APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-14682-HH

JAMES P. CROCKER,

Plaintiff-Appellant,

versus

DEPUTY SHERIFF STEVEN ERIC BEATTY,
Martin County Sheriff's Office, in his individual capacity,
MARTIN COUNTY SHERIFF,
William D. Snyder, in his individual and official capacities,
ROBERT CROWDER,
former Sheriff in his individual capacity

Defendants-Appellees.

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

ON PETITION(S) FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

BEFORE: MARTIN, NEWSOM, and JULIE CARNES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

Filed June 28, 2021.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-14682

JAMES P. CROCKER,

Plaintiff-Appellant,

versus

DEPUTY SHERIFF STEVEN ERIC BEATTY, Martin County Sheriff's Office, in his individual capacity,

Defendant-Appellee.

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

(April 20, 2021)

BEFORE MARTIN, NEWSOM, and JULIE CARNES, Circuit Judges.

NEWSOM, Circuit Judge:

When Deputy Sheriff Steven Beatty arrived at the scene of a fatal car crash on I-95 in south Florida, he saw James Crocker standing in the median taking

photos of the accident with his phone. Beatty seized Crocker's phone and told him to drive away. When Crocker refused to leave without his phone, Beatty arrested him and left him in a hot patrol car for about 30 minutes. Crocker sued, alleging that Beatty violated his rights under the First, Fourth, and Fourteenth Amendments and Florida law. The district court granted Beatty summary judgment on all of Crocker's claims save one, on which Crocker later prevailed at trial. Crocker now appeals the district court's order.

We affirm. In particular, we hold (1) that Crocker's First Amendment claim is barred by qualified immunity, (2) that his false-arrest claims fail because Beatty had probable cause to arrest him, and (3) that his excessive-force claim fails on the merits and, in any event, is barred by qualified immunity.

I

A

Facts first.[1] James Crocker was driving north on I-95 through Florida when he saw an overturned vehicle in the median. Crocker pulled over to the shoulder and got out of his car to see if he could help. Ten to fifteen other people did the same. As law-

[1] Because we are reviewing the district court's order granting Beatty summary judgment, we take the facts in the light most favorable to Crocker. *Skop v. City of Atlanta*, 485 F.3d 1130, 1136 (11th Cir. 2007). As appropriate, we will note where Beatty's account diverges from Crocker's.

enforcement and emergency personnel began to arrive, Crocker and the other onlookers moved away. Crocker then stood 40–50 feet from the accident scene and about 125 feet from his own vehicle. Crocker and other bystanders took pictures of the scene with their phones.

Martin County Deputy Sheriff Steven Beatty approached Crocker and confiscated his phone—Crocker says "without warning or explanation." When Crocker asked whether it was illegal to photograph the accident scene, Beatty replied: "[N]o, but now your phone is evidence of the State." Beatty instructed Crocker to drive to a nearby weigh station to wait. Crocker didn't leave; instead, he offered to delete the pictures from his phone. Beatty again told Crocker to go to the weigh station and that someone from the Florida Highway Patrol would follow up with him about his phone. Crocker again refused, telling Beatty: "I've been a law-abiding citizen of this town for 20 something years, [and] I deserve to be treated with dignity and respect."

At that point, Beatty informed Crocker that he was under arrest for resisting an officer. Crocker then offered to leave—but, he said, not without his phone. Beatty handcuffed Crocker and escorted him toward his patrol car. Along the way, Crocker told Beatty: "[S]ir, I've been personal friends with [Sheriff] Will Snyder over 25 years, I employ over a hundred people in this town, [and] I've never broken the law." Beatty responded: "I don't care who you know or how many people you employ, you're going to jail." After placing Crocker in the patrol car, Beatty turned off the air

conditioning.[2] Outside, it was about 84° Fahrenheit,[3] and inside the patrol car, Crocker became hot and uncomfortable. He sweated profusely, experienced some trouble breathing, and felt anxious. Beatty left Crocker for a short while, and when he returned to the car Crocker begged for air and said he was "about to die." Beatty responded, "[I]t's not meant to be comfortable sir," and left Crocker where he was.

Sometime later, a Florida Highway Patrol trooper came by, opened the car's door, and asked Crocker for his driver's license. Crocker pleaded with her for help, too. Shortly thereafter, Crocker says, the trooper spoke to Beatty, who returned to the car and turned the AC back on.

In total, Crocker was left in the hot patrol car for somewhere between 22 and 30 minutes, after which Beatty drove him to the local jail. County officials eventually released Crocker, returned his phone to him, and dropped the "resisting an officer" charge. Crocker didn't seek any medical attention in the aftermath of his arrest.[4]

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[2] Beatty denies turning the AC off or down.

[3] The district court took judicial notice of this fact. Although "the taking of judicial notice of facts is, as a matter of evidence law, a highly limited process," we've observed that "scientific facts" are among "the kinds of things about which courts ordinarily take judicial notice." *Shahar v. Bowers*, 120 F.3d 211, 214 (11th Cir. 1997) (en banc). The temperature outside on a given day qualifies.

[4] Although Crocker submitted an expert report stating that he suffered severe contusions as a result of being handcuffed by Beatty, the district court excluded that report

B

Crocker sued Beatty and Martin County Sheriff William Snyder under 42 U.S.C. § 1983. As relevant here, Crocker alleged violations of his rights under the First, Fourth, and Fourteenth Amendments on the grounds that Beatty (1) prevented him from taking photographs of government officials, (2) seized his phone and falsely arrested him, and (3) used excessive force during the arrest. Crocker separately challenged his arrest under Florida law.

The district court granted Snyder's motion for summary judgment in its entirety and granted Beatty's motion on qualified-immunity grounds with respect to all of Crocker's claims except the one alleging that his phone was seized in violation of the Fourth Amendment. Crocker filed a motion for reconsideration, which the court denied.

Beatty filed an interlocutory appeal of the district court's order denying him qualified immunity on the phone-seizure claim, but this Court affirmed. *Crocker v. Beatty*, 886 F.3d 1132, 1138 (11th Cir.

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because (1) it came four years after Crocker's arrest, (2) it contradicted Crocker's own testimony that he suffered no visible injuries from being handcuffed, (3) it ignored other significant contributing factors to Crocker's condition, like his pre-existing carpal-tunnel syndrome, and (4) the doctor who authored the report purporting to link Crocker's wrist problems to his arrest didn't know that Crocker had been arrested (and handcuffed) again only weeks after this incident. Crocker doesn't challenge the exclusion of this expert report on appeal.

2018). Crocker prevailed on that claim at trial, and the jury awarded him $1,000 in damages.

Crocker then appealed the district court's summary judgment order granting Beatty qualified immunity on the First Amendment, false-arrest, and excessive-force claims, which became final when judgment was entered following the jury verdict. This is Crocker's appeal.

II

Before us, Crocker presents three issues. He contends that the district court shouldn't have granted summary judgment to Beatty on (1) his First Amendment claim, (2) his Fourth Amendment and state-law false-arrest claims, or (3) his Fourteenth Amendment excessive-force claim. Because the district court rejected each claim on qualified-immunity grounds, we will begin with an overview of how qualified immunity works.[5]

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[5] This Court "review[s] a district court's grant or denial of a motion for summary judgment *de novo*." *Harris v. Bd. of Educ. of the City of Atlanta*, 105 F.3d 591, 595 (11th Cir. 1997) (per curiam) (quotation marks omitted). Whether a public official is entitled to qualified immunity is "a purely legal question, subject to *de novo* review." *Id*. "Summary judgment is appropriate where 'there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.' " *Skop*, 485 F.3d at 1136 (quoting Fed. R. Civ. P. 56(c)). We view the facts "in the light most favorable to the non-moving party." *Id*. (quotation marks omitted). "We may affirm the judgment below on any ground supported by the record, regardless of whether it was relied on by the district court."

A

Qualified immunity "shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)). When qualified immunity applies, it is "an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). The doctrine shields "all but the plainly incompetent or those who knowingly violate the law." *Gates v. Khokhar*, 884 F.3d 1290, 1296 (11th Cir. 2018) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)).

"To receive qualified immunity, the officer must first show that he acted within his discretionary authority." *Lewis v. City of W. Palm Beach*, 561 F.3d 1288, 1291 (11th Cir. 2009). It's undisputed here that Beatty was acting within his discretionary authority, so it falls to Crocker to "show that qualified immunity should not apply." *Id*. To do so, Crocker must allege facts establishing both (1) that Beatty violated a constitutional right and (2) that the relevant right was "clearly established" at the time of the alleged misconduct. *Jacoby v. Baldwin Cnty.*, 835 F.3d 1338, 1344 (11th Cir. 2016). We can affirm a grant of

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Statton v. Fla. Fed. Jud. Nominating Comm'n, 959 F.3d 1061, 1065 (11th Cir. 2020).

qualified immunity by addressing either prong or both. *Pearson*, 555 U.S. at 236, 129 S.Ct. 808.

On the second prong, only decisions of the United States Supreme Court, this Court, or the highest court in a state can "clearly establish" the law. *Gates*, 884 F.3d at 1296. Because only clearly established law gives an officer "fair notice that her conduct was unlawful," *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004), the Supreme Court has held that the contours of the constitutional right at issue "must be sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right," *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (quotation marks omitted).

Under this Court's precedent, a right can be clearly established in one of three ways. Crocker must point to either (1) "case law with indistinguishable facts," (2) "a broad statement of principle within the Constitution, statute, or case law," or (3) "conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law." *Lewis*, 561 F.3d at 1291–92. Although we have recognized that options two and three can suffice, the Supreme Court has warned us not to "define clearly established law at a high level of generality." *Plumhoff v. Rickard*, 572 U.S. 765, 779, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014) (quotation marks omitted). For that reason, the second and third paths are rarely-trod ones. *See Gaines v. Wardynski*, 871 F.3d 1203, 1209 (11th Cir. 2017) (collecting cases). And when a plaintiff relies on a "general rule[ ]" to show that the law is clearly established, it must "appl[y] with obvious clarity to

the circumstances." *Long v. Slaton*, 508 F.3d 576, 584 (11th Cir. 2007) (quotation marks omitted; emphasis added); *see also Youmans v. Gagnon*, 626 F.3d 557, 563 (11th Cir. 2010) ("[I]f a plaintiff relies on a general rule, it must be obvious that the general rule applies to the specific situation in question.").

With that background, we turn to Crocker's claims.

B

1

We begin with Crocker's First Amendment claim. The district court held that Beatty was entitled to qualified immunity because the law underlying Crocker's First Amendment claim wasn't clearly established. We agree.

Crocker's contrary argument appears to be of the Path-2 variety—*i.e.*, a contention that a "broad statement of [First Amendment] principle" in our caselaw clearly established his right to photograph the accident scene. For that proposition, he first points to our three-paragraph opinion in *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000). There, we said that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." *Id.* at 1333. In particular, we held that the plaintiffs there "had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or

videotape police conduct." *Id*. So far, so good—that's certainly a "broad statement."

But in our view, it is decidedly *not* "obvious" that *Smith*'s "general rule applies to the specific situation in question" here. *Youmans*, 626 F.3d 557 at 563. To borrow the district court's phrasing, Crocker was "spectating on the median of a major highway at the rapidly evolving scene of a fatal crash." In that "specific situation," we don't think it would be obvious to every reasonable officer that *Smith* gave Crocker the right to take pictures of the accident's aftermath. *Smith*'s declaration of a right to record police conduct came without much explanation; as the Third Circuit has pointed out, our opinion "provided few details regarding the facts of the case, making it difficult to determine the context of the First Amendment right it recognized." *Kelly v. Borough of Carlisle*, 622 F.3d 248, 260 (3d Cir. 2010). What's more, *Smith* went on to hold that "[a]lthough the [plaintiffs there] ha[d] a right to videotape police activities, they ha[d] not shown that the Defendants' actions violated that right." 212 F.3d at 1333. The dearth of detail about the contours of the right announced in *Smith* undermines any claim that it provides officers "fair warning" under other circumstances.[6] And that's

[6] None of the other cases that Crocker cites help his cause. *Childs v. Dekalb County*, 286 F. App'x 687 (11th Cir. 2008), and *Bowens v. Superintendent of Miami South Beach Police Department*, 557 F. App'x 857 (11th Cir. 2014), don't do the trick because "[u]npublished cases ... do not serve as binding precedent and cannot be relied upon to define clearly established law." *J W by & through Tammy Williams v. Birmingham Bd. of Educ.*, 904 F.3d 1248, 1260 n.1 (11th Cir. 2018) (citation omitted). (*Bowens* is doubly deficient; not only is it unpublished,

especially so here, given the chaos of a fatal car crash and a citizen who (as we will explain shortly) might well have been photographing the incident from an unlawful vantage point.

The dissent concludes otherwise on the ground that "the broad pronouncement in *Smith* underscores the right's general applicability." Dissenting Op. at 1260. And so, as the dissent reads *Smith*, the "right to record police activity" may be "limited only by 'reasonable time, manner and place restrictions.' " Dissenting Op. at 1259–60 – ——— (quoting *Smith*, 212 F.3d at 1333). Because the dissent finds no such restrictions in the record here, it would "hold that Mr. Crocker's First Amendment right to record the fatal car crash was clearly established" by *Smith*. Dissenting Op. at 1261.

A couple of responses. First, there is the Supreme Court's oft-repeated instruction "not to define clearly established law at a high level of generality." *Ashcroft*, 563 U.S. at 742, 131 S.Ct. 2074.

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but it was also decided in 2014, two years after the events underlying this case. *See Brosseau*, 543 U.S. at 200 n.4, 125 S.Ct. 596 (decisions that postdate alleged misconduct can't clearly establish the law).) The various district court decisions that Crocker cites fare no better, as they likewise can't clearly establish the law. *See D'Aguanno v. Gallagher*, 50 F.3d 877, 880 n.5 (11th Cir. 1995); *see also Camreta v. Greene*, 563 U.S. 692, 709 n.7, 131 S.Ct. 2020, 179 L.Ed.2d 1118 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (quotation marks and citation omitted)).

With that negative injunction comes a positive command to ask "whether the violative nature of *particular* conduct is clearly established." *Mullenix*, 577 U.S. at 12, 136 S.Ct. 305 (quotation marks omitted). And we must answer that question "in light of the specific context of the case, not as a broad general proposition." *Brosseau*, 543 U.S. at 198, 125 S.Ct. 596 (quotation marks omitted). Given that guidance, it seems to us that *Smith*'s lack of explanation remains more vice than virtue for the purpose of clearly establishing the law here.

Second, we think that one of the few contextual clues *Smith* did leave behind counsels against reading it to have clearly established the law for the purposes of this case. Specifically, *Smith*'s reference to "reasonable time, manner and place restrictions" (which the dissent echoes) calls to mind either "a traditional public forum—parks, streets, sidewalks, and the like"—or a "designated public forum"—i.e., a place made a public forum by government action. *Minnesota Voters All. v. Mansky*, —— U.S. ——, 138 S. Ct. 1876, 1885, 201 L.Ed.2d 201 (2018) (explaining that time, place, and manner restrictions may govern speech in those public forums). *Smith*'s allusion to these restrictions indicates that the plaintiffs there attempted to film police activity while in a public forum of some sort—*Smith* would seem to be a First Amendment anomaly otherwise. Needless to say, I-95's median isn't a public forum of any stripe. It's not clear to us, then,

that *Smith*'s (and the dissent's) time-place-and-manner gloss even applies here.[7]

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[7] The dissent notes that time, place, and manner restrictions can be imposed in places other than public forums. Dissenting Op. at 1260 n.2. That's true. But what makes *Smith*'s reference to those restrictions telling is that the Court there said that *only* those restrictions could be imposed on the right that it announced. *See Smith*, 212 F.3d at 1333. We know that in nonpublic forums, "the government has much more flexibility to craft rules limiting speech." *Minnesota Voters All. v. Mansky*, —– U.S. ——, 138 S. Ct. 1876, 1885, 201 L.Ed.2d 201 (2018); *see also id.* at 1885–86 (noting that "the government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy"). So, given that *Smith* said that the only possible restrictions on the right that it recognized were time, place, and manner restrictions, one can reasonably infer that the Court there recognized a right to record police conduct in public forums.

The dissent also suggests that all this public-forums talk is beside the point because *Smith* held that there's a First Amendment "right to gather information about what public officials do on *public property*." 212 F.3d at 1333 (emphasis added). Accordingly, on the dissent's view, *Smith* grants citizens the right to film police "in public," full-stop. Dissenting Op. at 1260 n.2. We don't think it's quite that simple. First, not all "public property" is "in public," per se, and second, even public property that is decidedly in public doesn't, by virtue of that fact alone, become a free-speech-friendly zone. *See, e.g.*, *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) ("Publicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will."); *Hodge v. Talkin*, 799 F.3d 1145, 1160 (D.C. Cir. 2015) ("[T]he Supreme Court plaza's status as a nonpublic forum is unaffected by the public's unrestricted access to the plaza at virtually any time."). Those background principles, we think, counsel against reading *Smith* too

To be clear, though, the question isn't whether *Smith* might imply to *us* some kind of public-forum predicate; rather, we must ask whether *every reasonable police officer in Beatty's position* would have known that Crocker had a right to record the accident's aftermath, subject only to reasonable time, place, and manner restrictions. *See Ashcroft*, 563 U.S. at 741, 131 S.Ct. 2074; *Gates*, 884 F.3d at 1303 ("[T]he test asks whether already existing law was so clear that, given the specific facts facing this particular officer, one must conclude that every reasonable official would have understood that what he is doing violates the Constitutional right at issue." (quotation marks omitted)). We don't think so. Subject to exceptions not relevant here, Florida law prohibits individuals from parking on the side of a "limited access facility" like I-95, Fla. Stat. § 316.1945(1)(a)(11), or walking on the same, *see id.* § 316.130(18). When Beatty seized his phone, Crocker was arguably in violation of both prohibitions. The dissent's *Smith*-based argument implies that, in addition to banning individuals from parking or walking on interstates, Florida must also craft separate time, place, and manner restrictions governing the speech of people who break those laws. That seems odd to us—and at the very least not obviously correct. The Supreme Court has long held that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Greer v. Spock*, 424 U.S. 828, 836, 96 S.Ct. 1211, 47

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aggressively, or, more relevantly, expecting every reasonable officer to do so.

L.Ed.2d 505 (1976) (quotation marks omitted). And more to the point, we don't think that it would have been obviously right to every reasonable officer in Beatty's position. *See Ashcroft*, 563 U.S. at 741, 131 S.Ct. 2074; *Gates*, 884 F.3d at 1303.[8]

For the foregoing reasons, we hold that *Smith*'s rule didn't apply with "obvious clarity to the circumstances," *Long*, 508 F.3d at 584, and, therefore, that Beatty is entitled to qualified immunity on Crocker's First Amendment claim.

