defendant Gillmore that they had administered Narcan and that Mr. Orem regained consciousness shortly thereafter. Id. at 16. However, the cause of Mr. Orem's cardiac arrest and loss of consciousness was still unknown. Id. at 12-16.

The parties dispute what Defendant Gillmore did next. However, to the extent that the parties rely on depositions taken after the close of the discovery [see ECF Nos. 32,

33, 35] the Court will not consider that evidence here. See ECF No. 34.

Relying on the remainder of the evidence submitted by the parties, after arriving on the scene, Defendant Gillmore asked to speak with Mrs. Orem to find out what occurred. ECF No. 36-4 at 19. After asking Mrs. Orem several questions about the incident, Defendant Gillmore entered the bathroom where Mr. Orem had collapsed. Id. at 22. Therein, Defendant Gillmore observed a shoelace on the bathroom sink and a small, clear, plastic baggie in the toilet. ECF No. 36-4 at 23-26. Defendant Gillmore then opened the bathroom cabinet and observed a metal spoon sitting on top of other items in the cabinet. Id. at 26. The spoon had white residue on it and burn marks on the back. Id. at 27. Defendant Gillmore believed this evidence was indicative of drug use and placed Mr. Orem under arrest for possession of a controlled substance. Id.; ECF No. 1 at 4.

After placing Mr. Orem under arrest, Defendant Gillmore transported Mr. Orem to the Berkeley County Magistrate Court in Berkeley County, West Virginia for his arraignment. ECF No. 1 at 5. When Defendant Gillmore and Mr. Orem arrived at the magistrate court, media was already present, and pictures were taken of Mr. Orem as he was led into the courthouse.[1] ECF No. 1 at 5. The Plaintiffs allege that Defendant Gillmore delayed in transporting Mr. Orem to the Berkeley County Magistrate Court so to allow time for the media to arrive at the courthouse. ECF No. 37 at 5. At some point that day, an unidentified person within the West Virginia State Police detachment took a

[1] At the time of this incident, Plaintiff John Orem was the Republican nominee for the sheriff of Berkeley County and was actively campaigning for the general election.

photograph of Mr. Orem and uploaded it to social media. ECF No. 1 at 5.

Thereafter, Defendant Gillmore drafted a criminal complaint charging Mr. Orem with possession of a controlled substance in violation of West Virginia Code § 60a-4-401(c). ECF No. 36-8 at 1. Based upon the criminal complaint, the magistrate judge found probable cause for Mr. Orem's warrantless arrest. Id. Following the arrest and arraignment, Defendant Gillmore provided the spoon to the forensic laboratory for testing. ECF No. 36-9. The residue on the spoon tested positive for Fentanyl, a scheduled II controlled narcotic substance. Id. Nevertheless, prior to trial the State of West Virginia dismissed the criminal charges against Mr. Orem. ECF No. 36-10. In support, the State alleged that "the search of the Defendant's bathroom cabinet does not fall within one of the known exceptions to the warrant requirement," and without the introduction of the spoon as evidence, the State believed it "could not prove the charge beyond a reasonable doubt." Id. at 2.

On April 9, 2018, the Plaintiffs filed the complaint in this matter charging: (1) unreasonable search in violation of the Fourth Amendment; (2) unreasonable seizure in violation of the Fourth Amendment; and (3) violation of the right to privacy under the Fourteenth Amendment. ECF No. 1. Specifically, in Count I the Plaintiffs argue that the search of the bathroom cabinet was illegal under the Fourth Amendment. Id. at 6. In Count II, the Plaintiffs allege that the arrest of Mr. Orem was unlawful. Id. at 8. Finally, in Count III, the Plaintiffs allege that the media coverage of the arrest and the photograph of Mr. Orem inside the West Virginia State Police detachment violated Mr. Orem's right to privacy under the Fourteenth Amendment. Id. at 11.

II. Applicable Legal Standards

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Thus, the Court must conduct "the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250.

The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., 475 U.S. at 586. That is, once the movant has met its burden to show an absence of material fact, the party opposing summary judgment must then come forward with affidavits or other evidence establishing there is indeed a genuine issue for trial. Fed. R. Civ. P. 56; Celotex Corp., 477 U.S. at 323-25; Anderson, 477 U.S. at 248. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249 (citations omitted). A motion for summary judgment should be denied "if the evidence is such that conflicting inferences may be drawn therefrom, or if reasonable men might reach different conclusions." Phoenix Savs. & Loan, Inc. v. Aetna Cas. & Sur. Co., 381 F.2d 245, 249 (4th Cir. 1967); see also id. at 253 (noting that

"[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge").

III. Discussion

On May 3, 2019, Defendant Gillmore filed the instant motion [ECF No. 36], seeking summary judgment on each of the Plaintiffs' claims. The claims will be addressed in turn.

A. Count I – Illegal Search under the Fourth Amendment

In Count I the Plaintiffs allege that Defendant Gillmore violated the Plaintiffs' Fourth Amendment rights when he searched the bathroom without a warrant and without an exception to the warrant requirement. ECF No. 1 at 6-7. Defendant Gillmore moves for summary judgment on this issue, arguing that the was search was lawful under the Fourth Amendment pursuant to the emergency aid exception. ECF No. 36-1 at 6.

1. Applicable Law

Under the Fourth Amendment, "searches and seizures inside a home without a warrant are presumptively unreasonable." Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (citing Groh v. Ramirez, 540 U.S. 551, 559 (2004)). However, "the warrant requirement is subject to certain exceptions," and if the "exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable," no warrant is required under the Fourth Amendment. Id. One such situation "obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury." Id. Therefore, "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured

occupant or to protect an occupant from imminent injury." Id.

To decide whether an officer "faced with an emergency" was justified in acting without a warrant, courts look to "the totality of the circumstances." Missouri v. McNeely, 569 U.S. 141, 149 (2013). "An action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify the action." Brigham City, 547 U.S. at 404 (internal quotations and citations omitted). Therefore, "[t]he officer's subjective motivation is irrelevant." Hunsberger v. Wood, 570 F.3d 546, 554 (4th Cir. 2009).

2. Analysis

In this case, it is undisputed that Defendant Gillmore conducted a search without a warrant when he opened the bathroom cabinet and located the spoon. However, Defendant Gillmore argues that he conducted the search pursuant to the emergency exception to the warrant requirement. Specifically, Defendant Gillmore maintains that his search of the bathroom cabinet "was performed in an effort to assist the medics in determining what may have caused John Orem's collapse." ECF No. 36-1 at 8. The Plaintiffs argue, "[W]hether Defendant Gillmore was engaged in administering 'emergency aid' or rather searching for evidence of criminal conduct, is a genuine material factual dispute, at best." ECF No. 37 at 6-7.

The Court finds that whether Defendant Gillmore's search was reasonable is an inherently factual inquiry and one best left for a jury. There is at least some evidence to support the conclusion that the medical emergency had ended prior to Defendant Gillmore's search of the bathroom. For example, EMS personnel testified at the criminal

pretrial that although they were "still very concerned about [Mr. Orem's] overall health . . . [t]he immediate life threat had concluded." ECF No. 37-8 at 32. EMS personnel also testified that they typically do not "do investigative work" to determine the cause of the incident unless the patient remains unconscious. Id. at 25. In this case, because Mr. Orem regained consciousness, EMS personnel testified that "needing to find the medications was not as important." Id. Finally, EMS personnel testified that they did not ask law enforcement to assist in determining what medications were ingested. Id. Although Defendant Gillmore may have been unaware of this information when he conducted the search, in the light most favorable to the Plaintiffs, there is at least some evidence to support the finding that the search was not conducted pursuant to the emergency exception.

However, even if the facts taken in the light most favorable to the Plaintiffs establish that Defendant Gillmore violated the Plaintiffs' constitutional rights, the Court must nevertheless decide whether those rights were "clearly established" at the time of the alleged misconduct. Saucier v. Katz, 533 U.S. 194, 201 (2001). This is the doctrine of qualified immunity—and it is a legal question to be decided by the Court, not the jury. Willingham v. Crooke, 412 F.3d 553, 560 (4th Cir. 2005). The doctrine of qualified immunity "acknowledge[s] that reasonable mistakes can be made as to the legal constraints on particular police conduct." Saucier at 205 (2001). Therefore, an officer is entitled to immunity unless "every reasonable official would have understood that what he is doing violates" the law. Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (citing Reichle v. Howards, 566 U.S. 658, 664 (2012)). "Put simply, qualified immunity protects all but

the plainly incompetent or those who knowingly violate the law." Mullenix, 136 S. Ct. at 308 (2015) (citations and quotations omitted).

In this case, it cannot be said that "every reasonable official" would have understood that Defendant Gillmore's actions violated the law. In fact, several state courts, relying on the Fourth Amendment, have held that actions like those of Defendant Gillmore are reasonable under the Fourth Amendment.

For example, in State v. McDonald, the Oregon Court of Appeals held that an officer's search of a home was reasonable under the emergency aid exception even though the drug overdose victim had regained consciousness and denied any drug use. 7 P.3d 617, 619-20 (Or. Ct. App. 2000). In McDonald, emergency personnel and law enforcement "responded to a 9-1-1 call regarding a drug overdose." Id. at 619. When law enforcement arrived, the defendant "who was conscious" was sitting on a landing at the top of the stairs. Id. Although the defendant "refused any help and denied drug use," law enforcement "began looking around to see exactly what kind of drug or combination of drugs defendant had taken." Id. Law enforcement ultimately located a spoon under a corner of the defendant's mattress. Id. at 620. The Oregon court held that "a drug overdose can constitute a true emergency," and so, it is objectively reasonable for an officer "to believe that his immediate assistance in determining the amount, variety, and combination of drugs taken by defendant [is] required to avert a life threatening drug overdose." Id.

Similarly, in People v. Paudel, the Illinois Appellate Court held that:

> [T]he mere fact that a person has regained consciousness does not in itself establish that all danger has alleviated or that the person's life or safety is

> not still threatened by the cause of unconsciousness. It is common knowledge that a drug overdose is sometimes a cause of death and that a person who is apparently suffering from an overdose must be regarded as being dangerously ill and in need of immediate assistance. Time is ordinarily of the essence, and police, fire and medical personnel responding to apparent overdose emergencies are naturally expected to act swiftly and efficiently.

613 N.E.2d 344, 351 (Ill. App. Ct. 1993). Therefore, the Illinois court found that law enforcement was assisting in the defendant's emergency treatment when they found drug contraband in the defendant's bedroom, even though the defendant had regained consciousness and was communicating with the paramedics. Id. at 354.

Based on these cases and the facts presented here, Defendant Gillmore is entitled to qualified immunity on the Fourth Amendment unlawful search claim. Before arriving on the scene, Defendant Gillmore was informed that he was being dispatched for a potential overdose. ECF No. 37-8 at 14. Once on the scene, emergency personnel informed Defendant Gillmore that they had administered Narcan, and that Mr. Orem thereafter regained consciousness. Id. at 28. However, emergency personnel testified that, even after a patient regains consciousness, they want to "continue to track improvement and if something begins to decline [they] want to try to be able to correct anything that's wrong before the patient would progress into another unconscious state or ultimately cardiac arrest." Id. at 20. Additionally, emergency personnel testified that they were "still very concerned about [Mr. Orem's] overall health." Id. at 32. As the courts note in McDonald and Paudel, regaining consciousness does not necessarily end the medical emergency. See 7 P.3d at 619-20; 613 N.E.2d at 351.

Shortly after Mr. Orem regained consciousness and while the cause of the cardiac

arrest was still unknown, Defendant Gillmore entered the bathroom. ECF No. 36-4 at 12-16. Defendant Gillmore testified at the criminal pretrial hearing that he went into the bathroom "to evaluate and find out what had caused this medical emergency." Id. at 22. Specifically, Defendant Gillmore testified "Mr. Orem had had a sudden cardiac and respiratory arrest, and at that time the medics and myself were trying to determine what had caused this." ECF No. 37-8 at 63. While, in hindsight, Defendant Gillmore deferred to the emergency personnel's opinion regarding whether the medical emergency had concluded, Defendant Gillmore testified that, in his opinion, everyone was "still very concerned about Mr. Orem" at the point he entered the bathroom. Id. at 29.

Based on these circumstances and the established law, it is objectively reasonable that Defendant Gillmore believed his actions were lawful under the emergency aid exception to the Fourth Amendment warrant requirement. Even after the criminal charges were dismissed, Defendant Gillmore maintained his position he was "assisting EMS personnel with determining what substance had been overdosed on . . . noting that overdose patients can go in and out of states of consciousness even after administering Naxalone." ECF No. 36-11. Although Defendant Gillmore's subjective intent does not carry the day—it is clear that an objectively reasonable officer would have believed his actions were lawful under the circumstances outlined above.

3. Conclusion

For the reasons provided above, the Court finds that there is genuine issue of material fact as to whether Defendant Gillmore was acting under the emergency aid exception to the Fourth Amendment warrant requirement. Nevertheless, Defendant

Gillmore is entitled to qualified immunity because it is not clearly established that Defendant Gillmore's actions violated the Plaintiffs' Fourth Amendment rights. Accordingly, the Defendant's motion for summary judgment as to Count I is **GRANTED**.

B. Count II – Illegal Seizure under the Fourth Amendment

In Count II, the Plaintiffs allege that Defendant Gillmore arrested Mr. Orem without a warrant or probable cause in violation of Mr. Orem's Fourth Amendment rights. ECF No. 1 at 8. Defendant Gillmore moves for summary judgment on this issue arguing that he had probable cause to make the warrantless arrest, and even if he did not have probable cause, the false arrest claim is barred by the statute of limitations. ECF No. 36-1 at 14-16.

1. Applicable Law

A law enforcement officer can make a warrantless arrest "as long as the officer has probable cause to believe that a felony has been committed." United States v. McGraw, 920 F.2d 224, 227 (1990). "Probable cause exists if at that moment the facts and circumstances within the officers' knowledge . . . were sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." Id. (internal citations, alterations, and quotations omitted). Ultimately, probable cause is based on the "totality of the circumstances." Id.

534 U.S. 266 & 939 F. Supp. 1256.

2. Analysis

The Court need not decide whether there was probable cause for Defendant Gillmore's warrantless arrest of Mr. Orem because the claim is time barred by the

applicable statute of limitations.

