No. 20-877

IN THE
Supreme Court of the United States

TRINELL KING,
Petitioner,
v.
RICKY PRIDMORE, COREY ARCHER, AND ANDREW HILL,
Respondents.

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

BRIEF IN OPPOSITION

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March 3, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's decision conflicts with the summary judgment standard of *Tolan v. Cotton*, 572 U.S. 650 (2014), and cases from the Fourth, Eighth, and Ninth Circuits, when those cases involve contradictory facts and Petitioner Trinell King's case does not, and when King's subjective interpretation of the police officers' words has no bearing on whether "every 'reasonable official would [have understood] that what he [was] doing violate[d] [King's Fourteenth Amendment substantive due process] right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (first bracketed words by the Court) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

2. Whether the Eleventh Circuit's decision conflicts with *Hope v. Pelzer*, 536 U.S. 730 (2002), when unlike the plaintiff in *Hope*, King can point to no prior cases, state regulations, or Department of Justice studies that support his argument for an obviously clear constitutional violation.

3. Whether the Court should select this case as the vehicle to remove the "clearly established law" requirement from qualified immunity analysis, when that would require this Court to recognize a new substantive due process right that would be violated by threatening words alone, overlook the record which lacks substantial evidence of a threat of physical violence, and disregard King's voluntary dismissal of his claim under the Fourth Amendment which most directly governs this traffic stop detention case.

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INTRODUCTION

Petitioner, Trinell King, does not challenge the legality of Respondent police officer Ricky Pridmore's traffic stop of King's car for not having a license plate. Nor does King challenge the police officers' returning fire and accidentally wounding King after his passenger, convicted felon Donovan Brown, shot Officer Pridmore in the chest. Instead, King contends that during the traffic stop and before the gunfight, the respondent police officers unconstitutionally overbore his will when they persuaded him to help them catch armed felon Brown.

It is *undisputed* that during the time King spent handcuffed in the back of a police vehicle:

- No officer physically harmed King in any way;
- No officer made a physical gesture threatening that he would harm King;
- No officer made an express verbal threat to harm King; and
- No racial slur was used or racial bias exhibited (during the time King was in the police vehicle or at any time ever).

The traffic stop could have resulted in the car King was driving being towed and King missing a drug test required by the conditions of his probation. King's associating with Brown, an armed, convicted felon, could have resulted in the revocation of King's probation.

King asked Officer Archer: "If I help you guys catch [Brown], will you let me keep [the car]?" (V3/D65-5/Archer Depo/ECF p.114.) The police officers wanted King to help catch Brown. King testified at his deposition:

> A. So when they got tired, they came back with me, like, f**k him, you don't want to help

> us out, *we're going to throw – we're going to hit you with this charge*, you gonna start f**king us over, *we'll f**k over you*. I don't know where you *get your car back. You have got to cooperate and help us catch him*.

(V2/D65-3/King Depo/ECF p.153) (emphases added).

King contends that he interpreted Officer Archer's words – "we're going to make sure we f**k over you, if you f**k over us" – as a threat to harm King physically. (*Id.*) King admitted, however, that those words can mean "*anything*." (V2/D65-3/King Depo/ECF p.171).

King argues that the Eleventh Circuit panel's unanimous affirmance of summary judgment based on qualified immunity deserves certiorari review because that court did not view the words "*f**k over you*" in the light most favorable to him.

King contends that the Eleventh Circuit misapplied the summary judgment evidentiary standard as stated in *Tolan v. Cotton*, 572 U.S. 650 (2014). The Eleventh Circuit applied the same summary judgment standard as stated in *Tolan*. However, the record in *Tolan* contained evidence that contradicted the Fifth Circuit's factual basis for concluding that qualified immunity applied; the record in this case does not.

Moreover, King's subjective belief that he was being threatened with physical harm is not relevant. The standard for qualified immunity is not subjective, but objective – whether "every reasonable official would [have understood] that what he is doing violates th[e] right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (internal quotation marks and citation omitted). King invokes the wrong standard.

King next contends that certiorari review is warranted because the Eleventh Circuit's holding conflicts with *Hope v. Pelzer*, 536 U.S. 730 (2002), because, he argues, the violation of his constitutional rights was obviously clear. In *Hope*, this Court found that handcuffing a prison inmate to a hitching post constituted an obviously clear violation of the Eighth Amendment. Prior case law noted that prolonged physical restraint violated inmate rights, a state regulation indicated the particular treatment of the inmates violated their rights, and a Department of Justice (DOJ) study concluded that the exact practice at issue in *Hope* violated the Constitution. But King points to no case, no regulation, and no study stating the widespread and decades old practice of bargaining charges against one suspect for assistance in catching another is unconstitutional. And King does not account for the numerous circuit court cases that reject easily alleged verbal threats as a basis for 42 U.S.C. § 1983 liability.

King also asks this Court to remove the "clearly established law" requirement from the qualified immunity defense because it has no basis in the text of § 1983. This case is a poor vehicle for such an undertaking because the Court would have to create a constitutional right for a verbal threat, overlook the lack of substantial evidence in the record, and disregard King's voluntary dismissal of his claim under the Fourth Amendment when that amendment alone should have governed this case.

STATEMENT OF THE CASE

A. Factual Background

This is a law enforcement liability case about the interaction between the police officers and petitioner Trinell King during a prolonged traffic stop in Warrior,

Alabama. The interaction resulted in King helping the officers capture Donovan Brown, an armed, convicted, fleeing felon. During the traffic stop, King's passenger, Brown, armed himself with a pistol, jumped from the car, and ran into the woods near some homes. (V3/D65-6/Pridmore Depo/ECF pp.162-63). King does not fault the police officers for stopping him or for the injuries he suffered in the gunfight that erupted when Brown shot a police officer in the chest during his capture. (Pet. App.10a). The focus of this case is on what happened and what was said between King and the police officers after the officers concluded their unsuccessful foot search for the fleeing Brown, and before King exited the police officers' vehicle, got back in his car, and drove away from the location of the traffic stop to pick up Brown.[1]

* * *

On the early morning of September 28, 2015, King was driving his girlfriend's car, a red Monte Carlo, on U.S. Highway 31 in Warrior with Brown as his front seat passenger. (V1/D1/King's Complaint/ECF p.23; V2/D65-3/King Depo/ECF p.145).[2] King and Brown had known each other for nearly twenty years. (V2/D65-3/King Depo/ECF p.140; V4/D65-9/Brown Depo/ECF pp.183,186-87).