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[8] One more thing: By its terms, *Smith* applies only to what the Court there called the right to "photograph or videotape police conduct." 212 F.3d at 1333. The dissent claims that "it is usually easy enough to know whether a plaintiff was recording police activity" and that here, Crocker "was photographing police conduct." Dissenting Op. at 1260. To the extent that the general proposition builds on the case-specific point, we're dubious. In his affidavit, Crocker said that he stood in the median "taking photographs and recording video ... of the crashed vehicle, the first responders and the jaws of life." Asked in his deposition, "What were you taking pictures of?" Crocker replied, "The overall scene, overturned vehicle, firemen." And when asked if he had "a specific reason" for taking pictures of the accident scene, Crocker said: "I really didn't have a clear and present agenda. I do remember seeing beer bottles laying there and I do remember photographing the beer bottles." On the district court's account, Crocker had just started "photographing the overall scene, which included empty beer bottles, the overturned vehicle, and firemen" when, less than 30 seconds later, he encountered Beatty. Even if, for purposes of our review, we were to grant that Crocker's references to "first responders" and "firemen" included police officers, we don't think it's always as easy as the dissent suggests for an officer acting in the heat of the moment to determine whether an onlooker is in fact "photograph[ing] or videotap[ing] police conduct" within the meaning of *Smith*.

2

We turn next to Crocker's two false-arrest claims, the first of which arises under the Fourth Amendment, and the second of which rests on Florida law.

a

On Crocker's Fourth Amendment claim, Beatty is entitled to qualified immunity because he didn't violate Crocker's constitutional rights.[9]

The Fourth Amendment protects individuals "against unreasonable searches and seizures." U.S. Const. amend. IV. An arrest constitutes a "seizure" within the meaning of the Fourth Amendment, and this Court "assess[es] the reasonableness of an arrest by the presence of probable cause for the arrest." *Carter v. Butts Cnty.*, 821 F.3d 1310, 1319 (11th Cir. 2016). The existence of probable cause bars a Fourth Amendment false-arrest claim. *Marx v. Gumbinner*, 905 F.2d 1503, 1505–06 (11th Cir. 1990).

A few probable-cause basics: An officer has probable cause when "the facts and circumstances

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[9] Although we often proceed straight to the clearly-established question to avoid making an unnecessary pronouncement of constitutional law, here we exercise our discretion to reach the constitutional question in order to conserve judicial resources. *See Pearson*, 555 U.S. at 236, 129 S.Ct. 808. As we explain in text, the existence of probable cause dooms both of Crocker's false-arrest claims, and accordingly, we think it sensible to "avoid avoidance." *Camreta*, 563 U.S. at 706, 131 S.Ct. 2020.

within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Williamson v. Mills*, 65 F.3d 155, 158 (11th Cir. 1995) (quotation marks omitted). Moreover, "[t]he validity of an arrest does not turn on the offense announced by the officer at the time of the arrest." *Bailey v. Bd. of Cnty. Comm'rs of Alachua Cnty.*, 956 F.2d 1112, 1119 n.4 (11th Cir. 1992). Finally, an officer's subjective intent doesn't matter for "ordinary, probable-cause Fourth Amendment analysis." *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

As to Crocker's Fourth Amendment claim, the district court held that Beatty was shielded by qualified immunity because he had probable cause to arrest Crocker for violating Florida Statute § 316.1945(1)(a)(11). That provision prohibits (in relevant part) stopping, standing, or parking a vehicle "[o]n the roadway or shoulder of a limited access facility."[10] There's a carveout for Good Samaritans, such that the prohibition doesn't apply to "a person stopping a vehicle to render aid to an injured person or assistance to a disabled vehicle in obedience to the directions of a law enforcement officer." *Id.* Florida law authorizes an officer to conduct a warrantless

[10] A limited-access facility is a "street or highway especially designed for through traffic and over, from, or to which owners or occupants of abutting land or other persons have no right or easement, or only a limited right or easement." 2010 Fla. Stat. § 316.003(19).

arrest for any violation of § 316 committed in his presence. *Id.* § 901.15(5).

Because Crocker's car was parked on the shoulder of I-95, a "limited access facility," the district court held that Beatty had probable cause to arrest him. And although Crocker might initially have been covered by the Good Samaritan exception, the court held that he no longer qualified by the time he encountered Beatty, at which point he was standing 40–50 feet away from the crash scene and merely observing it.

We agree with the district court that Officer Beatty had probable cause to arrest Crocker. Even under Crocker's own version of the arrest, "the facts and circumstances within [Beatty's] knowledge" could have "cause[d] a prudent person to believe," *Williamson*, 65 F.3d at 158, that Crocker was violating § 316.1945(1)(a)(11). No one disputes that Crocker pulled over and parked on the shoulder of a limited-access facility or that the arrest took place about 125 feet from Crocker's car. And the district court took judicial notice of the fact—which we have no reason to doubt—that this particular stretch of I-95 is "relatively flat," and then concluded, in the light of that fact, that it would be unreasonable to infer that Beatty was oblivious to Crocker's car's existence.

Crocker insists, however, that there's no evidence that Beatty knew that Crocker had *driven* to the scene and that Beatty therefore couldn't formulate probable cause to arrest him for the *parking* offense. But Crocker's own testimony, which we accept as true, defeats his argument. Crocker

testified that during their brief encounter before the arrest, Beatty "told [him] *to leave and drive* to the northbound weigh station and wait there"—to which Crocker responded that he'd be more than happy to cooperate. Crocker also testified that "[Beatty] told me to *get in my car* and drive to the northbound ... weigh station." That testimony—both Beatty's commands and Crocker's responses—would have made little sense if Crocker was a mere pedestrian.

All of that is to say that the facts within Beatty's knowledge could "cause a prudent person to believe," *Williamson*, 65 F.3d at 158, that Crocker's car was parked on a limited-access facility in violation of Florida law. And at the time of the arrest, Crocker was just taking pictures with his phone—not rendering aid—meaning that he no longer even arguably qualified for the statute's Good Samaritan exception. Because Beatty had probable cause to arrest Crocker, there was no constitutional violation, and Beatty is entitled to qualified immunity.

b

On, then, to the state-law false-arrest claim. Probable cause bars a claim for false arrest under Florida law just as it does under federal law. *Manners v. Cannella*, 891 F.3d 959, 975 (11th Cir. 2018); *see also Rankin v. Evans*, 133 F.3d 1425, 1435 (11th Cir. 1998) (recognizing that "probable cause constitutes an absolute bar to both state and § 1983 claims alleging false arrest" and that "the standard for determining whether probable cause exists is the same under Florida and federal law"). Because we hold that Beatty had probable cause to arrest, Crocker's Florida

false-arrest claim—like his Fourth Amendment claim—fails.

Crocker counters that even if his arrest didn't violate the Fourth Amendment, it violated state law because the governing Florida statute requires the offense at issue to occur "in the presence of the officer"—and here, Crocker contends, the offense didn't occur in Beatty's presence. *See* Fla. Stat. § 901.15(5). For support, Crocker points out that Florida "courts have strictly construed the 'presence of the officer' language, requiring that the arresting officer actually see or otherwise detect by his senses that the person has violated the ordinance." *Horsley v. State*, 734 So. 2d 525, 526 (Fla. Dist. Ct. App. 1999).

No matter how strictly we construe it, though, the presence-of-the-officer requirement was met here. Again, the relevant rule of Florida law is that "no person shall ... [s]top, stand, or park a vehicle" on the "shoulder of a limited access facility." Fla. Stat. § 316.1945(1)(a)(11). From the premise—already explained—that Beatty could see that Crocker had parked on the shoulder of I-95, it follows that the offense was committed in Beatty's presence. Because Beatty had probable cause to arrest Crocker for an offense committed in his presence, the district court was right to give him summary judgment on this claim too.

3

Finally, to Crocker's argument that Beatty used excessive force in violation of the Fourteenth

Amendment by detaining him in a hot patrol car.[11] "We begin from the premises that exposure to uncomfortable heat is part and parcel of life in the South and, accordingly, that not every 'hot car' case will give rise to a cognizable constitutional claim." *Patel v. Lanier Cnty.*, 969 F.3d 1173, 1178 (11th Cir. 2020). This one doesn't. Explaining why takes some doing.

First, we'll survey the excessive-force landscape. Second, we'll situate Crocker's claim within it. And finally, we'll explain why the district court's grant of summary judgment was right even though its analysis was wrong. Because we review a court's judgment rather than its explanation for that judgment, *Jennings v. Stephens*, 574 U.S. 271, 277, 135 S.Ct. 793, 190 L.Ed.2d 662 (2015), we will affirm.

a

Let's start with what's clear: There is no "generic 'right' to be free from excessive force." *Graham v. Connor*, 490 U.S. 386, 393, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). That's because § 1983 protects rights—it doesn't create them. *Id.* at 393–94, 109 S.Ct. 1865; *see also Baker v. McCollan*, 443 U.S. 137, 145 n.3, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) (explaining that § 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred"). For purposes of

[11] Although Crocker argued in the district court that Beatty also used excessive force in tightening his handcuffs and squeezing a pressure point on his shoulder, he hasn't pursued those arguments on appeal.

claims under § 1983, three constitutional provisions protect a right to be free from excessive force: the Fourth, Eighth, and Fourteenth Amendments. *Piazza v. Jefferson Cnty.*, 923 F.3d 947, 952 (11th Cir. 2019).

The Fourth Amendment, already introduced, secures "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ...." U.S. Const. amend. IV. The prohibition against "unreasonable ... seizures" encompasses a bar on the use of excessive force in the course of an arrest. *See Graham*, 490 U.S. at 394, 109 S.Ct. 1865; *Piazza*, 923 F.3d at 952. The Eighth Amendment forbids the infliction of "cruel and unusual punishments," U.S. Const. amend. VIII, and the Supreme Court has interpreted it to prohibit the use of excessive force against convicted prisoners. *See Hudson v. McMillian*, 503 U.S. 1, 9, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992). The Fourteenth Amendment provides that a State shall not "deprive any person of life, liberty, or property, without due process of law," U.S. Const. amend. XIV, and the Court has construed those terms to forbid the use of excessive force, too. *See Kingsley v. Hendrickson*, 576 U.S. 389, 393, 135 S.Ct. 2466, 192 L.Ed.2d 416 (2015). So, under the Supreme Court's current framework, the Fourth Amendment covers arrestees, the Eighth Amendment covers prisoners, and the Fourteenth Amendment covers "those who exist in the in-between—pretrial detainees." *Piazza*, 923 F.3d at 952.

With that background in mind, we turn to Crocker's claim.

b

The Supreme Court has long taught that "[i]n addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham*, 490 U.S. at 394, 109 S.Ct. 1865; *accord, e.g.*, *Paez v. Mulvey*, 915 F.3d 1276, 1285 (11th Cir. 2019). So, exactly what kind of excessive-force claim has Crocker alleged?

Not entirely clear. Crocker's filings before the district court could be read as raising either a Fourth Amendment claim, a Fourteenth Amendment claim, or perhaps both.[12] But Crocker's counsel later clarified that his hot-car excessive-force claim relied *solely* on the Fourteenth Amendment. And in his opening brief to this Court, Crocker expressly cast his claim in Fourteenth Amendment terms.

But as you might suspect from Crocker's shape-shifting arguments, the Fourteenth Amendment doesn't offer a perfect fit for the facts here. As we said

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[12] In his complaint, Crocker's excessive-force claims against Beatty weren't expressly tethered to any particular constitutional provision. He generally alleged that Beatty violated his Fourth, Eighth, and Fourteenth Amendment rights, but he didn't specify which amendments were tied to particular excessive-force allegations. In response to the motion for summary judgment, Crocker explicitly relied on the Fourth Amendment, and he cited *Graham* repeatedly for propositions about the Fourth Amendment right to be free from excessive force. But he also alluded to the Fourteenth Amendment. All of that is to say that the precise nature of Crocker's excessive-force claim is hard to nail down from his district-court pleadings.

in *Piazza*, the Fourteenth Amendment has been interpreted to protect "pretrial detainees" from excessive force. *See* 923 F.3d at 952. And it's not obvious that Crocker was a pretrial detainee. The Supreme Court long ago described a pretrial detainee as a person who had received "a 'judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest.' " *Bell v. Wolfish*, 441 U.S. 520, 536, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975)) (alterations in original). Because Crocker never made it to the probable-cause-determination stage, calling him a "pretrial detainee" is hard to square with *Bell*. Accordingly, it's not clear that the Fourteenth Amendment provides the appropriate framework for Crocker's excessive-force claim.

Bell's suggestion notwithstanding, we've acknowledged that "the line is not always clear as to when an arrest ends and pretrial detainment begins." *Garrett v. Athens-Clarke Cnty.*, 378 F.3d 1274, 1279 n.11 (11th Cir. 2004). As a result, the line—for excessive-force purposes—between an arrestee and a pretrial detainee isn't always clear, either. *See Hicks v. Moore*, 422 F.3d 1246, 1254 n.7 (11th Cir. 2005) ("The precise point at which a seizure ends (for purposes of Fourth Amendment coverage) and at which pretrial detention begins (governed until a conviction by the Fourteenth Amendment) is not settled in this Circuit."). And the definitional problem creates a follow-on analytical issue: For someone who could plausibly be characterized as either an arrestee or a pretrial detainee, it's hard to say whether the

Fourth or Fourteenth Amendment should govern the analysis.[13] The day may well come when we need to clarify the distinction.

Today, though, isn't that day. Whether framed in terms of the Fourth or Fourteenth Amendment, Crocker's claim fails.[14]

c

We will start with the Fourteenth Amendment analysis since that's the framework that Crocker has invoked before us. First, we'll articulate the governing standard—which the district court misapprehended and our dissenting colleague disputes—and then,

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[13] Our sister circuits disagree about how best to analyze claims that arise in this "legal twilight zone." *See Wilson v. Spain*, 209 F.3d 713, 715 & n.2 (8th Cir. 2000) (discussing circuit split and collecting cases).

[14] The dissent says that the question whether the Fourth or Fourteenth Amendment should govern our analysis is "a question the majority opinion injects into this case." Dissenting Op. at 1261. But in his brief to us, Beatty argued—no doubt in response to Crocker's own variable framing of the issue—that "[r]egardless of whether the Fourth or Fourteenth Amendment standard were applied to this case, the use of force did not violate the Constitution," Br. of Appellee at 23, and as part of his argument that "*Kingsley* does not clearly establish the rights of an arrestee before arriving at a detention center," he contended that the law "did not define when the Fourth Amendment ceases to apply and the Fourteenth Amendment begins to apply," *id.* at 25. We took all that to mean that one of Beatty's points was that Crocker's claim might fall on the "wrong" side of an (admittedly) ill-defined line between Fourth and Fourteenth Amendment claims, such that *Kingsley*, as a Fourteenth Amendment case, didn't help Crocker's cause.

having done so, we'll apply that standard to Crocker's case.

i

We recently laid out the proper Fourteenth Amendment excessive-force framework and applied it in a "hot car" case in *Patel*. There, we began by explaining that claims of excessive force under the Fourteenth Amendment *used to be* analyzed like excessive-force claims under the Eighth Amendment, such that we had to undertake a subjective inquiry into whether an officer applied force "maliciously and sadistically." *Patel*, 969 F.3d at 1181 (quoting *Fennell v. Gilstrap*, 559 F.3d 1212, 1217 (11th Cir. 2009)). If so, then there was excessive force. If not, then there wasn't.

Not anymore. In *Kingsley v. Hendrickson*, the Supreme Court held that for Fourteenth Amendment excessive-force claims "the relevant standard is objective not subjective." 576 U.S. at 395, 135 S.Ct. 2466. Underscoring the shift, the Court repeated itself: "[T]he appropriate standard for a pretrial detainee's excessive force claim is *solely an objective one*." *Id.* at 397, 135 S.Ct. 2466 (emphasis added); *see also Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 70 (1st Cir. 2016) ("[T]he Supreme Court has held that the appropriate standard for a pretrial detainee's Fourteenth Amendment excessive force claim is simply objective reasonableness."). So, as we said in *Patel*, our Fourteenth Amendment excessive-force analysis now tracks the Fourth Amendment's "objective-reasonableness" standard rather than the Eighth Amendment's "malicious-and-sadistic

standard." 969 F.3d at 1181–82; *see also Piazza*, 923 F.3d at 952 (reading *Kingsley* to require an objective-reasonableness inquiry akin to Fourth Amendment excessive-force analysis). Here, the district court erroneously applied the old malicious-and-sadistic standard and, on that basis, granted summary judgment on Crocker's excessive-force claim.

Before applying *Kingsley*'s "objective not subjective" standard to the facts of Crocker's case, we must say a few words in response to our dissenting colleague's reading of that decision. On the dissent's view, both before and after *Kingsley*, a viable excessive-force claim can be based even on "objectively reasonable force" provided that the officer-defendant acted with a sufficiently sinister state of mind—what the dissent calls "an express intent to punish." Dissenting Op. at 1262. That, the dissent says, is because under *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), "pretrial detainees can establish a violation of their Fourteenth Amendment rights by showing that an official inflicted force with an express intent to punish." Dissenting Op. at 1263. And, the dissent maintains, *Kingsley* shouldn't be read to have done "away with this method of proving Fourteenth Amendment violations for excessive force claims when it said nothing about having done so." *Id.* at 1264. On that theory, both before and after *Kingsley*, "proof of express intent to punish is alone sufficient" to support an excessive-force claim. *Id.*

Several responses. First, while *Kingsley* certainly discusses *Bell*'s subjective standard for punishment, we don't draw from that discussion the

dissent's two-track treatment of excessive-force claims. Consider, for instance, how the *Kingsley* Court framed the case: "The question before us is whether, to prove an excessive force claim, a pretrial detainee must show that the officers were *subjectively* aware that their use of force was unreasonable, *or only* that the officers' use of that force was *objectively* unreasonable." 576 U.S. at 391–92, 135 S.Ct. 2466 (second emphasis added). As the Court's phrasing indicates, proof of objectively unreasonable force has always been *necessary* to a pretrial detainee's excessive-force claim. *See Piazza*, 923 F.3d at 952 ("Historically, both prisoners and pretrial detainees needed to show *not only* that a jail official deliberately used excessive force, *but also* that the official did so maliciously or sadistically for the very purpose of causing harm." (quotation marks omitted; emphasis added)). Post-*Kingsley*, such proof is sufficient. 576 U.S. at 398, 135 S.Ct. 2466. But in becoming sufficient, it didn't cease to be necessary.