Claims brought under 42 U.S.C. § 1983 "borrow" the state statute of limitations. Owens v. Okure, 488 U.S. 235, 239 (1989). Specifically, courts are to apply "the general or residual statute for personal injury actions." Id. at 250. In West Virginia, the residual statute of limitations for "personal actions" is codified at West Virginia Code § 55-2-12. The West Virginia Supreme Court has held that subsection (c) of that statute applies to false imprisonment claims. See Canterbury v. Laird, 655 S.E.2d 199, 202 (W. Va. 2007) (holding that "torts such as false arrest take the one-year statute of limitations set forth in West Virginia Code § 55-2-12(c)). Subsection (c) provides that "[e]very personal action for which no limitation is otherwise prescribed shall be brought . . . within one year." W. Va. Code § 55-2-12(c). Therefore, the statute of limitations for a false arrest under 42 U.S.C. § 1983 is one year. See Coss v. Blatt, No. 2:18-CV-1199, 2019 WL 357979, at *3 (S.D. W. Va. Jan. 29, 2019); Camastro v. W. Va. Alcohol Beverage Control Comm'n, Civil Action No. 5:14CV67, 2014 WL 6612915, at *5 (N.D. W. Va. Nov. 20, 2014) The claim for an false arrest begins to accrue "at the time the claimant becomes detained pursuant to legal process." Wallace v. Kato, 549 U.S. 384, 397 (2007).

In this case, Mr. Orem was arrested and arraigned on August 2, 2016. Therefore, his false imprisonment claim began to accrue on August 2, 2016. Pursuant to West Virginia Code § 55-2-12(c), the one-year statute of limitations expired on August 2, 2017. The complaint in this matter was not filed until April 9, 2018—more than eight months after the statute of limitations ran. Therefore, Count II is time barred.

3. Conclusion

Because Count II is time barred, Defendant Gillmore's motion for summary judgement with respect to Count II is **GRANTED**.

C. Count III – Violation of Privacy under the Fourteenth Amendment

Finally, in Count III the Plaintiffs allege that Defendant Gillmore violated Mr. Orem's right to privacy under the Fourteenth Amendment. ECF No. 1 at 11. Defendant Gillmore moves for summary judgment on this issue, arguing that there is no evidence to support the allegations in the complaint, but even if there were, there is no constitutional right to privacy in Mr. Orem's medical or arrest information. ECF No. 36-1 at 17-22.

1. Applicable Law

"The Constitution does not explicitly mention any right to privacy." Roe v. Wade, 410 U.S. 113, 152 (1973). Nevertheless, the Supreme Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." Id. Specifically, the Supreme Court has recognized a right to privacy in "activities relating to marriage . . . procreation . . . contraception . . . family relationships . . . and child rearing and education." Id. (internal citations omitted). The right to privacy is designed to "avoid[] disclosure of personal matters" and protect an individual's "freedom of action in a sphere contended to be private." Whalen v. Roe, 429 U.S. 589, 599 (1977); Paul v. Davis, 424 U.S. 693, 713 (1976).

Neither the Supreme Court nor the Fourth Circuit have decided whether the constitutional right to privacy extends to medical information. See Whalen, 429 U.S. 589; Watson v. Lowcountry Red Cross, 974 F.2d 482, 487–89 n. 9 (4th Cir.1992); Taylor v.

Best, 746 F.2d 220, 225 (4th Cir.1984). However, district courts in this circuit "have found that alleged violations of federal laws that concern the confidentiality of medical records are not actionable under § 1983." DM v. Louisa Cty. Dept. of Human Servs., 194 F. Supp. 3d 504, 509 (W.D. Va. 2016) (collecting cases).

As to criminal records, the Supreme Court has held that the state may "publicize a record of an official act such as an arrest." Paul, 424 U.S. at 713 (1976). Specifically, the Supreme Court held that the constitutional right to privacy does not limit a state's ability to publicize a flyer depicting "active shoplifters" with the person's name and photograph. Id. at 695-96.

2. Analysis

Here, the Plaintiffs argue that Mr. Orem's constitutional right to privacy was violated in the following ways. First, the Plaintiffs aver that Defendant Gillmore and Defendant John took a photo of Mr. Orem "handcuffed and shackled inside the West Virginia State Police detachment on August 2, 2016, and uploaded the photo to social media." ECF No. 1 at 11. Next, the Plaintiffs aver that Defendant Gillmore and Defendant John Doe "notified the media and told them about Mr. Orem's medical emergency, as well as the allegations surrounding his arrest." Id. at 12. Finally, the Plaintiffs suggest that Defendant Gillmore "delayed Mr. Orem's arraignment in order to give time for the media to arrive at the Magistrate Court of Berkeley County in time to be able to photograph Mr. Orem being 'perp-walked' into the courthouse." Id.

As an initial matter, the Plaintiffs present no evidence to support any of these claims. Without any evidence, these claims cannot withstand summary judgment.

Nevertheless, even if the Plaintiffs presented some evidence, the Fourteenth Amendment does not afford a right to privacy in these matters.

As the Plaintiffs readily admit, the right to privacy "protects only information with respect to which the individual has a reasonable expectation of privacy." Walls v. City of Petersburg, 895 F.2d 188, 193 (4th Cir. 1990). Thus, "to the extent that [] information is freely available in public records . . ." it loses protection under the right to privacy. Id. However, "any details that are not part of the public record . . . are private and thus protected." Walls, 895 F.2d at 193.

Here, the 9-1-1 call is a public record. See W. Va. Code § 24-6-13(a) ("calls for emergency service to a county answering point are not confidential"); see also Barnes v. Montgomery Cty., Civil Action No. 09-cv-02507, 2012 WL 13012456, at *2 (D. Md. July 9, 2012) ("Courts routinely admit 911 tapes because, as public records, they are self-authenticating."); Dennis v. Feeney, No. 1:11-cv-1293, 2012 WL 194169, at *3 n.1 (M.D. Pa. Jan. 23, 2012) (identifying 911 call transcripts as "[p]ublic records"). In that 9-1-1 call, Mrs. Orem stated that she believed her "husband ha[d] overdosed." ECF No. 36-2 at 2. Mrs. Orem also explained that Mr. Orem was unconscious, not breathing, and turning purple. Id. Therefore, Mr. Orem's suspected overdose is part of the public record. The criminal record is also a public record, and is therefore not protected by a right to privacy.

3. Conclusion

In sum, the Plaintiffs' claim that Defendant Gillmore violated Mr. Orem's right to privacy is not supported by any evidence. Moreover, even if the Plaintiffs had presented

evidence to support their claim, their claims are not actionable under the law. Accordingly, Defendant Gillmore's motion for summary judgment as to Count III is **GRANTED**.

D. Claims Against John Doe Defendant

Finally, Defendant Gillmore moves to dismiss the claims against the John Doe Defendant. ECF No. 36-1 at 22. In their response to the motion for summary judgment, the Plaintiffs do not object to the dismissal of the John Doe Defendant. Moreover, the law does not permit this claim to proceed. The Fourth Circuit has held that "if it does nto appear that the true identity of an unnamed party can be discovered . . . the court could dismiss the action without prejudice." Schiff v. Kennedy, 691 F.2d 196, 198 (4th Cir. 1982). In this case, discovery has closed and trial is set to commence in less than two months. Therefore, it does not appear that the Plaintiffs can identify the John Doe Defendant. Accordingly, the John Doe Defendant must be **DISMISSED WITHOUT PREJUDICE**.

IV. Conclusion

For the aforementioned reasons, the Court **ORDERS** that Defendant Gillmore's Motion for Summary Judgment [ECF No. 36] is **GRANTED**. The Court further **ORDERS** that Defendant John Doe is **DISMISSED WITHOUT PREJUDICE**.

The Clerk of Court is **DIRECTED** to enter a separate judgment in favor of Defendant Gillmore pursuant to Rule 58 of the Federal Rules of Civil Procedure. The Clerk is further **DIRECTED** that this case shall be **DISMISSED WITH PREJUDICE** as to Defendant Gillmore and **STRICKEN** from the Court's active docket.

The Clerk is **DIRECTED** to transmit copies of this Order to all counsel of record herein.

DATED: June 17, 2019

GINA M. GROH
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

for the

Northern District of West Virginia

John W. Orem and Sher Orem

Plaintiff(s)

v.

Civil Action No. 3:18-CV-50

Matthew D. Gillmore and John Doe

Defendant(s)

JUDGMENT IN A CIVIL ACTION

The court has ordered that:

☐ Judgment award ☐ Judgment costs ☒ Other

other: that Defendant Gillmore's Motion for Summary Judgment [ECF No. 36] is GRANTED and that Defendant John Doe is DISMISSED WITHOUT PREJUDICE.

This action was:

☐ tried by jury ☐ tried by judge ☒ decided by judge

decided by Judge Gina M. Groh

Date: 06/17/2019

CLERK OF COURT

Cheryl Dean Riley

/s/ C. Mullen - Deputy Clerk

Signature of Clerk or Deputy Clerk

FILED: July 28, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6920
(3:18-cv-00050-GMG-RWT)

JOHN W. OREM; SHER OREM

Plaintiffs - Appellants

v.

MATTHEW W. GILLMORE, individually

Defendant - Appellee

and

JOHN DOE, individually

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: Judge Motz, Judge Agee, and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

RECORD NO. 19-6920

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

JOHN W. OREM; SHER OREM,
Plaintiffs-Appellants,

v.

MATTHEW W. GILLMORE, individually,
Defendant-Appellee.

and

JOHN DOE, individually,
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WET VIRGINIA
AT MARTINSBURG

OPENING BRIEF OF APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-6920 Caption: John W. Orem and Sher Orem v. Matthew D. Gillmore, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

John W. Orem and Sher Orem
(name of party/amicus)

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

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

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

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

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

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

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ John H. Bryan Date: 7/15/19

Counsel for: Appelants

CERTIFICATE OF SERVICE

****

I certify that on 7/15/19 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Tracey B. Eberling, Esq. (WVSB #6306)
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/s/ John H. Bryan
(signature)

7/15/19
(date)

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RULES, STATUTES, AND OTHER AUTHORITIES

STATEMENT OF JURISDICTION

Plaintiffs, John W. Orem and Sher Orem, filed their Complaint (J.A. 5), pursuant to United States Code, Title 42, Section 1983, alleging Appellee, Matthew D. Gillmore, committed an unreasoanble search and seizure against the plaintiffs, in violation of the Fourth Amendment of the Constitution of the United States. The United States District Court for the Northern District of West Virginia exercised subject-matter jurisdiction pursuant to United States Code, Title 28, Sections 1331 (federal question jurisdiction) and 1343 (civil rights jurisdiction). On June 17, 2019, the District Court entered the Order Granting Motion for Summary Judgment in favor of the Defendant, Matthew D. Gillmore. (J.A. 599)

The Plaintiffs seek to invoke the jurisdiction of this Court pursuant to United States Code, Title 28, Section 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The following issues are presented for review on this Appeal:

1. Whether the District Court erred in granting qualified immunity to Defendant Matthew D. Gillmore on the claim that he performed an unconstitutional search of the Plaintiffs' bathroom?

2. Whether the District Court erred in dismissing Count Two of the Complaint based on the Defendant's mistaken argument that Count Two is based on

a one-year statute of limitations, rather than the appropriate two-year statute of limitations?

3. Whether the District Court erred in dismissing Count Three of the Complaint, finding that there is no applicable right to privacy for information pertaining to a medical emergency suffered by John W. Orem in his home which was subsequently released into the local and national news media, as well as social media platforms?

STATEMENT OF THE CASE

John and Sher Orem own and manage numerous rental properties. On the days immediately prior to Mr. Orem's medical emergency, he had been traveling on a real estate buying trip. He became extremely ill, and found a hotel room to attempt to recover, hoping to continue his trip. However, Mr. Orem kept getting more and more sick. (J.A. 193:9-15). His wife, Sher Orem, took her husband some medicines, and eventually picked him up at the hotel, and brought him home, since he was still sick and apparently not recovering properly. (J.A. 193:16-22, 14:18-19).

As this was happening, Mr. Orem was the Republican nominee for Sheriff of Berkeley County and was actively engaged in campaigning for the general election. Mr. Orem is a former police officer, and owns a number of local businesses in the Berkeley County area. One of Mr. Orem's opponents in the election was a retired Captain of the Berkeley County Sheriff's Department, D. Scott Richmond. On

August 2, 2016, Mr. Richmond's wife was employed by the West Virginia State Police as the dispatcher at the Martinsburg, West Virginia State Police detachment. She had been Trooper Gillmore's secretary for ten years, and Gillmore knew her when she was a dispatcher prior to working in that capacity. (J.A. 263:7-14) She was on duty and inside the detachment on the day in dispute *sub judice*. (Id. 4-6)

At the Orem residence, Sher Orem was attempting to care for her sick husband, giving him flue medicines and other medicines to help him sleep. She recalled that she may have given him Nyquil tablets, and some of her Clonazepam prescription medications, and possibly other over-the-counter medicines in an attempt to assist him. (J.A. 196:16-24, 197:1-4). Mr. Orem remembers taking over-the-counter medicines from his wife, as well as a couple prescription medications, such as Oxycodone and Klonopin, hoping it would help him sleep. (J.A. 360:14-20). John was cold, but feverish at the same time. He was sweaty, vomiting, suffering from diarrhea, and coughing. (J.A. 198:2-5). The first medical emergency occurred around August 1, 2016. Sher called 911 because John was in bed, and barely breathing. The dispatcher told her that she needed to start CPR, which she attempted despite not knowing how to perform CPR. (J.A. 198-99). By the time EMS had arrived, Mr. Orem had woken up, and he told EMS that he was sick, and that he wasn't sure why she called 911. He said he was okay. They checked his blood pressure and he declined medical attention. (J.A. 200:3-18). The EMS personnel

were only there for about 5 to 10 minutes. (J.A. 201:12-16). There was no administration of Narcan - nor any evidence of narcotics on that occasion.

After the first 911 call, John Orem went back to bed, continuing to take any medications which he thought would make him feel better. He was sleeping, and going back and forth to the bathroom frequently. He was switching sleeping from in his bed, to on the couch, still back and forth to the bathroom (J.A. 282:6-9, 16-17, 21-24). Suddenly, Sher awoke to what she described as a "loud thump," and jumped out of bed to see what had made the noise. She found her husband laying on the floor of the hall bathroom. She started screaming his name, trying to wake him up. Mr. Orem didn't respond, so she called 911. She knew John had taken a lot of medications, mixing medications for several days. (J.A. 203:1-18). Following the 911 call, three paramedics arrived. Two of them entered the home, and one remained outside, apparently calling the state police. (J.A. 205:2-9).