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[1] The physical events that occurred during this case are undisputed. The lower courts resolved all factual disputes about the words the officers and King exchanged in King's favor.

[2] Unless otherwise indicated, record citations in this brief in opposition refer to the underlying record on appeal by volume number/district court document number/document name/the relevant page number(s) as assigned by the lower courts' electronic case filing (ECF) system.

King was serving a supervised probation sentence under the Jefferson County, Alabama Community Corrections Program (JCCCP) for felony possession of a controlled substance (V2/D65-3/King Depo/ECF p.133). The terms of the sentence required King to obey all laws and avoid the company of other felons, like Brown. King admits he understood that he could have been ordered to prison for the remainder of his sentence for violating the terms of his supervised probation. (*Id*. at pp.133-34).

King also admits he did not have a driver's license or proof of insurance for his girlfriend's car. The car did not have a license plate/tag on it. He understands that these were violations of the law for which he was guilty. (*Id*. at p.145; V1/D46/Mem. Op./ECF p.166).[3]

Officer Ricky Pridmore of the Warrior Police Department was on patrol and initiated a traffic stop of King and Brown because he observed the car did not have a license tag. (V3/D65-6/Pridmore Depo/ECF pp.158, 161; V4/D65-9/Brown Depo/ECF pp.179-80). During the traffic stop, Officer Pridmore learned that King did not have a driver's license or proof of liability insurance on the car. (V2/D65-3/King Depo/ ECF pp.145,148; V3/D65-6/Pridmore Depo/ECF p.161). Officer Pridmore also learned that Brown had no identification at all. (V2/D65-3/King Depo/ECF p.148; V3/D65-6/Pridmore Depo/ECF p.161). King admits that Brown gave Pridmore a false name (Eric Davis) and date of birth. (*Id*.) Officer Pridmore then walked back to his patrol vehicle and radioed dispatch about King

[3] *See* Ala. Code §§ 32-6-1(a) (2010) (driver's license required); 32-6-18(a)(1) (misdemeanor to drive without license); 32-6-51 (rear tag required; misdemeanor to operate vehicle without rear tag), 32-7A-4(a) (liability insurance required); 32-7A-16(a) (misdemeanor to operate vehicle without liability insurance).

and "Davis." (V3/D65-6/Pridmore Depo/ECF p.161; V4/D65-9/Brown Depo/ECF p.180).

While Officer Pridmore was in his patrol vehicle, Brown told King he was going to run because he was carrying a pistol and had warrants out for his arrest. (V4/D65-9/Brown Depo/ECF pp.180,185-86; V2/D65-3/King Depo/ECF pp.144, 147,150). King admits he knew Brown was a convicted felon, knew Brown's criminal history, and knew that Brown had recently been released from prison. (V4/D65-9/Brown Depo/ECF p.185; V2/D65-3/King Depo/ECF p.141). King also knew that being in the company of Brown violated the terms of King's supervised release and placed him in jeopardy of confinement in state prison for the remainder of his sentence. This worried King. (V2/D65-3/King Depo/ECF p.134,156).

Brown jumped out of King's car with his pistol and ran away. (V2/D65-3/King Depo/ECF p.150; V4/D65-9/Brown Depo/ECF pp.180, 185-86; V3/D65-6/Pridmore Depo/ECF pp.162-63). Officer Pridmore called for back-up. (V3/D65-6/Pridmore Depo/ECF pp.162-63). Because of the dangerous situation, Pridmore handcuffed King and detained him in his patrol vehicle so he could search for Brown. (V2/D65-3/King Depo./ECF p.150; V3/D65-6/Pridmore Depo/ECF pp.162-63; V3/D65-5/Archer Depo./ECF p.110).

King admits he understood why Officer Pridmore handcuffed and detained him in the back of his patrol vehicle. (V2/D65-3/King Depo/ECF pp.150-51). He does not fault or make any claim against Pridmore for such action. (*Id*.) King agrees Officer Pridmore "did what he was supposed to do." (*Id*. at p.147).

Officer Pridmore searched for Brown on foot. (V3/D65-6/Pridmore Depo/ECF pp.163-64; V2/D65-3/King

Depo/ECF pp.150-51). Other Warrior police officers, including respondents Corey Archer and Andrew Hill, joined in the search for Brown. (V3/D65-5/Archer Depo/ECF pp.106,110-11; V4/D65-7/Hill Depo/ECF p.16). The officers searched, but they were unable to find Brown. (V3/D65-6/Pridmore Depo/ECF pp.164-165; V3/D65-5/Archer Depo/ECF p.111; V4/D65-7/Hill Depo/ECF p.21).

The officers regrouped at the scene of the traffic stop. King remained handcuffed in the back seat of Officer Pridmore's patrol vehicle. The officers questioned King about Brown's name and why he and Brown were in Warrior that morning. (V2/D65-3/King Depo/ECF pp.151-52). King admits he understood that the officers wanted him to help them catch Brown. (*Id*. at p.152).

A tow truck arrived and loaded King's girlfriend's car. (*Id*. at p.152; V4/D65-7/Hill Depo/ECF p.22). King admits he was worried about the car and the time and money it would take to get the car back if the police had it towed away. (V2/D65-3/King Depo/ECF p.156; V3/D65-5/Archer Depo/ECF pp.113,115). King admits he was also worried that he had violated some of the terms of his probation (V2/D65-3/King Depo/ECF p.156) (especially because he had been in the company of an armed felon (*id*.)). King also worried that he would "*miss work*" that day and show up late for a scheduled probation drug test. (*Id*. at p.153).

