No.: 23-

In the
Supreme Court of the United States

TIMOTHY DAVIS, SR.,
Petitioner,

v.

CITY OF APOPKA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW:

I. Whether the federal court denied effect to the immunity provision of the state statute when it concluded that the arrest of Mr. Davis was objectively reasonable, even in light of Florida's "Justifiable Use of Force" Statute or so-called "Stand Your Ground" law, Fla. Stat. §§ 776.012, 776.032, and that actual *probable cause* to arrest existed although the arresting officers had no specific evidence or witness statement that the force Mr. Davis used against his son was in fact unlawful, based on the totality of circumstances known to the officers at the scene of the arrest?

II. Whether the decision of the Eleventh Circuit to require that a self-defense claim be "conclusively established" by the accused at the time of arrest in order to avoid an arrest, rather than the express prohibition against arrests in Section 776.032(2) Fla. Stat. (2010) "unless [law enforcement] determines that there is probable cause that the force that was used or threatened was unlawful," is an unconstitutional change of state law by a federal court?

III. Whether the Eleventh Circuit and the District Court should have honored the Plaintiff's request and certified the question to the Florida Supreme Court of whether Section 776.032(2) of the Florida Statutes (2011) requires specific evidence of "*probable cause* that the force that was used or threatened was unlawful" as a condition to arrest?

IV. Whether the Eleventh Circuit, as well as the district court, failed to adhere to the axiom that in ruling on a motion to dismiss under Rule 12(b)(6) Fed. R. Civ. P., that the facts alleged in the complaint are taken as true, and all justifiable inferences are to be drawn in favor of the complainant?"

V. Whether the district court erred in refusing Mr. Davis' request for a jury instruction that Police Chief Manley, as final policy maker for the City of Apopka, created a custom or practice of illegally entering residences before warrants were obtained or present at the residence, where former, retired Apopka Police Captain, David Call testified at trial that doing so was "the culture of the Apopka Police Department," Police Chief Manley was "aware of that" practice, and that he observed Chief Maley himself enter the Davis home without a warrant while officers of the Apopka Police Department were searching it?

VI. Whether, to be held liable under 42 U.S.C. §1983, Police Chief Manley was required to have known of the absence of a warrant, when he directly participated in, adopted, or ratified the unlawful search of Mr. Davis' home without a warrant constituting an official policy of the City of Apopka?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

1. Baez, Rafael, former Defendant

2. Burr & Forman LLP, former Counsel for Plaintiff/Respondent

3. Call, David, former Defendant

4. City of Apopka, Defendant/Respondent

5. Creaser, Mark, former Defendant

6. Dalton, Jr., Hon. Roy B., United States District Judge

7. Davis, Timothy Allen, Sr., Plaintiff/Appellant.

8. Dean, Ringers, Morgan & Lawton, P.A., law firm formerly representing Defendant/Respondent City of Apopka

9. DeMaggio, Bryan E., Esquire, former Counsel for Plaintiff/Petitioner

10. Dunn, Nicole, former Defendant

11. Emmanuel, Jr., Charles Edward, former Counsel for Plaintiff/ Respondent

12. Fernandez, Randall, former Defendant

13. Flood, Joseph, Esquire, former Counsel for

Defendant/Appellee City of Apopka

14. Green, James K., Counsel for Plaintiff/Petitioner Timothy Allen Davis, Sr.

15. Ham, David, former Counsel for Plaintiff/Petitioner

16. Hoffman, Leslie R., United States Magistrate Judge

17. Logan, Meagan Lindsay, Esquire, former Counsel for Defendants Apopka

18. Manley, III, Robert, former Defendant

19. Marks, Howard, former Counsel for Plaintiff/Respondent

20. Morales, Michele Denise, former Counsel for Defendant Apopka Police Department

21. Oxford, Lamar, Esquire, former Counsel for Defendant/Respondent City of Apopka

22. Parkinson, Andrew, former Defendant

23. Pettingill, Lynn, former Defendant

24. Rego Chapman, Patricia M.Counsel for City of Apopka, Defendant/Respondent

25. Reindhart, Matthew, former Defendant

26. Spaulding, Hon. Karla R., United States Magistrate Judge

27. Torres, Ruben, former Defendant

28. Walsh, Kimberly, former Defendant

29. White, Elizabeth Louise, Counsel for Plaintiff/Petitioner Timothy Allen Davis, Sr.

30. Wilkinson, Jesse B. Counsel for Plaintiff/Petitioner

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

None of the parties currently has corporate affiliates that have issued shares to the public.

LIST OF ALL PROCEEDINGS IN STATE AND FEDERAL TRIAL AND APPELLATE COURTS THAT ARE DIRECTLY RELATED TO THE CASE

1. **Orange County, Florida Case Number 2011-CF-3424**
   Mr. Davis was acquitted of murder after a jury trial on February 14th 2013.

2. **Middle District of Florida Case No. 6:15-cv-1631-Orl-37KRS.**
   Hon. ROY B. DALTON, Jr., District Judge. Presided over Mr. Davis' Civil Action against the City of Apopka, Apopka, Police Chief Manley, and seven other Apopka Police Defendants for violations of 42 USC 1983, federal and state False Arrest, Unlawful Search, Malicious Prosecution, and Intentional Infliction of Emotional Distress. Dismissed all §1983 False Arrest Claims and state False Arrest Claims, as well as all state claims for Malicious Prosecution, and Intentional Infliction of Emotional Distress with prejudice against all Defendants, and enter judgment in favor of Defendants after a jury trial and verdict on the Warrantless Search of Plaintiff's home.

3. **United States Court of Appeals, Eleventh Circuit Case No. 17-11706.**
   Appeal from the United States District Court for the Middle District of Florida D.C. Docket No. 6:15-cv-01631-RBD-LRH, appealed the district court's order dismissing with prejudice his claims against the City of Apopka, Florida, under Federal Rule of Civil Procedure 12(b)(6). Affirmed in part, Vacated in part, and Remanded for further proceedings.

4. **United States Court of Appeals, Eleventh Circuit Case No. 20-11994.**
   Appeal from the United States District Court for the Middle District of Florida D.C. Docket No. 6:15-cv-01631-RBD-LRH. Affirmed the District Court.

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Davis v. City of Apopka, No. 6: 15-cv-1631-Orl-37LRH (M.D. Fla. May 20, 2020).

Davis v. City of Apopka, 424 F. Supp. 3d 1161 (M.D. Fla. 2019).