At the time of the incident, Sher thought that John had possibly overdosed on medication, which was the concern she had relayed to the 911 dispatcher. She had never seen him faint before, and she knew he had taken a mix of medications, combined with a number of other things, such as his blood pressure issues, blood disease, and his extreme illness he had experiencing. (J.A. 206:20-24) Based on the circumstances, the EMS administered Narcan.

Following the administration of Narcan, Mr. Orem was able to walk on his own from the bathroom, with the paramedics following closely behind. (J.A. 211:6-13) The medics began to ask John if he wanted to go to the hospital, and possibly they checked his blood pressure. (J.A. 212:2-5). John was sitting on the edge of the sofa in the living room, speaking with the paramedics. He was very alert, and very adamant that he was fine, and that he didn't need anymore care. (J.A. 210:9-16).

As the paramedics were working on Mr. Orem, Defendant Trooper Gillmore arrived at the home and let himself in the house. As he observed the paramedics working on Mr. Orem, he followed Sher to the master bedroom. Mr. Gillmore followed her inside and, according to Sher Orem, pulled the door partially closed. He asked her, "where are the drugs." She pointed to the night stand, to his prescriptions, and the over the counter medications he had been taking. Gillmore said, "no, I want to know where the drugs are." Sher responded, "so you're telling me that there are drugs? Where are they? I don't know . . . I don't know anything about any other drugs other than what's on the night stand." Then Gillmore walked back out to the hallway. (J.A. 208:14-24, 209:1-3) Mrs. Orem testified that as the conversation took place, Mr. Gillmore was looking around the bedroom, opening the closet, looking around the closet, just long enough to briefly do "like a little turnaround circle in the bedroom . . . " and then walked back out. (J.A. 209:4-12). Defendant Gillmore denies ever asking Mrs. Orem about drugs. He denies looking

around the bedroom. He denies being shown Mr. Orem's medications in the bedroom bathroom medicine cabinet. (J.A. 272:23-24, 273:2-23).

After Mr. Orem and the paramedics moved into the living room of the home, Mrs. Orem noticed Defendant Gillmore proceed to walk, by himself, down the hallway of her home. She followed Mr. Gillmore, because she didn't understand why he was walking in that direction. Defendant Gillmore then began to shut the bathroom door, and as he was shutting it, Mrs. Orem grabbed ahold of her side of the door, and attempted to keep it open. As she was trying to push the door open, Gillmore was pushing back against her, trying to close the door. Then Defendant Gillmore forced the door shut and locked Mrs. Orem out of her bathroom. (J.A. 212:16-24, 213:1-3.) Defendant Gillmore denies that there was ever a struggle over the door. (*See* J.A. 279:13-24). John Orem testified that he saw Gillmore walk back towards the bathroom, and saw his wife attempting to get in the bathroom door. (J.A. 366:3-21).

As John Orem was speaking with the paramedics, Defendant Gillmore went outside for a period of time. According to Defendant Gillmore, he was speaking with his detachment commander, discussing with him that he was going to make a high-profile arrest of well-known sheriff candidate, and Republican Nominee, John Orem. (J.A. 288:5-12; 289:7-24; 290:3-10). Mr. Gillmore then walked into the house from outside, just as the paramedics were asking John if he wanted to go to the

hospital. Defendant Gillmore then asked Mr. Orem to step outside. (J.A. 366:22-24). John had not yet signed the written waiver of medical treatment. (J.A. 366:1-10) Mr. Orem was then handcuffed, and then Trooper Gillmore signed the waiver of medical attention on Mr. Orem's behalf. (J.A. 366:11-13). Although Defendant Gillmore claims to have been assisting the paramedics in rendering medical treatment, at no point did Mr. Orem observe Mr. Gillmore speak with either of the paramedics who were attending to him. (J.A. 420:19-24, 421:1-4).

Mr. Orem was transported to the local state police detachment by Defendant Gillmore. Prior to Mr. Orem being transported to the magistrate court for arraignment, an occupant of the state police detachment apparently leaked news of Mr. Orem's arrest to the local media, as well as social media. Reporters with cameras were already present, and waiting, at the Berkeley County Magistrate Court entrance, as Troooper Gillmore walked Mr. Orem into the building for his arraignment. Shockingly, a photograph of Mr. Orem sitting inside the state police detachment, handcuffed to a bench in his pajamas, began to immediately circulate on social media. (J.A. 388:8-17, 393:6-23) Defendant Gillmore's behavior is consistent with him having delayed transporting Mr. Orem to the arraignment at magistrate court, in order to give reporters time to arrive. They would have been traveling from Hagerstown, Maryland. (J.A. 393:21-23) Mr. Orem's arrest was effected without a warrant, thus the Criminal Complaint against him was written by Gillmore at the

detachment while Mr. Orem was handcuffed to the bench. As such, the publicity began to go viral prior to the issuance of any warrants or allegations against him. (J.A. 417:5-12).

Both Mr. Orem's defense attorney, as well as the Prosecuting Attorney, concluded that the search and seizure of the spoon from the Orem bathroom was an unconstitutional violation of the Fourth Amendment. At the joint request of both the State and Mr. Orem, the criminal charge against him was dismissed. (*See* Dismissal Motion and Order, J.A. 141-150).

In response to the dismissal, Defendant Gillmore took the unprecedented action of attempting to defy the prosecuting attorney, and sending a letter directly to the Magistrate, objecting to the dismissal of criminal charges.(*See* J.A. 151). In his letter, Gillmore attempted to argue the legality of his actions. The State of West Virginia responded to Gillmore's letter, by filing an official response with the Magistrate Court, stating that "Cpl. Gillmore does not have standing to object in this matter . . . ." and that the "Prosecutor's Office has an ethical duty to review the evidence and apply said evidence to constitutional restrictions."(*See* State's Response to Gillmore Letter, J.A. 447).

SUMMARY OF ARGUMENT

The District Court erred in granting qualified immunity to Defendant Gillmore, because assuming the Plaintiffs' allegations are true, no objectively

reasonable police officer would believe that they could legally search a homeowner's bathroom for evidence of illegal drug use without first obtaining a search warrant, or requesting consent. It's probably the most basic rule of search and seizure governing the behavior of police officers in the past half-century of jurisprudence. Indeed, the Prosecuting Attorney concluded that the search was unconstitutional and dismissed the criminal charge against Mr. Orem, over the written objection of Defendant Gillmore.

The District Court erred in dismissing Count Two of the Complaint based on the mistaken assumption contained in the Defendant's motion that Count Two carries a one-year statute of limitations. Despite frequent confusion on the subject, as well as vague and incorrect case law from various courts and circuit court panels, there can be no doubt that Count Two carries a two-year statute of limitations.

The District Court erred in dismissing Count Three of the Complaint based on the holding that there is no right to privacy in information pertaining to a medical emergency suffered by a homeowner while inside his home. Federal law protects healthcare information, and public records generated pursuant to an unconstitutional search, and illegal arrest, cannot negate the Plaintiff John W. Orem's privacy rights by utilizing an abuse of the public records exception.

ARGUMENT

I. Standard of Review

A. Legal Standard for review of a District Court's grant of Summary Judgment

On appeal, a District Court's grant of a motion for summary judgment is reviewed *de novo*. Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 340-41 (4th Cir. 2000). The Court must take care to "resolve all factual disputes and any competing, rational inferences in the light most favorable" to the party who opposed the motion. Wightman v. Springfield Terminal Ry. Co., 100 F.3d 228, 230 (1st Cir. 1996).

In determining whether summary judgment is appropriate, the Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). And, "[i]n deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in his favor." Taylor v. McDuffie, 155 F.3d 479, 482 (4th Cir. 1998).

B. Legal Standard for application of Qualified Immunity

The Court reviews application of qualified immunity by the District Court under the two-step qualified immunity analysis. *See* Saucier v. Katz, 533 U.S. 194,

201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). The "threshold question" in the qualified immunity analysis on summary judgment is whether, "[t]aken in the light most favorable to the party asserting the injury, ... the facts alleged show [that] the officer's conduct violated a constitutional right." Id. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." Id.; *see* Figg v. Schroeder, 312 F.3d 625, 635 (4th Cir.2002). If, however, the facts alleged show a constitutional violation, "then the next step is to ask whether the constitutional right was clearly established in the specific context of the case." Figg, 312 F.3d at 635 (*internal quotation marks omitted*). Odom v. South Carolina Dept. of Corrections, 349 F.3d 765 (4th Cir., 2003).

In determining whether a right was clearly established, we "'ordinarily need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose,'" as of the date of the conduct at issue. Doe ex rel. Johnson v. S.C. Dept. of Soc. Servs., 597 F.3d 163, 176 (4th Cir.) (citation omitted), *cert. denied*, ___ U.S. ___, 131 S. Ct. 392 (2010). And, the "'nonexistence of a case holding the defendant's identical conduct to be unlawful does not prevent denial of qualified immunity,'" because "'qualified immunity was never intended to relieve government officials from the responsibility of applying familiar legal principles to new situations.'" Wilson v. Kittoe, 337 F.3d 392, 403 (4th

Cir. 2003) (*citations omitted*). Thus, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." Hope v. Pelzer, 536 U.S. 730, 741 (2002) (*quoting* Sawyer v. Asbury, No. 12-2123 (4th Cir., 2013)).

II. The District Court erred in granting qualified immunity to Defendant Matthew D. Gillmore on the claim that he performed an unconstitutional search of the Plaintiffs' bathroom

The District Court concluded that, "there is genuine issue of material fact as to whether Defendant Gillmore was acting under the emergency aid exception to the Fourth Amendment warrant requirement . . . ," but that "[N]evertheless, Defendant Gillmore is entitled to qualified immunity because it is not clearly established that Defendant Gillmore's actions violated the Plaintiff's Fourth Amendment rights." (JA at 609-10) The Court erred in treating a warrantless search as if it were a new, or novel, legal issue, when it is the most basic and fundamental premise upon which our criminal justice system adheres to the Fourth Amendment: a citizen's home cannot be searched without a warrant.

The District Court avoided the implication that, if Defendant Gillmore was not acting to render "emergency aid," he was therefore engaging in a warrantless illegal search of a home, looking for evidence upon which to arrest the homeowner. That being the case, and viewing the facts in the light most favorable to the Orems, who were the homeowners of the premises searched by Defendant Gillmore, qualified immunity must be denied. All objectively reasonable police officers know that

warrants are required to search a home. As such, the District Court erred in granting qualified immunity.

A. The underlying violation

Amendment IV of the U.S. Constitution provides that "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. Article III, Section 6 of the West Virginia Constitution provides for the same protections, almost verbatim. West Virginia state-level search warrants must be executed by the officer who obtained the warrant within ten days of being issued. *See* W. Va. Code § 62-1A-4; State v. Clements, 175 W. Va. 463 (1985).

"The emergency doctrine may be said to permit a limited, warrantless search or entry of an area by police officers where (1) there is an immediate need for their assistance in the protection of human life, (2) the search or entry by the officers is motivated by an emergency, rather than by an intent to arrest or secure evidence, and (3) there is a reasonable connection between the emergency and the area in question." State v. Bookheimer, 656 S.E.2d 471 (W. Va. 2007) (*quoting* Syl. Pt. 2, State v. Cecil, 311 S.E.2d 144 (W. Va. 1983)). "The 'reasonableness' of a warrantless search or entry under the emergency doctrine is established by the

'compelling need to render immediate assistance to the victim of a crime, or insure the safety of the occupants of a house when the police reasonably believe them to be in distress and in need of protection.'" Id. (quoting Cecil, 311 S.E.2d at 150.

During the preliminary hearing conducted in the underlying criminal action in the Magistrate Court of Berkeley County, Defendant Gillmore admitted that there was no immediate or compelling need for his assistance for the purposes of protecting human life, and that any emergency which may have existed prior to his actions, had ended by the time the search was performed:

Q: And there was no compelling need to render him assistance by you?

A: No, sir.

(*See* Pretrial Hearing Transcript J.A. 513). The Chief EMS personnel on the scene testified that Defendant Gillmore was not requested to assist:

Q. Did you ask the troopers present to assist you guys in determining what he had taken?

A: No.

(J.A. 473).

In fact, the extent of the EMS chief's conversation with Gillmore was just to tell him that Narcan was administered to the patient. (J.A. 476). By the time Mr. Orem walked to the living room, the Chief considered the immediate threat of life to be over, and nothing further was required from a medical standpoint. (J.A. 480). Despite being in charge of providing medical care to the patient, the Chief never

even entered the bathroom. Mr. Orem was not being violent, and there were no safety concerns for EMS. (J.A. 482). Prior to Gillmore beginning his search of the Orem bathroom, there was no medical treatment being provided:

> Q: [O]nce the emergency intervention was concluded, your walk with Mr. Orem he was walking upright, talking, oriented, and you had no compelling need to render any more immediate intervention services?
>
> A: That's correct.

(J.A. 489). Defendant Gillmore agreed with the testimony of Chief Winebrenner that the medical intervention emergency ended when Mr. Orem reached the living room. (J.A. 513-14). Moreover, Gillmore testified that he had purposefully waited until the emergency had ended prior to entering the bathroom to conduct a search for evidence:

> Q. . . . [b]ut it's just you stand by your testimony that you waited until the medical emergency was done?
>
> A: That's correct.
>
> Q: And then you went into the bathroom?
>
> A: That's correct.

(J.A. 515).

Defendant Gillmore testified that the only reason he was dispatched to the scene would be for the purposes of providing for the safety of EMS professionals on the scene. (J.A. 269:1-11) However, there were no safety concerns ever conveyed to

Gillmore by the EMS professionals at the scene that morning. (J.A. 269:12-14) Defendant Gillmore's testimony has changed over time to attempt to redefine his conduct into what he believes qualifies under the emergency aid exception. Gillmore testified at his deposition that he was looking for "something there that could help to answer this conundrum why a healthy man had a immediate cardiac arrest . . . ." Moreover, he went out of his way to avoid admitting that he was looking for opiates in the bathroom, claiming he was concerned for Mr. Orem's health. (J.A. 280:13-24, 281:1-19). However, there is sufficient evidence for a jury to believe that his sole purpose was only to perform a Fourth Amendment search of the bathroom. Had Trooper Gillmore legitimately wanted to know what Mr. Orem had ingested, he would have at least looked at the prescription medications in the house, or he could have obviously asked Mr. Orem - neither of which he did according to his own admissions. (J.A. 291:15-24, 292:1-15).

The State of West Virginia, through the prosecuting attorney, also agreed that Defendant Gillmore had performed an illegal search which was unrelated to the emergency aid exception. During his deposition, Gillmore testified that the prosecutor told him that the case was being dismissed due to the bathroom search being illegal, and because there was no evidence of narcotics possession. (J.A. 308:23-24; 309:1-10; 317:13-21).