According to King, the police officers threatened to tow his girlfriend's car and to *"put some serious charges"* on him if he did not cooperate with them. King says he interpreted this as a threat *"to falsely arrest him on serious charges."* (V1/D1/King's Complaint/ECF p.25, ¶¶25-28) (emphases added). King clarified that he did not verbalize this perception,

stating only *"that's how I felt*[;] [*t*]*hat's how I was feeling . . . ."* (V2/D65-3/King Depo/ECF p.171) (emphasis added). King testified that the police officers never told him what the *"serious charges*" would be. (*Id*. at p.153).

King claims that the police officers told him that if he *"f**k*[*ed*] *over"* them, they would *"f**k* [*him*] *over,"* as well. (*Id*. at p.153) (emphases added). In his deposition, King testified that he perceived these statements as an implied threat to physically injure him because, *"in the streets,"* that statement could mean "*anything*." (*Id*. at p.171) (emphasis added).

Over six months after his deposition, King submitted an affidavit in opposition to summary judgment, adding that he believed the police officers would physically injure him as reprisal for refusing to cooperate and that this was the main factor which motivated him to help the officers find Brown. (V5/D80-1/King Affidavit/ECF pp.47-48). King, however, never identified any specific or express threat of physical harm to him by the police officers.

King consistently identified and described the officers' alleged verbal threats in the context of threats *to charge and arrest him*, as opposed to threats to physically harm him:

> A. [T]he police said *to keep myself out of jail I gotta get him* [*Brown*] *back in the car*, so I called him back . . . .

(V5/D79/Conventionally Filed Recording of King's Stmt. to the State Bureau of Investigation at 2:40 mark) (emphasis added).

> A. [T]hey were trying to get me to help them catch him, *threatening, throw charges on me.*

> Q. I need you to try to be as specific as you can about what these officers actually said.
>
> [King's lawyer]: Yeah, take your time. He's just asking you to tell him – give him the conversation. You have a summary. He wants the details.
>
> * * *
>
> A. So when they got tired, they came back with me, like, f**k him, you don't want to help us out, *we're going to throw – we're going to hit you with this charge*, *you gonna start f**king us over, we'll f**k over you*. I don't know where you get your car back. You have got to cooperate and help us catch him.
>
> * * *
>
> A. The lieutenant, the one that had on the blue shirt and khaki pants, I believe, he the one that back of us and the officer who called it in, they was doing all the talking, like if you are not going to help us, *we're going to get you with this, we're going to try to throw some charges on you*; we're going to make sure we f**k you over, if you f**k over us. I don't know where you get your car down, you've got to cooperate with us.

(V2/D65-3/King Depo/ECF pp.152-53) (emphases added).

> Q. Do you recall what the lieutenant specifically said to you?
>
> A. I mean, yes. Everything that I said, he said – he asked me for his name, what we was doing down here, asked me was I lying, and then it went from there.

> Q. Okay. Anything else you can –
>
> A. With the negotiation, the threats, everything they were telling me, *if I don't cooperate, they're going to throw some charges on me and they going to f**k over me. So, in the streets that means it could mean anything. It can mean being shot. It can mean being anything* . . . .

(*Id.* at pp.170-71) (emphasis added).

King neither alleged nor offered evidence that while making their alleged verbal threats to him, the police officers hit, punched, slapped, kicked, or even laid a finger on him. King does not allege or offer evidence to show that the officers used, displayed, or gestured in any way to threaten him with a gun, Taser, knife, baton, fist, or any other weapon. And King neither alleged nor offered evidence of an overt threat to harm him (e.g., "I'm going to hit you").

King admits he wanted to help himself and avoid the consequences he faced for driving without a license or insurance, tag, and violating the conditions of his supervised release (i.e., having his girlfriend's car towed, being late to work, missing a drug test, and going to prison). King hoped he could avoid those consequences by helping the officers locate and arrest Brown. (V2/D65-3/King Depo/ECF p.156).

King asked Officer Archer, *"*[*i*]*f I help you guys catch* [*Brown*]*, will you let me keep my car?"* (V3/D65-5/ Archer Depo/ECF p.114) (emphasis added). King admits he cooperated with the police officers and voluntarily told them Brown's name, that Brown had warrants out for his arrest, and that Brown was carrying a pistol. (V2/D65-3/King Depo/ECF p.155). King admits he told the police officers all these things to not only help the

officers get information to capture Brown, but to also help himself. (*Id*. at pp.155-56). King understood the police officers wanted him to help them catch Brown. King admits he agreed to do just that. (*Id*. at p.156; V4/D65-7/Hill Depo/ECF pp.22-23).

During the conversation between the police officers and King, King's cell phone rang, and it was Brown calling King. (V2/D65-3/King Depo/ECF p.153). King answered the phone, and at the officers' instruction, he told Brown that the officers had let him go. Brown told King he was hiding in the woods nearby. King replied that he would pick Brown up. (*Id*. at pp.153,157,169; V3/D65-5/Archer Depo/ECF pp.112-114; V4/D65-7/Hill Depo/ECF pp.23-24).

The officers told King that after he picked up Brown, he was to drive to a nearby access road to Interstate 65 and get on the interstate travelling south, where they would be waiting to stop his car and arrest Brown. (V4/D65-7/Hill Depo/ECF pp.24-25; V3/D65-6/Pridmore Depo/ECF pp.167-69,176; V2/D65-3/King Depo/ECF pp.141,153-54,159). The officers also told King to tell Brown–before Brown got back into the car–to get rid of the pistol he was carrying. (V3/D65-5/Archer Depo/ECF p.116; V3/D65-6/Pridmore Depo/ECF pp.171-72).

The tow truck driver unloaded King's girlfriend's car. (V2/D65-3/King Depo/ECF p.153). The police officers released King from the handcuffs. (*Id.* at p.157). King got in the car and drove away from the police officers. (V2/D65-3/King Depo/ECF pp.153-54).

When King arrived at Brown's location, Brown got in the car and sat in the front passenger's seat. King told Brown to lower his seat back all the way because the police were still looking for him. (V2/D65-3/King

Depo/ECF pp.154,160; V4/D65-9/Brown Depo/ECF pp.182,186). King asked Brown about his pistol and Brown replied that he had left the pistol in the woods. (V2/D65-3/King Depo/ECF p.160).