Second, we don't think that the dissent's assertion that, as a general matter, unconstitutional "punishment" can be proven based on "an express intent to punish," Dissenting Op. at 1263–64, demonstrates, more particularly, that proof of objectively unreasonable force is unnecessary to an excessive-force claim. Here, we think it important to distinguish between and among punishment and its specific instantiations. We agree, of course, that the Constitution prohibits any "punishment" of pretrial detainees, *see Kingsley*, 576 U.S. at 400, 135 S.Ct. 2466, including the "use of excessive force that amounts to punishment," *Graham*, 490 U.S. at 395

n.10, 109 S.Ct. 1865. But not all punishment involves excessive force. Indeed, neither *Bell* nor *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir. 1996)—the two cases on which the dissent principally relies—mention "excessive force" at all. Rather, both involved what we've called "conditions-of-confinement" claims. *See, e.g.*, *Patel*, 969 F.3d at 1182 n.6. And although the genus "punishment" contains several species, including both excessive-force and conditions-of-confinement claims, the standard by which one might discern the one won't necessarily reveal the other. We don't think, then, that an express intent to punish alone, coupled with an objectively reasonable use of force, can sustain an excessive-force claim.[15]

Third, it would be passing strange if, as the dissent seems to suggest, the excessiveness of an officer's use of force ultimately had nothing to do with the excessiveness of that force but, instead, hinged entirely on proof of an "express intent to punish."

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[15] We recognize, of course, that *Kingsley* discusses cases involving a subjective intent to punish. 576 U.S. at 398–99, 135 S.Ct. 2466. But for reasons explained in text, we haven't—and don't—read *Kingsley* to preserve (or create) the possibility of an excessive-force violation, even in circumstances where the use of force is objectively reasonable, on the ground that some sinister purpose is allegedly afoot. As already explained, the *Kingsley* Court stressed that "the appropriate standard for a pretrial detainee's excessive force claim is *solely an objective one*." *Id.* at 397, 135 S.Ct. 2466 (emphasis added). Cases involving the old malicious-or-sadistic standard can be useful as reference points, but that's because proving that force was both objectively unreasonable and malicious or sadistic would "almost invariably be more difficult" than proving only the former—*not* because one could stake a winning claim on proof of the latter alone. *See Piazza*, 923 F.3d at 953 n.7.

Dissenting Op. at 1264. Imagine, for instance, that an officer gently and carefully places a suspect in the back of a brand new—and comfy, and temperate—police cruiser, and as he's doing so he growls, "I pray you hate every second of this, you lowlife scum—it's the punishment you deserve." It's unfathomable to us that the suspect could make out a viable excessive-force claim on those facts. But that's precisely the upshot of the dissent's twin positions (1) that an excessive-force claim can be based even on "objectively reasonable force" and (2) that "proof of express intent to punish is alone sufficient" to support such a claim. *Id.* at 1262, 1264. That just can't be the law.

Finally, and in any event, even if one could make an objectively-reasonable-but-nonetheless-excessive-force claim, Crocker didn't make one here. In his opening brief to us, Crocker maintained that "[i]n *Kingsley*, the Court held that *the only issue to be decided in a use of force case* was whether the 'use of that force was objectively unreasonable.' " Br. of Appellant at 35 (quoting *Kingsley*, 576 U.S. at 392, 135 S.Ct. 2466 (emphasis added)). In doing so, he relied on Fourth Amendment excessive-force cases as "analogous," pointing to *Kingsley*'s own reliance on *Graham*—the canonical Fourth Amendment *objective*-reasonableness case. *Id.* at 37 n.8. He then asked for remand so that the district court could "apply the proper *Kingsley* standard." *Id.* at 40. None of that, it seems to us, would have alerted Beatty that he needed to respond to an argument about a straight express-intent-to-punish-based excessive-force claim. Accordingly, even if we were to conclude that *Kingsley*

somehow preserved two separate excessive-force standards for pretrial detainees—one objective, another subjective—we would apply only the objective one here. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 682–83 (11th Cir. 2014) (explaining that an appellant abandons issues not argued in his opening brief).

ii

On, then, to this case. Although the district court erroneously invoked the malicious-and-sadistic standard, rather than *Kingsley*'s "objective not subjective" standard, it landed on the right answer. As an initial matter, there was (under the proper framework) no constitutional violation. Moreover, and in any event, even if there had been, the law wasn't so clearly established that Beatty should have known better. We begin with the constitutional question.[16]

Officer Beatty's alleged conduct wasn't objectively unreasonable. The Supreme Court has given us six factors to consider in making a Fourteenth Amendment excessive-force

[16] The Supreme Court has said that "courts should think hard, and then think hard again" before addressing the merits of an underlying constitutional claim as well as whether the law is clearly established. *Camreta*, 563 U.S. at 707, 131 S.Ct. 2020. Having done our due diligence, we conclude that addressing the constitutional claim here will "clarify the legal standards governing public officials." *Id*. Paired with *Patel*, this case helps illustrate what kind of conduct does and doesn't cross a constitutional line in the context of hot-car cases.

determination, and although the Court cautioned that these factors aren't exhaustive or exclusive, they're sufficient here. *See Kingsley*, 576 U.S. at 397, 135 S.Ct. 2466. In the course of applying the factors to Crocker's case, we'll compare and contrast *Patel* in an effort to more clearly demonstrate the objective-reasonableness standard's real-world operation.

Here are the *Kingsley* factors:

> Considerations such as the following may bear on the reasonableness or unreasonableness of the force used: [1] the relationship between the need for the use of force and the amount of force used; [2] the extent of the plaintiff's injury; [3] any effort made by the officer to temper or to limit the amount of force; [4] the severity of the security problem at issue; [5] the threat reasonably perceived by the officer; and [6] whether the plaintiff was actively resisting.

Patel, 969 F.3d at 1182 (quoting *Kingsley*, 576 U.S. at 397, 135 S.Ct. 2466) (alterations adopted).

First, we consider the need for force and the amount of force used. In weighing the amount of force used, we consider the severity of the conditions that Crocker endured and how long he endured them. *Patel*, 969 F.3d at 1183. Crocker alleges that it was 84° outside and that he was in the patrol car without AC for half an hour. In *Patel*, the temperature was

about the same—85°—but the duration of detention was much longer—two hours. 969 F.3d at 1179 & 1183. So, the amount of force used in *Patel* was far greater.

What about the need? In *Patel*, we noted that about half of the detention was "not just harsh but also unnecessary" because the detainee there could have been held inside an immediately adjacent jail instead of the hot van. *Id.* at 1184. Here, by contrast, there doesn't appear to have been another feasible place for Beatty to detain Crocker. And although Beatty could have cracked a window or left the AC running, failing to do so isn't nearly as troubling as the behavior in *Patel*. Though the need for "force" was slight, the force used was slighter still.

Second, we consider the extent of Crocker's injury. We've acknowledged that "resulting injuries can be an indicator, however imperfect, of the severity of the force that caused them." *Patel*, 969 F.3d at 1184. Here, Crocker's lack of injury suggests that the force used was pretty minimal.[17] That's yet another point of contrast with *Patel*, in which the plaintiff's two-hour stint in a hot transport van left him "unconscious, hyperventilating, and with mucus and saliva running from his nose and mouth," and a doctor

[17] To be clear, we're not saying that a lack of significant injury always and everywhere means that the force used was reasonable. *Cf. Lee v. Ferraro*, 284 F.3d 1188, 1200 (11th Cir. 2002) ("[O]bjectively unreasonable force does not become reasonable simply because the fortuity of the circumstances protected the plaintiff from suffering more severe physical harm.").

diagnosed him with "heat exhaustion, heat syncope, and panic attack." *Id.* at 1189. Not so here. Crocker endured some discomfort, to be sure, but he suffered no significant injury and sought no medical attention following his arrest.

Third, we consider any effort made by Beatty to temper or limit the force used. *Id.* at 1184. Beatty returned to the car twice, and although he was rude in his initial exchange with Crocker, on his second trip back he turned the AC back on. In *Patel*, the officer left the detainee in the hot van for nearly an hour when he could have let him wait in an air-conditioned jail. *Id.* And he left the detainee alone for a sizable chunk of the two hours that he was in his van. *Id.* We recognize that Beatty could have done more, but in limiting the time that Crocker was alone and in eventually turning the AC back on, he did a good deal more than the officer in *Patel*.

As for whether Crocker posed a "security problem" or a "threat," or "actively resist[ed]"—factors four, five, and six—it seems to us that the answer on all accounts is basically no—his vociferous opposition to his arrest notwithstanding.

So, where does all that leave us? Considering all the *Kingsley* factors, it seems most important that there was very little "force" used and essentially no harm done. In the Fourteenth Amendment context—and the Fourth as well, for that matter—"[t]here is, of course, a *de minimis* level of imposition with which the Constitution is not concerned." *Bell*, 441 U.S. at 539 n.21, 99 S.Ct. 1861 (quotation marks omitted); *see also Graham*, 490 U.S. at 396, 109 S.Ct. 1865 ("Not

every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." (quotation marks and citation omitted)); *Vinyard v. Wilson*, 311 F.3d 1340, 1349 n.13 (11th Cir. 2002) (collecting cases "where force and injury were held to be de minimis and not excessive"). That *de minimis* principle reflects the reality that "[n]ot everything that stinks violates the Constitution." *Hillcrest Property, LLP v. Pasco Cnty.*, 915 F.3d 1292, 1303 (11th Cir. 2019) (Newsom, J., concurring) (cleaned up). And it's hard to imagine how we could find a constitutional violation here without making a federal case of just about every "hot car" incident in Alabama, Florida, and Georgia, which we (once again) decline to do. *See Patel*, 969 F.3d at 1178; *see also Peterson v. Baker*, 504 F.3d 1331, 1336 (11th Cir. 2007) ("Section 1983 must not be used as a font of tort law to convert state tort claims into federal causes of action." (quotation marks omitted)). Beatty's alleged conduct might have stunk, but it wasn't unconstitutional.

If we harbored any doubts about that conclusion—and we don't—we'd still affirm the grant of summary judgment because the law on this point is not at all clearly established. Until recently, we'd never even "directly confronted a 'hot car' case ...." *Patel*, 969 F.3d at 1182. Our one-time paucity of hot-car caselaw makes it tough for Crocker to win. Not even Patel—whose constitutional claim was much stronger—could overcome qualified immunity. *See id.* at 1184–88; *cf. Kisela v. Hughes*, —— U.S. ——, 138 S. Ct. 1148, 1153, 200 L.Ed.2d 449 (2018) ("Use of excessive force is an area of the law in which the

result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." (quotation marks omitted)). And frankly, we can't see how Crocker's claim could succeed where Patel's failed.

Crocker says that the clearly established law here comes from our decision in *Danley v. Allen*, 540 F.3d 1298 (11th Cir. 2008). We considered and rejected the analogy between *Danley* and hot-car cases in *Patel*, 969 F.3d at 1186–87, and we do so again today. In *Danley*, a prisoner was pepper-sprayed in a poorly ventilated cell, and although officials allowed him a brief shower, that proved ineffective—Danley ultimately spent 12 or 13 hours stuck "in pepper-spray vapor in a poorly ventilated cell." *Patel*, 969 F.3d at 1187. The use of force in *Danley* was "altogether different" from the force used in *Patel*. *Id.* So too here.

Like Patel before him, Crocker also points to *Danley*'s citation of *Burchett v. Kiefer*, 310 F.3d 937 (6th Cir. 2002). *Burchett* was another hot-car case, and there, the Sixth Circuit held that confining an arrestee "for three hours in ninety-degree heat with no ventilation violated his Fourth Amendment right against unreasonable seizures." 310 F.3d at 945. To the extent Crocker contends that *Danley*'s citation of *Burchett* made *Burchett* part of our caselaw, we reject that incorporation-by-citation argument just as we did in *Patel*. *See* 969 F.3d at 1187 ("[A] mere citation to an out-of-circuit decision—even with approval, and even with an accompanying factual précis—cannot

clearly establish the law for qualified-immunity purposes.").

* * *

Because Crocker's Fourteenth Amendment claim fails on the merits—and because the law underlying that claim wasn't clearly established, in any event—we hold that the district court correctly granted summary judgment for Deputy Beatty.

d

One final point for the sake of symmetry: We'd reach the same result if we analyzed this claim under the Fourth Amendment. We have already observed that "the Fourteenth Amendment standard has come to resemble the test that governs excessive-force claims brought by arrestees under the Fourth Amendment." *Piazza*, 923 F.3d at 953. And we've said as much about the hot-car context. *See Patel*, 969 F.3d at 1184 n.7 ("Although many of these 'hot car' cases arose under the Fourth Amendment, the same basic standard applies post-*Kingsley* (as we have explained) to excessive-force claims brought under the Fourteenth Amendment."). We think that Officer Beatty's conduct was objectively reasonable under either standard. Here, as in the Fourteenth Amendment context, the *de minimis* principle applies. *See Nolin v. Isbell*, 207 F.3d 1253, 1257 (11th Cir. 2000) ("[T]he application of de minimis force, without more, will not support a claim for excessive

force in violation of the Fourth Amendment.").[18] As a result, this claim falls short whether analyzed under the Fourth or Fourteenth Amendment.

III

To sum up: Because (1) the law on Crocker's First Amendment claim wasn't clearly established, (2) Beatty had probable cause to arrest Crocker, and (3) Beatty didn't use excessive force in the course of arresting Crocker (and the law underlying Crocker's excessive-force claim wasn't clearly established, in any event), Beatty was entitled to qualified immunity. The district court properly granted summary judgment to him on that basis.

AFFIRMED.

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[18] We recognize, of course, that "even de minimis force will violate the Fourth Amendment if the officer is not entitled to arrest or detain the suspect." *Reese v. Herbert*, 527 F.3d 1253, 1272 (11th Cir. 2008) (quotation marks omitted). But for reasons already explained, that caveat doesn't apply here.

NEWSOM, Circuit Judge, concurring:

The main opinion finds it unnecessary to decide whether someone in Crocker's position—*i.e.*, one who has been arrested but has not yet been taken before a magistrate for a probable-cause determination—is (1) an *arrestee* whose excessive-force claim should be analyzed under the Fourth Amendment or instead (2) *a pretrial detainee* whose excessive-force claim should be analyzed under the Fourteenth Amendment. *See* Maj. Op. at 1246–47 – ——. I write separately to suggest two things: first, that this Court hasn't (to my mind) committed itself to any particular position on that issue, which has generated a circuit split; and second, that if another panel confronts this question, it should draw the line between arrestees and pretrial detainees in accordance with *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), such that the probable-cause determination is the divider.

I

A

First, how and why have our sister circuits split? In short, they've divided over the question of where to locate the constitutional prohibition on excessive force as applied to someone in Crocker's position. As the main opinion explains, "§ 1983 protects rights—it doesn't create them." Maj. Op. at 1246. That means that a plaintiff bringing an excessive-force claim under § 1983 has to ground it in a particular provision of the Constitution. *See Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). For prisoners, that's the

Eighth Amendment; for free citizens, it's the Fourth Amendment; and for those "in between"—those who obviously qualify as pretrial detainees—it's the Fourteenth Amendment. *See Piazza v. Jefferson Cnty.*, 923 F.3d 947, 952 (11th Cir. 2019). But what about individuals—like Crocker here—who bring excessive-force claims based on events that occur after the initial act of arrest but before they've received a judicial determination of probable cause? *See, e.g.*, *Calhoun v. Thomas*, 360 F. Supp. 2d 1264, 1272 (M.D. Ala. 2005) (discussing "this post-arrest, pre-custody time period"). Courts have disagreed about whether the Fourth or Fourteenth Amendment governs in this legal limbo. *See, e.g.*, *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 70 (1st Cir. 2016) (collecting cases).

There are at least two fixed points. First, we've been told in no uncertain terms that "all claims that law enforcement officials have used excessive force ... in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. at 395, 109 S.Ct. 1865. Second, we know that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Id.* at 395 n.10, 109 S.Ct. 1865 (citing *Bell*, 441 U.S. at 535–39, 99 S.Ct. 1861). What, though, to do about someone who might no longer be subject to seizure but isn't yet a post-probable-cause-determination pretrial detainee? What constitutional protection against excessive force do people in that situation have?

One answer—offered by exactly zero courts, as best I can tell—is "None." The Seventh Circuit, sketching the argument before rejecting it, put it this way: "[M]aybe the Constitution is not a seamless web, and contains gaps that courts are not authorized to fill either by stretching the Fourth Amendment or by invoking the nebulous and historically much-abused concept of substantive due process." *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989).[1] The argument's premise—basically, that the Constitution neither provides every good thing nor prohibits every bad thing—is true enough. Even so, courts—including the Seventh Circuit—have uniformly rejected the possibility that officers' conduct between an arrest and a probable-cause determination takes place in a constitutional no man's land.[2]

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[1] *Wilkins* is an odd case to bring into the Fourth-versus-Fourteenth conversation because the excessive-force allegations there were against FBI agents—brought via a *Bivens* action—and although it spoke of "[t]he due process *clause* of the Fifth and Fourteenth Amendments," it seems clear enough that the court's holding vis-à-vis the FBI agents necessarily concerned the Fifth Amendment. 872 F.2d at 191–92, 195 (emphasis added). But courts have featured *Wilkins* in this discussion, *see, e.g., Aldini v. Johnson*, 609 F.3d 858, 864 n.6 (6th Cir. 2010) (citing *Wilkins*), and the explanation in Wilkins itself certainly implicates the Due Process *Clauses* of both the Fifth and Fourteenth Amendments, *see* 872 F.2d at 195.

[2] One reason courts have rejected this possibility, I imagine, is that the Supreme Court's decisions suggest, if anything, an overlap of protections rather than a gap between them. For instance, in *Graham*, the Court didn't answer "the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends

Broadly speaking, courts have done so in two ways. The first involves reading the word "seizure[ ]" in the Fourth Amendment to extend beyond the initial moment of arrest. The Tenth Circuit, for instance, has recognized that some seizures "may extend beyond arrest up until a probable cause determination." *Estate of Booker v. Gomez*, 745 F.3d 405, 420 (10th Cir. 2014). Other circuits have done much the same. *See, e.g., Aldini v. Johnson*, 609 F.3d 858, 866 (6th Cir. 2010) (establishing "the line between Fourth and Fourteenth Amendment protection at the probable-cause hearing" for those arrested without a warrant); *Pierce v. Multnomah Cnty.*, 76 F.3d 1032, 1043 (9th Cir. 1996) (holding "that the Fourth Amendment sets the applicable constitutional limitations on the treatment of an arrestee detained without a warrant up until the time such arrestee is released or found to be legally in custody based upon probable cause for arrest"); *Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989) ("We think the Fourth Amendment standard probably should be applied at least to the

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and pretrial detention begins." 490 U.S. at 395 n.10, 109 S.Ct. 1865. And the Court noted that after conviction, the Eighth Amendment's Cruel and Unusual Punishment Clause provides the constitutional basis for excessive-force claims, making "[a]ny protection that 'substantive due process' affords ... at best redundant of that provided by the Eighth Amendment." *Id.* (citing *Whitley v. Albers*, 475 U.S. 312, 327, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986)). Our own decisions likewise suggest some degree of overlap. Compare *J W by & through Tammy Williams v. Birmingham Bd. of Educ.*, 904 F.3d 1248, 1259 (11th Cir. 2018) (stating that "the Fourteenth Amendment guards against the use of excessive force against arrestees and pretrial detainees"), *with Piazza*, 923 F.3d at 953 (explaining that the Fourth Amendment protects arrestees from excessive force).

period prior to the time when the person arrested is arraigned or formally charged, and remains in the custody (sole or joint) of the arresting officer.").