Dr. Jack Daniel, forensic pathologist, gave the opinion, during the criminal litigation stage, that "[n]ecessary medical treatment for opioid overdose is the same regardless of the specific opioid administered; i.e., airway management, cardiorespiratory support, and further medical intervention as indicated by the individual's condition following Narcan administration. In this instance, the record indicates that Mr. Orem did in fact appear to respond promptly to Narcan, becoming coherent and alert though groggy direction following administration. There is no evidence that he was in further immediate medical danger once he regained consciousness." (J.A. 179:6).

B. Whether the right was clearly established in the context of the case

Violating clearly established constitutional rights which any reasonable person would have known, such as the basic constitutional requirement that searches within a citizen's home require a search warrant, cannot be reasonable as a matter of law. To the contrary, Defendant Gillmore's actions violated the most basic and fundamental tenant of the Fourth Amendment - that a man's home is his castle and is subject to the highest protections of the Constitution. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Pearson v. Callahan, 555 U.S. 223, 231 (2009) (*quoting* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). It represents a

balance between two significant 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." Id.[1]

As the prosecuting attorney explained to Defendant Gillmore prior to moving to dismiss the criminal charge against the plaintiff, police officers cannot constitutionally search inside a citizen's home for evidence of a crime without a warrant. (J.A. 385:23-24; 386:1-10; 394:13-21). It is undisputed that Gillmore did not have a search warrant at the time of the search. (J.A. 390:18) It is undisputed that Gillmore did not see contraband in "plain view" prior to conducting the search. (J.A. 353:4-16). It is undisputed that Gillmore did not obtain consent to search the bathroom. (J.A. 390:19-21) The only possible theory, upon which Gillmore relied upon in his dispositive motion, was the emergency aid exception. However, Gillmore's emergency aid defense was only asserted as a legal tactic, long after the

[1] Traditionally, determining the existence of qualified immunity required a two-part analysis by the court. Saucier v. Katz, 533 U.S. 194, 201-02 (2001). First, a court was required to determine if "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Scott v. Harris, 550 U.S. 372, 377 (2007). If the court determined that the officer's conduct violated a constitutional right, the court was required to determine "whether the right was clearly established . . . in light of the specific context of the case." Id. However, courts are no longer required to adhere to this rigid two-step inquiry. The U.S. Supreme Court held that the sequence of analysis to determine whether qualified immunity exists is no longer mandatory, and it was committed to the discretion of the court to determine which prong of the qualified immunity test the court would consider first. Pearson, 555 U.S. at 243.

search occurred. Mr. Gillmore's testimony from the pretrial hearing during the criminal litigation admitted that he was not assisting with an emergency, since he purposefully waited until the emergency passed prior to beginning his search. (J.A. 515-18).

All police officers know that a warrant is required to perform a search in a citizen's home. The situation is not new or novel. The only novel aspect of the matter is Defendant Gillmore's attempt at circumventing the warrant requirement by trying to pigeonhole his actions into an otherwise valid exception, by misrepresenting his actions that day. The fact alone that Gillmore's testimony has changed over time is reason enough to send the matter to a jury. Taking the facts in the light most favorable to the plaintiffs, Gillmore's conduct violates the Fourth Amendment prohibition on unreasonable searches and seizures. That searches and seizures of a suspect's home requires a warrant, or a valid exception to the warrant requirement, has been clearly established as well as any right ever litigated in the history of the federal courts. Assuming the plaintiffs' allegations are true, Defendant Gillmore cannot be entitled to qualified immunity.

III. The District Court erred in dismissing Count Two of the Complaint based on the Defendant's mistaken argument that Count Two is based on a one-year statute of limitations, rather than the appropriate two-year statute of limitations.

The District Court held that Count Two of the Complaint is time-barred due to it having a one year statute of limitations. However, both the Defendant's motion,

referencing the existence of a one year statute of limitations, as well as the Court's order, are mistaken and based on case law which is likewise incorrect. Count Two, being a Fourth Amendment violation, rather than a state law tort, carries a two year statute of limitations, consistent with Supreme Court guidance.

In his dispositive motion, Defendant made the common mistake of conflating the state law claim for "false arrest," which can be asserted as a separate count in a federal 1983 action (or in state courts), and an actual direct 1983 claim for "false arrest" in the federal meaning of the phrase, which is actually a Fourth Amendment search and seizure claim. The federal claim *sub judice* carries the same general two year statute of limitations as other search and seizure claims. Such is a common misconception, which many courts and litigants have confused over the years. This has resulted in conflicting opinions, both in terms of characterization of "false arrest" as a non-Fourth Amendment case, and in terms of using a one year statute of limitations in West Virginia cases.

To be clear, as Judge Keeley once explained, "[t]he Fourth Circuit has recognized two distinct causes of action under Section 1983 for violations of a person's Fourth Amendment right against unreasonable search and seizure. *See* Brooks v. Winston-Salem, 85 F.3d 178, 181-82 (4th Cir. 1996) (*citing* Heck v. Humphrey, 512 U.S. 477, 484 (1994)). One of these is a cause of action for false or unlawful arrest or arrest without legal process. *See* Wallace v. Kato, 549 U.S. 384,

389 (2007). Such a cause of action cannot be pursued, however, when a person has been arrested based on a facially valid warrant. *See e.g.*, Bellamy v. Wells, 548 F. Supp.2d 234, 237 (W.D. Va. 2008); Porterfield v. Lott, 156 F.3d 563, 568 (4th Cir. 1998) ("a claim for false arrest may be considered only when no arrest warrant has been obtained"); *see also* Dorn v. Town of Prosperity, 375 F. App'x 284, 286 (4th Cir. 2010) ("The distinction between malicious prosecution and false arrest . . . is whether the arrest was made pursuant to a warrant") *quoting* Judge Keeley's Memorandum Opinion and Order in Davis v. City of Shinnston, Civil Action No. 1:12-cv-53 at page 21-22 (N.D.W.Va. 2013).

Thus, whether the claim is generally termed false arrest, or malicious prosecution, etc., the underlying claim is a violation of the Fourth Amendment search and seizure requirements, which does not contain separate subsets of different torts with different statutes of limitations. In an attempt to avoid this very confusion, the U.S. Supreme Court addressed the issue back in 1989. In Owens v. Okure, 488 U.S. 235, 109 S.Ct. 573 (1989), the Court made it clear that "where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the State's general or residual personal injury statute of limitations. Id. 239-242.

The Court explained that different state intentional tort limitations, such as a one year limitations for false arrest claims, "fails to recognize the enormous practical

disadvantages of such a selection in terms of the confusion and unpredictability the selection would cause for potential § 1983 plaintiffs and defendants." Id. 242-250; *see also* Battle v. Ledford, No. 17-6287 at 5 (4th Cir. January 8, 2019) (citing and reiterating the Okura holding that the general personal injury statute of a state is to be used in 1983 actions). To be sure, the Court can look to guidance from the 2014 Fourth Circuit opinion in Owens v. Balt. City State's Attorneys Office, 767 F.3d 379, 388 (4th Cir., 2014), which also cited Okura. The Court applied Maryland's three year personal injury statute of limitations period to a Fourth Amendment false arrest § 1983 claim, just as is pending *sub judice*. Similarly, despite the existence of conflicting opinions on the issue, a two year statute of limitations period is the applicable period for the claim as presented herein. As such, the District Court's order dismissing Count Two should be reversed and remanded.

IV. The District Court erred in dismissing Count Three of the Complaint, finding that there is no applicable right to privacy for information pertaining to a medical emergency suffered by John W. Orem in his home, despite highly confidential information being immediately released into the local and national news media, as well as social media platforms.

The District Court granted summary judgment on Count Three of the Plaintiffs' Complaint based on Defendant's argument that arrest records are public records, and therefore not applicable to the right of privacy. However, the arrest was illegal, and even worse, the information released was in excess of basic public arrest

records. Moreover, the public records exception cannot swallow the entire right of privacy as a matter of law.

The constitutional right to privacy extends to two types of interests: "one is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600, 97 S.Ct. 869, 876-877, 51 L.Ed.2d 64 (1977). Areas protected within these interests include matters relating to marriage, Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); procreation, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); contraception, Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); family relationships, Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). *See* Paul v. Davis, 424 U.S. 693, 713, 96 S.Ct. 1155 1166, 47 L.Ed.2d 405, 421 (1976); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

As the first step in determining whether the information sought is entitled to privacy protection, courts have looked at whether it is within an individual's reasonable expectations of confidentiality. The more intimate or personal the information, the more justified is the expectation that it will not be subject to public

scrutiny. Fraternal Order of Police, Lodge 5 v. Philadelphia, 812 F.2d 105, 112-113 (3d Cir.1987). The right to keep one's beliefs and thoughts and emotions and sensations secure, and, as against the government, private was described by Justice Brandeis as "the right to be let alone--the most comprehensive of rights and the right most valued by civilized man." Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). Personal, private information in which an individual has a reasonable expectation of confidentiality is protected by one's constitutional right to privacy.

The right to privacy is not absolute. If the information is protected by a person's right to privacy, then the defendant has the burden to prove that a compelling governmental interest in disclosure outweighs the individual's privacy interest. Carey v. Population Services International, 431 U.S. 678, 686, 97 S.Ct. 2010 2016, 52 L.Ed.2d 675 (1977); Fraternal Order of Police, 812 F.2d at 110; Ponton v. Newport News School Bd., 632 F.Supp. 1056, 1061 (E.D.Va.1986). As the Supreme Court has recognized, "compelling" is the key word. Carey, 431 U.S. at 686, 97 S.Ct. at 2016, 52 L.Ed.2d at 685. When the decision or the information sought is "fundamental," regulation "may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." Id.; *see also* Gibson v. Florida Investigation Committee, 372 U.S. 539, 546, 83 S.Ct. 889, 893, 9 L.Ed.2d 929, 935-936 (1963) (Investigation Committee sought to subpoena membership list

of Miami NAACP; "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."). *Quoting* Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1990).

John Orem had a reasonable expectation of confidentiality in information pertaining to the medical emergency he experienced. Just as medical information is protected by well established federal law under HIPPA, most people reasonably expect that health information and medical treatment information is private. A reasonable person would never expect that personal medical details of a medical emergency and treatment, occurring inside their home, would be released publicly to the masses - especially in the midst of a patient's political campaign, or for the purposes of politics. There can be no dispute that information pertaining to medical health and treatment are highly confidential. The remaining question is, whether the disclosure which occurred to Mr. Orem, was allowable as a matter of law due to the fact that he was arrested, which arguably creates a public record.

This Circuit has explained that "to the extent that this information is available in public records . . ." it loses protection under the right to privacy. However, "any details that are not part of the public record . . . are private and thus protected." Walls v. City of Petersburg, 895 F.2d 188, 193 (4th Cir. 1990). Mr. Orem was arrested without a warrant. At the time he was brought to the detachment for processing, there was no public record at the Magistrate Court of Berkeley County containing

information regarding the medical emergency. Before he was arraigned, a photograph was taken from inside the detachment, of Mr. Orem handcuffed to a bench in his pajamas. The confidential information, including the photograph, made its way to social media prior to the creation of any public record. At the moment Mr. Orem was photographed handcuffed to the bench for an hour and a half, still in his pajamas due to the medical emergency, Defendant Gillmore claims to have been performing a field test of the seized spoon. He also claimed to have been drafting the Criminal Complaint and other arrest warrant application related documents. (J.A. 497:2-19) Meanwhile while in Gillmore's handcuffs, a photograph of Mr. Orem inside the secure area was taken and uploaded to social media. Defendant Gillmore said that he only found out about the posting later that day. He claimed that he doesn't know who took the picture, and that he never attempted to find out who took the picture - despite Mr. Orem having been in his custody, and despite Gillmore believing that it was "inappropriate and improper and not the right thing to do." (J.A. 500:16-23, 501:23-24).

Secondly, the Orem arrest was unlawful, and there should have been no public record in existence to be thrust into the public limelight. At the time the social media photograph was taken, Mr. Orem was handcuffed to a bench in a secure, non-public area of the state police facility. (J.A. 497:20-24, 498:1-8) The wife of Mr. Orem's political opponent, Jill Richmond was in the building at the time,

and there was discussion with other state police employees about the news that Mr. Orem was under arrest. (J.A. 499:6-20) Indeed, by the time they arrived at the magistrate court, there was a reporter sitting there waiting for them to arrive, which resulted in a picture in the newspaper of Gillmore escorting a handcuffed Mr. Orem into the court. (J.A. 502:8-16) Gillmore claims that he didn't provide information to the media regarding the arrest and the time and place of their arrival, and that he doesn't know if anyone else did. (J.A. 503:17-19). There are numerous genuine issues of fact pertaining to these events which should be decided by a jury.

In the usual case, an arrestee would not have a reasonable expectation of privacy in details surrounding their arrest. However, the instant case is distinguishable because looking at the totality of the circumstances, the information released should never have been categorized as "arrest details," and primarily encompassed medical information, including the medical emergency the prior day, for which no arrest had taken place. In the light most favorable to the plaintiff, the arrest only took place because Mr. Orem was a candidate for sheriff. The end-result was a medical emergency being inserted into local and national news.

Defendant Gillmore admitted during his deposition, that he treated the situation differently due to the fact that Mr. Orem lived in a very nice house, and because he was a candidate for sheriff. (J.A. 484:5-12, 485:7-24, 486:3-10; 490:8-13) He knew there would be implications and consequences if he made an arrest of Mr.

Orem in such a way as to cause the public to learn about the incident. He called his detachment commander to discuss the special circumstances of arresting Mr. Orem. To the contrary, Defendant Gillmore rarely, if ever, arrested the subject of a suspected overdose on criminal charges. (J.A. 464:2-17) But in Mr. Orem's case, not only did he make an arrest, but before an arraignment could take place, a photograph of Mr. Orem shackled to a bench was spreading on social media, and local news reporters were photographing Mr. Orem being "perp walked" by Defendant Gillmore for a newspaper. (J.A. 123-24).