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STATEMENT OF THE BASIS FOR JURISDICTION IN THE SUPREME COURT OF THE UNITED STATES

This is a Petition to the Supreme Court of the United States for a Writ of Certiorari to the Eleventh Circuit, seeking review of District Court's dismissal under Rule 12(b)(6) of Counts of his Complaint filed under 42 USC §1983 against the Respondents for violation of Petitioner's Constitutional Rights under the 4th Amendment of the Constitution of the United States to be free from unreasonable arrest and unreasonable search of his home. This honorable Court has jurisdiction under Article III, Section 2, Clause 2 of the United States Constitution as well as

pursuant to 28 USC §1254 (1). There is federal question jurisdiction under 28 U.S.C. §§1331 and 1343. There is supplemental jurisdiction over the state claims under 28 USC §1367.

The opinion and judgment of the Eleventh Circuit was filed on August 28th, 2023, and the opinion later recorded under *Davis v. City of Apopka, 78 F. 4th 1326 (11th Circuit 2023)*. (Doc# 53(Opinion) Doc#54(Judgment)). Rehearing and Rehearing En Banc denied were November 6th, 2023. (Doc# 65-2). The mandate was issued November 14th, 2023. (Doc# 66).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

1) **Amendment IV, Constitution of the United States**

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

2) **42 USC §1983 ("Civil action for deprivation of rights")**

> Every person who, under color of any statute, ordinance, regulation, custom, or

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

3) **§776.012(1) Fla. Stat. (2011)(Use or threatened use of force in defense of person.)**

A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, **a person is justified in the use of deadly force and does not have a duty to retreat if:**
(1) He or she reasonably believes

that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; or

(2) Under those circumstances permitted pursuant to s. 776.013.

4) **§776.032(2) Fla. Stat. (2011)("Immunity from criminal prosecution and civil action for justifiable use of force.")**

(2) A law enforcement agency may use standard procedures for investigating the use or threatened use of force as described in subsection (1), but the agency may not arrest the person for using or threatening to use force unless it determines that there is *probable cause* that the force that was used or threatened was unlawful.

History.—s. 4, ch. 2005-27.

5) **§901.15, Fla. Stat. (2011)("When arrest by officer without warrant is lawful.")**

A law enforcement officer may arrest a person without a warrant when:

(1)The person has committed a felony or misdemeanor or violated a municipal or county ordinance in the presence of the officer. An arrest for the commission of a misdemeanor or the violation of a municipal or county ordinance shall be made immediately or in fresh pursuit.

(2)A felony has been committed and he or she reasonably believes that the person committed it.

6) **§ 901.151, Fla. Stat. (2011)("Stop and Frisk Law.")**

(1) This section may be known and cited as the 'Florida Stop and Frisk Law.'
(2) Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state or the criminal ordinances of any municipality or county, the officer **may temporarily detain** such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding the person's presence abroad which led the officer to believe that the person had committed, was committing, or was about to commit a criminal offense.
(3) No person shall be temporarily detained under the provisions of subsection (2) longer than is reasonably necessary to effect the purposes of that subsection. Such temporary detention shall not extend beyond the place where it was first effected or the immediate vicinity thereof.
...

STATEMENT OF THE CASE

Facts Material to Consideration of the Questions Presented Police Arrive and Arrest

Upon arriving at the driveway of Davis's home on October 1st, 2011, at 6:30pm, responding to a 911 call Davis's wife placed stating that Timothy Davis, Sr. (Davis) and their adult son Timothy Davis, II (Timmy) were involved in a confrontation and she believed he had shot their son, officers Mark Creaser and Rafael Baez of the Apopka Police Department(APD) found the two men on the ground near the open garage. *TAC ¶¶12, 18, 19, 47.* APD Chief Manley (Manley) arrived on the scene and joined the officers as they approached Davis and Timmy. *Id. at ¶¶ 47, 48.* The three officers found Davis, visibly injured, with a bloodied mouth and face, severe, visible bruises and contusions all over his face resulting from the attack by Timmy. *Id. at ¶49.* Davis had visible swelling around both of his eyelids, swelling to his jaw and his lips were busted. *Id.* Ofc. Creaser asked "Who shot him." *Id at 50.* Davis explained Timmy attacked him, beat him up, hurt his knees, and kept coming at him when he fired the gun. *Id. at 51, 55 and 39.* Timmy, a former college football player, weighed 280 pounds and stood 6'1" tall. *Id. at 21.* Davis, then was a 47-year-old man standing 5'10 and weighed 240 pounds. He was a medically retired, disabled Orlando Police lieutenant who retired in 2006 due to bi-lateral ruptures to both knees he sustained simultaneously in the line of duty. Davis stated he shot Timmy "because [he] beat me up and kept coming at me." *See id. ¶51* When Creaser asked Davis where the gun was, he stated that the gun was

in his pants' front pocket. *See id.* ¶¶*51, 54, 55.*

The Arrest

Officers Creaser and Baez brandished their guns and ordered Davis to move away from Timmy. Davis replied, "I can't get up; I can't move my legs because when my son tackled me, I heard my knees pop, and now my legs are hurt." *Id at* ¶¶*52, 53.* Officer Creaser then handcuffed Davis behind his back and recovered the gun. *See id* ¶¶*56, 93, 95, 96.* Without communicating the fact to Davis, Creaser placed Davis under arrest as he handcuffed him. The arrest was for first degree (premeditated) murder of Timmy. *Id at* ¶*97.* The arrest affidavit was dated October 1st, 2011 at 6:30 pm, within the same minute of the officer's reported arrival time. *Id.* This murder arrest was even though Timmy, who could corroborate or contradict Davis, was alive and verbally responsive, yelling at the officers "leave my daddy alone." *Id.* at ¶¶57, 97.

Manley then ordered Baez and Creaser to lift Davis off the ground and into the garage. *Id at* ¶58. Once inside the garage, Davis reiterated to the officers and Manley that his son had attacked and caused him great bodily harm. *Id at* ¶*59.* Manley ordered Davis and Timmy to be transported to different hospitals for treatment of their injuries. *Id.* ¶¶60, 63. Timmy, Mrs. Davis and her minor daughter were transported to the Orlando Regional Medical Center, where Timmy died at 12:36 a.m. on October 2, 2011. *See id.* ¶¶*64, 114.* Davis was not ambulatory due to the knee injuries Timmy caused him that required surgery and over 40 stitches. *Id at 59.*

Timmy had a gunshot wound and required surgery.

Deliberate Police Misconduct/Plan of Attack

In the criminal court proceeding, (1) APD officers edited videotape evidence in an attempt to conceal the warrantless search of the home, (*see id.* ¶¶*76–78*), (2) sped up video footage of the shooting to make it appear more incriminating, (3) mistranscribed the recorded statement from Davis's minor daughter to make Timmy appear unaggressive and non-threatening, with his attention diverted away from Davis. (s*ee id.* ¶136.), and (4) falsely claimed the actual time of arrest was "some unknown" time after midnight on October 2nd 2011 instead of the date and time provided on the report (*see id,* ¶*132.*).

