No. 23-

IN THE

Supreme Court of the United States

SHAWN T. SWINDELL,

Petitioner,

v.

KENNETH BAILEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This §1983 qualified immunity case involves the legality of entry into a residence by Petitioner Swindell, a Florida Sheriff's Deputy, to arrest Respondent Bailey. Bailey committed a misdemeanor in Swindell's presence, on the porch to the home, and Swindell immediately followed Bailey into the home to arrest him. The district court granted Swindell summary judgment on Bailey's §1983 claim of unlawful arrest, but in *Bailey v. Swindell*, 940 F.3d 1295 (11th Cir. 2019) ("*Bailey I*"), the Eleventh Circuit reversed and held that the entry might have been unconstitutional under *Payton v. New York*, 445 U.S. 573 (1980), if the arrest was initiated while Bailey was inside the home.

A jury subsequently rendered a general verdict for Bailey but determined that the arrest was initiated *outside* the home. The district court thus granted judgment to Swindell based on qualified immunity, citing *United States v. Santana*, 427 U.S. 38 (1976) and *Lange v. California*, 594 U.S. ___, 141 S.Ct. 2011 (2021).

In *Bailey v. Swindell*, 89 F.4th 1324 (11th Cir. 2024) ("*Bailey II*"), however, the Eleventh Circuit rejected the conclusion that Bailey was outside the home when the arrest was initiated and determined that Swindell's entry into the home to complete the arrest of Bailey was a violation of clearly established law under *Payton*. *Id.*, pp. 1330-31. Against this backdrop, the instant matter presents the following questions for the Court's review:

1. Was it clearly established in 2014 that a law enforcement officer violates the Fourth Amendment when he witnesses a person commit

a misdemeanor offense in public view and immediately pursues the fleeing misdemeanant into a home to arrest that person, but without exigency apart from the pursuit?

2. Where a jury has determined that a misdemeanor arrest was supported by probable cause and was initiated *outside of* a residence, is the deputy effectuating the arrest entitled to qualified immunity under the Fourth Amendment where he instantaneously follows the arrestee into a home to complete the arrest?

3. Where a circuit court of appeals denies qualified immunity to a deputy sheriff for entry into a home to make an arrest based on the specific question of where the arrest was initiated – inside or outside – and a jury subsequently determines that the arrest was initiated outside, may the circuit court of appeals reject that finding of fact and substitute its own finding that the arrest was initiated inside the home so as to once again deny the deputy qualified immunity?

RELATED PROCEEDINGS

Bailey v. Swindell, 11th Circuit Case No. 18-13572, 940 F.3d 1295 (11th Cir. 2019). Opinion dated October 16, 2019, reversing grant of summary judgment. (App., pp. 108-123).

Bailey v. Swindell, District Court Case No. 3:15cv390, Final Judgment for Bailey dated June 7, 2021. (App., pp. 42-43).

Bailey v. Swindell, District Court Case No. 3:15cv390, Order dated December 4, 2021, granting Judgment as a Matter of Law and vacating June 7, 2021, Final Judgment. (App., pp. 22-40).

Bailey v. Swindell, District Court Case No. 3:15cv390, Final Judgment for Swindell dated December 23, 2021. (App., p. 41).

Bailey v. Swindell, 11th Circuit Case No.21-14454, 89 F.4th 1324 (11th Cir. 2024). Opinion dated January 8, 2024, reversing grant of Judgment as a Matter of Law. (App., pp. 1-21).

Bailey v. Swindell, 11th Circuit Case No.21-14454. Order denying petition for rehearing or rehearing en banc entered on March 6, 2024. (App., p. 44).

PARTIES TO THE PROCEEDING

The Petitioner, Defendant below, is Shawn T. Swindell. The Respondent, Plaintiff below, is Kenneth Bailey.

No party is a nongovernmental corporation and so no corporate disclosure statement is applicable under S.Ct. Rule 14.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit at issue here, reversing the district court's grant of Judgment as a Matter of Law to Petitioner Swindell, is located at 89 F.4th 1324 (11th Cir. 2024). A copy of the Opinion is included in this petition as Appendix A and is found at pages 1 through 21 of the Appendix.[1]

JURISDICTION

The Opinion of the United States Court of Appeals for the Eleventh Circuit Court was entered on January 8, 2024. (App., p. 1). Petitioner Swindell timely moved for panel or en banc rehearing on January 29, 2024. (App., pp. 47-68) The circuit court denied Swindell's motion for panel or en banc rehearing on March 6, 2024. A copy of the circuit court's March 6, 2024, order denying panel or en banc rehearing is included in the appendix to this petition, at App., p. 44. The petition for rehearing is also included, at App., pp. 47-68.

Pursuant to S.Ct. Rule 13.3, this Court has jurisdiction over this Petition for Writ of Certiorari as it is filed within 90 days of the circuit court's March 6, 2024, Order denying panel or en banc rehearing.