The public records exception cannot swallow the entire right to privacy. And even if it did completely overwhelm the right to privacy, the confidential information in Mr. Orem's case was released prior to the judicial process becoming actual public records, since it was contemporaneous with a warrantless arrest. Assuming the facts in the light most favorable to the plaintiff are true, there is a genuine issue of material fact whether the public record exception is applicable, and regarding whether the defendant is responsible for disseminating the information. Defendant Gillmore admitted that arrests of overdose victims are extremely rare.(J.A. 268:9-17)

The purpose of police presence at the scene is to ensure the safety of the EMS workers. (J.A. 269:5-6) Instead of actually assisting in any emergency, Trooper Gillmore arrested the EMS workers' patient while he was still in a blood pressure sleeve, and prior to him having an opportunity to sign a written waiver of medical

treatment. (J.A. 371:18-24; 382:4-5). Defendant Gillmore admittedly was personally invested in seeing Mr. Orem convicted. He testified that he was personally invested in getting a conviction because, "[M]ost people I arrest they, if they're upset with what happened, they don't have a microphone to go to and - and tell everyone about how horrible that person is, and so it was a little different…" (J.A. 316:1-13).

CONCLUSION

For the foregoing reasons, Plaintiff-Appellants, John W. Orem and Sher Orem, respectfully requests that this Court:

1. Reverse the June 17, 2019 District Court Order Granting Motion for Summary Judgment in favor of the Defendant, Matthew D. Gillmore.

2. Remand this matter to the District Court for trial;

3. And for such other and further relief as this Court deems just and fit, or which is allowable by law.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellants request oral argument pursuant to Rule 34(a)(2)(C) of the Federal Rules of Appellate Procedure because the decisional process would be significantly aided by oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed.R.App.Proc. § 28.1(e)(2) because it contains a total of 7,073 words.

2. This brief complies with the typeface using requirements of F.R.A.P. § 32(a)(5) and the type style requirements of Fed.R.App.Proc. § 32(a) because it has been prepared in a proportionately spaced typeface using Microsoft Office, Times New Roman 14 point font text.

August 26, 2019

/s JOHN H. BRYAN
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Opening Brief of Appellant has been electronically filed with the Clerk of Court this 26th day of August, 2019, by using the CM/ECF system which will send notice of electronic filing to all parties of record.

/s JOHN H. BRYAN
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JOHN H. BRYAN, ATTORNEYS AT LAW

No. 19-6920

IN THE

United States Court of Appeals

for the

Fourth Circuit

JOHN W. OREM *and* SHER OREM,
individually,

Appellants (Plaintiffs),

v.

MATTHEW W. GILLMORE, *individually*,

Appellee (Defendant), *and*

JOHN DOE, *individually*,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

RESPONSE BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is not required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-6920 Caption: John Orem v. Matthew Gillmore

Pursuant to FRAP 26.1 and Local Rule 26.1,

Matthew Gillmore
(name of party/amicus)

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

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

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

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

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

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

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Tracey B. Eberling Date: 7/31/19

Counsel for: Matthew Gillmore

CERTIFICATE OF SERVICE

****

I certify that on July 31, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

John H. Bryan
411 Main Street, P.O. Box 366
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/s/ Tracey B. Eberling
(signature)

July 31, 2019
(date)

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I. STATEMENT OF THE ISSUES

The issues presented on appeal are:

(1) whether the district court erred in granting qualified immunity to Cpl. Matthew D.[1] Gillmore on Appellants' claim in Count I that he performed an unconstitutional search of Appellants' bathroom;

(2) whether the district court erred in dismissing Count Two based on Cpl. Gillmore's argument that the false arrest claim is governed by a one-year statute of limitations; and

(3) whether the district court erred in dismissing Count Three based on its finding that there is no constitutional right to privacy for information pertaining to a medical emergency suffered by Appellant John Orem.

II. STATEMENT OF THE CASE

A. Factual background

On the morning of August 2, 2016, Appellant Sher Orem entered the bathroom on the main floor of her home to find her husband, Appellant John Orem, unconscious.[2] She immediately dialed 9-1-1 and advised the dispatcher, "I think my husband has overdosed. I just found him on the bathroom floor."[3] Mrs. Orem told the dispatcher that her husband was forty-seven years old, that he was unconscious,

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[1] The caption identifies Appellee as "Matthew W. Gillmore." Appellee's middle initial is "D." Appellee will seek leave to correct his name as it appears in the caption.

[2] *See* J.A. 6, 23, 66–67.

[3] *See* J.A. 66.

and that he was not breathing.[4] She also advised that she performed CPR on her husband the previous day, but that she was not sure whether the two medical emergencies were related.[5] Mrs. Orem began to perform CPR, but when emergency medical services ("EMS") arrived, they confirmed that John Orem had "no pulse."[6]

As a result of Sher Orem's 9-1-1 call, EMS and Troopers with the West Virginia State Police ("WVSP") were dispatched to John and Sher Orem's residence in reference to a possible drug overdose.[7] Upon their arrival, EMS workers observed John Orem's pinpoint pupils, which "were consistent with an opioid overdose."[8] EMS personnel then administered Narcan to Orem, which had a positive effect, causing him to regain consciousness within minutes.[9]

When WVSP Trooper Matthew Gillmore ("Cpl. Gillmore") arrived at John and Sher Orem's residence, EMS workers informed him that they suspected John Orem's collapse was related to an opioid overdose.[10] Cpl. Gillmore was aware that EMS administered Narcan to John Orem, and he was also aware of Orem's

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4 *See id.*

5 *See* J.A. 67–68.

6 *See* J.A. 68–75.

7 *See* J.A. 6, 23, 85, 109.

8 *See* J.A. 98; *see also* J.A. 99, 143.

9 *See* J.A. 7, 24, 86, 98–99, 144.

10 *See* J.A. 7, 24, 85, 88.

positive reaction quickly thereafter.[11] After Orem exited the bathroom, but prior to either EMS or law enforcement learning of the cause of his cardiac arrest and loss of consciousness, Cpl. Gillmore entered the bathroom.[12]

When he entered the bathroom, Cpl. Gillmore initially observed one shoelace on the bathroom sink and a small, clear, tied-off plastic baggie floating in the toilet, which, based upon his training and experience, are items evidencing drug possession and use.[13] Cpl. Gillmore then opened one side of the bathroom cabinet and immediately saw a metal spoon with white residue, which he believed was related to illegal drug use.[14] After locating the metal spoon, Cpl. Gillmore placed John Orem under arrest for possession of a controlled substance because Cpl. Gillmore's experience and the events that just occurred, coupled with the items he observed, demonstrated evidence of illegal drug possession and use.[15]

Cpl. Gillmore then transported Orem to the Berkeley County Magistrate Court in Berkeley County, West Virginia, where Orem was arraigned.[16] When they arrived, the media was already present, and took pictures of Orem as Cpl.

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11 *See* J.A. 85, 107.

12 *See* J.A. 86, 102–105, 112–113, 115, 119–121.

13 *See* J.A. 86, 116, 135, 139, 601.

14 *See* J.A. 8, 25, 86, 117–118.

15 *See* J.A. 8, 25, 86–87, 138–139.

16 *See* J.A. 9, 26.

Gillmore lead him into the courthouse.[17] At some point while Orem was inside the WVSP detachment, a photograph was taken of him and subsequently uploaded to social media.[18] There is absolutely no evidence that Cpl. Gillmore took this picture. Orem's arrest, and the facts and circumstances that occurred on August 2, 2016, that provided probable cause for his arrest, received attention from both local and national media.[19]

Based on the facts and circumstances described above, Cpl. Gillmore drafted a criminal complaint, charging John Orem with possession of a controlled substance in violation of West Virginia Code § 60a-4-401(c).[20] After reviewing the criminal complaint and Cpl. Gillmore's narrative attached thereto, the magistrate judge found probable cause for Orem's warrantless arrest.[21] Following Orem's arrest, Cpl. Gillmore provided the spoon recovered from the bathroom cabinet to the WVSP Forensic Laboratory for testing.[22] The testing performed by the Lab concluded that the white powder residue on the spoon was fentanyl, a Schedule II controlled narcotic substance.[23]

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17 *See* J.A. 9, 26, 123–124.

18 *See* J.A. 15, 30.

19 *See* J.A. 9, 12, 26, 31, 125–136.

20 *See* J.A. 137–139.

21 *See* J.A. 137.

22 *See* J.A. 140.

23 *See id.*

Prior to John Orem's criminal trial, the State of West Virginia filed a motion to dismiss the drug possession charge against him.[24] In support, the State claimed that "the search of the Defendant's bathroom cabinet does not fall within one of the known exceptions to the warrant requirement," and the State believed that without introduction of the spoon as evidence, it "could not prove the charge beyond a reasonable doubt."[25] That same day, Cpl. Gillmore wrote to the magistrate judge, expressing his disagreement with the State's decision to dismiss the criminal case.[26] In his letter, Cpl. Gillmore advised:

> At the time I located the spoon, I was still assisting EMS personnel with determining what substance had been overdosed on. The APA cites that the emergency was over at the time the defendant was able to stand in the hallway of his home. I respectfully disagree, noting that overdose patients can go in and out of states of consciousness even after administering Naxalone [*sic*].[27]

Following the filing of the State's motion, the magistrate dismissed the criminal case against Orem.[28] The underlying civil suit filed by John and Sher Orem in the United States District Court for the Northern District of West Virginia followed.

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24 *See* J.A. 141–150.

25 *See* J.A. 142.

26 *See* J.A. 151.

27 *Id.*

28 *See* J.A. 9, 26.

B. Procedural background

On April 9, 2018, Appellants, John and Sher Orem, sued Cpl. Gillmore in his individual capacity and named a "John Doe" defendant, an alleged employee of the WVSP, in his or her individual capacity, asserting three separate causes of action:[29]

- 42 U.S.C. § 1983 claim for unreasonable search and seizure in violation of the Fourth Amendment (Count I);[30]
- 42 U.S.C. § 1983 claim for the alleged false arrest of John Orem in violation of the Fourth Amendment (Count II);[31] and
- 42 U.S.C. § 1983 claim for the alleged violation of John Orem's Fourteenth Amendment right to privacy (Count III).[32]

Cpl. Gillmore filed a motion for summary judgment as to all claims,[33] which the district court granted in its entirety.[34] John and Sher Orem now appeal the district court's grant of summary judgment only insofar as the court (1) granted Cpl. Gillmore qualified immunity with regard to Count I, (2) dismissed Count II based on its conclusion that the one-year statute of limitations barred John Orem's

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29 *See* J.A. 5–6, 10–18.

30 J.A. 10–11.

31 J.A. 12–14.

32 J.A. 15–18.

33 J.A. 39–64.

34 J.A. 599–616.

claim for false arrest, and (3) dismissed Count III based on its finding that John Orem's constitutional right to privacy was not violated by the disclosure of information related to his medical emergency and, specifically, his August 2, 2016 drug overdose.[35]

III. SUMMARY OF THE ARGUMENT

Regarding the first issue raised on appeal, the district court did not err in its finding that qualified immunity applied to Cpl. Gillmore's search of the bathroom cabinet. Based on the totality of the circumstances, an objectively reasonable police officer presented with the same facts and circumstances as those presented to Cpl. Gillmore at the time of John Orem's medical emergency and suspected drug overdose could have believed that the opening of the bathroom cabinet door was in accordance with the Fourth Amendment under the emergency aid exception. Appellants' argument that qualified immunity is inapplicable is without merit. Notably, they continue to focus on what they allege to be Cpl. Gillmore's subjective intent at the time of his entry into the bathroom and opening of the cabinet, which, in addition to being pure speculation, has no place in either a Fourth Amendment probable cause or qualified immunity analysis. The facts and circumstances, viewed objectively as they must be, entitle Cpl. Gillmore to qualified

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[35] Br. of Appellants at 1–2.

immunity with regard to John and Sher Orem's claim of Fourth Amendment unreasonable search and seizure.

With respect to the second issue raised on appeal, the district court was correct in applying the one-year statute of limitations to the underlying false arrest claim. State law provides the applicable statute of limitations, and, in West Virginia, Code § 55-2-12(c) prescribes a one-year statute of limitations for claims of false arrest. In addition, notwithstanding the statute of limitations, John Orem's false arrest claim fails because either the existence of probable cause or the application of qualified immunity requires that Cpl. Gillmore is entitled to judgment as a matter of law. Specifically, based on a totality of the circumstances, there was probable cause that John Orem had committed the crime of possession of a controlled substance, and, even if it later turned out that probable cause was absent, based on the facts and circumstances at the time of John Orem's arrest, a reasonable police officer could have believed that John Orem committed the crime of possession of a controlled substance.

Finally, the Orems' third argument fails because John Orem had no fundamental constitutional right to privacy in the information disclosed regarding his medical emergency and suspected drug overdose. During her 9-1-1 call, John Orem's wife told dispatch that her husband was unconscious on the bathroom floor and that she believed he had overdosed, thereby making that information publicly

available. In addition, other than the information contained in his criminal complaint to support a finding of probable cause, there is no evidence that Cpl. Gillmore relayed any information, or pictures, related to John Orem's overdose or arrest to the media. Moreover, neither the Supreme Court nor the Fourth Circuit has held that there is a fundamental constitutional right to privacy in an individual's medical information, and courts within this Circuit have held that alleged HIPPA violations regarding the confidentiality of medical information are not actionable in § 1983 suits.

IV. ARGUMENT

A. Standard of review

The Court reviews the grant of a motion for summary judgment *de novo*, viewing the facts in the light most favorable to the nonmoving party (here, Appellants).[36] When considering Fourth Amendment claims, however, it is important that the officer's actions not be judged "with the 20/20 vision of hindsight."[37]

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[36] *See Crouse v. Town of Moncks Corner*, 848 F.3d 576, 583 (4th Cir. 2017).

[37] *See Graham v. Connor*, 490 U.S. 386, 396–97 (1989); *see also Hunsberger v. Wood*, 570 F.3d 546, 555 (4th Cir. 2009) ("When a child goes missing, time is of the essence. It turned out that [the child] was not in immediate danger, but we cannot judge [the officer's] search based on what we know in hindsight. At the time of the search, there was reason to think [the child] needed help.").

In their brief, John and Sher Orem cite to deposition testimony that was taken after the close of discovery, which the district court explicitly declined to consider in its review of Cpl. Gillmore's underlying motion for summary judgment. Because this deposition testimony properly was not considered by the district court, this Court should likewise decline to consider the deposition testimony not taken within the ordered discovery timeframe set by the trial court.[38] Moreover, this Court should decline to consider the deposition testimony evidence because Appellants do not raise the district court's refusal to consider the same as an issue on appeal and, therefore, have waived any argument that the exclusion of the evidence was improper.[39]

B. Qualified immunity

Qualified immunity shields police officers "from liability for civil damages insofar as their conduct does not violate clearly established statutory or

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[38] *See Whitlock v. Duke Univ.*, 829 F.2d 1340, 1343 (4th Cir. 1987) ("We also decline to consider these depositions on appeal because they properly were not considered by the district court."); *see also Rohrbough v. Wyeth Labs., Inc.*, 916 F.2d 970, 973 n.8 (4th Cir. 1990) (declining to consider a letter "not before the district court when it considered defendant's motion for summary judgment . . . . as well as the other documents not considered by the district court").