Crime Scene Investigator Dunn, according to her own testimony in the criminal proceeding, said a high ranking on-scene APD manager whose name she could not recall specifically ordered her not to photograph Davis's injuries, as she would normally do, when she went to his hospital room but only to confiscate his clothing and jewelry. *Id at* ¶¶*104-106.* Davis only then learned that he was under arrest for First Degree (Premeditated) Murder. Timmy was still alive until 12:36 am. *Id. at* ¶¶*90-98.* Officers previously told Davis that he was only being detained or "baby-sitted" up until then. *Id. at* ¶132.

Among other false statements to obtain the search warrant, Detective Reindhart stated the Apopka police officers had probable cause to believe Davis's residence contained narcotics. However,

during the state court criminal proceedings against Davis, the officers admitted under oath they never had probable cause to believe narcotics were in the Davis residence. *Id at ¶83*. Also, Det. Reinhart lied on the search warrant application stating two neighbor-witnesses gave sworn statements they observed Timmy walk in the garage with Davis following behind him and they heard gunshots moments later. *Id.* Det. Reinhard further lied to say a third neighbor heard gunshots immediately after the men entered the residence. *Id.* Apopka Police carried out these acts in accordance with a plan they formulated in the front yard of Davis' home after his arrest and transport to the hospital. *Id. ¶68-71.* The "plan of attack" against Davis was "[m]otivated by personal animus and ill will toward [Davis] because of a …bitter local youth football … coaching rivalry" between Manley and Davis.

Deprivation of Freedom

Davis's arrest for 1st degree (premeditated) murder, rather than a lesser charge, prevented Davis from attending Timmy's funeral. Manley delayed Davis's release on bond by failing to provide mutual aid, as the local home confinement unit requested. Davis was detained in his home until he was acquitted. *Id. ¶¶143, 146–49, 152.*

Post Acquittal §1983 Complaint

After his acquittal, Davis timely filed a complaint in the federal district court for the Middle District of Florida. The final complaint was the third amended complaint. It detailed how Davis became the

victim of domestic violence when his son first attacked him without provocation in the upstairs bathroom of the home because he was angry that Mrs. Davis had given Timmy's young child to the child's mother against Timmy's wishes when she came to the house for the child. *See id.* ¶¶*21-31.* Timmy head-butted his father, football- tackled him, slammed him down to the tile bathroom floor, which caused a concussion, breaking his eyeglasses, then straddled his defenseless father and proceeded to repeatedly punch Davis violently in the face, resulting in the injuries to Davis the arresting officers must have seen upon their arrival. *Id at 31, 32.* The complaint further detailed how after Mrs. Davis coaxed Timmy off Davis in the upstairs bathroom floor, Davis stumbled down the stairs to wait for the paramedics. *Id.*

Timmy Continues His Pursuit

Timmy followed Davis downstairs. Davis fled "into the garage to get away from Timmy." Still enraged, Timmy followed his father into the garage. *Id.*¶¶*37, 38.* In an effort to keep Timmy from Attacking him again*,* Davis limped out of the garage and retrieved his firearm from his vehicle in the driveway. *Id. at ¶39.* Despite seeing the gun, displayed as a threat to ward off further attack, Timmy took off the sweatshirt he was wearing, threw it on the ground, and aggressively walked toward Davis. Davis interpreted his son's actions as imminent danger and first fired a shot in Timmy's direction to scare him off. *Id.* ¶¶*40, 41.* Timmy continued toward his father undeterred. *Id.* Davis then fired a second time to defend himself from Timmy's attack. *Id.* ¶¶*42.* When he noticed bleeding

from Timmy's chest, he called for his wife to help their son into the car to go to the hospital. *Id.* ¶¶*42, 43*. As they neared Mrs. Davis's car, Timmy collapsed to the ground and Davis lost his balance and fell on top of Timmy because Davis's knees buckled. *Id.* ¶*44*. Davis's daughter witnessed the shooting in the garage. *Id* ¶*136*.

Mrs. Davis's Statement

Mrs. Davis provided a recorded statement to the APD, "that when she observed Timmy on the ground after he had been shot, he was apologizing to his father, telling Davis that he was sorry he had hurt Davis." *Id at* ¶*137*. Mrs. Davis further delineated how Timmy had been "stressed out about a lot of stuff at the time of the incident," having been "sent home" from playing college football due to injury and "having relationship problems with his [infant] child's mother" in "a relationship that was not working out as he had hoped." *Id*. She also stated "Timmy was getting progressively nastier and more vulgar. *Id.* Davis was encouraging Timmy [to] handle any custody dispute with the court. *Id.*"

Proceedings Below:

Davis was acquitted of the murder charge after a jury trial in Orange County, Florida Case Number 2011-CF-3424 on February 14th, 2013. Petitioner Davis filed his Third Amended Complaint ("TAC") on March 7, 2016 under 42 U.S.C. §1983 and Florida law against the City of Apopka and various police officers in their individual capacities for violations of his federal constitutional rights, stemming from the

warrantless search of his home and his wrongful arrest and prosecution. On July 1, 2016, Judge Roy B. Dalton Jr., of the U.S. District Court for the Middle District of Florida, issued an Order granting the City's Motion to Dismiss, and dismissing with prejudice Counts I and II of the TAC. On March 17, 2017, following a settlement with the individual defendants, the district court dismissed with prejudice the action against all defendants, including the City. On April 14, 2017, Davis timely appealed the dismissal of the claims against the City in Counts I, II, XVIII and XXVI. On April 12, 2018, the Eleventh Circuit reversed the final judgment that had dismissed the case with prejudice. *Davis v. City of Apopka, 734 Fed. Appx. 616, 619, 620 (11th Cir. 2018)*: "We agree with Davis that the district court erred in failing to consider [Chief of Police] … Davis stated a claim … against the City based on a single decision by a final policymaker. ... Since Davis also alleged that Manley, as Chief of Police, personally ordered the search, Davis stated a claim against the City ..."