The contrary approach relies on the Fourteenth Amendment's Due Process Clause and concepts of due process that are more (or less) "substantive." In *Orem v. Rephann*, for instance, the Fourth Circuit acknowledged that although "[t]he point at which Fourth Amendment protections end and Fourteenth Amendment protections begin is often murky," an excessive-force claim based on events during post-arrest transport "requires application of the Fourteenth Amendment." 523 F.3d 442, 446 (4th Cir. 2008).

If we're counting noses, it seems fair to say that most circuits to have answered this question have lined up behind the Fourth Amendment. *See Miranda-Rivera*, 813 F.3d at 70 (collecting cases). So what about us—where are we? On the basis of our decision in *Cottrell v. Caldwell*, 85 F.3d 1480 (11th Cir. 1996), some have placed us in the minority camp, lumping us in with those courts that rely on the Fourteenth Amendment to analyze excessive-force claims brought by those whose arrest is complete but who haven't yet had a probable-cause hearing. *See, e.g.*, *Wilson v. Spain*, 209 F.3d 713, 716 n.2 (8th Cir. 2000). Respectfully, I don't think that either Cottrell or our subsequent interpretations of it compel that reading.

First, *Cottrell* itself. That case concerned "the death of Leroy Bush Wilson from positional asphyxia as he was being transported in the back of a police car

after his arrest." 85 F.3d at 1483. Our court addressed two claims arising "out of the same facts." *Id.* at 1485. One was a "custodial mistreatment claim," *id.* at 1489, and it was indeed based on a supposed substantive-due-process right, *id.* at 1485. The second was a Fourth Amendment excessive-force claim. *Id.* Our treatment of the first, custodial-mistreatment claim appears to be the one that other courts have read to put us on the minority side of the circuit split. *See, e.g.*, *Miranda-Rivera*, 813 F.3d at 70 (citing *Cottrell*, 85 F.3d at 1490). But it seems to me that a custodial-mistreatment claim is different from an excessive-force claim, even if both might arise out of the same facts. And the question as relevant to the custodial-mistreatment claim in *Cottrell* wasn't whether the Fourth or Fourteenth Amendment might govern, but whether the *Eighth* or Fourteenth did. *See* 85 F.3d at 1490. Because a decision doesn't answer questions that aren't asked, *see Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170, 125 S.Ct. 577, 160 L.Ed.2d 548 (2004), I don't think *Cottrell* definitively resolved the Fourth-versus-Fourteenth issue for claims like Crocker's.

Subsequent decisions from within this circuit support that conclusion. First, we have (at least once) read *Cottrell* for what it could tell us about the *Fourth* Amendment excessive-force standard. In *Garrett v. Athens-Clarke County*, we analyzed a Fourth Amendment excessive-force claim and explained *Cottrell* as having "conclude[d] officers did not use excessive force, although [the] arrestee died of positional asphyxia, where officers placed [the] arrestee in handcuffs and leg restraints after a 20-

minute struggle and put him in a prone position in the back of a police car." 378 F.3d 1274, 1281 (11th Cir. 2004). *See also Calhoun*, 360 F. Supp. 2d at 1272–73 (citing *Cottrell* for the proposition that we have "indirectly countenanced the application of the Fourth Amendment to post-arrest, pre-detention excessive-force claims"). As I read *Garrett* and the follow-on *Calhoun*, they reveal, at the very least—and contrary to what other circuits have said—that *Cottrell* didn't commit us to the Fourteenth Amendment side of this split.

To sum up: Other circuits disagree about whether claims like Crocker's—brought by an individual who has been arrested but hasn't yet received a judicial determination of probable cause—arise under the Fourth or Fourteenth Amendment.[3] Our own precedent hasn't settled the issue, either. If I'm right about that, then a future panel might have

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[3] Note that because the practical consequences of the split aren't what they used to be pre-*Kingsley*, the Supreme Court may have less reason to step in and resolve any conflict between the circuits. *Cf. Piazza*, 923 F.3d at 952–53 ("[I]nasmuch as it entails an inquiry into the objective reasonableness of the officers' actions, the Fourteenth Amendment standard has come to resemble the test that governs excessive-force claims brought by arrestees under the Fourth Amendment."); *Miranda-Rivera*, 813 F.3d at 70 ("Since *Kingsley* has extended the objective reasonableness standard for use of force from the arrest stage through the probable cause hearing, whether the Fourth or Fourteenth Amendment standard applies presents less of a problem in cases like this one than before."). For that matter, I suppose that insofar as the so-what factor isn't what it used to be, our en banc court may have less incentive to untangle any knots in our precedent in this area.

to answer the questions this case only caused us to ask.

B

If and when that happens, I'd recommend that we (1) draw the line between arrestees and pretrial detainees in accord with *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), and thus (2) analyze the excessive-force claims of all pre-probable-cause-determination arrestees under the Fourth Amendment.

Although we've said that "the line is not always clear as to when an arrest ends and pretrial detainment begins," *Garrett*, 378 F.3d at 1279 n.11, I think that line can be clearly drawn—in many cases, anyway—at the probable-cause hearing.[4] The Supreme Court has told us that a pretrial detainee is a person who has had "a 'judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest.' " *Bell*, 441 U.S. at 536, 99 S.Ct. 1861 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975)) (alterations in original). It has also told us that "the Fourth Amendment requires a timely judicial

[4] I can imagine that the analysis might (?) look different for someone who has already had a judicial determination of probable cause—*e.g.*, when he is arrested pursuant to a valid warrant. *Cf. Frohmader v. Wayne*, 958 F.2d 1024, 1026 (10th Cir. 1992) (explaining that "claims of post-arrest excessive force by arrestees ... who are detained without a warrant, are governed by the 'objective reasonableness' standard of the Fourth Amendment ... until they are brought before a judicial officer for a determination of probable cause to arrest").

determination of probable cause as a prerequisite to detention." *Gerstein*, 420 U.S. at 126, 95 S.Ct. 854. Taken together, I understand *Bell* and *Gerstein* to mean that until a judge has weighed in on whether probable cause exists to detain someone, he remains an arrestee and is thus entitled to (but only to) Fourth-Amendment protection from excessive force. *Cf. Graham*, 490 U.S. at 395 n.10, 109 S.Ct. 1865 (reserving "the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond *the point at which arrest ends and pretrial detention begins*" (emphasis added)).

Several other circuits have taken that general approach. In *Estate of Booker v. Gomez*, for instance, the Tenth Circuit clearly distinguished an arrestee from a pretrial detainee in explaining which amendments control which excessive-force claims. *See* 745 F.3d 405, 419 (10th Cir. 2014). The court there concluded that "the Fourth Amendment, not the Fourteenth, governs excessive force claims arising from treatment of an arrestee detained without a warrant and prior to any probable cause hearing." *Id.* (quotation marks and alterations omitted).[5] By contrast, the court held, the Fourteenth Amendment governs an excessive-force claim made by a pretrial detainee, which it defined to mean "one who has had a 'judicial determination of probable cause as a

[5] Note that the *Estate of Booker* court also held that "the Fourteenth Amendment standard governs excessive force claims arising from post-arrest and pre-conviction treatment if the arrestee has been taken into custody pursuant to a warrant supported by probable cause." 745 F.3d at 421.

prerequisite to [the] extended restraint of [his] liberty following arrest.' " *Id.* (quoting *Bell*, 441 U.S. at 536, 99 S.Ct. 1861) (alterations in original). Other circuits follow a similar (albeit not identical) analysis. *See, e.g.*, *Burchett v. Kiefer*, 310 F.3d 937, 945 (6th Cir. 2002) (holding that the detention of arrestee in hot patrol car for three hours with no ventilation "violated his Fourth Amendment right against unreasonable seizures"); *Fontana v. Haskin*, 262 F.3d 871, 879–80 (9th Cir. 2001) (holding that "[t]he trip to the police station is a 'continuing seizure' during which the police are obliged to treat their suspects in a reasonable manner" under the Fourth Amendment); *Wilson*, 209 F.3d at 716 (observing that Fourth Amendment standards apply "not only to the act of arrest, but also to use of force against an arrestee who was restrained in the back of a police car"); *cf. United States v. Johnstone*, 107 F.3d 200, 206 (3d Cir. 1997) (applying Fourth Amendment standards to conduct occurring after the arrestee had been transported to the police station on the theory that "a 'seizure' can be a process, a kind of continuum, and is not necessarily a discrete moment of initial restraint"). *See generally* Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. Pa. L. Rev. 1009, 1063–64 (2013) (advocating this approach).

One might object to this general approach on the ground that it necessarily embodies a "continuing seizure" theory, about which we (and others) have expressed "doubts," *Kingsland v. City of Miami*, 382 F.3d 1220, 1236 (11th Cir. 2004), and "questions," *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996). *See also Reed v. City of Chicago*, 77 F.3d 1049, 1052 &

n.3 (7th Cir. 1996). Our reticence is well-founded; the Supreme Court has said, after all, that "[a] seizure is a single act, and not a continuous fact." *California v. Hodari D.*, 499 U.S. 621, 625, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) (quoting *Thompson v. Whitman*, 85 U.S. 457, 471, 18 Wall. 457, 21 L.Ed. 897 (1873)); *see also Torres v. Madrid*, —— U.S. ——, ——, 141 S.Ct. 989, 1001–02, 209 L.Ed.2d 190 (2021) (similar). And that view finds support in the original public meaning of the Fourth Amendment. *See Manuel v. City of Joliet*, —— U.S. ——, 137 S. Ct. 911, 927, 197 L.Ed.2d 312 (2017) (Alito, J., dissenting) ("Dictionary definitions from around the time of the adoption of the Fourth Amendment define the term 'seizure' as a single event—and not a continuing condition."). There's good reason, then, to be suspicious of a flabby conception of "seizure."

Even so, it seems to me that what transpires between the initial act of a warrantless arrest and the subsequent probable-cause determination may be considered a "seizure" without doing violence to the Fourth Amendment—or, for that matter, even requiring the "continuing" modifier.[6] Consider Justice Alito's explanation in *Manuel*:

> [W]hen an arrest is made without a warrant, the arrestee, generally within 48 hours, must be brought

[6] Tellingly, I think, in the same decision in which it again rejected the "continuing seizure" theory, the Seventh Circuit took for granted "the fact that the 'seizure' of an arrestee ends *after* the *Gerstein* hearing." *Reed*, 77 F.3d at 1052 (emphasis added).

> before a judicial officer, who then completes the arrest process by making the same determination that would have been made as part of the warrant application process. *Thus, this appearance is an integral part of the process of taking the arrestee into custody and easily falls within the meaning of the term 'seizure.'*

137 S. Ct. at 928 (Alito, J., dissenting) (emphasis added) (citations omitted). That makes perfect sense to me.

And happily, that understanding of "seizure" supports drawing a nice, bright line between the Fourth and Fourteenth Amendments at the probable-cause hearing. *Cf. United States v. Johnson*, 921 F.3d 991, 1004–06 (11th Cir. 2019) (en banc) (Newsom, J., concurring) (stressing the importance of bright lines and "clear rule[s]" in Fourth Amendment jurisprudence). That is, if that which constitutes an "integral part of the process of taking the arrestee into custody" counts as part of the "seizure," then when a person in Crocker's position makes an allegation of excessive force, "the Fourth Amendment provides an explicit textual source of constitutional protection." *Graham*, 490 U.S. at 395, 109 S.Ct. 1865. (And as that rationale applies here, I can hardly think of something more "integral" to taking an arrestee into custody than holding him in a squad car.) On that understanding of what constitutes a seizure, the Fourth Amendment, and "not the more generalized

notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.*[7]

* * *

Our duty to follow the Constitution and the Supreme Court's decisions requires us to reject an in-there-somewhere approach to excessive-force claims brought under § 1983. We didn't have to go to the roots of Crocker's claim to know that it could bear no fruit, but in another case, our court may need to dig deeper. If so, I hope that panel will distinguish between arrestees and pretrial detainees and clarify the analytical framework that applies to the excessive-force claims of both.

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[7] In *Torres v. Madrid*, the Supreme Court held that "the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued." —— U.S. ——, ——, 141 S.Ct. 989, 991, 209 L.Ed.2d 190 (2021). That rule, the majority emphasized, was a "narrow" one. *Id.* at ——, 141 S.Ct. at 999. So, although the Court explained that "the application of force completes an arrest even if the arrestee eludes custody," *id.*, it's not immediately apparent (to me, at least) whether and to what extent *Torres* impacts the circuit-splitting questions that I've discussed here. At the very least, the extensive back and forth between the *Torres* majority and dissent concerning the original meaning of "seizures" shows that those looking for answers to these questions would do well to attend closely to text, history, and tradition. *Compare id.* at —— – ——, 141 S.Ct. at 994–1003, *with id.* at —— – ——, 141 S.Ct. at 1002–15 (Gorsuch, J., dissenting).

MARTIN, Circuit Judge, concurring in part and dissenting in part:

As set forth in the majority opinion, James Crocker witnessed a fatal car accident and stood in the median of I-95 photographing the scene. Deputy Steven Beatty approached him, seized his phone, arrested him, and locked him in the back of a hot patrol car for almost a half hour. Mr. Crocker sued Deputy Beatty, alleging, as relevant here, unlawful seizure of his phone in violation of the First Amendment, false arrest in violation of the Fourth Amendment and state law, and excessive force in violation of the Fourteenth Amendment. This appeal asks us to decide whether the District Court properly entered summary judgment in favor of Deputy Beatty on these claims.

I agree with the majority that Deputy Beatty had probable cause to arrest Mr. Crocker for violating Florida Statute § 316.1945(1)(a)(11). As a result, Mr. Crocker's Fourth Amendment false arrest claim is barred by qualified immunity. Also, since Deputy Beatty had probable cause to arrest Mr. Crocker, his state law false arrest claim fails as well. But I part ways with the majority as to Mr. Crocker's First and Fourteenth Amendment claims. I do not think Deputy Beatty can properly be granted qualified immunity on either of those claims, so I would reverse the District Court's grant of summary judgment on those issues. I therefore respectfully dissent.

I.

I will begin with Mr. Crocker's First Amendment claim. Mr. Crocker argues that Deputy Beatty violated his First Amendment rights when he seized Crocker's phone while he was photographing the accident scene. The District Court held that Deputy Beatty was entitled to qualified immunity on this claim, and the majority opinion affirms. Maj. Op. at 1240–43 – ———. The majority says the law underlying Mr. Crocker's First Amendment claim was not clearly established at the time Deputy Beatty seized his phone. Id. at 1240–41 – ———. Specifically, the majority opinion says this Court's opinion in Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000), does not obviously apply to the facts here. Maj. Op. at 1240–43 – ———. But I think the majority cabins Smith too narrowly. In my view, Smith clearly establishes that Mr. Crocker had a right to photograph the accident scene and I would therefore reverse the grant of qualified immunity to Deputy Beatty on this claim.

In Smith, our Court addressed a claim from plaintiffs who said they were prevented from videotaping police activity in violation of their First Amendment rights. 212 F.3d at 1332. We held that the Smiths "had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct." Id. at 1333. And we explained that this is because "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." Id. (collecting cases).

The majority acknowledges that Smith announced a "broad statement of First Amendment principle," but it says this principle does not obviously apply to the facts here. Maj. Op. at 1240–41 – ——— (quotation marks omitted) (alteration adopted). More to the point, the majority says Smith's rule does not obviously apply to Mr. Crocker who was "spectating on the median of a major highway at the rapidly evolving scene of a fatal crash." Id. at 1241 (quotation marks omitted). According to the majority, because Smith "provided few details regarding the facts of the case" it cannot provide officers " 'fair warning' under other circumstances" such as this one. Id. at 1240–41 – ——— (quotation marks omitted).

I read Smith differently. It is true that Smith does not detail the specific facts presented there. See Smith, 212 F.3d at 1332–33. But for me, the lack of factual detail does not do away with the right Smith announced. To the contrary, the broad pronouncement in Smith underscores the right's general applicability. Smith says there is "a First Amendment right ... to photograph or videotape police conduct." Id. at 1333. This statement is unambiguous and not couched in specifics that limit its application. Instead, the right is limited only by "reasonable time, manner and place restrictions." Id. And the contours of the right announced in Smith do not require such precise definition. Unlike findings about the use of excessive force, for example, it is usually easy enough to know whether a plaintiff was recording police activity. Indeed, a number of district courts within this Circuit have relied on Smith to determine, in distinct factual contexts, that the right to record

police activity is clearly established.[1] I thus read Smith to clearly establish a general rule that the First Amendment protects a person's right to record police conduct—subject only to reasonable time, place, and manner restrictions.[2]

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[1] See, e.g., Bacon v. McKeithen, No. 5:14-cv-37-RS-CJK, 2014 WL 12479640, at *4–5 (N.D. Fla. Aug. 28, 2014) (unpublished) (denying qualified immunity and concluding that Smith clearly established the right to videotape a police officer without his consent at a routine traffic stop); Abella v. Simon, 831 F. Supp. 2d 1316, 1329–30, 1352 (S.D. Fla. 2011) (denying qualified immunity and concluding that Smith clearly established Mr. Abella's First Amendment right to photograph a police officer who had been trailing him), vacated in part on other grounds, 482 F. App'x 522 (11th Cir. 2012) (per curiam) (unpublished); id. at 1352 n.27 (distinguishing Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010), as relying on cases from the Third Circuit, and concluding that "in the Eleventh Circuit, Smith controls and the Court is compelled to find the law is clearly established"); Dunn v. City of Fort Valley, 464 F. Supp. 3d 1347, 1355–56, 1366–67 (M.D. Ga. 2020) (denying qualified immunity and citing Smith to conclude that Mr. Dunn had a clearly established First Amendment right to take photographs and videos inside the Police Department building and around the grounds); Johnson v. DeKalb County, 391 F. Supp. 3d 1224, 1234, 1250–51 & n.214 (N.D. Ga. 2019) (denying qualified immunity and citing Smith to conclude that Ms. Johnson had a clearly established First Amendment right to film an arrest).