As agreed, King drove north toward the access road to the interstate. As King approached the interstate and saw some of the police officers' vehicles, he slowed his car to a stop. (*Id*. at pp.161-62). King then urged Brown to get out of the car and run. (*Id*. at p.162). Instead of running, Brown pulled out his pistol. (*Id.*)

King admits that at that point, Officer Pridmore drove his patrol vehicle alongside the passenger's side of King's car and yelled, *"[f]reeze, put your . . . hands up[,]*" and that he (King) saw Pridmore with his pistol drawn and pointed at Brown. (*Id*. at pp.162-63). King admits that rather than complying with Officer Pridmore's commands, Brown shot Pridmore in the chest through the closed front passenger's window of King's car. (*Id*. at pp.162-63; V4/D65-9/Brown Depo/ ECF pp.182, 187; V3/D65-6/Pridmore Depo/ECF p.178).

The bulletproof vest that Officer Pridmore was wearing prevented any serious injury to him. (V3/D65-6/Pridmore Depo/ECF p.178). Officer Pridmore returned fire at Brown, as did Officer Archer who was nearby in his own patrol vehicle. (V3/D65-5/Archer Depo/ECF p.120; V3/D65-6/Pridmore Depo/ECF p.178). The gunfight ended when the officers saw Brown drop his pistol. (V4/D65-7/Hill Depo/ECF p.28).

King and Brown were both shot in the incident, King being accidentally caught in the crossfire. (V4/D65-9/Brown Depo/ECF p.182; V3/D65-6/Pridmore Depo/ ECF p.178).

King admits Brown started the shooting, after which the police officers returned fire. (V2/D65-3/King Depo/

ECF p.140). King does not complain about the officers' decision to return fire. (*Id*. at p.141). King admits that had Brown not shot first, he (King) would not have been shot in the crossfire. (*Id*. at p.163.)

The officers' shooting of King was accidental. (V3/D65-4/Horn Depo/ECF p.36). King blames Brown – not the police officers – for the fact that he was shot. (V2/D65-3/King Depo/ECF p.141). King said he would have returned fire too, if he had been one of the police officers. (*Id*. at p.163).

Brown was charged with and pled guilty to the criminal offenses of attempted murder of Officer Pridmore and possession of a firearm while being a convicted felon. (V4/D65-9/Brown Depo/ECF p.187).

King filed his complaint (V1/D1/King's Complaint), testified for over three hours in his deposition (V2/D65-3/King Depo), and submitted a post-deposition affidavit (V5/D80-1/King Affidavit/ECF pp.46-49). Not once did King allege, state, or suggest that the police officers used any racial slur or displayed any racial bias toward him at any time.

B. Proceedings Below

The district court granted summary judgment to respondents on King's Thirteenth Amendment claim based on qualified immunity, reasoning that (1) no materially similar and controlling case law exists, (2) such a claim is one of first impression and there is no case on point from any jurisdiction in which the Thirteenth Amendment has been considered on similar facts, and (3) King failed to demonstrate that the officers' alleged conduct obviously violated the Thirteenth Amendment. (V1/D46-47/Order).

Separately, the district court granted summary judgment to respondents on King's Fourteenth Amendment claim based on qualified immunity, reasoning that the officers' alleged threat to "f**k [King] over," considered in context, did not violate the Constitution. (Pet. App. 45a-47a, 9a).

The Eleventh Circuit affirmed, reasoning that the then-existing controlling precedent would not have placed every reasonable officer on notice that the words "*[if] you gonna start f**king us over, we'll f**k over you*" violated the Constitution. (Pet. App. 21a-22a).

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's Opinion Does Not Conflict With The Evidentiary Standard For Summary Judgments.

A. The Eleventh Circuit's Opinion Is Consistent With *Tolan v. Cotton* and Faithfully Applies the Summary Judgment Standard to Undisputed Evidence.

King contends that the "Eleventh Circuit egregiously erred in applying the governing legal rule [of *Tolan v. Cotton*, 572 U.S. 650 (2014),] by crediting the White police officers' purported intention rather than how the jury could interpret their intent . . . ." (Pet. 16.) This argument fails on the law and the facts.

King's argument fails on the law for two reasons. First, King's argument that the Eleventh Circuit erred in crediting the "White police officers' purported intention rather than how the jury could interpret their intent . . . ," (Pet. 16), fails because the Eleventh Circuit did not do that. The Eleventh Circuit concluded that King's subjective interpretation of the

officers' intent was irrelevant to the objective "every reasonable officer" standard for qualified immunity:

> It cannot be maintained that all objectively reasonable officers in their position would have known—*with obvious clarity*—that what they said, in context, would necessarily be understood as a threat of false criminal charges and physical violence in violation of the Constitution. While King may have *subjectively* interpreted the officers' words to that effect, that is categorically not the standard that we must apply.

(Pet. App. 21a-22a).

King asserts a substantive due process violation. Instead of asking what the officers subjectively intended, the qualified immunity question is whether *every reasonable officer*[4] would have known that saying the words "f**k over you" to King amounted to "conscience shocking" "conduct [that was] intended to injure in some way *unjustifiable by any government interest.*" *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) (emphasis added).[5]

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[4] "Clearly established means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotation marks and citations omitted).

[5] King does not explain how the Thirteenth Amendment affords him a claim; this Court's precedents hold it does not. *See United States v. Kozminski*, 487 U.S. 931, 943-44 (1988) ("[T]he Court has recognized that the prohibition against involuntary servitude does not prevent the State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform certain civic duties [e.g., jury duty]."); *Hurtado v. United States*, 410 U.S. 578, 589 (1973) (duty to testify as a witness);

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), this Court removed subjective intent from the qualified immunity analysis, stating:

> [*Q*]*uestions of subjective intent so rarely can be decided by summary judgment*. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.
>
> . . . .
>
> *Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government* and permit the resolution of many insubstantial claims on summary judgment.

Harlow, 457 U.S. 816-18 (emphases added) (footnotes omitted).