As to Davis's false arrest claims, this Court held:

> We also remand his §1983 and state-law false arrest claims … Because Davis is right that the correct standard is actual probable cause and **the district court did not consider the impact of Florida's ["Stand Your Ground"] law** on whether probable cause existed to arrest him, we vacate the district court's dismissal with prejudice. *Id.*

On remand, the City filed a Motion for Clarification Regarding Probable Cause and Supplemental Motion to Dismiss Plaintiff's False Arrest Claims("Motion"), which the district court granted, dismissing Davis's false arrest claims with prejudice. Davis then moved under 28 U.S.C.§1292(b) to certify an interlocutory appeal of the district court's dismissal of the false arrest claims, so that this Court could consider the Stand Your Ground immunity issue, which the City opposed, and the district court denied. Davis sought to **certify two questions**:

(1) Does the **"conclusively established" test** set forth in *Williams v. Sirmons, 307 Fed. Appx. 354, 358-359 (11th Cir. 2009)*, long applicable to common law self-defense, apply to Stand Your Ground statutory immunity from arrest, thereby **rendering statutory immunity surplusage**?

(2) Does the **Stand Your Ground law require as a necessary determination a finding of probable cause as to the unlawfulness of force before making an arrest** for an offense involving the use or threatened use of force in self-defense?

The district court subsequently granted Davis's motion for partial summary judgment on the unlawful search claim, and that claim proceeded to a jury trial on the City's liability and damages, as the court had already ruled that the City had engaged in an unconstitutional search of Davis's home. The first trial ended in a **mistrial** based upon defense counsel's misconduct; the second trial resulted in a verdict for the City after the district court refused to instruct the

jury that the City could be liable under *Monell* based upon the City's unlawful custom and policy.

Davis appealed again the federal and state arrest claims dismissed by the district court under Rule 12(b)(6) before the trial, the district court's refusal to certify the questions to the Florida Supreme Court, and the refusal of Davis's requested jury instruction. The Eleventh Circuit affirmed the district court on all issues in a written published opinion issued on August 28th, 2023, and denied Davis's Petition for Rehearing and Rehearing *En Banc* on November 6th, 2023.

Basis for Federal Jurisdiction in the Court of First Instance.

Davis timely filed a civil action against the City of Apopka, Police Chief Manely, and several officers of the APD for false arrest in violation of 1983 and Florida law, and for violation of his 4th Amendment right by conducting an unlawful search of his residence without a warrant. The complaint sought that the district court exercise federal question jurisdiction over the 1983 claims and supplemental jurisdiction over the state law claims of false arrest, malicious prosecution, and intentional infliction of emotional distress. The district court had jurisdiction under 28 U.S.C. §§1331, 1343, and 1367.

ARGUMENT

Twenty-seven states in the United States have enacted Stand Your Ground statutes as of the date of this petition. The decision of the Eleventh Circuit in

this case unconstitutionally altered Florida's Stand Your Ground statutes by essentially ignoring them and denying them legal effect. This Court has stated federal courts are "not at liberty to *deny effect* to specific provisions, which Congress has constitutional power to enact" (*NLRB v. Jones & Laughlin Steel Corp.*, 301 US 1 - Supreme Court 1937) and elaborated regarding enactments of state legislatures "Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created State law or to create substantive rights denied by State law." (*Guaranty Trust Co. v. York*, 326 US 99 - Supreme Court 1945).

To dismiss Davis's post-acquittal Stand Your Ground Immunity-based §1983 and state law false arrest claims against the City of Apopka and Police Chief Manley (Manley), the Eleventh Circuit **denied effect to express provisions of important statutes enacted by the Florida legislature**. It did so without permitting the Florida Supreme Court to weigh-in. The Eleventh Circuit **chose a standard** that is not founded in U.S. Supreme Court or even Eleventh Circuit case law in the context of analyzing an element of an offense.

The chosen standard would permit law enforcement to disregard express state statutory requirements that law enforcement agencies determine "that there is *probable cause* that the force that was used or threatened was unlawful" as a condition precedent to making an arrest. It also approves homicide investigations consisting of only two questions and lasting less than one minute, that blatantly ignore observed exculpatory facts. The

decision conflicts with the only known state supreme court to decide this issue directly. The Kansas Supreme Court found that the lack of self-defense is an element of crimes of violence after enactment of the state's Stand Your Ground Immunity Statute, which is almost identical to the statute in this case.

In the trial for the illegal warrantless search of Davis's home, the district court permitted the City and Manley to open an impermissible escape hatch from §1983 liability (1) by allowing the jury to consider as an excuse Manley's claim that he did not know there was no warrant obtained or present, when he saw his officers in the Davis residence prior to the search warrant, and (2) by refusing Davis's requested jury instruction that properly stated the law concerning an issue that was properly before the jury, and refusal resulted in prejudicial harm to Davis.

STANDARD OF REVIEW

This case presents questions of law that are subject to *de novo* review.

"[Courts] review dismissals under Rule 12(b)(6) de novo, accepting the factual allegations in the complaint as true and construing them in the light most favorable to the plaintiff." *Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1288 (11th Cir. 2010) quoted in Davis v. City of Apopka, 734 F. App'x 616 (11th Cir. 2018).* "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' *Iqbal, 556 U.S. at* 570*, 129 S.Ct. at 1949" (citing Bell Atl. Corp. v. Twombly, 550 U.S.*

544, 555, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007)). Davis pleaded sufficient facts for relief in his third amended complaint that were plausible on their face to establish the absence of probable cause to arrest.

Regarding the refusal to provide the requested jury instruction "[courts] accord the trial judge "wide discretion as to the style and wording employed" in jury instructions and verdict forms. *Carter v. Decision One Corp., 122 F.3d 997, 1005 (11th Cir.1997)*. And, [courts] review jury instructions and verdict forms together rather than separately for reversible error. *See Carter, 122 F.3d at 1005*. The element from *Noga* is satisfied if a party proves that the instruction will "`mislead the jury or leave the jury to speculate as to an essential point of law.'" *Noga*, 168 F.3d at 1294; *Farley v. Nationwide Mut. Ins. Co., 197 F. 3d 1322 (11th Circuit 1999).*

Part A

False Arrest

I. The Totality of Circumstances surrounding the Arrest:

"The law has been clearly established since at least the Supreme Court's decision in *Carroll v. United States, 267 U.S. 132, 162 (1925)*, that probable cause determinations involve an examination of *all facts* and circumstances within an officer's knowledge at the time of an arrest." *Williams v. Sirmons, No. 08-13218 (11th Cir. Jan. 13, 2009)*. It is the totality of circumstances, including the facts available to the

officer, that are dispositive. *Gates*, 462 U.S. at 231-32, 103 S.Ct. at 2328-29.