[2] Contrary to the majority's suggestion, Smith's reference to time, place, and manner restrictions does not confine the right it clearly established to public forums. See Maj. Op. at 1241–42. Of course, the government can implement time, place, and manner restrictions in nonpublic forums as well. M.N.C. of Hinesville, Inc. v. U.S. Dep't of Defense, 791 F.2d 1466, 1474 (11th Cir. 1986) ("As in all other forums, the government may subject speech in nonpublic forums to reasonable content-neutral, i.e., time, place, and manner, restrictions."). But in any

Smith's general rule applies here. Taking the facts in the light most favorable to Mr. Crocker, he was photographing police conduct. When Deputy Beatty seized his phone, Mr. Crocker was photographing the scene of a fatal car accident and the emergency response, including police activity, surrounding it. This record reveals no "reasonable time, manner and place restrictions," limiting Mr. Crocker's speech here. See Smith, 212 F.3d at 1333. Permissible time, place, and manner restrictions are content-neutral restrictions on First Amendment conduct that are supported by a substantial government interest and do not unreasonably limit alternative avenues of communication. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47, 106 S. Ct. 925, 928, 89 L.Ed.2d 29 (1986). They are, by their nature, rules, not discretionary enforcement decisions by individual police officers. See Forsyth County v. Nationalist Movement, 505 U.S. 123, 130, 112 S. Ct. 2395, 2401, 120 L.Ed.2d 101 (1992) ("A government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." (quotation marks omitted)). Again, this record suggests no such rules were in place here. And indeed, accepting Mr. Crocker's allegations as true, even Deputy Beatty understood that Florida's statutes regarding limited access

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event, by its own terms Smith's right applies in public and the median is obviously in public. See Smith, 212 F.3d at 1333 ("The First Amendment protects the right to gather information about what public officials do on public property[.]").

facilities did not bear on Crocker's First Amendment activity. Mr. Crocker says when he asked Deputy Beatty whether it was illegal to photograph the scene, Beatty replied "no, but now your phone is evidence of the State."

The right to record police activity is important not only as a form of expression, but also as a practical check on police power. Recordings of police misconduct have played a vital role in the national conversation about criminal justice for decades. I read today's opinion to parse this critical right too narrowly. I would hold that Mr. Crocker's First Amendment right to record the fatal car crash was clearly established and reverse the grant of qualified immunity to Deputy Beatty.

II.

Now for Mr. Crocker's Fourteenth Amendment claim. Mr. Crocker argues that Deputy Beatty used excessive force in violation of the Fourteenth Amendment when he detained Crocker in a hot patrol car for approximately half an hour. The District Court held that Deputy Beatty was entitled to qualified immunity on this claim, and the majority now affirms. Yet in my view, Mr. Crocker presented sufficient evidence to create a dispute of fact about whether Deputy Beatty acted with express intent to punish him. For this reason, summary judgment on this claim is not warranted.

A.

Before turning to the proper analysis under the Fourteenth Amendment, I will address a question the majority opinion injects into this case. That question is which amendment—the Fourth or the Fourteenth—governs Mr. Crocker's claim. See Maj. Op. at 1246–47 – ———. Despite the majority's discussion to the contrary, Mr. Crocker made clear, both before the District Court and now on appeal, that he is bringing his excessive force claim solely under the Fourteenth Amendment. And while Deputy Beatty notes that the line between arrest and pretrial detention is not clear, he makes no argument that the Fourth Amendment, rather than the Fourteenth, should govern. Despite acknowledging that application of one amendment over the other does not change the outcome of Mr. Crocker's excessive force claim under its interpretation, the majority opinion analyzes Crocker's claim under both the Fourth and Fourteenth Amendments. Id. at 1247–53 – ———. In addition to authoring the majority opinion, Judge Newsom also writes a separate concurrence to say that, in his view, it is the Fourth Amendment that should apply in these post-arrest, pre-custody situations. Conc. Op. at 1256.

Judge Newsom is right in pointing out that this Court has not committed itself to either outcome. See id. at 1255–56 – ———. And this is not the context in which to decide this question. The parties have treated and argued this case as a Fourteenth Amendment case, and I would decide it as such. In the past, and in the absence of an affirmative answer as to when arrest ends and pretrial detention begins,

this Court has deferred to the characterization given by the parties, where they agree. See Hicks v. Moore, 422 F.3d 1246, 1253 n.7 (11th Cir. 2005) ("We underline that Defendants never argue that the strip search or fingerprinting was separate from Plaintiff's seizure; so we—will assume (for this case) Plaintiff was still being seized and—analyze the claim under the Fourth Amendment"). I think this is the best approach and would do the same in this case. I would therefore apply the Fourteenth Amendment to Mr. Crocker's excessive force claim.

That is not to say that in a future case where the question is fully briefed and argued I would necessarily hold that the Fourteenth Amendment always governs this situation. Here, however, we have no briefing on the question and both parties have understood Mr. Crocker's excessive force claim to travel under the Fourteenth Amendment. I would therefore analyze whether Deputy Beatty used excessive force against Mr. Crocker when he locked him in a hot patrol car and left him there, as the parties did, under the Fourteenth Amendment alone.

B.

The Fourteenth Amendment analysis does not bestow qualified immunity on Deputy Beatty for the excessive force claim. I agree with the majority that the District Court's analysis of this claim was wrong because the court failed to apply the Supreme Court's decision in Kingsley v. Hendrickson, 576 U.S. 389, 135 S. Ct. 2466, 192 L.Ed.2d 416 (2015). See Maj. Op. at 1248 – ———. I also agree that the force used here

was not objectively unreasonable.[3] See id. at 1250. But again, I part ways with the majority insofar as I do not read Kingsley to do away with Fourteenth Amendment liability where an officer applies objectively reasonable force with an express intent to punish. I say Mr. Crocker presented sufficient evidence to create a dispute of fact about whether Deputy Beatty acted with express intent to punish him.[4] And since it was clearly established at the time of Mr. Crocker's arrest that applying force with the

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[3] I do not view the force used here to rise to the level of objectively unreasonable, but neither would I characterize it—as the majority does—as de minimis. See Maj. Op. at 1252–53.

[4] Mr. Crocker explicitly says in his reply brief that Deputy Beatty violated his Fourteenth Amendment rights by inflicting force with the express intent to punish him. See Reply Br. of Appellant 10 ("As the Kingsley Court noted ... 'punishment' can consist of action taken with an 'expressed intent to punish.' When someone tells you after you beg for relief, 'it's not meant to be comfortable, sir,' that is punishment." (citations omitted)). However, while issues not raised in the initial brief generally are considered abandoned, "briefs should be read liberally to ascertain the issues raised on appeal." Allstate Ins. Co. v. Swann, 27 F.3d 1539, 1542 (11th Cir. 1994). Viewed liberally, Mr. Crocker's briefing raises the issue of the District Court's failure to apply Kingsley when evaluating his Fourteenth Amendment excessive force claim. And Mr. Crocker discussed express intent to punish before the District Court. Doc. 156 at 15–16 ("The placement of [Crocker] in the back of the patrol car while turning the air off demonstrates a conscious decision by Beatty to punish [Crocker] ...."). However, even accepting the majority's concerns, see Maj. Op. at 1249–50 – ——, "application of the waiver rule would be unduly harsh," Allstate, 27 F.3d at 1542 (considering issue not raised in initial brief where party preserved it in the lower court, discussed the circumstances of the relevant ruling in its initial brief, and argued the point in reply).

express intent to punish a pretrial detainee violated the Fourteenth Amendment, Deputy Beatty is not entitled to qualified immunity on this claim. See Jacoby v. Baldwin County, 835 F.3d 1338, 1344 (11th Cir. 2016) ("To [overcome qualified immunity], the plaintiff must: (1) allege facts that establish that the officer violated his constitutional rights; and (2) show that the right involved was clearly established at the time of the putative misconduct." (quotation marks omitted) (alteration adopted)).

I will now discuss my reading of Kingsley. Then I will set out why, under Kingsley, Mr. Crocker has alleged facts that establish Deputy Beatty violated his constitutional right. Finally I will address whether that right was clearly established at the time of Mr. Crocker's arrest.

1.

In Kingsley, the Supreme Court considered whether, in order to prove an excessive force claim, a pretrial detainee must show that the official subjectively intended to violate the detainee's rights. 576 U.S. at 391–92, 135 S. Ct. at 2470. The Court concluded that the answer to that question is no: "the defendant's state of mind is not a matter that a plaintiff is required to prove." Id. at 395, 135 S. Ct. at 2472. Instead, it is sufficient to prove that an officer inflicted objectively unreasonable force. Id. According to the majority opinion, Kinglsey's holding that pretrial detainees can prove excessive force simply by establishing that an official used objectively unreasonable force means that proof of objectively unreasonable force is the only way pretrial detainees

can prove excessive force in violation of the Fourteenth Amendment. Maj. Op. at 1248–50 – ——— . In the majority's view, Kingsley forecloses "the possibility of an excessive-force violation, even in circumstances where the use of force is objectively reasonable, on the ground that some sinister purpose is allegedly afoot." Id. at 1249 n.15. But the majority misreads Kingsley. Kingsley did nothing to disallow Fourteenth Amendment claims based on express intent to punish, and those claims remain viable today.

Importantly, Kingsley did not wholly abrogate the existing landscape of Fourteenth Amendment excessive force claims. The Supreme Court in Kingsley merely clarified one of the standards under which pretrial detainees can show "the use of excessive force that amounts to punishment." 576 U.S. at 397, 135 S. Ct. at 2473. This is evident from the Court's analysis. The Supreme Court understood Kingsley's holding that pretrial detainees are not required to prove subjective intent to be "consistent with [its] precedent"—specifically, with Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L.Ed.2d 447 (1979). Kingsley, 576 U.S. at 397, 135 S. Ct. at 2473. It explained that Bell set out two standards under which pretrial detainees can establish unconstitutional punishment. Id. at 398, 135 S. Ct. at 2473. The first Bell standard is subjective: "such 'punishment' can consist of actions taken with an 'expressed intent to punish.' " Id. (quoting Bell, 441 U.S. at 538, 99 S. Ct. at 1873–74). The second is objective: "in the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail

by showing that the actions are not 'rationally related to a legitimate nonpunitive governmental purpose' or that the actions 'appear excessive in relation to that purpose.' " Id. (quoting Bell, 441 U.S. at 561, 99 S. Ct. at 1886).

Kingsley clarified that Bell's objective standard does not involve subjective considerations. The Court explained, for example, that its holding was consistent with cases postdating Bell because those cases did not suggest that "application of Bell's objective standard should involve subjective considerations." Id. at 399, 135 S. Ct. at 2474 (emphasis added). But the Court never said it was doing away with Bell's subjective standard, under which pretrial detainees can establish a violation of their Fourteenth Amendment rights by showing that an official inflicted force with an express intent to punish. See id. at 397–402, 135 S. Ct. at 2473–76. Much less did the Court say it was doing away with Bell's subjective standard solely for excessive force claims while leaving it in place for other claims of punishment, as the majority opinion suggests. See Maj. Op. at 1248–49 – ———. The Supreme Court tells us that it "does not normally overturn, or so dramatically limit, earlier authority sub silentio." Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 18, 120 S. Ct. 1084, 1096, 146 L.Ed.2d 1 (2000); see also Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1260 n.12 (11th Cir. 2020) (recognizing this principle). Surely this principle holds especially true where, as here, the Court expressly stated that its holding is "consistent with" Bell. Kingsley, 576 U.S. at 397, 135 S. Ct. at 2473.

Indeed, Kingsley says nothing about redefining what constitutes punishment in the excessive force context. The Fourteenth Amendment's Due Process Clause "prohibits a state from punishing a pretrial detainee at all until he is lawfully convicted of a crime." McMillian v. Johnson, 88 F.3d 1554, 1564 (11th Cir. 1996). In other words, an official violates a pretrial detainee's Fourteenth Amendment rights if he subjects the detainee to punishment. In the context of the Fourteenth Amendment, then, excessive force means "excessive force that amounts to punishment." Kingsley, 576 U.S. at 397, 135 S. Ct. at 2473 (quotation marks omitted) (emphasis added). And one of the ways an action "amounts to punishment" is if it was "taken with an expressed intent to punish." Id. at 397–98, 135 S. Ct. at 2473 (quotation marks omitted). It has thus long been understood, prior to Kingsley, that proof of express intent to punish is alone sufficient to establish a Fourteenth Amendment violation.[5] Kingsley—a decision that sought to make it easier for pretrial detainees to vindicate their rights—cannot properly be read to do away with this

[5] See, e.g., Blackmon v. Sutton, 734 F.3d 1237, 1241–43 (10th Cir. 2013) (Gorsuch, J.) (finding Fourteenth Amendment excessive force violation where juvenile detention officials used restraint chair with express purpose of punishing detainee); McMillian, 88 F.3d at 1564–65 (holding that pretrial detainee stated Fourteenth Amendment claim where he presented evidence that officials placed him on death row with express goal of punishment); Putman v. Gerloff, 639 F.2d 415, 419–20 (8th Cir. 1981) (explaining that, for a trial regarding a claim that chaining and handcuffing pretrial detainees overnight violated the Fourteenth Amendment, "the jury could find that the defendants' conduct was punishment on the basis of direct evidence of intent to punish").

method of proving Fourteenth Amendment violations for excessive force claims when it said nothing about having done so.

Based on my reading of Kingsley, I would ask whether the evidence in this case demonstrates that Deputy Beatty locked Mr. Crocker in the back of a hot car for nearly half an hour with the goal of punishing him.[6]

2.

And I see sufficient evidence here to create a dispute of fact about whether Deputy Beatty locked Mr. Crocker in the hot car with an express intent to punish him. In a sworn affidavit, Mr. Crocker stated that Deputy Beatty intentionally turned off the air conditioning in the car before leaving Crocker inside with the windows rolled up. The heat caused Mr. Crocker to experience anxiety, difficulty breathing, and profuse sweating. When Deputy Beatty briefly returned to the car, Mr. Crocker "begged" him for relief and told him he was "about to die in here." Deputy Beatty responded that Mr. Crocker was not meant to be comfortable and again left him in the car with the windows rolled up and no air conditioning. Together, Deputy Beatty's actions and statements

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[6] The majority says this standard would permit Fourteenth Amendment liability where an official expressly intends to punish yet uses no force at all. See Maj. Op. at 1249–50 – ——. But, of course, the application of de minimis force (or, as in the majority's example, no force) cannot support a claim for excessive force. Nolin v. Isbell, 207 F.3d 1253, 1257 (11th Cir. 2000). As noted earlier, see supra at 1262 n.3, I do not view the force inflicted in this case to be de minimis.

create a dispute of fact as to whether he subjected Mr. Crocker to extreme environmental conditions with the sole purpose of punishing him.

Notably, there is a complete lack of evidence that Deputy Beatty acted with the goal of furthering any "permissible governmental objective." Piazza v. Jefferson County, 923 F.3d 947, 952 (11th Cir. 2019). Mr. Crocker was subdued and handcuffed in the back seat of a police cruiser. Nothing in the record suggests that Deputy Beatty had any reason to turn off the air conditioning in his car other than to cause Mr. Crocker to suffer. This and the fact that Deputy Beatty ignored Mr. Crocker's pleas for fresh air and told him he was "not meant to be comfortable" further reinforce Crocker's claim that Beatty's only objective was to inflict punishment. This punishment was plainly prohibited in Bell, 441 U.S. at 538, 99 S. Ct. at 1873–74, and remains prohibited after Kingsley, 576 U.S. at 397–98, 135 S. Ct. at 2473. On this record, I believe the District Court erred by failing to find a dispute of fact about whether Deputy Beatty kept Mr. Crocker in a hot car with the express intent of punishing him, in violation of his Fourteenth Amendment rights.

3.

Finally I address whether, at the time of Mr. Crocker's arrest, it was clearly established that Deputy Beatty's conduct violated the Fourteenth Amendment. The majority gets it right here, as in Patel v. Lanier County, 969 F.3d 1173, 1184–88 (11th Cir. 2020), in saying that the mere act of detaining Mr. Crocker in the back seat of a hot car for

approximately 30 minutes was not clearly established as amounting to objectively unreasonable force. See Maj. Op. at 1252 – ——. However, Patel did not present the question of whether it was clearly established that prolonged detention in a hot car for the express purpose of inflicting punishment amounted to excessive force under Bell's subjective test. "Where the official's state of mind is an essential element of the underlying violation," as it is under Bell, "the [official's] state of mind must be considered in the qualified immunity analysis or a plaintiff would almost never be able to prove that the official was not entitled to qualified immunity." Walker v. Schwalbe, 112 F.3d 1127, 1132 (11th Cir. 1997). Here, Mr. Crocker presented evidence sufficient to raise a dispute of fact as to whether Deputy Beatty locked him in the back of a hot patrol car with the express intent of punishing him.

Since Mr. Crocker has established a genuine issue of material fact about whether Deputy Beatty acted with express intent to punish, Beatty is not entitled to qualified immunity. We have held that "Bell's prohibition on any pretrial punishment, defined to include conditions imposed with an intent to punish," should make it "obvious to all reasonable officials" that the Fourteenth Amendment prohibits imposing detention conditions with the express goal of punishment. McMillian, 88 F.3d at 1565. Based on this rationale, McMillian held that it was clearly established that placing a pretrial detainee on death row for the express purpose of punishing him violated the Fourteenth Amendment even though there was "no case with facts similar to McMillian's allegations."

Id. The imposition of restrictive conditions with the express goal of punishment was sufficient to put the officers in McMillian on notice that their actions violated the Fourteenth Amendment.

So too here. At the time of Mr. Crocker's arrest, it was clear enough that police officers may not intentionally expose pretrial detainees to extreme environmental conditions for the sole purpose of causing suffering. This "broad statement of principle" clearly established Mr. Crocker's right to be free of intentionally inflicted punishment. Lewis v. City of West Palm Beach, 561 F.3d 1288, 1291–92 (11th Cir. 2009). And it should have been "obvious" to Deputy Beatty that the Constitution prohibited him from intentionally turning off his air conditioning and leaving Mr. Crocker in the back of his hot patrol car with the sole purpose of causing him to suffer. McMillian, 88 F.3d at 1565. I would therefore hold that the District Court erred in granting summary judgment to Deputy Beatty on this claim.

I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO: 2:16-cv-14162-ROSENBERG/MAYNARD

JAMES P. CROCKER,

Plaintiff,

v.

DEPUTY SHERIFF
STEVEN ERIC BEATTY,
et al.,

Defendants. /

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT BEATTY AND GRANTING MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT SNYDER

Plaintiff James Crocker saw an upside-down car on Interstate 95 and pulled over. Emergency personnel arrived on scene. At some point, Mr. Crocker began photographing the scene on his cellular phone. Defendant Steven Beatty, a Deputy Sheriff, seized Crocker's phone and also arrested Plaintiff for resisting an officer without violence when Plaintiff refused to leave the scene without his phone.