Second, catching a fleeing, armed felon is a governmental interest and a compelling one under the Fourteenth Amendment. So an officer saying that he will "f**k over" a suspect if the suspect does not help catch the armed felon does not on its face constitute a substantive due process violation under *Lewis*, 523 U.S. at 849.

Arver v. United States, 245 U.S. 366 (1918) (duty to comply with military draft laws); Ala. Code § 13A-10-5 (2015) (criminal statute requiring citizens, upon command by a peace officer, to aid such peace officer in effecting a lawful arrest).

Likewise, King's argument fails on the facts for two reasons. First, in *Tolan*, the evidence submitted by the plaintiff contradicted the version of the facts the Fifth Circuit had relied on to hold that qualified immunity applied. By contrast, the evidence King presented does not contradict the facts relied on by the Eleventh Circuit to hold that qualified immunity applies.

In *Tolan*, 572 U.S. at 657-58, the Fifth Circuit said the porch where the shooting occurred was "dimly-lit," *id*. at 657, while the plaintiff testified he was "not in darkness," *id*. at 658. The Fifth Circuit assumed the plaintiff's mother "refus[ed] orders to remain quiet and calm," but the mother testified that she was neither "aggravated" nor "agitated." *Id*. at 658. The Fifth Circuit assumed that the plaintiff was "shouting," but the plaintiff testified he "was not screaming." *Id*. And the Fifth Circuit credited an officer's account that the plaintiff was on both feet "[i]n a crouch" or a "charging position" and inferred that he was "moving to intervene in Sergeant Cotton's" interaction with his mother," but the plaintiff testified he "wasn't going anywhere" and he did not "jump up" from his lying position on the porch. *Id*. at 659. This Court reversed the Fifth Circuit's holding that qualified immunity applied because the Fifth Circuit had ignored multiple genuine disputes of material fact.

King points to no genuine disputes of material fact. The Eleventh Circuit fully credited King's account of everything the officers said and did. (Pet. App. 3a-10a).

There was no physical harm to King, no gestures threatening to harm King, and no overt threat to harm King. King described a dialogue in which an officer threatened to bring charges against King and to tow his girlfriend's car if King did not cooperate and help

the police catch Brown. As the Eleventh Circuit recognized, the "police lawfully use the same or similar tactics to encourage and incentivize people to assist law enforcement all the time." (Pet. App. 15a).

Second, at the summary judgment stage, the Court draws only *reasonable* inferences in favor of the non-movant. *See Crawford v. Metro. Gov't of Nashville & Davidson Cty.,* 555 U.S. 271, 274 n.1 (2009) ("Because this case arises out of the District Court's grant of summary judgment for Metro, 'we are required to view all facts and draw all reasonable inferences in favor of the nonmoving party, [Crawford].' *Brosseau v. Haugen*, 543 U.S. 194, 195, n.2, 125 S. Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam)."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) ("Respondents in this case, in other words, must show that the inference of conspiracy is reasonable . . . .").

The context of the "*f**k over you*" phrase that King attributes to an officer excludes a reasonable inference that those words constituted a threat of physical harm. By King's own account, the officer specified that he was referring to criminal charges and an impounded vehicle:

> So when they got tired, they came back with me, like, f**k him, you don't want to help us out, *we're going to throw – we're going to hit you with this charge*, *you gonna start f**king us over, we'll f**k over you*. I don't know where you get your car back. You have got to cooperate and help us catch him.

(V2/D65-3/King Depo/ECF p.153) (emphases added).

When the disputed words are evaluated in their proper context, King's suggested inference that the officer intended to communicate a veiled threat of violence at

the same time the officer clarified that he was referring to criminal charges and an impounded vehicle is not a reasonable one. *See generally Matsushita*, 475 U.S. at 587 ("If the factual context renders [the plaintiff's] claim implausible . . . [the plaintiff] must come forward with more persuasive evidence to support [his] claim than would otherwise be necessary."). [6]

Further, King's proposed inference that the officers' words "*f**k over you*" meant they were going to physically harm him is internally inconsistent with King's own testimony that such would happen only if "*you [King] gonna start f**king us [the officers] over.*" Unarmed and handcuffed in the back of the police patrol vehicle and surrounded by several armed

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[6] The slang term *"f**k you over,"* means to do wrong to another person. The slang term *"f**k you up"* means that a person is going to beat or punch another person. *See* Urban Dictionary, https://www.urbandictionary.com/define.php?term=fuck%20you%20over (defining "f**k you over" as meaning "To do somebody wrong. To do wrong to another person, usually intentionally. Be careful who you trust, even the people closest to you may f**k you over."); *id.* at https://www.urbandictionary.com/define.php?term=fuck%20you%20up ("f**k you up means that you are f**king pissed at someone and you are going to beat them . . . punch them or whatever. Dude you're so f**king annoying I'm going to f**k you up.") (last visited Feb. 25, 2021). It is the former words, not the latter ones, which King attributes to the police officers. (Pet. App. 16a-17a). *See generally United States v. Guidry*, 960 F.3d 676, 680 n.2 (5th Cir. 2020) (citing Urban Dictionary); *United States v. Chin*, 736 F. App'x 785, 787 n.1 (11th Cir. 2018) (same); *Franchina v. City of Providence*, 881 F.3d 32, 40 (1st Cir. 2018) (same); *In re Brunetti*, 877 F.3d 1330, 1337 (Fed. Cir. 2017) (Same), *aff'd sub nom. Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *United States v. Zimny*, 846 F.3d 458, 464 n.6 (1st Cir. 2017) (same); *Bikram's Yoga Coll. of India, L.P. v. Evolation Yoga, LLC*, 803 F.3d 1032, 1044 n.13 (9th Cir. 2015) (same); *United States v. Walker*, 529 F. App'x 256, 264 n.2 (3d Cir. 2013) (same); *Pole v. Randolph*, 570 F.3d 922, 945 n.10 (7th Cir. 2009) (same).

officers, it was not plausible that the phrase "*f**king us over*" meant that the officers believed King was going to physically harm them. So the quid of a non-physical harm "*f**king us over*" makes no sense with the quo of a physical harm "*f**k over you.*" *See generally Matsushita*, 475 U.S. at 587 ("If the factual context renders [the plaintiff's] claim implausible—if the claim is one that simply makes no . . . sense—[the plaintiff] must come forward with more persuasive evidence to support [his] claim than would otherwise be necessary."). An internally inconsistent inference is not a reasonable one.