[39] *See Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007) ("[A]ny issue that could have been but was not raised on appeal is waived and thus not remanded."); *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993) (advising that the mandate rule "forecloses litigation of issues decided by the district court but foregone on appeal or otherwise waived"); *see also United States v. Washington*, 743 F.3d 938, 941 (4th Cir. 2014) ("Issues that [appellant] failed to raise in his opening brief are waived.").

constitutional rights of which a reasonable person would have known."[40] The doctrine affords police officers "'ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'"[41] It insulates them from "bad guesses in gray areas," ensuring that they are only liable "for transgressing bright lines."[42] "This accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued."[43] "Where there is a legitimate question as to whether the officer's conduct would objectively violate the plaintiff's right, qualified immunity gives police officers the necessary latitude to pursue their [duties] without having to anticipate, on the pain of civil liability, future refinements or clarifications of constitutional law."[44]

In analyzing whether a defendant officer is liable to a plaintiff for an alleged violation, courts must make two determinations: whether the officer's

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40 *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

41 *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

42 *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

43 *Hunter*, 502 U.S. at 229 (internal quotation and citation omitted).

44 *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) (alteration in *Slattery*) (internal quotation and citation omitted); *see also Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (observing that a "clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right" (internal quotation and citation omitted)).

conduct violated the right that the plaintiff identified and whether that right was "clearly established" at the time of that conduct.[45] Qualified immunity requires courts to grant summary judgment to an officer if he objectively reasonably misperceived or misinterpreted the *facts* of his circumstances (and thus did not violate the law under the first prong), or if he reasonably mistakenly believed that his response to those facts was constitutional under then-governing clearly established *law* (and thus is entitled to immunity under the second).[46] "A police officer should prevail on an assertion of qualified immunity if a reasonable officer possessing the same information *could* have believed that his conduct was lawful."[47]

Importantly, "[b]ecause qualified immunity is designed to shield officers not only from liability but from the burdens of litigation, its establishment at the pleading or summary judgment stage has been specifically encouraged."[48]

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45 *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009); *see also Milstead v. Kibler*, 243 F.3d 157, 161 (4th Cir. 2001), *abrogated in part on other grounds by Pearson*, 555 U.S. 223.

46 *See Saucier*, 533 U.S. at 206; *see also Groh v. Ramirez*, 540 U.S. 551, 566–67 (2004) (Kennedy, J., dissenting) ("Our qualified immunity doctrine applies regardless of whether the officer's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." (internal citations omitted)).

47 *Slattery*, 939 F.2d at 216 (emphasis in original).

48 *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992).

C. An objectively reasonable police officer confronted with the totality of the circumstances confronting Cpl. Gillmore at the time of the bathroom search could have believed that his actions were in accordance with the Fourth Amendment under the emergency aid exception to the warrant requirement.

1. Elements of Count I

Count I is a § 1983 claim brought by both John and Sher Orem against Cpl. Gillmore for unreasonable search and seizure in violation of the Fourth Amendment.[49] One exception to the Fourth Amendment's warrant requirement is when an officer is providing emergency aid.[50] When "the exigencies of [a] situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment," the absence of a warrant is of no moment.[51] Indeed, "the ultimate touchstone of the Fourth Amendment is '*reasonableness*.'"[52] Accordingly, under this standard, "[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency."[53] Thus, "law enforcement officers may

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49 *See* J.A. 10–11.

50 *See Kentucky v. King*, 563 U.S. 452, 460 (2011); *Michigan v. Fisher*, 558 U.S. 45, 47–48 (2009); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

51 *Brigham*, 547 U.S. at 403 (internal quotation and citation omitted).

52 *Id.* (emphasis added).

53 *Id.* (internal quotations and citations omitted).

enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[54]

Courts consider "the totality of the circumstances" in determining "whether a law enforcement officer faced an emergency that justified acting without a warrant."[55] The reasonableness determination and the totality of the circumstances are viewed in light of the facts and circumstances at the time of the alleged violation.[56] When considering Fourth Amendment claims, it is important that the officer's actions not be judged "with the 20/20 vision of hindsight."[57]

On August 2, 2016, Cpl. Gillmore was dispatched to John and Sher Orem's home in reference to a possible drug overdose.[58] This was in response to Mrs. Orem's call to 9-1-1, informing dispatch that she thought her husband had overdosed.[59] When EMS arrived, John Orem had no pulse.[60] Prior to Cpl. Gillmore arriving on scene, EMS administered Narcan to Orem, whose pupils were pinpoint,

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54 *Id.*

55 *Missouri v. McNeely*, 569 U.S. 141, 149 (2013).

56 *See, e.g.*, *Maryland v. Macon*, 472 U.S. 463, 470–71 (1985) ("Whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's actual state of mind at the time the challenged action was taken." (internal quotations and citations omitted)).

57 *See Graham*, 490 U.S. at 396.

58 *See* J.A. 23, 85.

59 *See* J.A. 66, 599.

60 *See* J.A. 75, 85, 600.

consistent with an opioid overdose.[61] Shortly thereafter, he regained consciousness.[62] Cpl. Gillmore entered the residence after Orem regained consciousness, but before he stood up from the floor and exited the bathroom.[63] At that time, neither EMS nor the officers knew the cause of Orem's collapse.[64] Following Orem's exit, Cpl. Gillmore entered the bathroom to look for anything that could help explain the cause of the collapse.[65] He noticed a shoe string on the sink and a clear, plastic, tied-off baggie floating in the toilet—both in plain view.[66] Based upon these facts and circumstances, coupled with training and experience, Cpl. Gillmore had probable cause to believe that the events and items indicated that Orem possessed, consumed, and overdosed on narcotics. Cpl. Gillmore then opened one side of the bathroom vanity cabinet, where he observed a metal spoon with burn marks and white residue,[67] which later tested positive for fentanyl.[68] To date, John

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61 *See* J.A. 464, 600; *see also* J.A. 17, 85, 295, 437.

62 *See* J.A. 100–01, 600.

63 *See* J.A. 86, 138, 144, 608–609.

64 *See* J.A. 6, 105, 471, 600, 609.

65 *See* J.A. 113, 145, 503, 511, 605.

66 *See* J.A. 86, 116, 135, 139, 601.

67 *See* J.A. 8, 85–87, 118, 138–139, 146.

68 *See* J.A. 91, 140, 142.

and Sher Orem claim that the cause of John Orem's medical emergency is still unknown.[69]

2. The events leading up to the search of the bathroom cabinet show that an objectively reasonable police officer could easily have concluded that the search was in accordance with the Fourth Amendment.

Speaking in the very broadest of terms, it is undisputed that an individual's right against unreasonable search and seizure is clearly established under the Fourth Amendment. The dispute in this appeal arises from John and Sher Orem's misunderstanding of the emergency aid exception to the warrant requirement, its application to the facts of this case, and the law of qualified immunity.

Contrary to Appellants' assertion, the district court did not "treat[ ] a warrantless search as if it were a new, or novel, legal issue."[70] Rather, the court found that an objectively reasonable officer confronted with the same facts and circumstances as those faced by Cpl. Gillmore "would have believed his actions were lawful."[71] The district court cited two state court decisions with similar factual scenarios involving the emergency aid exception as it relates to drug overdoses.[72]

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69 *See* J.A. 4 ("There is no way of knowing what specifically caused Mr. Orem's unconsciousness and collapse to the floor.").

70 Br. of Appellants at 12.

71 J.A. 609.

72 J.A. 607–608.

Similar to the state courts' conclusions in those cases, the district court concluded that because "regaining consciousness does not necessarily end the medical emergency,"[73] an objectively reasonable officer could believe that his actions, including an attempt to determine the amount, variety, and combination of drugs ingested by the overdose victim and, ultimately, the cause of the overdose, are consistent with the Fourth Amendment's emergency aid exception.[74] The Orems repeatedly, and incorrectly, emphasize the warrant requirement,[75] which, although a central tenant of Fourth Amendment jurisprudence, is inapplicable in instances where, as here, a medical emergency is at play.

John and Sher Orem continue to claim, as they have since the initial filing of their complaint with the district court in April of 2018, that Cpl. Gillmore's search of the bathroom cabinet was fueled by ill motive.[76] Cpl. Gillmore maintains, as he has from the very beginning, that his search of the bathroom cabinet was performed in an effort to assist the medics in determining what may have caused John Orem's collapse. Nevertheless, an officer's subjective intent is immaterial to the determination of both the lawfulness of the search and the applicability of qualified immunity. It is well-settled that whether a search is in accordance with the

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73 J.A. 608.

74 *See* J.A. 607–609.

75 *See* Br. of Appellants at 9, 12, 17–19.

76 *See id.* at 12.

Fourth Amendment is an objective inquiry—one that does not consider the officer's motive, intent, or propensity.[77] Thus, Cpl. Gillmore's subjective understanding and later characterization of, and testimony concerning, the events that occurred on August 2, 2016, are of no moment.[78]

John and Sher Orem falsely assert that Cpl. Gillmore attempts to "circumvent[ ] the warrant requirement by trying to pigeonhole his actions into an otherwise valid exception, by misrepresenting his actions" on August 2, 2016.[79] Nowhere in the record does it indicate that Cpl. Gillmore's actions on the day of John Orem's overdose have been misrepresented. Rather, the Orems take issue with what they allege to be Cpl. Gillmore's improper motive in opening the bathroom cabinet. That allegation is not only false, but also an irrelevant consideration for the purpose of determining whether Cpl. Gillmore's actions, based on the totality of the

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[77] *See Brigham*, 547 U.S. at 404 ("An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'" (emphasis in original) (citation omitted)); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers."); *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) ("Subjective factors involving the officer's motives, intent, or propensities are not relevant. The objective nature of the inquiry is specifically intended to limit examination into an officer's subjective state of mind, and thereby enhance the chances of a speedy disposition of the case.").

[78] *See* Br. of Appellants at 14–15 (citing Cpl. Gillmore's testimony during the preliminary hearing in the underlying criminal case).

[79] *See id.* at 19.

circumstances, were reasonable under the Fourth Amendment, and whether those actions are protected under the doctrine of qualified immunity.

Likewise, John and Sher Orem's reference to the testimony of EMS Chief Chad Winebrenner must be ignored.[80] The inquiry is not, as the Orems appear to suggest, based on a medical professional's or an EMS worker's knowledge and understanding of the medical emergency in light of the surrounding circumstances at the time of the allegedly unlawful event,[81] but is rather

> filtered through the lens of the *officer's* perceptions at the time of the incident in question. Such a perspective serves two purposes. First, using the *officer's* perception of the facts at the time limits second-guessing the reasonableness of actions with the benefit of 20/20 hindsight. Second, using this perspective limits the need for decision-makers to sort through conflicting versions of the "actual" facts, and allows them to focus instead on *what the police officer reasonably perceived*. In sum, the officer's subjective state of mind is not relevant to the qualified immunity inquiry but his perceptions of the objective facts of the incident in question are.[82]

Using this correct approach, the district court accurately concluded that an objectively reasonable officer, faced with the same facts and circumstances that were presented to Cpl. Gillmore at the time of the alleged violation in question,[83]

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80 *See id.* (citing EMS Chief's testimony discussing interaction with officers and scope of medical emergency during the preliminary hearing in the underlying criminal case).

81 *See id.* at 14, 17.

82 *Rowland*, 41 F.3d at 173 (emphasis added) (internal citation omitted).

83 These facts and circumstances include that, on the morning of August 2, 2016, John Orem's wife called 9-1-1, advising, "I think my husband has overdosed."

could have "believed his actions were lawful under the emergency aid exception to the Fourth Amendment warrant requirement."[84] Accordingly, because it committed no error, the decision of the district court must be affirmed.

D. The district court was correct in applying the one-year statute of limitations to John Orem's false arrest claim raised in Count II.

1. The statute of limitations under West Virginia Code § 55-2-12(c) was properly applied to bar John Orem's false arrest claim.

State law provides the applicable statute of limitations in actions arising under 42 U.S.C. § 1983.[85] In West Virginia, false arrest claims have a one-year statute of limitations period, as provided in West Virginia Code § 55-2-12(c).[86]

See J.A. 66, 599. The 9-1-1 call center dispatched officers, including Cpl. Gillmore, to John and Sher Orem's residence in reference to a "possible drug overdose." *See* J.A. 23, 85. When EMS arrived, John Orem had no pulse. *See* J.A. 75, 85, 600. EMS performed chest compressions and, eventually, administered Narcan because, in addition to other factors, Orem's "pupils were pinpoint which [is] consistent with an opioid overdose." *See* J.A. 464, 600; *see also* J.A. 17, 85, 295, 437. Cpl. Gillmore was informed by EMS personnel that John Orem's collapse was related to an opioid overdose. *See* J.A. 24, 86, 600. Within just a few minutes of administering Narcan, John Orem regained consciousness. *See* J.A. 100–01, 600. Even after Orem exited the bathroom where he collapsed, the cause of his medical emergency was still unknown. *See* J.A. 6, 105, 471, 600, 609. When he entered the bathroom, prior to opening the bathroom cabinet, Cpl. Gillmore saw a shoe string on the sink and a small, clear, plastic tied-off baggie floating in the toilet, both in plain view. *See* J.A. 86, 116, 135, 139, 601.

84 *See* J.A. 609.

85 *See Owens v. Okure*, 488 U.S. 235, 239 (1989).

86 *Canterbury v. Laird*, 221 W. Va. 453, 456, 655 S.E.2d 199, 202 (2007).

Thus, here, the applicable statute of limitations is one year.[87] The limitations period for claims of false arrest pursuant to § 1983 "begins to run at the time the claimant becomes detained pursuant to legal process."[88]

Here, John Orem was arrested on August 2, 2016.[89] Therefore, he had until August 2, 2017, to file his claim for false arrest. John and Sher Orem did not file their complaint until more than eight months later, on April 9, 2018.[90] Accordingly, because the false arrest claim was time barred, the district court properly granted summary judgment in dismissing Count II of the complaint.

2. Notwithstanding the applicable statute of limitations, John Orem's false arrest claim fails as a matter of law because the totality of the circumstances provided probable cause for an objectively reasonable officer to believe that the criminal offense of possession of a controlled substance had been committed.