This case arises out of the seizure of Plaintiff's person and phone. The Amended Complaint contains claims against Defendant Beatty in his individual capacity and against Sheriff William Snyder in his official capacity as Sheriff of Martin County.[1] Both Defendants moved for summary judgment. The motions are now ripe. The Court has considered all relevant filings and the argument heard in this matter on June 29, 2017. Defendant Beatty's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART** and Defendant Snyder's Motion for Summary Judgment is **GRANTED**.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The existence of a factual dispute is not by itself sufficient grounds to defeat a motion for summary judgment; rather, "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A dispute is genuine if "a reasonable trier of fact could return judgment for the non-moving party." *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d

[1] The Amended Complaint also contains claims against former Martin County Sheriff Robert Crowder in his individual capacity. Sheriff Crowder moved for summary judgment. DE 145. However, Plaintiff voluntarily dismissed the claims against Sheriff Crowder with prejudice following the hearing on June 29, 2017, pursuant to Federal Rule of Civil Procedure 41. *See* DE 171.

1235, 1243 (11th Cir. 2008) (citing *Anderson*, 477 U.S. at 247-48). A fact is material if "it would affect the outcome of the suit under the governing law." *Id.* (citing Anderson, 477 U.S. at 247-48).

In deciding a summary judgment motion, the Court views the facts in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *See Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006). The Court does not weigh conflicting evidence. *See Skop v. City of Atlanta*, 485 F.3d 1130, 1140 (11th Cir. 2007). Thus, upon discovering a genuine dispute of material fact, the Court must deny summary judgment. *See id.*

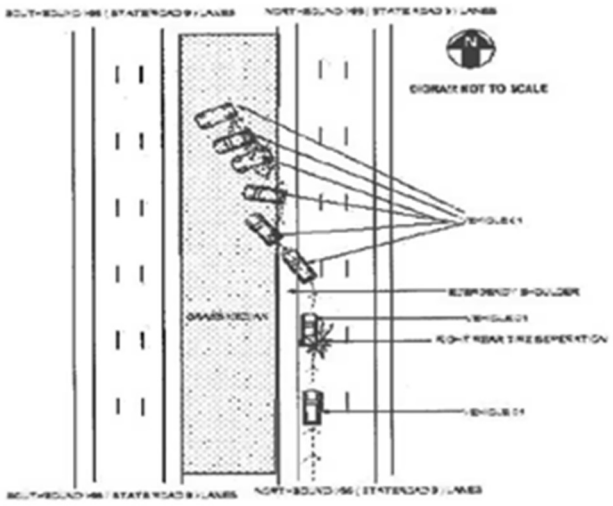
The moving party bears the initial burden of showing the absence of a genuine dispute of material fact. *See Shiver v. Chertoff*, 549 F.3d 1342, 1343 (11th Cir. 2008). Once the moving party satisfies this burden, "the nonmoving party 'must do more than simply show that there is some metaphysical doubt as to the material facts.' " *Ray v. Equifax Info. Servs.*, LLC, 327 Fed.Appx. 819, 825 (11th Cir. 2009) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). Instead, "[t]he non-moving party must make a sufficient showing on each essential element of the case for which he has the burden of proof." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Accordingly, the non-moving party must produce evidence, going beyond the pleadings, to show that a reasonable jury could find in favor of that party. *See Shiver*, 549 F.3d at 1343.

II. BACKGROUND[2]

On May 20, 2012, Plaintiff James Crocker left Palm Beach Gardens traveling northbound on Interstate 95. DE 151-1 at 51:25; 52:1-3. Plaintiff observed an overturned vehicle in the median he believed had recently been involved in a car accident. *Id.* at 52:5-16. The accident scene was at mile marker 89, DE 151-4 at ¶ 3, where Interstate 95 is three lanes wide in both directions, DE 151-1 at 53:6-7; DE 151-4 at ¶ 3. The northbound and southbound lanes are separated by a grass median with no guard rail. DE 151-1 at 52:23-25, 53:1-3; DE 151-4 at ¶ 3.

The overturned vehicle had been traveling northbound when its right rear tire "separated" and the driver lost control. DE 155-1. The vehicle veered off the road and onto the median, flipping over. *Id.* The vehicle came to rest on its roof in the portion of the median nearest to the southbound lanes, as shown:

[2] The facts are largely undisputed, but where there is a conflict the Court has so noted.



Plaintiff pulled over on the left shoulder of the northbound lanes, out of the lane of travel. DE 151-1 at 53:3-5; 54:4-6. After stopping his own car, Plaintiff ran to the overturned vehicle on the median which, as noted above, had come to rest in the portion of the median nearest to the southbound lanes of Interstate 95. *Id.* at 54:19-25. He was accompanied by ten or fifteen other people who also had pulled over to assist. *Id.* at 55:5-13. A road ranger arrived on scene shortly thereafter and assured the group that emergency personnel were en route. *Id.* at 59:24-25; 60:22-25. Plaintiff walked back to the other side of the median—the side nearest the northbound lanes of Interstate 95—to wait. *Id.* at 62:7-11.

Plaintiff was standing near the western edge of the northbound lanes approximately forty to fifty feet away from the overturned vehicle, DE 151-1 at 63:8-10, and approximately one hundred and twenty-five feet north of his own vehicle, *id.* at 62:19-25. He was

in the median approximately ten feet off of the paved break-down lane. *Id.* at 63:1-7. Plaintiff remained in this location until his arrest, *id.*, which also occurred at mile marker 89, DE 151-8. Plaintiff could not recall whether he was standing north or south of the overturned vehicle. DE 151-1 at 62:19-22.

There is a dispute about where, exactly, Plaintiff pulled over. Defendant Beatty's Statement of Material Facts alleges Plaintiff pulled over at mile marker 91. *See* DE 152. In support, Defendant Beatty cites a "Release of Responsibility Form" stating Plaintiff's vehicle was towed from "I-95 NB @ 91 Mile Marker." DE 151-9 at 1. However, Defendant does not dispute that Plaintiff was standing approximately forty to fifty feet from the overturned vehicle at mile marker 89, DE 151-1 at 63:8-10, and approximately one hundred and twenty-five feet north of his parked vehicle, *id.* at 62:23-25. This conflicts with Defendant's assertion that Plaintiff pulled over at mile marker 91. Plaintiff could not have been one hundred and twenty-five feet north of a car parked at mile marker 91 and, simultaneously, within forty to fifty feet of the overturned vehicle at mile marker 89.

Plaintiff looked to his left and observed other people taking pictures. DE 151-1 at 73:4-7. Plaintiff began photographing the overall scene, which included empty beer bottles, the overturned vehicle, and firemen. *Id.* at 73:16-19; *see also id.* at 74:25-25; 75:1. He could not see any of the persons involved in the accident. *Id.* at 73:13-15. Five to seven other bystanders were also taking pictures at the time. *Id.* at 75:24-25. The group on the median was spread out over an area of forty to fifty feet. *Id.* at 76:4-9.

The Florida Highway Patrol ("FHP") arrived on scene at 13:56:47. DE 151-5. Within minutes, FHP requested assistance from the Martin County Sheriff's Office ("MCSO"). *Id.* Defendant Beatty arrived on scene at 14:07:47. DE 151-5 at 3. Plaintiff had been taking pictures for less than thirty seconds when he first encountered Defendant Beatty. DE 151-1 at 75:16-22. Plaintiff first noticed Defendant Beatty when he was about four or five feet away and in the process of approaching Plaintiff. *Id.* at 77:3-7. Defendant Beatty's uniform immediately alerted Plaintiff that Defendant Beatty was an MCSO officer. *Id.* at 77:8-18.

Here, Defendant Beatty's account and Plaintiff's diverge. According to Defendant Beatty, the facts are as follows: Defendant Beatty approached Plaintiff and asked who he was, to which Plaintiff responded that he had arrived after the crash. DE 151-4 at ¶ 7. Defendant Beatty then took Plaintiff's phone. Plaintiff asked Defendant Beatty if photographing the crash scene was illegal, to which Defendant Beatty responded that the photographs on the phone were evidence because the crash involved a potential fatality. Id.

According to Plaintiff, events unfolded differently: Defendant Beatty grabbed Plaintiff's phone from his hand "without warning or explanation." DE 157-5 at ¶ 19. Defendant Beatty did not say anything to Plaintiff before taking his phone. *Id.* at ¶ 20. Only after taking Plaintiff's phone did Defendant Beatty ask what Plaintiff was doing at the scene. *Id.* at ¶ 22. Plaintiff asked if it was illegal to photograph the scene, to which Defendant Beatty

responded, "[N]o, but now your phone is evidence of the State." *Id.* at ¶ 24.

At this point, the parties' accounts come back together. Defendant Beatty told Plaintiff to leave the scene, drive to a northbound weigh station, and wait. DE 151-4 at ¶ 8. The weigh station was about a mile away on the northbound side of Interstate 95. DE 151-1 at 82:4-8. Plaintiff offered to delete the pictures in an effort to resolve the situation. *Id.* at 80:19-23. Defendant Beatty again told Plaintiff to leave the area, go to the northbound weigh station, and wait. *Id.* at 82:19-21. He advised Plaintiff that his phone would be turned over to an FHP investigator who would contact him concerning its disposition. DE 151-4 at ¶ 10.

Plaintiff asked Defendant Beatty for his name, which Defendant Beatty provided. DE 151-1 at 82:22-23. Plaintiff insisted that he deserved to be treated with dignity and respect, having been a law abiding citizen for over twenty years. *Id.* at 82:23-25; 83:1. Defendant Beatty told Plaintiff to turn around because he was under arrest. *Id.* at 83:1-2. When Plaintiff asked what he was being arrested for, Defendant Beatty responded that Plaintiff was being arrested for resisting an officer. *Id.* at 83:2-3. Plaintiff then told Defendant Beatty he would be happy to leave, but not without his phone. *Id.* at 83:3-4. Defendant Beatty asked Plaintiff to put his hands behind his back. *Id.* at 88:20-24. Plaintiff complied and was placed under arrest. *Id.*

Defendant Beatty testified to calling the arrest in to dispatch when it was made. DE 154-5 at 14-16.

Defendant Beatty's affidavit also reflects that he notified dispatch shortly after Plaintiff was handcuffed: "I handcuffed the Plaintiff behind his back and notified dispatch that I had placed him under arrest, which is reflected in the CAD Report under the main call number 12121553 at 14:21:45 at 'Beatty w/m 10-15.' " DE 151-4 at ¶ 11. The entire interaction—from the time Plaintiff first saw Defendant Beatty until Plaintiff was in handcuffs—lasted between sixty and ninety seconds. *Id.* at 83:7-8.

There is a conflict about when Plaintiff's phone was taken. Defendant Beatty argues in his Reply that Plaintiff's phone was taken at 14:15:00, citing the "Initial Property/Evidence Receipt." *See* DE 151-7. This document was completed after-the-fact while Plaintiff was seated in Defendant Beatty's patrol car. DE 151-4 at ¶ 11. Even assuming the interaction between Plaintiff and Defendant Beatty lasted only sixty seconds, the phone would have been seized by Defendant Beatty at approximately 14:20:45—one minute before Defendant Beatty notified dispatch after arresting Plaintiff, not at 14:15:00.

After handcuffing Plaintiff, Defendant Beatty walked Plaintiff to the patrol car, which was parked on the east shoulder of Interstate 95, facing south. DE 151-1 at 89:5-12. During the walk, Plaintiff told Defendant Beatty he had taken the pictures to show his daughter. *Id.* at 84:12-16; DE 151-4 at ¶ 12. Plaintiff also told Defendant Beatty that he has been personal friends with Sheriff Snyder for over twenty years, that he employs over one hundred people in the town, and that he had never broken the law. DE 151-

1 at 83:16-25; 84:1-3.[3] Defendant Beatty told Plaintiff he did not care who Plaintiff knew or how many people he employed—he was going to jail. *Id.* at 84:4-9. Defendant Beatty then used one hand to squeeze Plaintiff's shoulder area on a pressure point. *Id.* at 91:5-25.[4] Simultaneously, Defendant Beatty reached down and tightened Plaintiff's handcuffs. *Id.* at 92:3-11.[5] The walk across the median took approximately thirty seconds. DE 151-4 at ¶ 12.

Plaintiff testified that when Defendant Beatty applied the pressure point, Plaintiff's knees buckled because of the severe pain. DE 151-1 at 92:24-25, 93:1-4; DE 57-5 at ¶ 39. Plaintiff also testified that the substantial tightening of the handcuffs caused "excruciating pain." DE 57-5 at ¶ 39. However, Plaintiff never mentioned to Defendant Beatty that he was in pain. *Id.* at 95:6-10. He also recalled that, following the incident, there were no signs of a physical injury—*e.g.* bruises, scrapes, or cuts. *Id.* at 93:8-12. Plaintiff never discussed the arrest with his doctors. *Id.* at 3-13.

Plaintiff was placed in the back of Defendant Beatty's patrol car. Defendant Beatty leaned in and turned the air-conditioning down or off.[6] Defendant Beatty then left. When he returned, Plaintiff begged

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[3] Defendant Beatty testified that this conversation occurred before Plaintiff was handcuffed.

[4] Defendant Beatty testified this never occurred.

[5] Defendant Beatty testified this never occurred.

[6] Defendant Beatty denied that he turned the air conditioning down or off.

for air. DE 151-1 at 101:11-19. Plaintiff was hot and uncomfortable; but he did not lose consciousness and he could breathe. *Id.* at 101:20-25; 102:1-8. Defendant Beatty responded that it was not meant to be comfortable and left again. Historical weather data, of which the Court takes judicial notice, reveals the temperature in the area on the afternoon of May 20, 2012, was approximately eighty-four degrees. *See* "Local Climatological Data: Hourly Observations on May 20, 2012," U.S. Dep't of Commerce Nat'l Oceanic & Atmospheric Admin. (accessed July 25, 2017).

Plaintiff testified that he was in the hot patrol car for more than thirty minutes. DE 156-1 at ¶ 41. As noted above, Defendant Beatty arrested Plaintiff at 14:21:45 and then took an approximately thirty-second walk to the patrol car. Defendant Beatty notified dispatch again when he left the scene to transport Plaintiff to jail, as shown on CAD report call number 12121591 at 14:43:47 as "Beatty in route to CJ." But based on the CAD reports, Plaintiff was in the hot patrol car for approximately twenty-two minutes. Defendant Beatty turned the air conditioning on before beginning the drive to the county jail. DE 156-1 at ¶¶ 44-45.

Finally, there is conflicting evidence about when the LifeStar helicopter landed at the scene of the accident. It is undisputed that the helicopter ultimately landed at mile marker 91. Defendant Beatty asserts that he asked Plaintiff to leave the area, in part, because he believed the helicopter needed to land in the area where Plaintiff was standing. DE 151-4 at ¶ 8. In his Reply, Defendant Beatty argues the helicopter did not land until

14:57:29, citing the following notation in the CAD report: "671 REQX70 APPROACH AWAY FROM MEDIANREF FUEL LEAK." DE 151-3 at 7. However, that is inconsistent with Defendant Beatty's Affidavit, which states: "I placed Plaintiff in the rear of my patrol vehicle where he waited for a few minutes while the helicopter landed." DE 151-4 at ¶ 11. Defendant Beatty testified to leaving the scene at 14:43:47—approximately fifteen minutes before 14:57:29.

Plaintiff points to evidence that the helicopter landed before his arrest. Plaintiff testified that although he thought the helicopter was on the ground before his arrest, he was not certain. However, the argument finds support in notations in the CAD report, including: 4:19:37 "CHOPPER LANDING PER 1439." DE 151-3 at 7. This is consistent with the Incident Report completed by Martin County Fire Rescue, which states that the helicopter arrived at 14:21:00 and departed at 14:29:00. DE 157-3 at 16. Indeed the Incident Report reflects that the helicopter had arrived at the chosen destination—St. Mary's Hospital—by 14:40:00. *Id.*

III. Analysis

A. Motion for Summary Judgment by Deputy Sheriff Beatty.

i. 42 U.S.C. § 1983 Claims Against Deputy Sheriff Beatty.

The § 1983 claims against Defendant Beatty are grounded in a plethora of constitutional

provisions including the First, Fourth, Eighth, and Fourteenth Amendments. The seizure of Plaintiff's phone allegedly violated his First Amendment right to record police activity and his Fourth Amendment right to freedom from unreasonable searches and seizures. Plaintiff alleges the seizure of his person—his arrest—also violated his Fourth Amendment right to freedom from unreasonable searches and seizures. Finally, Plaintiff alleges that two acts amounted to excessive force: (i) Defendant Beatty's use of a pressure point and tightening of Plaintiff's handcuffs and (ii) the time spent in Defendant Beatty's hot patrol car. The Amended Complaint mentioned the Fourth, Eighth, and Fourteenth Amendments in connection with Plaintiff's excessive force claims. But, during the hearing, Plaintiff's counsel clarified that he is traveling under only the Fourteenth Amendment.[7] Defendant Beatty—who is being sued solely in his individual capacity—argues he is entitled to qualified immunity on each of Plaintiff's constitutional claims.

"In order to receive qualified immunity, the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (internal

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[7] "The Court: 'The excessive force claim of detention in a hot patrol car is being brought under the Fourteenth Amendment?' Mr. Rubin: 'Yes' .... The Court: 'And with respect to—under which constitutional amendment are you bringing the excessive force claim of the squeezing of the Plaintiff's shoulder and the tightening of his handcuffs?' Mr. Rubin: 'Same answer, Your Honor.' " Hrng. Trans. 29-30.

quotation marks omitted). "[A] government official proves that he acted within his discretionary authority by showing objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority." *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991) (internal quotation marks omitted). It is undisputed that Defendant Beatty was acting within his discretionary authority. *See* DE 156 at 4 ("With no dispute as to Beatty's discretionary authority....").

Once the defendant has established that he was acting in his discretionary authority, the burden shifts to plaintiff. *See Garczynski v. Bradshaw*, 573 F.3d 1158, 1166 (11th Cir. 2009) (per curiam). "One inquiry in a qualified immunity analysis is whether the plaintiff's allegations, if true, establish a constitutional violation. If the facts, construed ... in the light most favorable to the plaintiff, show that a constitutional right has been violated, another inquiry is whether the right violated was 'clearly established.' " *Brown v. City of Huntsville, Ala.*, 608 F.3d 724, 734 (11th Cir. 2010) (internal citations omitted). For an official to lose qualified immunity, the plaintiff must show both that a constitutional violation occurred, *and* that the violation was of a clearly established right. *See id.* "[T]his two-pronged analysis may be done in whatever order is deemed most appropriate for the case." *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223 (2009)).

1. First Amendment Claim.

The Eleventh Circuit recognizes a First Amendment right to record police activity, subject to reasonable time, place, and manner restrictions. *Smith v. Cumming*, 212 F.3d 1332 (11th Cir. 2000). Defendant Beatty allegedly violated this right by seizing Plaintiff's phone while Plaintiff was photographing the accident scene. Defendant Beatty asserts qualified immunity. To overcome qualified immunity, Plaintiff must show Defendant Beatty violated a constitutional right that was clearly established when the alleged violation occurred. The Court can address the two prongs of the qualified immunity analysis in any order.