Circumstances of the Davis Arrest:

The totality of circumstance known to Creaser, at the time he arrested Davis, could not establish that Davis unlawfully used deadly force against his son. Regarding the lawfulness of the shooting, the officers at the time of arrest "(1) knew Davis and Timmy had been arguing, (2) knew that they had come outside the house, (3) knew that shots had been fired, and (3) when they arrived, they saw that Davis was lying on top of Timmy and (4) had visible injuries to his face" *Davis v. City of Apopka, 78 F. 4th 1326 (11th Circuit 2023) at 1347 (Numbers added).* Also, (5) the officers knew Davis could not stand or walk on account of an injury to his knee, (6) Davis had blood oozing from his mouth, (7) Timmy was alive, (8) Timmy could speak intelligently because he was yelling at the officers, (9) Davis explained to the officers his son beat him up, hurt his knees, and kept coming at him, *TAC ¶51,* and (10) Timmy, who was capable of contradicting Davis's statement, did not do so. (11) He instead yelled for the officers to "Get away from daddy and leave my daddy alone!" *TAC ¶57.* These eleven items do not establish probable cause that the force Davis used was unlawful.

The District Court

The District Court determined that there was **actual probable cause** to support Davis's arrest using the **same facts** and allegations from which it previously found only "**arguable probable cause**."

The finding of only arguable probable cause prompted reversal in the first unpublished written opinion of the 11th Circuit in this matter. *Davis v. City of Apopka, 734 F. App'x 616 (11th Cir. 2018). Probable cause* to arrest exists when an arrest is objectively reasonable based on the totality of the circumstances. See *Rankin v. Evans*, *133 F.3d 1425, 1435 (11th Cir. 1998).*

An Officer's Knowledge Can Preclude Probable Cause

"While an officer needn't prove every element of the charged crime, (citation omitted), her knowledge that an element isn't met—or is exceedingly unlikely to be met—will ***preclude*** **a finding of probable cause**, see Holmes, 321 F.3d at 1081; *Thornton v. City of Macon, 132 F.3d 1395, 1399 (11th Cir. 1998).*" *Butler v. Smith, 85 F. 4th 1102 (11th Circuit 2023).*

"Every" Does Not Mean "None."

The opinion for review reiterates through multiple citations of case law that officers do not have to investigate "***every*** claim of innocence." *Davis v. City of Apopka, 78 F. 4th 1326, 1355 (11th Circuit 2023) at 1337.* But the opinion seems to imply officers do not have to investigate ***any*** claim of innocence under ***any*** circumstances. Here, officers were confronted with ***facts*** that established Davis's justified use of deadly force in self-defense and they chose not to investigate readily obtainable exculpatory evidence.

The opinion under review quoted only the beginning of footnote 10 of *Kingsland*, "officers are not required to perform error-free investigations or independently investigate **every proffered claim of innocence.**" *Kingsland, 382 F.3d at 1229 n.10* . That quote itself is from *Baker v. McCollan, 443 U.S. 137, 145-46, 99 S.Ct.2689, 61 L.Ed.2d 433 (1979).* At 146, *Baker* expressly refers to "a sheriff **executing an arrest warrant"** not being "required by the constitution to investigate independently every claim of innocence." The full footnote 10 of *Kingsland* goes on to state: "However, that is a separate inquiry than the narrow question presented here. Here, Kingsland alleges that the defendants turned a **blind eye to immediately available exculpatory information**, improperly choosing to gather information … in a biased manner." *Kingsland* n.10. The Seventh Circuit has noted "A police officer may not close her or his eyes to **facts that would help clarify the circumstances of an arrest**," which is exactly what the arresting officers did as they arrested Davis. *BeVier v. Hucal, 806 F. 2d 123 (7th Circuit 1986) at 128.*

Paez v. Mulvey, in the opinion under review speaks to **inconsistency** in the evidence. *Paez, 915 F.3d at 1286.* It does not apply to this case with **no inconsistent fact** regarding Davis's justified use of force under Florida law. No one and no fact contradicted Davis's claim of justified use of force in self-defense.

Start by Asking Questions (Reasonable Investigations).

Asking Timmy what happen just before your dad shot you could have provided the available exculpatory information that the officers turned a blind eye to, especially since witnesses including Mrs. Davis heard Timmy on the ground after he was shot apologizing for hurting his father. *TAC 137*. Had the officers questioned Davis's daughter at the time, they would have learned she witnessed the shooting "in the garage," and that she saw her brother with his shirt off moving toward her bleeding father. The APD investigation consisting of two questions and lasting less than one minute was patently unreasonable.

Kingsland's* Requirement for a *Reasonable Investigation

In recent decisions, other than *Davis v. City of Apopka*, the Eleventh Circuit has emphasized rather than abandoned the requirement in *Kingsland* for a reasonable investigation by law enforcement.

> …[E]ven in the arrest context, 'an officer may not `unreasonably disregard certain pieces of evidence' by `choosing to ignore information that has been offered to him or her' or `**electing not to obtain easily discoverable facts**' that might tend to exculpate a suspect. *Cozzi v. City of Birmingham, 892 F.3d 1293, 1294 (11th Cir. 2018)* ...

Warren v. DeSantis, No. 23-10459 (11th Cir. Jan. 11,

2024).

In *Warren*, the Eleventh Circuit found that the governor and his staff **ignored readily available information** contradicting the purported basis for the suspension. *Id.*

A Probable Cause Standard Lower than *Beck v. Ohio.*

Probable cause consists of facts "sufficient to warrant a prudent man in believing that the [suspect] had **committed or was committing an offense**.' *Beck v. Ohio*, 379 U. S. 89, 91 (1964)."

The second *Davis* panel relied on the factually distinct case of *Washington v. Howard* to provide the probable cause standard for *Davis*. *See Washington v. Howard, 25 F. 4th 891 (11th Circuit 2022)* ("Howard was entitled to rely on a *facially valid and lawfully obtained* ***warrant***, and he did not take an affirmative action to continue the prosecution"). *Howard* drew its "substantial chance of criminal activity" standard from the *Wesby* case where D.C. officers conducted an extensive investigation into a wild bachelor party that included strippers giving lap dances and naked people having sex in an abandoned house. *District of Columbia v. Wesby*, 583 US 48, 57 (2018).

The police in *Wesby* not only telephoned a purported tenant and contacted the owner to confirm no one was authorized in the house, but they interviewed all twenty-one people they encountered in the house prior to making any arrests. D.C. officers developed probable cause specifically of partygoers

"entering the property without authorization." Prior to arresting any partygoers, the D.C. police: (1) detained suspects, (2) investigated, and (3) obtained warrants. APD did nothing remotely similar. APD arrested Davis for murder without a reasonable investigation and without probable cause.