At bottom, King's petition reveals that the Eleventh Circuit correctly stated the summary judgment standard. "In considering a motion for summary judgment," the Eleventh Circuit wrote, "the non-movant's evidence must be accepted as true and all reasonable inferences must be drawn in his favor." (Pet. App. 3a). King's real complaint is that the Eleventh Circuit "erred in applying the governing legal rule." (Pet. at 16.).

"Every year the courts of appeals decide hundreds of cases in which they must determine whether thin evidence provided by a plaintiff is just enough to survive a motion for summary judgment or not quite enough." *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277 (2017) (Alito, J., concurring in denial of cert.). "[R]egardless of whether the petitioner is an officer or an alleged victim of police misconduct," this Court will "rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *Id.* at 1278. That is certainly the case here, and reason enough to deny the petition outright.

B. The Eleventh Circuit's Opinion Does Not Conflict With the Fourth, Eighth, and Ninth Circuits Because the Eleventh Circuit Does Not Have a Special Deadly Force Standard and Did Not Ignore Contradictory Evidence.

King asserts a circuit split exists regarding the summary judgment standard (Pet. at 19), but there is none. The Eleventh Circuit's opinion does not conflict with the Ninth Circuit's summary judgment standard in *Cruz v. City of Anaheim*, 765 F.3d 1076 (9th Cir. 2014). In *Cruz*, the Ninth Circuit arguably applied a unique summary judgment standard that it reserves only for deadly force cases in which the decedent cannot testify:

> Could any reasonable jury find it more likely than not that Cruz *didn't* reach for his waistband? In ruling for the officers, the district court answered this question "No." The evidence it relied on in reaching this conclusion – indeed, the only evidence that suggests this is what happened – is the testimony of the officers, four of whom say they saw Cruz make the fateful reach.
>
> But ***in the deadly force context***, we cannot "simply accept what may be a self-serving account by the police officer." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). Because the person most likely to rebut the officers' version of events – the one killed – can't testify, "[t]he judge must carefully examine all the evidence in the record . . . to determine whether the officer's story is internally consistent and consistent with other known facts." *Id.*; *see also Gonzalez v. City of*

> *Anaheim*, 747 F.3d 789, 794-95 (9th Cir. 2014) (en banc). This includes "circumstantial evidence that, if believed, would tend to discredit the police officer's story." *Scott*, 39 F.3d at 915.

Cruz, 765 F.3d at 1079 (emphasis added).

This Ninth Circuit standard, whether right or wrong, is unique to that circuit and specific to cases involving the use of lethal force. *Cf. Martinez v. City of Clovis*, 943 F.3d 1260, 1270 (9th Cir. 2019) (using the general summary judgment standard of "view[ing] the evidence in the light most favorable to the nonmoving party[,]" concluding the officers were entitled to qualified immunity at the summary judgment stage, and not mentioning the *Cruz* deadly force standard). The function of such a standard – to draw all possible inferences in favor of the absent decedent and against self-serving evidence offered by police officers – has no place in this case. King is alive and testified at his deposition.

Regardless, the specific standard articulated in *Cruz* is inapposite here because King does not sue over the officers' use of deadly force or otherwise argue that the Ninth Circuit's special standard applies to his case. (Pet. at 9, n.2.) To the extent the Ninth Circuit's summary judgment standard for deadly force cases differs from the well-established Rule 56 standard, this Court has previously rejected the judicial creation of a special rule that conflicts with the Federal Rules of Civil Procedure. *Cf. Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which

must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.").

Next, King argues that the Eleventh Circuit's opinion conflicts with the Eighth Circuit's opinion in *Williams v. Holley*, 764 F.3d 976 (8th Cir. 2014). But in *Williams*, the Eighth Circuit applied the same standard: "'We . . . view[ ] the evidence in the light most favorable to the non-moving party and giv[e] that party the benefit of all reasonable inferences.'" *Williams*, 764 F.3d at 979 (quoting *Edwards v. Byrd*, 750 F.3d 728, 731 (8th Cir. 2014)). In *Williams*, the Eighth Circuit's decision to affirm the lower court's denial of summary judgment was based on the existence of conflicting circumstantial evidence that created a genuine issue of material fact regarding the officer's use of lethal force. 764 F.3d at 980-81. Applying an identical standard to that of the Eighth Circuit, here, the Eleventh Circuit found that there was no such conflicting evidence and thus genuine dispute of material fact. (*Cf.* Pet. App. 13a-15a).

King also argues the Eleventh Circuit's opinion conflicts with the Fourth Circuit's opinion in *Jacobs v. N.C. Administrative Office of the Courts*, 780 F.3d 562, 570 (4th Cir. 2015). In *Jacobs*, however, the Fourth Circuit applied the same summary judgment standard:

> As in *Tolan*, the district court "neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." 134 S. Ct. at 1868. Rather, the court incorrectly drew all inferences in favor of the AOC, not Jacobs. We therefore reverse the district court's determination that there is no genuine dispute as to whether Jacobs had a disability.

Jacobs, 780 F.3d at 570.

The Fourth Circuit's decision was not based on application of a different standard, but rather on the lower court's failure to consider conflicting evidence that created a factual dispute. *Id.* at 570-71.

Simply stated, King cannot point to a genuine circuit split. Instead, King's petition is based on a dispute with the Eleventh Circuit's application of the Rule 56 standard to the record before it. Disagreement with that application is not a "compelling reason" to grant the petition. *See Salazar-Limon v. City of Houston*, 137 S. Ct. 1277-78 (Alito, J., concurring).

II. There Is No Conflict With *Hope v. Pelzer* Because There Are No Cases, No Regulations, And No Studies Making The Officers' Interaction With King An Obviously Clear Constitutional Violation.