The Court exercises its discretion to address, first, whether the right at issue was clearly established when the alleged violation occurred. Qualified immunity protects government officials performing discretionary functions from civil liability if their conduct violates no "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). No case law specifically articulates a right to record police activity at the evolving scene of a crash from the median of a major highway. But Plaintiff can show the law was clearly established in three ways: "(1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law."

Lewis v. City of West Palm Beach, 561 F.3d 1288, 1291-92 (11th Cir. 2009) (citations omitted) (emphasis added). *Smith* contains a broad statement of principle clearly establishing a constitutional right applicable to the novel facts of this case—namely, the First Amendment right to photograph police activity. *See Bacon v. McKeithen*, No. 14-cv-37, 2014 WL 12479640 at *4 (N.D. Fla. Apr. 28, 2014) (finding, in the context of an officer being recorded without his consent at a traffic stop, that "the holding in *Smith* dictates that its broad, clearly established principle should control the novel facts in this situation.") (internal quotation, citation omitted).

However, the First Amendment right to record police activity is subject to reasonable time, place, and manner restrictions. The Court must, therefore, determine whether it was clearly established when the alleged violation occurred that Plaintiff was photographing police activity in a reasonable time, place, and manner. There is no case law fleshing out what does (or does not) constitute a reasonable time, place, and manner in the context of photographing police activity. The broad statement of principle that only reasonable restrictions are acceptable is little help. Reasonableness is, the Supreme Court has recognized, "a factbound morass." *Scott v. Harris*, 550 U.S. 372 (2007). Notice that the right to photograph police officers is subject to "reasonable" restrictions tells officers nothing about whether restricting recording in this particular context would (or would not) be reasonable. As the Eleventh Circuit has acknowledged, the " 'clearly established' standard demands that a bright line be crossed. The line is not

found in abstractions—to act reasonably, to act with probable cause, and so on—but in studying how these abstractions have been applied in concrete circumstances." *Post v. City of Ft. Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993). And the Court does not find, on these facts, that Defendant Beatty's conduct was "so egregious" that a constitutional right was clearly violated even in the total absence of case law. Having found qualified immunity applies, the Court need not address whether Plaintiff's First Amendment right was violated in this case.

2. Fourth Amendment Claims.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." As noted above, Plaintiff has alleged two discrete violations of this constitutional right: the seizure of his phone and the seizure of his person. The Court turns, first, to the seizure of Plaintiff's phone.

a. Seizure of Plaintiff's Phone.

"Ordinarily, the seizure of personal property is per se unreasonable unless the seizure is pursuant to a warrant issued upon probable cause." *United States v. Virden*, 488 F.3d 1317, 1321 (11th Cir. 2007). But there are several exceptions, including the existence of exigent circumstances. Exigent circumstances may arise from a variety of situations: "[H]ot pursuit of a fleeing felon, or imminent destruction of evidence, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling." *Minnesota v. Olson*, 495 U.S.

91, 100 (1990) (quotation and citation omitted). However, "[p]olice officers relying on this exception must demonstrate an objectively reasonable basis for deciding that immediate action is required." *United States v. Young*, 909 F.2d 442, 446 (11th Cir. 1990).

Defendant argues there is no constitutional violation, citing his "belief that the photographs [on Plaintiff's phone] were evidence and would possibly be destroyed." DE 151 at 5. As an objective basis for his belief, Defendant notes Plaintiff's offer to delete the photographs. But that offer was made only *after* Plaintiff's phone had been seized. It could not, therefore, have served as the basis for an objectively reasonable belief that Defendant was justified in seizing Plaintiff's phone in the first place. Counsel also cites, as an alternative objective basis, general knowledge "that things can disappear, especially on a phone, once they are away from the scene, once they are no longer available." Hrng. Trans. 16:13-15. Taken to its logical conclusion, this argument would justify the seizure of any phone containing photographs or recordings of a potential crime scene—such a finding sweeps too broadly. Based on the record evidence and the required inferences at this stage of the matter, the Court finds Defendant's summary seizure of Plaintiff's phone violated Plaintiff's Fourth Amendment rights.

The Court must next analyze whether the relevant law was clearly established at the time of the seizure. It has been the law of this Circuit for over a decade that officers relying on the exigent circumstances exception must show that the facts would have lead a reasonable, experienced officer to

believe the evidence might be destroyed before a warrant could be secured. *See Young*, 909 F.2d at 446. There is no evidence in the record to support an objectively reasonable belief that the destruction of the photographs was imminent. Plaintiff was photographing the accident scene when Defendant Beatty approached him and took his phone. Nothing said or done by Plaintiff before the seizure provided any indication he intended to delete the photographs. Nor did Defendant Beatty make any inquiry about the photographs in an effort to determine whether they actually constituted evidence potentially relevant to the Florida Highway Patrol's investigation before seizing the phone. Taking the facts in the light most favorable to Plaintiff, *nothing* was said before the seizure. Therefore, Defendant Beatty is not entitled to qualified immunity on Plaintiff's claim that the summary seizure of his phone violated the Fourth Amendment.

b. Seizure of Plaintiff's Person.

Plaintiff also alleges his arrest violated the Fourth Amendment. An individual has a right under the Fourth Amendment to be free from unreasonable searches and seizures. An arrest is a seizure of the person. *California v. Hodari D.*, 449 U.S. 621, 624 (1991). The reasonableness of a warrantless arrest turns on whether the officer had probable cause. "A warrantless arrest without probable cause violates the Fourth Amendment and forms the basis for a section 1983 claim." *Ortega v. Christian*, 85 F.3d 1521, 1525 (11th Cir. 1996). For probable cause to exist, an arrest must be objectively reasonable under the totality of the circumstances. *Bailey v. Bd. of Cty.*

Comm'rs of Alachua Cty., 956 F.2d 1112, 1119 (11th Cir. 1992). This standard is met when "the facts and circumstances within the officer's knowledge, and of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Williamson v. Mills*, 65 F.3d 155, 158 (11th Cir. 1995).

Although an officer who arrests an individual without probable cause violates the Fourth Amendment, his error "does not inevitably remove the shield of qualified immunity." *Skop v. City of Atlanta, GA*, 485 F.3d 1130, 1137 (11th Cir. 2007). Even if the officer did not have actual probable cause, the Court must apply the standard of "arguable probable cause," asking whether "reasonable officers in the same circumstances and possessing the same knowledge as the Defendant[ ] *could have believed* that probable cause existed to arrest." *Lee v. Ferraro*, 284 F.3d 1188, 1195 (11th Cir. 2002) (emphasis added, quotation marks omitted). This standard recognizes officers may make reasonable but mistaken judgments regarding probable cause. *Skop*, 485 F.3d at 1137. But it does not shield officers who unreasonably conclude that probable cause exists from liability. Id.

Whether Defendant Beatty had probable cause or arguable probable cause to arrest Plaintiff depends on the elements of the alleged crime, *Crosby v. Monroe Cty.*, 394 F.3d 1328, 1333 (11th Cir. 2004), and on the operative facts, *Skop*, 485 F.3d at 1137-38. Defendant Beatty argues there are four crimes for which he had probable cause to arrest Plaintiff: resisting an officer

without violence in violation of Florida Statute § 843.02; stopping, standing, or parking in a prohibited place in violation of Florida Statute § 316.1945; walking on a limited access facility in violation of Florida Statute § 316.130(18); and hindering or attempting to hinder a firefighter in performance of his duty in violation of Florida Statute § 806.10. Although Plaintiff was only charged with resisting an officer without violence, Defendant Beatty is shielded by qualified immunity if he had probable cause or arguable probable cause to arrest Plaintiff for *any* offense. *Bailey*, 956 F.2d at 1119 n.4.

Defendant Beatty had probable cause to arrest Plaintiff for a violation of Florida Statute § 316.1945(11), entitled "Stopping, standing, or parking prohibited in specific places." It prohibits stopping, standing, or parking:

> On the roadway or shoulder of a limited access facility, except as provided by regulation of the Department of Transportation, or on the paved portion of a connecting ramp; except that a vehicle which is disabled or in a condition improper to be driven as a result of mechanical failure or crash may be parked on such shoulder for a period not to exceed 6 hours. This provision is not applicable to a person stopping a vehicle to render aid to an injured person or assistance to a disabled vehicle in obedience to the directions of a law enforcement officer or to a

> person stopping a vehicle in compliance with applicable traffic laws.[8]

Under Florida law, a law enforcement officer may arrest a person without a warrant if "[a] violation of chapter 316 has been committed in the presence of the officer." Fla. Stat. § 901.15(5). It is undisputed that Plaintiff pulled over on the shoulder of the northbound lanes of Interstate 95, out of the lane of travel. He stopped his car and then went to the overturned car, which was on the median. There is no evidence that Plaintiff's car was located anywhere but the northbound shoulder of Interstate 95. Interstate 95 is a limited access facility.[9] Therefore, stopping

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[8] The citation to this specific statutory provision is provided for the first time in Defendant Beatty's Reply. However, the argument was not raised for the first time in Defendant's Reply. *See* Local Rule 7.1 ("[R]eply memorand[a] shall be strictly limited to rebuttal of matters raised in the memorandum in opposition[.]"). Rather, Defendant Beatty's Motion for Summary Judgment states, in the context of his argument from Florida Statute § 316.130(18) that "Plaintiff could have been cited and taken into custody for parking on the side of the road and remaining in the median after first responders arrived. Although his initial presence may have been permitted for purposes of rendering aid, once the first responders arrived Plaintiff could no longer legally remain." DE 151 at 6. Accordingly, this argument is properly before the Court.

[9] A limited access facility is defined as: "A street or highway especially designed for through traffic and over, from, or to which owners or occupants of abutting land or other persons have no right or easement, or only a limited right or easement, of access, light, air, or view by reason of the fact that their property abuts upon such limited access facility or for any other reason. Such highways or streets may be parkways from which trucks, buses, and other commercial vehicles are excluded or

and parking on the northbound shoulder is prohibited unless one of the exceptions provided in the statute applies. When Plaintiff first pulled over in an attempt to aid the occupants of the overturned vehicle, he would arguably have been covered by the exception for "a person stopping a vehicle to render aid to an injured person ..." Fla. Stat. § 316.1945(11).

But none of the exceptions outlined above would have permitted Plaintiff to be parked on the shoulder of Interstate 95 at the time he encountered Defendant Beatty. When Defendant Beatty approached Plaintiff, Plaintiff was not "render[ing] aid to an injured person or assistance to a disabled vehicle in obedience with the directions of a law enforcement officer or to a person stopping a vehicle in compliance with applicable traffic laws." *Id.* Instead, Plaintiff was standing forty to fifty feet away from the accident scene (and one hundred and twenty-five feet north of his own vehicle) taking photographs. As noted above, the only evidence in the record indicates Plaintiff's vehicle was on the northbound shoulder. Therefore, Defendant Beatty had probable cause to arrest Plaintiff for violating Florida Statute § 316.1945(11). The existence of probable cause is a complete bar to Plaintiff's claim that his arrest violated the Fourth Amendment. *See Rankin v. Evans*, 133 F.3d 1425, 1435 (11th Cir. 1998). Having concluded Defendant Beatty had probable cause to arrest Plaintiff for violating Florida Statute § 316.1945(11), the Court need not address whether

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may be freeways open to use by all customary forms of street and highway traffic." Fla. Stat. § 316.003(33).

there was probable cause to arrest Plaintiff violating the other statutes cited by Defendant.

3. Fourteenth Amendment Claims.

The standard for showing excessive force under the Fourteenth Amendment is more difficult to meet than the standard for showing excessive force under the Fourth Amendment. Plaintiff argues that two happenings amount to the application of excessive force in violation of the Fourteenth Amendment: (i) the tightening of his handcuffs and Defendant Beatty's use of a pressure point as well as (ii) Plaintiff's detention in a hot patrol car.

To establish a claim for excessive force, the plaintiff must show both that defendant acted with a malicious and sadistic purpose to inflict harm and that more than a de minimis injury resulted. *See Johnson v. Breeden*, 280 F.3d 1308, 1321 (11th Cir. 2002). To determine whether force was applied maliciously and sadistically, federal courts look to: (1) the extent of the injury; (2) the need for application of force; (3) the relationship between the need and the amount of force used; (4) any efforts made to temper the severity of a forceful response; and (5) the extent of the threat to the safety of staff and inmates, as reasonably perceived by responsible individuals on the basis of the facts known to him. *Campbell v. Sikes*, 169 F.3d 1353, 1374 (11th Cir. 1999) (quoting *Whitley*, 475 U.S. at 320-21).

The qualified immunity inquiry usually involves two prongs. For claims of excessive force in violation of the Eighth or Fourteenth Amendments,

however, a plaintiff can overcome a defense of qualified immunity by showing only the first prong, that his Eighth or Fourteenth Amendment rights have been violated. *Johnson v. Breeden*, 280 F.3d 1308, 1321–22 (11th Cir. 2002). The Eleventh Circuit created this rule because, for an excessive-force violation of the Eighth or Fourteenth Amendments, "the subjective element required to establish it is so extreme that every conceivable set of circumstances in which this constitutional violation occurs is clearly established to be a violation of the Constitution...." *Id.*

a. Tightening of Handcuffs and use of Pressure Point.

The Court begins with the threshold inquiry: Whether the force used was more than de minimis. Plaintiff testified that when Defendant Beatty applied the pressure point, Plaintiff's knees buckled because of the severe pain. DE 151-1 at 92:24-25, 93:1-4; DE 57-5 at ¶ 39. Plaintiff also testified that the substantial tightening of the handcuffs caused "excruciating pain." DE 57-5 at ¶ 39. However, Plaintiff never mentioned to Defendant Beatty that he was in pain. *Id.* at 95:6-10. He also recalled that, following the incident, there were no signs of a physical injury—*e.g.* bruises, scrapes, or cuts. *Id.* at 93:8-12. Plaintiff did not ever discuss the arrest with his doctors. *Id.* at 3-13.

According to Plaintiff's expert Dr. Hussamy—who reviewed Plaintiff's medical records approximately four and a half years after the incident—Defendant Beatty's actions caused a severe contusion to both of Plaintiff's wrists and the

exacerbation of Plaintiff's carpal tunnel syndrome, which was pre-existing. DE 87-1. Dr. Hussamy opined that in the years following the arrest, the pain, numbness, and tingling in Plaintiff's hands has worsened; that Plaintiff's injury is permanent; and that Plaintiff may, eventually, need a second carpal tunnel release procedure. *Id.*[10]

While claims involving mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment's Due Process Clause instead of the Eighth Amendment's Cruel and Unusual Punishment Clause, the applicable standard is the same. Accordingly, decisional law involving prison inmates applies equally to cases involving arrestees or pretrial detainees. *See Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996). In the Eighth Amendment context, the Eleventh Circuit found the force used in *Harris* was more than de minimis. 97 F.3d at 505-06 (11th Cir. 1996). There, a group of officers beat plaintiff. *Id.* During the beating, one individual defendant snapped plaintiff's head back with a towel, "mugged" or slapped him twice in the face, and harassed him with several racial epithets and other taunts. *Id.* Plaintiff claimed that some of these actions, particularly the kicking and use of the towel, caused or exacerbated the injuries to his back. *Id.* The Eleventh Circuit characterized its decision as a "close call." The facts here involve the use of less force than

[10] Plaintiff had a carpal tunnel release procedure months before the incident at issue in this case. It did not provide him any relief. DE 87-1 at 4.

Harris. Ultimately, the Court cannot conclude that more than de minimis force was used.[11]

It is true that, taking the facts in the light most favorable to Plaintiff, he had already been handcuffed and was compliant and walking across the median to the patrol car. There is a "basic legal principle [ ] that once the necessity for the application of force ceases, any continued use of harmful force *can* be a violation of the Eighth and Fourteenth Amendments ..." *Williams v. Burton*, 943 F.2d 1572, 1576 (11th Cir. 1991) (emphasis added). However, the Court finds that, as matter of law, the injuries Plaintiff sustained and the force used in this case do not rise to the constitutionally cognizable level illustrated by cases like *Harris*. *See also Cotney v. Bowers*, No. 03-cv-1181, 2006 WL 2772775 at * 7 (N.D. Ala. Sept. 26, 2006) (declining to grant summary judgment on Fourteenth Amendment claim where Plaintiff shackled to the floor of his cell was kicked by officers). In the absence of a constitutionally cognizable injury, there is no Fourteenth Amendment violation. Defendant is entitled to summary judgment on Plaintiff's Fourteenth Amendment claim.

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[11] Defendant urges the Court to credit analogies to cases like *Nolin v. Isbell*, 207 F.3d 1253, 1258 (11th Cir. 2000); *Durruthy v. Pastor*, 351 F.3d 1080 (11th Cir. 2003); and *Rodriguez v. Farrell*, 280 F.3d 1341 (11th Cir. 2001) for the proposition that painful handcuffing is de minimis force. However, in all three of those cases, the force was used *during* an arrest. Here, Plaintiff had already been handcuffed.

b. Detention in Hot Patrol Car.

Defendant Beatty handcuffed Plaintiff and notified dispatch Plaintiff had been placed under arrest, reflected in the CAD report at 14:21:45 as "Beatty w/m 10-15." Plaintiff and Defendant Beatty walked to the patrol car, which took between thirty seconds and one minute. Defendant Beatty notified dispatch again when he left the scene to transport Plaintiff to jail, shown on CAD report call number 12121591 at 14:43:47 as "Beatty in route to CJ." Plaintiff testified that he was in the hot patrol car for more than thirty minutes. But based on the CAD reports, Plaintiff was in the hot patrol car for a half an hour at most. Historical weather data, of which the Court takes judicial notice, reveals the temperature during the afternoon on May 20, 2012, was approximately eighty-four degrees.

In *Anderson v. Naples*, 501 Fed.Appx. 910, 918 n.8 (11th Cir. 2012) the Court noted in *dicta* that plaintiff had not shown "the kind of extreme conduct that amounts to a Fourteenth Amendment violation." There, plaintiff—who was wearing a gorilla suit—was left in a patrol car with the windows up and the air conditioning off for thirty-two minutes (at most) on an afternoon when the high temperature was eighty-one degrees. *Id.* The officer had leaned in the car and turned the air conditioning off.

One arguable difference between these two cases is that the plaintiff in *Anderson* did not produce any evidence showing he was injured by his time in the hot patrol car. *Id.* Here, Plaintiff's counsel asserted during the hearing that Dr. Omar

Hussamy—Plaintiff's expert—concluded that "Mr. Crocker's position in the car and that because he was struggling for air and understandably thrashing around" contributed to the exacerbation of Plaintiff's carpal tunnel syndrome. Hrng. Trans. 38:23-25; 39:1-2. But Dr. Hussamy did not so testify. On cross-examination he merely replied "Yes" when asked the hypothetical question: "[I]f a person was struggling to breathe and their hands are behind their back in a closed compartment in a squad car, *could* the struggle in trying to breathe and get air cause additional wrenching of the wrists?" DE 87-3 at 58:21-25; 59:1-2. This is not the equivalent of testimony that Plaintiff's struggle in the patrol car did, in fact, contribute to his injuries. The Court finds that, as in *Anderson*, Plaintiff's time in the hot patrol car does not rise to the level of a Fourteenth Amendment violation. Therefore, Defendant Beatty is entitled to summary judgment on this portion of Plaintiff's Fourteenth Amendment claim.

ii. State Law False Arrest Claim Against Deputy Sheriff Beatty.