The existence of probable cause to support a warrantless arrest is based on the totality of the circumstances,[91] and is found to exist when "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent

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87 *See* W. VA. CODE § 55-2-12(c); *Canterbury*, 221 W. Va. at 456, 655 S.E.2d at 202; *see also Coss v. Blatt*, No. 2:18-cv-1199, 2019 WL 357979, at *3 (S.D. W. Va. Jan. 29, 2019); *Hamlet v. West Virginia*, No. 1:06-0181, 2009 WL 261450, at *3 (S.D. W. Va. Feb. 3, 2009); *Buckhannon v. Moody*, 6:07-cv-00529, 2008 WL 2400926, at *3 (June 11, 2008).

88 *Wallace v. Kato*, 549 U.S. 384, 397 (2007).

89 J.A. 8–9, 12, 14, 25, 28, 77, 87.

90 J.A. 2.

91 *Illinois v. Gates*, 462 U.S. 213, 230–32 (1983).

person, or one of reasonable caution, in believing . . . that the suspect has committed, is committing, or is about to commit an offense."[92] To establish probable cause, 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."[93] In some cases, "even seemingly innocent activity when placed in the context of surrounding circumstances" can give rise to probable cause.[94]

In this case, the facts existing at the time of John Orem's arrest that support a finding of probable cause include Sher Orem advising dispatch that she believed her husband overdosed;[95] the emergency call being dispatched as a possible drug overdose;[96] John Orem's age, collapse, state of unconsciousness, and lack of health issues;[97] his quick and positive reaction to the administration of Narcan;[98]

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92 *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979).

93 *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

94 *United States v. Humphries*, 372 F.3d 653, 657 (4th Cir. 2004) (internal quotation and citation omitted).

95 *See* J.A. 66, 599.

96 *See* J.A. 23, 85.

97 *See* J.A. 66–67, 120.

98 *See* J.A. 100–01, 600. John Orem's positive and rapid reaction to the administration of Narcan is extremely important to establishing probable cause in this case. *See, e.g.*, *United States v. Tanguay*, 918 F.3d 1, 3 (1st Cir. 2019) (describing Narcan as "an opioid-overdose-reversal drug"); *United States v. Borchardt*, 809 F.2d 1115, 1116 n.1 (5th Cir. 1987) ("Narcan is a narcotic antagonist used to reverse the effects of opiates after surgery or overdoses."); *United States v.*

EMS workers advising that they believed the collapse was caused by an opioid overdose;[99] the presence of one shoe lace on the bathroom sink;[100] and the presence of a small, clear, tied-off plastic baggie floating in the toilet.[101] Moreover, as demonstrated above, Cpl. Gillmore's search of the bathroom cabinet, which resulted in his seizure of the metal spoon, falls under the medical emergency exception to the warrant requirement. Because the bathroom cabinet search was lawful, the spoon may also be considered in conjunction with the other evidence to establish probable cause for Mr. Orem's arrest.

Furthermore, a neutral and detached magistrate found probable cause,[102] rendering the false arrest claim meritless.[103] In sum, the totality of the circumstances demonstrate that there was probable cause to arrest John Orem and that, even if debatable, an objectively reasonable officer in Cpl. Gillmore's shoes

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Cruz, No. 1:16 cr 261, 2019 WL 1058288, at *3 (N.D. Ohio Mar. 6, 2019) ("NARCAN is a medication that can reverse the effects of opioids alone. It does not counter the effects of other drugs such as cocaine and cannabinoids."); *Fuller v. Washington Cty. Hosp.*, No. 05-2333, 2006 WL 4571279, at *1 (D. Md. May 23, 2006) ("Narcan is an injection used to reverse the effects of opioids.").

99 *See* J.A. 24, 86, 600.

100 *See* J.A. 86, 116, 135, 139, 601.

101 *See id.*

102 J.A. 137.

103 *See Rhodes v. Smithers*, 939 F. Supp. 1256, 1274 (S.D. W. Va. 1995) (collecting cases), *aff'd*, 91 F.3d 132 (4th Cir. 1996); *see also Taylor v. Meacham*, 82 F.3d 1556, 1563–64 (10th Cir. 1996); *Eubanks v. Gerwen*, 40 F.3d 1157, 1160–61 (11th Cir. 1994).

would believe that arresting Orem was supported by probable cause, thus entitling Cpl. Gillmore to qualified immunity. Therefore, the district court properly granted summary judgment on, and dismissed, Count II of the underlying complaint.

E. The district court was correct in finding that John Orem's right to privacy was not violated.

1. Information related to John Orem's overdose was publicly available.

John Orem argues that the district court erred in granting summary judgment on his Fourteenth Amendment right to privacy claim based on the public records exception.[104] He goes to great lengths to cite case law that he contends supports his position that his "medical information," or the fact that he suffered a drug overdose, is constitutionally protected from public disclosure.[105] He avers that "[a] reasonable person would never expect that personal medical details of a medical emergency and treatment, occurring inside their home, would be released publicly to the masses."[106] Yet, he fails to acknowledge that this information was voluntarily divulged by his wife during her 9-1-1 call when she advised that she found him unconscious "on the bathroom floor," suspected he had "overdosed," that she dialed 9-1-1 just the night before and performed CPR at that time, and that, when EMS

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104 *See* Br. of Appellants at 22–28.

105 *See id.* at 23–24.

106 *Id.* at 25.

arrived on scene, Orem had "no pulse."[107] The district court found, in accordance with West Virginia Code § 24-6-13(a),[108] that the 9-1-1 call is a public record and, therefore, all of the information contained therein relating to Orem's overdose is "not protected by a right to privacy."[109]

John Orem also takes issue with the photograph taken while he was "inside the detachment . . . handcuffed to a bench in his pajamas,"[110] and with the presence of a reporter outside of the courthouse who was "waiting for [him and Cpl. Gillmore] to arrive, which resulted in a picture in the newspaper of Gillmore escorting a handcuffed Mr. Orem into the court."[111] The district court also correctly rejected this argument because there is absolutely no evidence in the record, and, thus, no genuine issue of material fact,[112] that Cpl. Gillmore took the photograph, contacted any media with regard to the arrest, or disseminated any other facts or

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107 *See* J.A. 66–75.

108 Section 24-6-13(a) states that, "[e]xcept as provided by the provisions of this section, calls for emergency service to a county answering point are not confidential." Under that section, only "calls for emergency service reporting alleged criminal conduct . . . are to be kept confidential."

109 *See* J.A. 614.

110 *See* Br. of Appellants at 26.

111 *See id.* at 27.

112 *See Hoschar v. Appalachian Power Co.*, 739 F.3d 163, 169 (4th Cir. 2014) ("[T]o show that a genuine issue of material fact exists, the non-moving party must set forth specific facts that go beyond the mere existence of a scintilla of evidence." (internal quotation and citation omitted)).

circumstances related to the overdose and arrest other than those contained in his publicly-available criminal complaint.

Accordingly, because information regarding John Orem's overdose was publicly available in light of his wife's 9-1-1 call, and because he offered no evidence to demonstrate that Cpl. Gillmore engaged in any unlawful conduct resulting in a violation of his right to privacy, the district court was correct in granting Cpl. Gillmore's motion for summary judgment as to Count III.

2. Neither the Supreme Court nor the Fourth Circuit has established a fundamental constitutional right to privacy in personal medical information.

In addition to the public records exception, and as the district court properly noted, neither the Supreme Court nor the Fourth Circuit has determined whether there is a fundamental constitutional right to privacy in medical information,[113] and district courts in this Circuit have held that alleged HIPPA violations regarding the confidentiality of medical information are not actionable in § 1983 suits.[114] Therefore, even if Sher Orem had not made available the fact of her

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[113] *See* J.A. 612–13 (citing *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *Watson v. Lowcountry Red Cross*, 974 F.2d 482, 487–89 n.9 (4th Cir. 1992); *Taylor v. Best*, 746 F.2d 220, 225 (4th Cir. 1984); and *DM v. Louisa Cty. Dep't of Human Servs.*, 194 F. Supp. 3d 504, 509 (W.D. Va. 2016) (collecting cases)).

[114] *See DM*, 194 F. Supp. 3d at 509 (W.D. Va. 2016) (collecting cases). Moreover, the Supreme Court has held that the nondisclosure provisions under the Family Educational Rights and Privacy Act do not create personal rights that are enforceable under 42 U.S.C. § 1983. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002).

husband's overdose through her 9-1-1 call, and even if Cpl. Gillmore had not properly narrated the medical events of August 2, 2016, in his criminal complaint, John Orem would not have an actionable Fourteenth Amendment claim based on the allegedly unlawful dissemination of his medical information.

V. CONCLUSION

Appellants continue to focus on issues that are irrelevant to a Fourth Amendment probable cause and qualified immunity analysis. What they fail to address, and cannot escape, is that the undisputed evidence shows that an objectively reasonable officer in Cpl. Gillmore's shoes could have believed: (1) that, at the time he opened the bathroom cabinet, there was an ongoing medical emergency requiring his assistance and (2) that there was probable cause to believe John Orem committed the offense of possession of a controlled substance. Because Appellants failed to adduce evidence that Cpl. Gillmore's conduct was either "plainly incompetent" or "knowingly violat[ive of] the law,"[115] he was entitled to summary judgment on the Fourth Amendment claims. In addition, the applicable state statute of limitations works to bar John Orem's false arrest claim. Therefore, the district court did not err in granting summary judgment as to Counts I and II.

Finally, John Orem not only assumes, without supporting authority on the particular issue, that a fundamental constitutional right to privacy in his medical

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115 *Malley*, 475 U.S. at 341.

information exists, but also refuses to acknowledge that the allegedly protected information related to his medical emergency and drug overdose was voluntarily disclosed by his wife during her 9-1-1 call. Thus, because the medical information was not only voluntarily divulged, but also is not recognized as being constitutionally protected, the district court was correct in dismissing his Fourteenth Amendment claim raised in Count III.

Accordingly, Cpl. Gillmore respectfully requests that Court **AFFIRM** the Order of the United States District Court for the Northern District of West Virginia granting his motion for summary judgment.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 19-6920 **Caption:** Orem v. Gillmore et al.

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(s) Tracey B. Eberling

Party Name Matthew D. Gillmore

Dated: 9/20/2019

11/14/2016 SCC

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN W. OREM *and* **SHER OREM**,
individually,

Appellants (Plaintiffs),

v. **No. 19-6920**

MATTHEW W. GILLMORE,
individually,

Appellee (Defendant),

and

JOHN DOE, *individually*,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that on the September 20, 2019, I electronically filed the "Response Brief of Appellee" with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant:

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NO. 19-6920

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

JOHN W. OREM and SHER OREM,

Plaintiffs,

v.

MATTHEW D. GILLMORE, individually,
and JOHN DOE, individually,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC*

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STATEMENT REQUIRED BY RULES 35 AND 40(b)

Rehearing is warranted because the *per curiam* opinion issued herein granted qualified immunity to a police officer who performed a warrantless search of the home of a political candidate, resulting in the candidate's warrantless arrest in his home, where no exception to the presumption of unconstitutionality was supported by the facts. Highlighting the unreasonableness of the respondent's actions, the unreasonable search and seizure involved a photograph being taken of the candidate, Petitioner John Orem, depicting him handcuffed inside a secure area of the state police detachment while in the respondent's custody.

The photograph began to go viral as a "meme" even before Mr. Orem was arraigned and released on bond, which made local, state and national headlines. The candidate thereafter lost the general election, despite the charges subsequently being dropped - the damage having been done. The *per curiam* opinion failed to apply the presumption of unconstitutionality to the respondent's conduct and accordingly analyze whether the respondent had rebutted the presumption as a matter of law. As a consequence, the *per curiam* opinion is in direct conflict with long-standing Supreme Court precedent holding that warrantless searches and seizures in an individual's home, without the establishment of facts showing the application of an exception, is objectively unreasonable for qualified immunity purposes.

Moreover, the opinion completely overlooked the underlying facts of the case, merely declaring them to be "beyond debate," but failing to support such the conclusion. To the contrary, the underlying facts show undisputedly, the existence of a presumptively unconstitutional search and seizure. A grant of qualified immunity to a police officer who performed a warrantless search and seizure inside a home, requires a demonstration that an exception to the warrant requirement

applies *as a matter of law*. There was no such demonstration by the respondent police officer. To the contrary, the respondent admitted that he committed a warrantless search against a political candidate, who happened to be the opponent of the police-officer-husband of his longtime secretary. Instead of rebutting the presumption of unconstitutionality, the respondent's admissions instead foreclose the application of an exception, because he admits that the search began *after* the petitioner's medical emergency had ended, and therefore could not have justifiably been made with an intent to render "emergency aid."

Rehearing *en banc* is warranted because the expansion of qualified immunity so as to include the warrantless search of a political candidate's home, where no justified exception is demonstrated as a matter of law, and which resulted in the use of legal process to affect the petitioner's political campaign, is a matter of public importance. Moreover, such a holding is in direct conflict with other opinions of this Court, as well as the Supreme Court. The order of the District Court should be reversed so that the petitioners may proceed to trial.

BACKGROUND

Plaintiffs, John W. Orem and Sher Orem, filed their original Complaint (J.A. 5), pursuant to United States Code, Title 42, Section 1983, alleging Appellee, Matthew D. Gillmore, committed an unreasonable search and seizure against the plaintiffs, in violation of the Fourth Amendment of the Constitution of the United States. The United States District Court for the Northern District of West Virginia exercised subject-matter jurisdiction pursuant to United States Code, Title 28, Sections 1331 (federal question jurisdiction) and 1343 (civil rights jurisdiction). On June 17, 2019, the District Court entered the Order Granting Motion for Summary Judgment in favor of the Defendant, Matthew D. Gillmore. (J.A. 599)

The Plaintiffs sought to invoke the jurisdiction of this Court pursuant to United States Code, Title 28, Section 1291. On May 11, 2020, this Court issued the unpublished *per curiam* opinion affirming the order of the District Court, for which the petitioner now respectfully requests a rehearing *en banc*. The issues presented in the Appeal to this Court were as follows:

> 1. Whether the District Court erred in granting qualified immunity to Defendant Matthew D. Gillmore on the claim that he performed an unconstitutional search of the Plaintiffs' bathroom?
>
> 2. Whether the District Court erred in dismissing Count Two of the Complaint based on the Defendant's mistaken argument that Count Two is based on a one-year statute of limitations, rather than the appropriate two-year statute of limitations?
>
> 3. Whether the District Court erred in dismissing Count Three of the Complaint, finding that there is no applicable right to privacy for information pertaining to a medical emergency suffered by John W. Orem in his home which was subsequently released into the local and national news media, as well as social media platforms?