The "substantial chance of criminal activity" language in *Wesby* was from a footnote in *Illinois v. Gates* (concerning a "magistrate's issuance of a search warrant on the basis of a partially corroborated anonymous informant's tip.") *Illinois v. Gates*, 462 US 213 (1983) at footnote 13 (the only place in *Gates* the phrase "substantial chance" appears). The first *Davis* panel cited *Lee v. Ferraro, which* stated the probable cause standard like *Beck v. Ohio (1964) and is* consistent with Florida arrest procedures. *See Lee v. Ferraro*, 284 F. 3d 1188 (11th Cir 2002) and *§901.151 F.S. (2011).*

II. Florida Law (Unlawful Use of Force):

"Whether an officer possesses *probable cause* ... depends on the **elements of the alleged crime** and the **operative fact pattern.**" See generally *Brown v. City of Huntsville, 608 F.3d 724, 735 (11th Cir. 2010).* At least one other district court in Florida found "Looking to Florida law, it appears in that situation the person would have immunity from arrest unless "there is probable cause that the force that was used . . . was unlawful." Fla. Stat. § 776.032(2)." *Martelli v. Knight, Dist. Court, MD Florida 2020.*

The opinion for review here stated, in parenthesis, "***The court did not believe* that the**

absence of self-defense was an element of murder under Florida law."

The plaintiff requested the district court certify this question to the Florida Supreme Court. Instead, it concluded "In light of Florida's Stand Your Ground law, the facts as alleged did not '***conclusively establish* the sufficiency of the defense [of self-defense]** so as to **negate probable cause** in the context of a false arrest claim.'" When someone dies at the hands of another it is either intentionally, accidentally, or as the result of self-defense. Therefore, a person should not be charged with murder if it could be proven that person was trying to defend himself.

A. The Problem with "conclusively established."

"Conclusively establishing" the sufficiency of self-defense is not a fair reading of or a proper standard for the requirement under Florida law that the force used in the commission of a crime of violence must be unlawful. Under Florida's Stand Your Ground law, "[a] person is **justified** in using deadly force if he or she reasonably believes that using such force is necessary to prevent imminent death or great bodily harm to himself." *Fla. Stat. § 776.012*. A person who uses such deadly force "is immune from criminal prosecution" for the use of force. *Id.* §776.032(1).

"[T]he statute provides, an officer 'may not arrest [a] person for using force unless [the officer] determines that there is probable cause that the force that was used was unlawful.' *Id.* §776.032(2). 'Section

776.032(1) expressly grants defendants a **substantive right** to not be arrested, detained, charged, or prosecuted as a result of the use of legally justified force.' *Dennis v. State, 51 So. 3d 456, 462 (Fla. 2010)"* quoted in *Davis v. City of Apopka, 734 Fed. Appx. 616 (11th Cir. 2018). See §776.032(2) Fla. Stat. (2011).*

Any fair reading of Florida's Stand Your Ground provision leads to the conclusion that an element of murder in Florida is that the use of force must be unlawful. The facts alleged that the officers did not *at all* investigate any of Davis's claims. Davis only pleaded for the officers to investigate the use of force not for the officers to believe him. Officers were precluded from a finding of probable cause because they never investigated and had no facts or witness statement to support a determination that the use of force was unlawful.

Stand Your Ground Immunity Changed the Rules

Stand Your Ground (SYG) Immunity expressly made the lack of self-defense an element of probable cause for all crimes of violence in Florida. The district court and the Eleventh Circuit expressly regarded Davis's claim of self- defense as **only an affirmative defense**, where the Florida legislature expressly provided for immunity from arrest. Thus, **the federal courts here gave the statute of the Florida legislature *no legal effect* and they *unconstitutionally substituted a judge-made standard for that of the state statute.***

B. Florida Arrest Procedures call for Temporary Detention.

The arrest procedures for warrantless arrests the Florida legislature prescribed in **§901.15** and **§901.151 of the Florida Statutes (2011)** expressly provide for temporary detention of persons suspected of committing crimes. They authorize arrest when "(2) A felony has been committed and he or she reasonably believes that the person committed it." *§901.15(2) F.S. (2011).* "(2) Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state or the criminal ordinances of any municipality or county, the officer may **temporarily detain** such person…" *§901.151(2) F.S.(2011).* "(3)No person shall be temporarily detained under the provisions of subsection (2) longer than is **reasonably necessary** to effect the purposes of that subsection." *Id.*

Arrest procedures permitting temporary detention for a reasonable time to determine probable cause to arrest was the only clear edict from *Kumar v. Patel, that* has any applicability to this case. The Florida Supreme Court stated "The law is clear that we expect officers to temporarily detain …" *Id* at 559-60. Davis was immediately arrested. The decision also denied effect to Florida's statutory arrest procedure.

C. Problems with *Kumar*.

"The question in the *Kumar* case was not about

the existence of probable cause or the role it plays in a SYG proceeding in a criminal case. The sole issue in Kumar was 'whether an immunity determination pursuant to the SYG law in a criminal proceeding control in a civil proceeding.'" *Davis v. City of Apopka, 78 F.4th 1326 (11th Cir. 2023) at 1339.* The court pointed out that the portion of the *Kumar* decision that favored Davis was "'dicta," but proceeded to quote a "lengthy passage" from the case that could "be read in two ways," the **first way meaning "absence of self-defense is an element of murder under Florida law" and the other meaning it is not.** *Id at 1340.* The court performed a grammar analysis of the use of a "modal auxiliary verb" and punctuation analysis of "semi colon" in the passage in the *Kumar* opinion to conclude the absence of self- defense is not an element of violent crimes, regardless of what the Florida statute actually says. *See Id.* **The court chose the interpretation that disfavored Davis over the interpretation that favored him.**

"The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, ..., our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same." *Federal Trade Comm'n* v. *American Tobacco Co.,* 264 U.S. 298, 307. *Kumar* is not useful in the analysis of this case, beyond its express pronouncements that Florida law clearly "expect[s] officers to ***temporarily detain*** a person for a reasonable period" in stand your ground circumstances.

On the other hand, the Florida Supreme Court

held in *Dennis v. State* that the "immunity from 'criminal prosecution' in section 776.032 **must be interpreted in a manner that provides the defendant with *more protection*** from prosecution for a justified use of force than the probable cause determination previously provided to the defendant by rule." *Dennis v State, 51 So. 3d 457, 463 (Fla. 2010) at 463.* The *Dennis* case stands in contrast to the decisions of the district court and the Eleventh Circuit that here provided Davis less protection.

D. Certifying the Question to the Florida Supreme Court

The district court or the Eleventh Circuit should have certified the two questions to the Florida Supreme Court, as Davis requested. The first question was whether the "conclusively established" test rendered the statutory immunity surplusage? And the second was whether Florida law required "a necessary determination of probable cause as to the unlawfulness of force before making an arrest for an offense involving the use or threatened use of force in self- defense?"