As under federal law, the existence of probable cause bars a claim under Florida law for false arrest. *See Whittington v. Town of Surfside*, 490 F. Supp. 2d 1239, 1256 (S.D. Fla. June 6, 2007) (citing *Von Stein v. Brescher*, 904 F.2d 572, 584 n.19 (11th Cir. 1990)). As noted above, Defendant Beatty had both probable cause and arguable probable cause to arrest Plaintiff for violating Florida Statute § 316.1945(11). Defendant Beatty is, therefore, entitled to summary judgment on Plaintiff's state law false arrest claim.

B. Motion for Summary Judgment by Sheriff William Snyder.

i. 42 U.S.C. § 1983 Claims Against Sheriff Snyder.

Defendant Sheriff Snyder is being sued solely in his official capacity. Suing a municipal official is the functional equivalent of suing the municipality. *Owens v. Fulton Cty.*, 877 F.2d 947, 951 n.5 (11th Cir. 1989) ("For liability purposes, a suit against a public official in his official capacity is a suit against the local government entity he represents."). In a suit filed pursuant to 42 U.S.C. § 1983, a municipality cannot be held liable under a theory of *respondeat superior*. *See Monell v. Dep't of Soc. Serv.*, 436 U.S. 658 (1978). Instead, "a municipality can be found liable under § 1983 only where the municipality itself causes the constitutional violation at issue." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (citing *Monell*, 436 U.S. at 386).

Plaintiff seeks to hold the municipality liable for each of the constitutional violations allegedly committed by Defendant Beatty: A violation of the First Amendment right to record police activity grounded in the seizure of Plaintiff's phone; violations of the Fourth Amendment right to freedom from unreasonable searches and seizures grounded in the seizures of Plaintiff's phone and person, respectively; and use of excessive force in violation of the Fourteenth Amendment. Plaintiff's claims against the municipality are each being brought under three theories of municipal liability: the custom or policy theory, the failure to train theory, and the ratification

theory.[12] However, Defendant Snyder is entitled to summary judgment because Plaintiff has not satisfied his burden with regard to any of the alleged violations.

1. First Amendment Claim.

Plaintiff seeks to hold the municipality liable for Defendant Beatty's alleged violation of Plaintiff's right to record police activity subject to reasonable time, place, and manner restrictions. First, Plaintiff advances the "custom or policy" theory of municipal liability, which has three elements: "(i) that [plaintiff's] constitutional rights were violated; (ii) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (iii) that the policy or custom caused the violation." *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004) (citing *City of Canton*, 489 U.S. at 388). The Court assumes *arguendo* a violation of Plaintiff's First Amendment right to record police activity and turns to the second element—the existence of a policy or custom that constituted deliberate indifference to that right.

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[12] The Amended Complaint is unclear about which of these three theories of municipal liability Plaintiff is asserting with regard to each alleged constitutional violation. And not all of these theories are colorably asserted with regard to each alleged constitutional violation in Plaintiff's Response in Opposition to Defendant Snyder's Motion for Summary Judgment. *See* DE 157. However, the Court will err on the side of caution and analyze each claim under each of the three theories of municipal liability in light of Plaintiff's counsel's comments at the hearing. *See* Hrng. Trans. 42-43.

"A policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality ... A custom is a practice that is so settled and permanent that it takes on the force of law." *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489 (11th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998). These requirements ensure a municipality will not be held liable "*solely* because it employs a tortfeasor." *Monell*, 436 U.S. at 691.

"A municipality's failure to correct the constitutionally offensive actions of its police department may rise to the level of a 'custom or policy' *if* the municipality tacitly authorizes these actions or displays deliberate indifference towards the police misconduct." *Brooks v. Scheib*, 813 F.3d 1191, 1193 (11th Cir. 1987). But there must be some evidence that the municipality was aware of past misconduct. *See id.* (reversing the district court's judgment for plaintiff, holding that "[q]uite simply, there [was] no evidence that city officials were aware of past police misconduct."). Plaintiff's claim that the municipality's failure to enact a policy regarding the First Amendment right to record police officers amounts to deliberate indifference rests solely on his personal experience. Indeed, Plaintiff's counsel recognized as much during the hearing.[13] The record contains

[13] The Court: 'Apart from Defendant Beatty's behavior in this case, is there any evidence that Sheriff Snyder was on actual or constructive notice that omissions in training or a lack of policies regarding citizens' rights to photograph first responders was causing constitutional violations like the one alleged in this

testimony that citizens frequently videotape police encounters. See, e.g., DE 150-6 at 1. But that is a far cry from evidence that the officers being videotaped had previously interfered with recording in violation of the bystanders' Fourth Amendment rights. And Captain Robert Seaman, a 30(b)(6) representative for the Martin County Sheriff's Office testified: "It is not an ongoing and regular occurrence where the phones, that I'm aware of, are taken." DE 150-4 at 12-15. Plaintiff has not provided evidence of a "policy or custom."

Plaintiff's Amended Complaint asserts a second theory of municipal liability: the failure to train theory. A municipality may be held liable for failure to train or supervise its employees, but only where "the municipality inadequately trains or supervises its employees, this failure to train or supervise is a city policy, and that city policy causes the employees to violate a citizen's constitutional rights." *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998) (citing *City of Canton*, 489 U.S. at 389-91). Because a municipality will rarely have a written or oral policy of inadequately training or supervising employees, liability attaches "where a municipality's failure to train its employees in a relevant respect evidences a deliberate indifference to the rights of its inhabitants such that the failure to train can properly be thought of as a city policy or custom ..." *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489-90 (11th Cir. 1997) (quoting *City of Canton*,

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case?' Mr. Rubin: 'No specific instances in the record, Your Honor.' " Hrng. Trans. 48:21-25; 49:1-3.

489 U.S. at 389) (internal quotation omitted). To show deliberate indifference, "a plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action." *Gold*, 151 F.3d at 1351. The Eleventh Circuit has "repeatedly [ ] held that without notice of a need to train or supervise in a *particular area*, a municipality is not liable as a matter of law for any failure to train or supervise." *Id.*

"A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' " to provide such notice; however, the Supreme Court has "hypothesized" that a municipality may also be held liable when a single incident is the "obvious" consequence of a failure to train or supervise. *Connick v. Thompson*, 563 U.S. 51, 61-63 (2011) (quoting *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997)). In *City of Canton*, the Supreme Court presented, as a hypothetical example, the obvious need to train police officers on the constitutional limitations regarding deadly force when the city provides the officers with firearms and knows the officers will be required to arrest fleeing felons. 489 U.S. 378, 390 n.10 (1989).

As discussed above, Plaintiff has not provided evidence of a pattern of constitutional violations similar to that alleged here—*i.e.* the seizure of a device being used by a bystander to record police activity.[14] However, Plaintiff argues Defendant Snyder may nonetheless be held liable because this

[14] *See* fn. 12, *supra*.

incident was an obvious consequence of a failure to train Defendant Beatty on citizens' right to record police activity. Where a constitutional violation is a "plainly obvious consequence" of a failure to train and the situation in which the violation occurs is likely to recur, a municipality may be said to have been deliberately indifferent to the need. *See City of Canton*, 489 U.S. at 390 n.10.

The Supreme Court clarified in *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 409 (1997): "In leaving open in *Canton* the possibility that a plaintiff might succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations, we simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations." Available guidance on the application of the single-incident variation of the failure-to-train theory is limited. It has never been applied by the Supreme Court or by the Eleventh Circuit. There is little doubt, particularly in modern times, that citizens recording police officers is a "recurring situation"—and there is ample support in the record for that conclusion. But the record does not support the conclusion that a violation of citizens' First Amendment rights is a "highly predictable" consequence of failing to equip officers with specific tools for handling that situation. *See, e.g.*, *Gold* 151 F.3d at 1352 (finding contentions that the municipality had failed to train officers regarding the disorderly conduct statute and responding to handcuff complaints fell " 'far short of the kind of

obvious need for training that would support a finding of deliberate indifference to constitutional rights on the part of the city.' ") (citing *City of Canton*, 489 U.S. at 396-97).

Third, and finally, Plaintiff asserts a ratification theory. The sole argument colorably advanced in Plaintiff's Response in Opposition to Defendant Snyder's Motion for Summary Judgment is that the ratification theory applies because a custom not approved through official decision-making channels led to the alleged First Amendment violation and Defendant Snyder must have known about that custom. But, as the Court has explained, Plaintiff has failed to produce evidence of such a custom. During the hearing, Plaintiff's counsel also argued the municipality should be held liable on a ratification theory because the Sheriff knew about this particular incident and nonetheless "failed to implement any review of the incident." Hrng. Trans. 43:14-20. "[W]hen plaintiffs are relying not on a pattern of unconstitutional conduct, but on a single incident, they must demonstrate that local government policymakers had an opportunity to review the subordinate's decision and agreed with both the decision and the decision's basis before a court can hold the government liable on a ratification theory." *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1174 n.12 (11th Cir. 2001), *cert. granted, judgment vacated sub nom. Thomas v. Roberts*, 536 U.S. 953 (2002), *opinion reinstated*, 323 F.3d 950 (11th Cir. 2003). Only when "the authorized policymakers approve a subordinate's decision and the basis for it" have they "ratifi[ed]" that "decision."

City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988). The Eleventh Circuit rejected the same argument being advanced by Plaintiff in *Salvato v. Miley*, 790 F.3d 1286, 1296 (11th Cir. 2015) because "[t]he sheriff did not review any part of Miley's actions before they became final, much less approve the decision and the basis for it." (internal citations, quotations, and alterations omitted). Just so here. Defendant Snyder is entitled to summary judgment on Plaintiff's First Amendment claim.

2. Fourth Amendment Claims.

a. Seizure of Plaintiff's Phone.

Next, Plaintiff seeks to hold the municipality liable for the seizure of his phone. The Court, begins, again, with the "custom or policy" theory of municipal liability. Defendant Beatty did violate Plaintiff's Fourth Amendment rights by seizing his phone. However, Plaintiff has not provided record support for the existence of a custom or policy that constituted deliberate indifference to that constitutional right. *See McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004) (citing *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).

Again, Plaintiff argues that "[a] municipality's failure to correct the constitutionally offensive actions of its police department may rise to the level of a 'custom or policy' if the municipality tacitly authorizes these actions or displays deliberate indifference towards the police misconduct." *Brooks v. Scheib*, 813 F.3d 1191, 1193 (11th Cir. 1987). But, as emphasized above, there must be some evidence that

the municipality was aware of past misconduct. *See id.* (reversing the district court's judgment for plaintiff, holding that "[q]uite simply, there [was] no evidence that city officials were aware of past police misconduct."). Here, again, there is no record evidence that the municipality was aware of past instances of misconduct.

However, proof of a single incident of unconstitutional activity is sufficient to impose liability on the municipality if there is proof the incident was caused by an existing, unconstitutional municipal policy, which can be attributed to a municipal policymaker. As evidence of such a policy, Plaintiff presents the testimony of Captain Seaman and characterizes Captain Seaman as having testified: "[T]hat in Martin County deputies do not need to obtain warrants or consent before seizing personal property, even in the absence of exigent circumstances!" DE 148 at 12. However, much of Captain Seaman's testimony was more nuanced. For example: "We are trained to look at the circumstances ... If at the moment [Defendant Beatty] believed that was directly related to the investigation and may be of benefit and need for the [ ] investigation ... him taking possession of that at that moment I think *could* certainly be justified." DE 150-4:9-16. And it *could* be—provided that, on the facts, there was some applicable exception to the general requirement of a warrant and probable cause (*e.g.* exigent circumstances).

Moreover, to the extent that Captain Seaman *did* testify to such an unwritten practice, his testimony nonetheless falls short of establishing the municipality's liability. Plaintiff can establish the municipality's liability by identifying either: (i) an officially promulgated policy or (ii) an unofficial custom or practice of the municipality shown through the repeated acts of a final policymaker. *Grech v. Clayton Cty., Ga.*, 335 F.3d 1326, 1329 (11th Cir. 2003). There was no official policy of allowing officers to seize evidence he or she believed had evidentiary value. And even assuming Captain Seaman did testify that "unofficial custom or practice" of the Martin County Sheriff's Office allowed officers to seize any evidence he or she believed had evidentiary value that had been operating since 2008, his testimony does not link that "unofficial custom or practice" to the repeated acts of a final policymaker.

Plaintiff also argues the municipality should be held liable for failure to train Defendant Beatty. However, there is no record evidence of a pattern of constitutional violations similar to the seizure of Plaintiff's phone. When asked about the existence of such evidence, Plaintiff's counsel emphasized that Sheriff Crowder reviewed all Internal Affairs inquiries for irregularities, reasoning: "*If* the institution as a whole has this tacit policy to ignore the Constitution as it relates to exigent circumstances ... and the Sheriff is reviewing all of these ... it would be patently obvious to any law enforcement reviewer that this is taking place." Hrng. Trans. 49:10-23. That response begs the question. At the hearing, Plaintiff's counsel also contended that the single-incident

variation of the failure to train theory is applicable. The record does not support the conclusion that a violation of citizens' Fourth Amendment rights is a "highly predictable" consequence of failing to enact a policy specifically addressing securing a citizens' property without a warrant or consent.

b. Seizure of Plaintiff's Person.

Even when individual officers are entitled to qualified immunity, a municipality might still be liable if a plaintiff can demonstrate that the municipality had a policy or custom that led to a constitutional deprivation. *See Monell v. Dep't of Social Servs. of City of New York*, 436 U.S. 658 (1978) ("[I]t is when execution of a government's policy or custom ... inflicts the injury that the government as an entity is responsible under § 1983."). However, the Court need make this inquiry only when a plaintiff has suffered a constitutional deprivation. *See City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (determining that the extent to which departmental regulations infringe on constitutional rights is irrelevant when no constitutional injury, in fact, occurred). As noted above, Defendant Beatty had not only arguable probable cause, but actual probable cause. Accordingly, there was no constitutional violation.

Even assuming the Court had found a Fourth Amendment violation, Plaintiff has not made a showing sufficient to establish municipal liability. The Court begins with the custom or policy theory of liability. There is no official policy approving the practice of making arrests without probable cause or

a warrant. And, as Plaintiff's counsel acknowledged during the hearing, the record contains no evidence of a custom or tacit policy. *See* Hrng. Trans. 45:16-21. Plaintiff has not established a failure to train. Defendant Sheriff Snyder has produced policies on arrest procedure. *See* DE 144-1. Additionally, Captain Seaman's affidavit states that as a sworn certified law officer Defendant Beatty received instruction and completed situational training on arresting persons. DE 144-2 at ¶¶ 1-5. Plaintiff has cited no record evidence to the contrary. Finally, there is no record evidence supporting the ratification theory.

3. Fourteenth Amendment Claims.

Defendant Snyder argues he is also entitled to summary judgment on Plaintiff's Fourteenth Amendment claims. Notably, Plaintiff's Response in Opposition to Defendant Snyder's Motion for Summary Judgment contains no argument whatsoever on this point. But a party's failure to oppose a summary judgment motion does not generally absolve the district court of its responsibility to consider the merits of the motion. *See United States v. One Piece of Real Prop. Located at 5800 SW 74th Ave., Miami, Fla.*, 363 F.3d 1099, 1101 (11th Cir. 2004). Therefore, the Court will address the merits of Plaintiff's Fourteenth Amendment Claims against Sheriff Snyder.

As discussed in the portion of this Order addressed to Plaintiff's claims against Defendant Beatty, Plaintiff has not shown a violation of the Fourteenth Amendment. Therefore, the Court need not address Plaintiff's municipal liability argument.

See City of Los Angeles v. Heller, 475 U.S. 796 (1986) (determining that the extent to which departmental regulations infringe on constitutional rights is irrelevant when no constitutional injury, in fact, occurred).

Even assuming the Court had found a Fourteenth Amendment violation, Plaintiff has not made a showing sufficient to establish municipal liability. The Court begins, once again, with the custom or policy theory of liability. There is no official policy approving the use of excessive force on arrestees in custody. And, as Plaintiff's counsel acknowledged during the hearing, the record contains no evidence of a custom or tacit policy. *See* Hrng. Trans. 45:16-21. Plaintiff has not established a failure to train. Defendant Sheriff Snyder has produced policies prohibiting the use of excessive force. *See* DE 144-1. Additionally, Captain Seaman's affidavit states that as a sworn certified law officer Defendant Beatty received instruction and completed situational training regarding the use of force. DE 144-2 at ¶ 1-5. Plaintiff has cited no record evidence to the contrary. Finally, there is no record evidence supporting the ratification theory. Defendant Snyder is entitled to summary judgment on Plaintiff's Fourteenth Amendment claims.

4. Claims for Declaratory and Injunctive Relief.

Plaintiff seeks a declaration that the MSCO has failed to consider and safeguard bystanders' First Amendment rights to record police and an injunction compelling the MCSO to enact constitutionally

adequate policies aimed at protecting that right. The requirement that a civil rights plaintiff suing a municipality show that his or her injury was caused by a municipal "policy or custom" is equally applicable were prospective relief is sought. *See Los Angeles Cty. v. Humphries*, 562 U.S. 29, 31 (11th Cir. 2010). A municipality may be sued directly for declaratory or injunctive relief when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" and when constitutional deprivations result from "governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." *Monell*, 436 U.S. at 690–91. Here, as detailed above, Plaintiff has not established municipal liability under either of these theories with regard to any of his First Amendment claims. And, even if he had, the Court is skeptical that Plaintiff would have standing to pursue injunctive relief in light of the standard set forth in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), which requires a plaintiff seeking injunctive relief to show "a sufficient likelihood he will again be wronged in a similar way," absent which he "is no more entitled to an injunction than any other citizen." Therefore, Plaintiff is not entitled to the prospective relief he seeks.

IV. CONCLUSION

For the reasons stated above, Defendant Sheriff Snyder's Motion for Summary Judgment is **GRANTED**. Defendant Beatty's Motion for Summary Judgment, on the other hand, is **GRANTED IN**

PART AND DENIED IN PART. Defendant Beatty is entitled to summary judgment on all of Plaintiff's claims except for Plaintiff's Fourth Amendment claim arising out of the seizure of his phone, which is being brought under 42 U.S.C. § 1983.

DONE AND ORDERED in Chambers, Fort Pierce, Florida, this 28th day of July 2017.