Of the original three issues, petitioner seeks rehearing only on the first and second issues. The second issue was decided in petitioner's favor in the *per curiam* opinion. However, the Court nevertheless affirmed the ruling on other grounds. Petitioner does not seek rehearing on issue number three.

Petitioner John Orem was the Republican Nominee for the office of Sheriff of Berkeley County, West Virginia, at the time the underlying incident occurred. One of Mr. Orem's opponents in the primary election, D. Scott Richmond, had a close connection to the respondent, in that Richmond's wife was the respondent's secretary for ten years. (J.A. 263:7-14). She was working in the capacity as respondent's secretary at the detachment at the day and time John Orem was arrested by the respondent. During the course of the arrest and booking, Mr. Orem was photographed while sitting in handcuffs, wearing pajamas, inside a secure area of the

respondent's state police detachment. The photo was uploaded onto social media and went "viral" - even prior to the issuance of any warrants or allegations against him (J.A. 263: 4-6, 388:8-17, 393:6-23, 417:5-12).

The Prosecuting Attorney of Berkeley County concluded that the respondent had violated Mr. Orem's civil rights by performing an unconstitutional warrantless search of the Orem home. He moved to dismiss the charges (*See* Dismissal Motion and Order, J.A. 141-150). Respondent Gillmore attempted to go-around the Prosecuting Attorney and argue against the dismissal (*See* J.A. 151). The Prosecuting Attorney filed a response with the court, noting that, "Cpl. Gillmore does not have standing to object in this matter . . . ." and that the "Prosecutor's Office has an ethical duty to review the evidence and apply said evidence to constitutional restrictions."(*See* State's Response to Gillmore Letter, J.A. 447). The criminal charges were dismissed. But the damage had been done, as one cannot "unring a bell."

ARGUMENT

A. Material factual matters were overlooked by the Court in granting qualified immunity to the respondent where the record shows that the respondent performed a presumptively unconstitutional search, which pursuant to long-standing Supreme Court holdings, requires application of a rebuttable presumption of unreasonableness, which was not applied in the *per curiam* opinion.

This Court found the reasonableness of the respondent's warrantless search of the Orem home to be "*beyond debate*," and therefore granted the respondent police officer qualified immunity. However, this Court never addressed the facts underlying the Court's conclusion, nor the application of the rebuttable presumption of unconstitutionality. The *per curiam* opinion correctly noted that qualified immunity is inapplicable where a police officer violates clearly

established statutory or constitutional rights of which a reasonable person would have known - *citing* Adams v. Ferguson, 884 F.3d 219, 226 (4th Cir. 2018)). However, the opinion failed to explain how a fundamental Fourth Amendment violation, such as the execution of a warrantless search and seizure in a citizen's home, could be "beyond debate" - especially where all such searches and seizures are *presumptively unreasonable*.

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." Brigham City v. Stuart, 547 U.S. 398, 403 (2006). The Supreme Court has ruled that no reasonable police officer could claim to be unaware of the basic rule that, absent consent or exigency, a warrantless search of a home is presumptively unconstitutional, and therefore would not be entitled to qualified immunity:

> "[T]he right of a man to retreat into his own home and there be free from unreasonable governmental intrusion' " stands " '[a]t the very core' of the Fourth Amendment," Kyllo v. United States, 533 U. S. 27, 31 (2001), our cases have firmly established the "'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable," Payton v. New York, 445 U. S. 573, 586 (1980). Thus, "absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within." Id., at 587–588 (footnote omitted). *See* Kyllo, 533 U. S., at 29.

Groh v. Ramirez, 540 U.S. 551, 559 (2004) (citations omitted). These principles are equally applicable to the respondent's search and seizure inside the Orem home, as well as the ensuing warrantless arrest of Mr. Orem:

> That rule is in keeping with the well-established principle that 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.' Camara v. Municipal Court, 387 U. S. 523, 528–529 (1967). *See* Steagald v. United States, 451 U. S. 204, 211–212 (1981); Jones v. United States, 357 U. S. 493, 499 (1958)." *Ibid*.

Id. 540 U.S. at 560 (2004)

Following the precedent of the Supreme Court, the respondent cannot be granted qualified immunity under the facts contained in the record. Examining the facts in the light most favorable to the petitioners, they demonstrate a warrantless search with no reasonable factual basis for the application of an exception for an exigency. The respondent cannot obtain qualified immunity for the violation of the most fundamental *and clearly established* tenant of the Fourth Amendment:

> **No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional**. *See* Payton, 445 U. S., at 586-588. Indeed, as we noted nearly 20 years ago in Sheppard:[1] "The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional."

Id., 540 U.S. at 564 (2004) (emphasis added).

The only possible applicable exception is the "emergency aid exception," which was the basis for the District Court's grant of qualified immunity to the respondent. However, the District Court erred, because where the facts show a warrantless search or seizure of a home, the respondent can seek to obtain summary judgment only "if [the respondent] can establish as a matter of law that a reasonable officer could have believed that the search comported with the Fourth Amendment even though it actually did not." Anderson v. Creighton, 483 U.S. 635 (1987). Thus, the respondent's actions are not "beyond debate." To the contrary, the respondent was required to show, as a matter of law, that his actions justifiably fall within an exception to the presumptive rule. *See* Groh., 540 U.S. at 564 (2004).

---

[1] Massachusetts v. Sheppard, 468 U.S. 981 (1984) ("[A] warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional").

The *per curiam* opinion contained no finding that the respondent had established reasonableness as a matter of law. Likewise, the District Court, on which the opinion relies, overlooked genuine disputes of material fact surrounding the respondent's claim of exigent circumstances. The facts of record show a warrantless search and seizure in the petitioners' home, with no reasonable basis for any immediate need for emergency aid. Instead, the record shows that the search and seizure was performed with the intent to secure evidence against Mr. Orem.

"The emergency doctrine may be said to permit a limited, warrantless search or entry of an area by police officers where (1) there is an immediate need for their assistance in the protection of human life, (2) the search or entry by the officers is motivated by an emergency, rather than by an intent to arrest or secure evidence, and (3) there is a reasonable connection between the emergency and the area in question." State v. Bookheimer, 656 S.E.2d 471 (W. Va. 2007) (*quoting* Syl. Pt. 2, State v. Cecil, 311 S.E.2d 144 (W. Va. 1983)). "The 'reasonableness' of a warrantless search or entry under the emergency doctrine is established by the 'compelling need to render immediate assistance to the victim of a crime, or insure the safety of the occupants of a house when the police reasonably believe them to be in distress and in need of protection.'" Id. (*quoting* Cecil, 311 S.E.2d at 150).

The record shows no compelling need to render immediate assistance to Mr. Orem. During the preliminary hearing conducted in the Magistrate Court of Berkeley County, Respondent Gillmore admitted that there was no immediate or compelling need for his assistance for the purposes of protecting human life, and that any emergency which may have existed prior to his actions, had ended by the time the search was performed:

Q: And there was no compelling need to render him assistance by you?

A: **No, sir.**

(*See* Pretrial Hearing Transcript J.A. 513). The Chief EMS personnel on the scene testified that Defendant Gillmore was not requested to assist in Mr. Orem's medical care:

Q. Did you ask the troopers present to assist you guys in determining what he had taken?

A: **No.**

(J.A. 473).

Prior to the inception of the respondent's search of the Orem bathroom, the immediate threat to Mr. Orem's life was over. Nothing further was required from a medical standpoint. (J.A. 480). EMS was present to render medical care. The respondent was not. He testified that the only reason he was dispatched to the scene was for the purposes of ensuring the safety of EMS personnel (J.A. 269:1-11). There was no medical need, nor emergency, requiring any individual to search the petitioners' bathroom. The EMS Chief stated that he never found it necessary to enter the bathroom in order to provide care to Mr. Orem. Nor was there a safety threat present. Mr. Orem was not being violent, and there were no safety concerns for EMS (J.A. 482). The record show that the medical treatment of Mr. Orem had ceased prior to the respondent beginning his search of the bathroom:

Q: [O]nce the emergency intervention was concluded, your walk with Mr. Orem he was walking upright, talking, oriented, and you had no compelling need to render any more immediate intervention services?

A: **That's correct.**

(J.A. 489). The respondent admitted the same (J.A. 513-14).

The record shows that the respondent had the intention of searching for evidence, rather than to render medical aid. He stated that he waited until the emergency had ceased prior to entering the bathroom *to conduct a search for evidence*:

> Q. . . . [b]ut it's just you stand by your testimony that you waited until the medical emergency was done?
>
> A: **That's correct.**
>
> Q: And then you went into the bathroom?
>
> A: **That's correct.**

(J.A. 515).

The respondent's testimony changed over time in attempt to redefine his conduct from a search for evidence into a claim to the emergency aid exception. The facts show however, and his own testimony admits, that the respondent believed he would find evidence of criminal conduct in the bathroom, and so he performed the search - purposefully waiting until the medical emergency was over before doing so. An objective analysis of what the respondent knew, shows that Mr. Orem's medical emergency had ended prior to the respondent conducting a search of the bathroom. The facts further show that the respondent's purpose of being on the scene was to ensure the safety of the EMS personnel, and that at no time did the EMS personnel request his assistance, or communicate any concern for their safety.

To the contrary, there are no facts available in the record to support *as a matter of law*, that an objectively reasonable officer would have believed that he could perform a warrantless search of the Orem household for the purposes of rendering emergency medical care. A reasonable officer is charged with understanding the basic concept that a warrant is required

prior to searching a home for evidence. "No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional. *See* Payton, 445 U. S., at 586-588." Groh v. Ramirez, 540 U.S. 551, 564 (2004). The prosecuting attorney presiding over the criminal charges wrote in the motion seeking dismissal of the charges, that "there was no need for Cpl. Gilmore to promptly act and search the bathroom cabinet in the proper discharge of his . . . duties," and that "the search of the bathroom cabinet also fails under the emergency doctrine as there was no longer an 'immediate need' for the search of the bathroom cabinet for the 'protection of human life . . . .'" (J.A. 149).

Therefore, the underlying facts are not beyond debate, but rather show that the respondent performed a presumptively unconstitutional search of the petitioners' home and that he is unable to demonstrate as a matter of law, that a reasonable officer would have believed the search to be justifiable under the emergency aid exception.

B. Material factual matters were overlooked by the Court in regards to Count Two - False Arrest - due to the District Court having erroneously dismissed the claim on statute of limitations grounds, thus depriving the petitioners of ever being heard on the issues regarding the existence of genuine issues of material fact applicable to Count Two of the underlying Complaint, as well as the application of those disputed facts to the grant of qualified immunity, which demonstrates the lack of probable cause and the lack of a basis for denial of qualified immunity.

The District Court granted summary judgment against the petitioners on Count Two of the Complaint - False Arrest - on the grounds that they were filed outside the applicable statute of limitations period. The *per curiam* opinion correctly overturned the ruling, holding that it was

in error for the District Court to have applied a one-year statute of limitations for false arrest, rather than a two year statute of limitations. However, the opinion dismissed the claim on other grounds, finding the existence of probable cause in the record, or in the alternative, granting qualified immunity to the respondent.

Because the District Court's grant of summary judgment was based on the statute of limitations, the petitioners were deprived of the opportunity to be heard on the issue of the false arrest claim. The *per curiam* opinion declared that the record demonstrated the existence of probable cause for the respondent to arrest Mr. Orem. However, the Court overlooked important facts in the record which demonstrate the absence of probable cause. Prior to the unconstitutional bathroom search, the respondent admitted that ***there was no reason to believe a crime had been committed by Mr. Orem***:

> Q. At the time that you went into the bathroom . . . you didn't know - I mean, there are opiates that are legal, right?
>
> **A. That's correct**
>
> …
>
> Q. So you had no indication whatsoever, or no evidence that - that Mr. Orem had committed any crime at that point?
>
> **A. That's correct, yes, sir.**

(J.A. 278-79).

The respondent failed to ask Mr. Orem about the spoon. Nor did he test the spoon for illegal drugs prior to making the warrantless arrest (J.A. 291:1-10; 285:11-20). The respondent never sought to interview, nor ask Mr. Orem, regarding what, if anything, he had ingested. Nor did he ask Mr. Orem whether legal prescription medications were ingested which may have been

opiates (J.A. 297:11-14). Therefore the respondent had no way of knowing whether the spoon contained an illegal substance. He likewise failed to ask Mr. Orem if he was aware of the presence of the spoon hidden in the bathroom, nor the number of people living in the house who could have placed the spoon in the bathroom.

There was no probable cause for an arrest without the illegal seizure of the spoon. There was no spoon without the unconstitutional search, which was the reason the criminal charges were dismissed. As the respondent himself acknowledged, the occurrence of a medical emergency, coupled with the administration of Narcan, cannot alone form the basis of probable cause. The prosecutor told Gillmore that "it was an inappropriate search, and because of that it negated the spoon, which was the only item of evidence that we had recovered that was tested positive for any kind of narcotics." (J.A. 317:13-21). In the prosecutor's motion to dismiss the charges, he wrote, "[i]t is the State's position that the fruits of the search: the spoon, the cotton on the spoon, and the results of the forensic testing of these objects will be suppressed. Without evidence of the controlled substance, the State has insufficient evidence to proceed forward and prove the charge beyond a reasonable doubt." (J.A. 149-50). Thus, the only evidence of criminal conduct obtained by the respondent was obtained by engaging in an illegal search. Without evidence of crime, there can be no factual basis for a finding of probable cause.

The *per curiam* opinion alternatively granted the respondent qualified immunity on the false arrest claim, in the event that he acted without probable cause to perform a warrantless arrest of Mr. Orem inside his home. However, for identical reasons discussed in section "A" above, qualified immunity cannot be granted because the respondent violated a clearly established central tenant of the Fourth Amendment. *See* Groh., 540 U.S. at 564 (2004) ("No

reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional.").

Given that the petitioners did not have an opportunity to be heard on the issue of probable cause and qualified immunity, pertaining to Count Two of the Complaint, the petitioners respectfully requests rehearing on the issue, on the grounds that the Court overlooked important factual components of the record, showing that there are genuine issues of material fact on the issues of probable cause

CONCLUSION

The Court should grant rehearing in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2020, I electronically filed the foregoing Petition for Rehearing with the Clerk of the Court using the CM/ECF System which will send notice of such filing to the following registered CM/ECF users:

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