The core of both the district court's and the eleventh circuit's decisions were that they **"did not believe that the absence of self-defense was an element of murder under Florida law**." The Florida Supreme Court has never directly answered this question, which apparently has never been presented to it. The federal judiciary should respect the right of the Florida Supreme Court to interpret this provision and definitively state what it means.

E. How Other States Have Answered the Question.

In *State v. Hardy, 390 P.3d 30 (Kan. 2017)*, the Kansas statutory prohibition on arrest nearly mirrored the Florida prohibition. The Kansas Supreme Court concluded "...the district court correctly reached the ultimate legal conclusion that the facts as found were **insufficient to establish** that the State had met its **burden to demonstrate probable cause that Hardy's use of force was not justified**, Hardy was entitled to statutory immunity from prosecution as a matter of law.

The Kansas Supreme Court highlighted the facts: "… the evidence is sufficient to support a reasonable factfinder's conclusion that the violence was contemporaneous and the risk of great bodily harm to Hardy was imminent." *Id* at *39*.

The Kansas statute reads as follows: "... the **agency shall not arrest** the person for using force **unless it determines** that there is probable cause for the arrest." *Id* at 37 quoting K.S.A. 2016 Supp. 21-5231." It is nearly verbatim what the Florida statute states in §776.032(2) F.S. (2011). From that the Kansas Supreme Court declared "Without probable cause to believe that unlawful force was used, arrest and prosecution is prohibited. K.S.A. 2014 Supp. 21-5231(b)." The justices further quoted Judge Karen Arnold-Burger, "**If immunity were the same as self- defense, there would have been no need to adopt a specific immunity statute** ..."

Kansas has also referenced Florida SYG law

stating: "The Florida statute, like the Kansas statute, does refer to a probable cause standard, but only in reference to an arrest; ... With no mention of the standard for initiating a prosecution, the Florida court felt the need to specify one and, in doing so, employed a commonly recognized **rule of statutory construction that legislation should not be interpreted in a way that makes it meaningless."** *State v. Barlow*, 368 P.3d 331, 303 Kan. 804 (2016).

Part B Warrantless Search

III. Failures to Consider Facts in Davis's Favor

A. Key Facts Disregarded or Discredited.

The counts in Davis's complaint were dismissed under Rule 12(b)(6) of the federal rules of civil procedure. Although the Eleventh Circuit stated in its opinion that it "accept[s] the facial allegation in the complaint as true and construe[s] them in the light most favorable to" Davis, the record demonstrates that it did not. *Davis v. City of Apopka, 78 F.4th 1326 (11th Circuit 2023) at 1331.*

Instead, the court discredited Davis's allegation in the third amended complaint that his daughter saw her brother Timmy "in the garage" with his shirt off as *he* advanced toward Davis. "The complaint does not allege Davis' nine-year-old daughter saw the shooting either..." *Id* at 1347.

The record shows Davis's daughter was in fact an eyewitness to the shooting in the garage or at least

the events leading up to the shooting in the Garage. Her important statement, taken soon after Davis was arrested, corroborated Davis's account that Timmy was the aggressor, in the garage. The only relevant event that took place in the garage was the shooting. Her original statement that Timmy was in the garage with his shirt off before approaching their father was so important and damaging that the defendants unlawfully altered it to read that Timmy was in the garage washing off his shirt, when there was no water source or sink in the garage.

The last *Davis* opinion repeated multiple times and placed great weight on the false conclusion "the only other eyewitness to the shooting [was] dead or dying." *Opinion at 1342*. It even labeled an entire section "The Interview of Davis's Nine- Year-Old Daughter Who Did Not Witness the Shooting." *Id at 1347*. The third amended complaint states, in paragraph 136, "...Defendants falsely transcribed the daughter's statement to read that she had seen Timmy in the garage washing his shirt when she actually corroborated Davis's story that Timmy was in the garage with his shirt off" just before advancing toward [her father] causing [her father] to shoot in self-defense." It is clear from the facts of the third amended complaint and the recitation of facts in the opinion that there was only a short period of time between the time Timmy entered the garage, removed his shirt, and was shot. Thus, it is undisputed that Davis's daughter, necessarily, witnessed the events leading up to the shooting.

Prior to *Bell Atlantic Corp. v. Twombly, 550 US 544 (2007),* "The Leimer court viewed the Federal

Rules — specifically Rules 8(a)(2), **12(b)(6)**, 12(e) (motion for a more definite statement), and 56 (motion for summary judgment) — as reinforcing the notion that "there is no justification for dismissing a complaint for insufficiency of statement, except where it appears **to a certainty** that the plaintiff would be entitled to **no relief under any state of facts** which could be proved in support of the claim." 108 F.2d, at 306. The court refuted in the strongest terms any suggestion that the unlikelihood of recovery should determine the fate of a complaint: "No matter how improbable it may be that she can prove her claim, she is **entitled to an opportunity to make the attempt**, and is not required to accept as final a determination of her rights based upon inferences drawn in favor of the defendant from her amended complaint." *Ibid."* The Eleventh Circuit labeled Davis' plausible allegation his daughter witnessed the events leading up to the shooting as vague in order to discredit the allegation and to impermissibly make the inference in favor of the defendants that she did not witness either the shooting or the events leading up to it.

"Asking for plausible grounds **does not impose a probability requirement** at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence … ." *Bell at 1959.* "But more importantly the District Court was required at this stage of the proceedings to construe [the] ambiguous statement in the plaintiffs' favor. *See Allen v. Wright, 468 U.S. 737, 767-768, n. 1, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)* (Brennan, J.,dissenting)." *Bell at 1986.*

B. Inferences Drawn In Favor of Defendants

The eleventh circuit drew several inferences in favor of Defendants and against Davis, with little or no basis in fact.

Only Timmy Fought.

The opinion refers to a "fight" nine times where Davis never struck, kicked, or in any way physically assailed or assaulted Timmy prior to shooting him. *See TAC* and compare *Davis v. City of Apopka, 78 F.4th 1326 (11th Cir. 2023).* The opinion concludes without basis in fact that "It was apparent that the two men had been in a fight and that the only one of them who had been shot was Timmy." *Davis v. City of Apopka, 78 F.4th 1326 (11th Cir. 2023)* at 1332. Where it says in 1331 "the fight turned physical," and "Mrs. Davis broke up the fight between her husband and son" it implies mutual combat where there the TAC makes clear was only a one sided attack on Davis. *Id* at 1331. The opinion declares "Timmy, of course, had far more serious injuries, ones that proved fatal. *Id at 1347*. However, Timmy had a single visible injury, the single gunshot wound.

Timmy Menaced and Followed His Father Outside.