A. While the Plaintiff in *Hope v. Pelzer* Presented Case Law, a State Regulation, and a DOJ Study that Made the Eighth Amendment Violation Obviously Clear, King Presents None of These.

In *Hope v. Pelzer*, 536 U.S. 730, 741-42 (2002), the Court held that despite the absence of controlling precedent with materially similar facts, "in light of binding Eleventh Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a DOJ report informing the ADOC of the constitutional infirmity in its use of the hitching post, we readily conclude that the respondents' conduct violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" (Internal citation omitted.)

First, in *Hope*, existing case law, though not directly on point, held that "handcuffing inmates to the fence and to cells for long periods of time" and "deny[ing] . . . water as punishment for . . . refusal to work" did or could violate the Eighth Amendment's bar on cruel and unusual punishment. *Id.* at 742-43 (citing *Gates v. Collier*, 501 F.2d 1291 (5th Cir.1974), and *Ort v. White*, 813 F.2d 318 (11th Cir. 1987)). By contrast, King cites no cases that interpret words similar to "*f**k over you*" to constitute a threat of violence and no cases holding that every reasonable police officer would have known that such words violate the Constitution.

Second, in *Hope*, 536 U.S. at 744, the Court found "fair notice" to prison officials because "a regulation promulgated by ADOC in 1993 . . . [that required] offers of water and bathroom breaks every 15 minutes" showed that ADOC officials were "fully aware of the wrongful character of their conduct." *Id*. at 744. King, however, identifies no state or other regulation prohibiting the use of words like "*f**k over you*" or the practice of asking one criminal suspect to help catch another.

Third, in *Hope*, 536 U.S. at 745, the Court relied on a "DOJ report [that] advised the ADOC to cease use of the hitching post in order to meet constitutional standards." Unlike the DOJ report that advised ADOC to cease the use of the hitching post, DOJ has issued guidelines and the American Bar Association (ABA) has issued standards that provide for the continued use of confidential informants to help catch criminals. The DOJ guidelines and the ABA standards expressly recognize that using confidential informants to catch criminals is dangerous and can involve the "risk of physical harm to" a confidential informant. *See The Attorney General's Guidelines Regarding the Use of Confidential Informants*, part II.A. 1 (noting that

federal law enforcement is required to weigh a number of factors to determine the suitability of a confidential informant, including "p. the risk of physical harm that may occur to the person or his or her immediate family or close associates as a result of providing information or assistance"), *available at* https://www.justia.com/criminal/docs/use-of-confidential-informants-guidelines/ (last visited Feb. 1, 2021); *ABA Criminal Justice Standard* 2.4(c) ("The prosecutor should consider . . . that the confidential informant will: . . . (v) be subject, or subject others, to serious risk of physical harm as a result of cooperating with law enforcement"), *available at* https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pinvestigate/ (last visited Feb. 1, 2021).[7]

In sum, King has cited no case, no regulation, and no study, guideline, or standard to demonstrate that every reasonable police officer would have known that the words King attributes to the officers violated King's right to substantive due process.

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[7] *See generally Alexander v. DeAngelo*, 329 F.3d 912, 918 (7th Cir. 2003) ("[C]onfidential informants often agree to engage in risky undercover work in exchange for leniency, and we cannot think of any reason, especially any reason rooted in constitutional text or doctrine, for creating a categorical prohibition against the informant's incurring a cost that takes a different form from the usual risk of being beaten up or for that matter bumped off by a drug dealer with whom one is negotiating a purchase or sale of drugs in the hope of obtaining lenient treatment from the government.").

B. The Police Officers' Words to King Could Not Have Been an Obviously Clear Constitutional Violation Because No Court Has Recognized Such a Violation.

Further, it could not have been obviously clear to the police officers that the words King attributes to them violated a constitutional right when no case from this Court or the Eleventh Circuit recognizes such a right. In fact, a large number of cases from other courts of appeals hold that verbal threats do not violate the Constitution. *See, e.g.*, *Parker v. Canham*, 82 F. App'x 503, 503-04 (8th Cir. 2003) (rejecting Fourth Amendment claim that arose from a traffic stop, where "[Deputy] Canham allegedly used profanity and a racial slur, and *threatened to 'beat the hell out of'* [*the plaintiff*] *with a club he was holding*. . . . [Deputy] Canham's alleged verbal threat and use of a racial epithet are *not cognizable under 42 U.S.C. § 1983*") (emphases added); *Hopson v. Fredericksen*, 961 F.2d 1374, 1378-79 (8th Cir. 1992) (affirming directed verdict for officer where "Hopson alleges that he was placed *alone in the back seat of the police car*. . . . Officer Thomure turned to Hopson, uttered a racial slur, and *threatened to 'knock* [*Hopson's*] *remaining teeth out of his mouth*' if he remained silent. . . . [W]e find that *no reasonable juror could find that Hopson's allegations constitute a cognizable constitutional claim* under § 1983.") (emphases added). *See generally, e.g.*, *Begnoche v. DeRose*, 676 F. App'x 117, 121 (3rd Cir. 2017) ("It is well-settled that *verbal abuse* does *not give rise to a constitutional violation under § 1983*") (emphases added); *Wyatt v. Fletcher*, 718 F.3d 496, 504 (5th Cir. 2013) (same); *McBride v. Deer*, 240 F.3d 1287, 1291 n.3 (10th Cir. 2001) (same); *Swoboda v. Dubach*, 992 F.2d 286, 290 (10th Cir. 1993) (same); *Emmons v.*

McLaughlin, 874 F.2d 351, 353 (6th Cir. 1989) (same); *McFadden v. Lucas*, 713 F.2d 143, 146 (5th Cir. 1983) (same).

Even if the Eleventh Circuit had construed the words at issue as a threat, the officers would still be entitled to qualified immunity. While the Eleventh Circuit has not decided a verbal threat case, the respondents were entitled to rely on cases from other circuits. *See Pearson v. Callahan*, 555 U.S. 223, 244-45 (2009) ("The officers here were entitled to rely on these cases [decisions by three federal courts of appeals and two state supreme courts], even though their own Federal Circuit had not yet ruled on 'consent-once-removed' entries. The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions.").