The opinion imagines Davis "went downstairs and got his gun and shot Timmy" as if his purpose was to go downstairs to get his gun. *See Id at 1333.* But, the TAC states, "Davis attempted to put distance between himself and his son to avoid continued violence…" *TAC at ¶35.* "Davis intended to sit on the

bottom step of the stairs to wait for the paramedics, but he was unable to because Timmy followed [him] downstairs. So, Davis continued into the garage to get away from Timmy. Timmy, still enraged, followed his dad into the garage." *Id at ¶¶36-38.* The opinion says that Davis did not tell the officers these details, showing he only limped out of the garage and retrieved his firearm after Timmy continued menacing him, but Davis did tell them "I did [shoot Timmy] because my son beat me up and kept coming at me." *Id at 51.* Davis had only enough time to briefly answer the officer's only two questions prior to arrest: "Who shot him?" and "Where's the gun?"

Shockingly, after a jury acquittal finding self-defense, the opinion authored by Judge Ed Carnes stated Davis's injuries "might be inculpatory evidence showing that Davis shot Timmy in anger and in retaliation for beating and injuring him." *Davis II* at 1343.

C. Consequence.

This Court has reversed circuit courts for failing to draw inferences in favor of non-moving parties. See *Tolan v. Cotton*, 572 U.S. 650, 651, 134 S.Ct. 1861, 188 L.Ed.2d 895 (2014) (vacating a grant of summary judgment and remanding for further proceedings because the Fifth Circuit "failed to adhere to the axiom that in ruling on a motion for summary judgment, [t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor") (internal quotation marks omitted)." *Followed by Butler v. Smith, 85 F. 4th 1102 (11th Circuit 2023).* This Court should grant

certiorari and reverse the Eleventh Circuit for failing to consider the facts in a light most favorable to Davis.

IV. The City of Apopka and Police Chief Manley as Official Policy Maker.

A. Davis' Jury Instruction on Practice should have been provided.

Davis requested a jury instruction that included a correct statement of the law that:

An "official policy or custom" means: (a) policy statement or decision made by Defendant City's final policy-maker, Chief Manley; or **(b) A practice or course of conduct that is so widespread that it has acquired the force of law—even if the practice has not been formally approved.**

The district court denied this portion of the jury instruction because it determined that the previous appeal did not expressly reverse the district court's ruling "address[ing] and reject[ing] Davis's alternative allegation that the City had a **custom of improper training** or **permitting the Chief of Police to override established protocols** and standard operating procedures."

Even accepting the district court's determination, such determinations should have been limited to the issue of a custom of "improper training," but not a custom the Chief overriding the established protocols because the prior panel of the Eleventh Circuit expressly found "Manley was a **final policymaker** for purposes of *Monell* liability …

[B]oth Florida state law and local law confirms that Chief Manley had final policymaking authority for the City of Apopka in matters of law enforcement and thus his actions could subject the city to § 1983 liability." *Davis v. City of Apopka, 734 F. App'x 616 (11th Cir. 2018).* Manley's personal participation in the search could create both policy and custom for the City of Apopka subjecting both to 1983 for either the policy or the custom. The single decision by Manley as a final policymaker. *Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989).*

The custom Davis proved at trial and for which he sought the legally correct jury instruction was a custom of City officers entering residences before obtaining warrants or having warrants present on the scene. The court allowed the defendant's instruction instead. David Call testified at trial that there was a culture within the APD of doing just that, that Manley knew about and participated in the practice, and that he personally observed Manley enter the Davis residence prior to the search warrant.

"In refusing to give a requested jury instruction, `[a]n abuse of discretion is committed only when (1) the requested instruction correctly stated the law, (2) the instruction dealt with an issue properly before the jury, and (3) the failure to give the instruction resulted in prejudicial harm to the requesting party.'" *Burchfield v. CSX Transp., Inc., 636 F.3d 1330, 1333-34 (11th Cir. 2011)*). This case satisfies all three requirements of an abuse of discretion.

B. Manley and the City should not have the Escape Hatch of Ignorance.

In *Cooper v. Dillon. See Cooper v.Dillon, 403 F.3d 1208 (11th Cir. 2005),* the City of Key West's Police Chief's single decision as a final policymaker to enforce an unconstitutional law made the City liable for the violation *regardless* of whether the Chief knew the law was unconstitutional. While Davis and the rest of his family were hospitalized, Manley and other officers entered his home without a warrant and without exigent circumstances. No allegation of the complaint or provision of law required that Manley know there was no warrant. In fact, *Cooper v. Dillon* expressly found it did not matter if the Key West's Police Chief did not know that the law he enforced was unconstitutional. Thus, Chief Manley's alleged lack of knowledge should never have been considered to excuse his personal participation in the unlawful search.

Quoting the verdict form, the panel opinion twice states the jury found "Davis had not met his burden of proving that Manley '**knowingly** directed, participated in, adopted, or ratified the unlawful search' of Davis' home." Opinion at 4, 56. The jury verdict form echoed the improper closing argument of the City of Apopka's trial counsel and the Rule 50 motion that Manley did not know that there was no warrant. The jury instructions did not include the word "knowingly" in it. The improper jury verdict form and improper argument of counsel combined to impact the jury. They misled the jury to believe they could excuse the Chief's misconduct.

CONCLUSION

This Court should grant Davis certiorari because the Eleventh Circuit decision (1) denied effect to the Florida Stand Your Ground Immunity provision of Florida's Justified Use of Force Statute, (2) unconstitutionally substituted the express arrest prohibition of Florida law for a judge-made requirement that an accused "conclusively establish" a claim of self-defense, and (3) refused to certify the question to the Florida Supreme Court of whether §776.032(2) F.S. (2011) requires specific evidence of "probable cause that the force that was used or threatened was unlawful." The decision also failed to accept as true all well pleaded facts of the complaint and draw inferences in favor of Davis, as required when deciding a motion to dismiss under Rule 12(b)(6), but instead discredited key allegations of fact and drew adverse inferences that were not supported by the facts alleged in the complaint. Davis's daughter was in fact an eyewitness to the events leading up to the shooting "in the garage," as alleged in the complaint, but the court improperly concluded there were no witnesses to the shooting. A reasonable investigation, prior to arrest, would have discovered Davis' daughter witnessed the shooting. Had they asked Timmy, who was alive and apologizing for hurting his father, APD would have confirmed Davis' self-defense. The unreasonable two-question investigation in under a minute did not establish probable cause to arrest for use of unlawful force.

The denied jury instruction at the trial of the search approved Manley's "culture" of entering homes without warrants. Requiring the jury to find that he

knew there was no search warrant when he searched gave him and the City an impermissible escape from §1983 liability.

If left to stand, this case effectively ends Stand Your Ground Immunity as enacted by state legislatures.

Respectfully submitted,

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