In light of the existing case law rejecting verbal threats as actionable under § 1983, it was not clearly obvious to every reasonable officer that the words "*you gonna start f**king us over, we'll f**k over you,*" (V2/D65-3/King Depo/ECF pp.152-53), violated a substantive due process right.

III. This Case Is Not A Proper Vehicle To Overrule The "Clearly Established Law" Element Of The Qualified Immunity Doctrine Because Doing So Would Require The Court To Create A New Constitutional Right Against Verbal Threats, Overlook The Absence Of Substantial Evidence In The Record, And Disregard King's Voluntary Dismissal Of His Fourth Amendment Claim.

King asks this Court to discard the "clearly established" law requirement of the qualified immunity doctrine. He argues there is no textual basis for this requirement.[8] But this case is a poor vehicle for such a far-reaching undertaking.

First, discarding the clearly established law" requirement would afford King no relief in this case. King does not demonstrate the violation of any cognizable

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[8] King's textual argument does not explain how this Court's expansion of 42 U.S.C. § 1983 claims in *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grounds*, *Monell v. Dept. of Soc. Servs*, 436 U.S. 658 (1978), to reach the actions of state officials that were not authorized by state law and for which state law provided a remedy was based on any amendment to the text of § 1983. *See Monroe*, 365 U.S. at 217 (Frankfurter, J., dissenting in part); Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights-Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1, 19 (1985). Similarly, King attempts no explanation of how *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), which provided a similar claim against federal agents who violated a plaintiff's constitutional rights, was based on any statutory text at all. And King attempts no explanation of why 42 U.S.C. § 1988(a), which authorizes the use of "common law" for civil rights claims, does not authorize the Court's development of qualified immunity jurisprudence. *See* Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. Rev. 547, 560-71 (Winter 2020).

constitutional right. As explained above, King admits no case recognizes a Thirteenth Amendment right on his facts. And existing cases reject any other constitutional right against verbal threats. *See, e.g.*, *Kozminski*, 487 U.S. at 943-44; *McBride*, 240 F.3d at 1291 n.3.

Second, even if such a right were recognized, the record does not support a violation of King's sought-after constitutional right. As explained above, King's proposed inference for the words "*you gonna start f**king us over, we'll f**k over you,*" (V2/D65-3/King Depo/ECF pp.152-53), is not a reasonable one. It is implausible given its context. (*Id.*) ("[Y]ou don't want to *help us out*, we're going to throw – *we're going to hit you with this charge*, I don't know where you *get your car back*. You *have got to cooperate* and *help us catch him*.") (emphases added). *See generally Matsushita*, 475 U.S. at 587-88.

Third, this is really a Fourth Amendment case, but King voluntarily dismissed his Fourth Amendment claim. (V1/D59/Mot. To Dismiss Count 1 – Plaintiff's Federal Excessive Force Claims/ECF pp.174-75.) King's seizure during the traffic stop is governed by the Fourth Amendment. *See Heien v. North Carolina*, 574 U.S. 54, 60 (2014) ("A traffic stop for a suspected violation of law is a 'seizure' of the occupants of the vehicle and therefore must be conducted in accordance with the Fourth Amendment.").

When a specific amendment governs a claim, substantive due process does not apply:

> [W]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government

> behavior, that Amendment, <u>not</u> the more generalized notion of substantive due process, must be the guide for analyzing these claims.

Lewis, 523 U.S. at 842 (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality op.)) (emphases added).

The Fourth Amendment states: "[T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." "And in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one – whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1, 8, 19-20 (1968).

As King admits, the traffic stop was justified at its inception because the car he was driving had no license plate. King also admits that after Brown fled, Officer Pridmore justifiably handcuffed him and detained him in the back of Pridmore's patrol vehicle. The Fourth Amendment's objective reasonableness standard governed King's roadside detention.

King is complaining about the *manner* in which the officers conducted his roadside seizure. *See Illinois v. Caballes*, 543 U.S. 405, 407 (2005) ("It is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution."). King is complaining about the second prong of the dual inquiry this Court highlighted in *Terry*. *See Terry*, 392 U.S. at 28-29 ("The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment

proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation."). King stipulates that his seizure was justified at its inception, but complains about the seizure's manner in which the officer expanded the scope of the seizure to encompass capturing Brown.

Specifically, King claims the officers expanded the scope of his seizure in an objectively unreasonable manner by verbally coercing him to participate in a dangerous sting operation to capture Brown. King's grievance lies squarely under the umbrella of the Fourth Amendment. *See United States v. Jacobsen*, 466 U.S. 109, 124 (1984) ("[A] seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes . . . interests protected by the Fourth Amendment's prohibition on unreasonable seizures.'").

In the District Court, however, King voluntarily dismissed his Fourth Amendment claim. (V1/D1/Complaint/ECF pp.30-31; V1/D59/Mot. to Dismiss Count 1-Plaintiff's Federal Excessive Force Claims/ECF pp.174-75; V1/D60/Mot. to Dismiss Count 1/ECF pp.179-80; V1/D61/Order Granting Mot. to Dismiss Count 1/ECF pp.184-85). Because King did not raise the Fourth Amendment claim in the Eleventh Circuit or in his petition for certiorari, he has waived it. This Court has encountered this situation before and determined the petitioner was not entitled to relief:

> We express no view as to whether petitioner's claim would succeed under the Fourth Amendment, since he has not presented that question in his petition for certiorari. We do hold that substantive due process, with its "scarce and open-ended" "guideposts," *Collins*

> *v. Harker Heights*, 503 U.S., at 125, 112 S. Ct., at 1068, can afford him no relief.

Albright, 510 U.S. at 275 (refusing to entertain Fourth Amendment claim that plaintiff did not raise after deciding that Fourteenth Amendment substantive due process did not apply to arrest without probable cause).

To use this case as a vehicle to overrule the clearly established law requirement of the qualified immunity doctrine, the Court would have to create a new constitutional right against verbal threats, overlook the absence of substantial evidence in this record, and disregard King's voluntary dismissal of his Fourth Amendment claim.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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March 3, 2021