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1. The individual documents reproduced in the Appendix are subdivided into entries A, B, C, etc., but citation to the Appendix in this Petition will be to "App." followed by the page number from the full appendix.

The statute conferring jurisdiction is 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. §1983 provides in relevant part that:

> "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. . . . "

U.S. Const. amend. IV provides that:

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

STATEMENT OF THE CASE

Petitioner Shawn T. Swindell was one of a number of law enforcement officers responding on September 11, 2014, to a report of a domestic altercation between Respondent Kenneth Bailey and his estranged wife, Sherri Rollinger. Rollinger told the initially responding deputy that Bailey "was not acting right," that the two had just had an argument, and that Bailey had "snapped." She believed that Bailey was at his parents' residence. *Bailey II*, 89 F.4th at 1326-27.[2]

Swindell was directed to Bailey's parents' home to assist in investigating Rollinger's complaint by interviewing Bailey. Swindell went to the front door and asked for Bailey. Bailey came outside, onto the front porch. On the front porch alongside Bailey were his mother, Evelyn, and his brother, Jeremy. Swindell was just off the porch, maintaining a distance of 6 to 7 feet away from Bailey. Both Evelyn and Jeremy repeatedly interjected themselves into the conversation between Swindell and Bailey. Swindell asked Bailey to come to his car, out on the street, or to step aside to speak to him alone. Bailey refused. *Id.* (see also Trial testimony of Swindell, App., pp. 197-98, 203-04, 236-40).

2. Citation in this Petition to *Bailey I* and *II* will be to the federal reporter citation, though they are also included in the Appendix.

This is the front porch where events occurred:

Deputy Swindell then asked Jeremy and Evelyn to go inside so that Swindell could finish his conversation with Bailey on the porch. They refused. *Bailey I*, 940 F.3d at 1299. Bailey acknowledged at trial that Swindell told him that Swindell was there to perform an investigation. (Bailey trial testimony, App., pp. 208-09). The parties differed at trial on what happened next.

According to Swindell, Bailey abruptly turned to go inside the home. Swindell placed his hand on Bailey's shoulder and told him he was not free to leave. Bailey turned back around and struck Swindell's arm, taking a fighting stance, backing up towards the residence. Swindell attempted a take-down maneuver and the two men fell into the residence. (Swindell trial testimony, App., pp. 240-41).

Bailey testified that he announced he was going back inside the house and turned and walked inside. According

to Bailey, Swindell did not order him to stop. Instead, according to Bailey, Swindell stated that he was going to tase Bailey. According to Bailey, he was now inside the door to the home and Swindell "in an instant" followed him from the porch into the living room of the home, tackling him and causing injury. (App., pp. 129-30).[3]

Bailey sued Swindell in his individual capacity under 42 U.S.C. §1983 for false arrest and excessive force in violation of the Fourth Amendment. *Bailey I*, 940 F.3d at 1299. Prior to the first trial, Swindell asserted qualified immunity as to both the false arrest and excessive force claims. The district court granted summary judgment to Swindell on the false arrest claim but denied summary judgment on the excessive force claim. The case proceeded to trial, with the jury returning a verdict completely in favor of Swindell on the excessive force claim. *Id*., n. 3.

Bailey appealed only the earlier summary judgment on the false arrest claim; he did not appeal the jury verdict in Swindell's favor as to the excessive force claim. In *Bailey I* the Eleventh Circuit reversed the grant of summary judgment to Swindell on the false arrest claim, focusing on the difference between two key cases addressing the issue of the propriety of the entry—*United States v. Santana*, 427 U.S. 38 (1976), and *Payton v. New York*, 445 U.S. 573 (1980).[4]

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3. Bailey's mother's and brother's trial testimony, as opposed to some of their out of court statements, generally supported Bailey's version of events.

4. It must be noted that Bailey's operative complaint did not actually assert a claim for unconstitutional entry into the home by Swindell, but the Eleventh Circuit in *Bailey I* included the theory

In *Payton*, this Court held that "the Fourth Amendment 'prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to' arrest him." (*Bailey I*, 940 F.3d at 1301, quoting *Payton*, 445 U.S. at 576). In *Santana*, however, this Court held that officers could pursue a suspect into a residence to complete an arrest supported by probable cause if it "began in a 'public place.'" *Bailey I*, 940 F.3d at 1301, quoting *Santana*, 427 U.S. at 42).

The Eleventh Circuit held in *Bailey I* that if one accepted Bailey's version of events whereby he was completely inside the home when the arrest "began," then Swindell's entry into the home to complete the arrest, absent exigent circumstances, a warrant, or consent, would be a violation of clearly established Fourth Amendment rights under *Payton*. On the other hand, if the arrest was "initiated" while Bailey was outside the house, then *Santana*, not *Payton*, might apply and Swindell would not clearly have violated the Fourth Amendment in pursuing Bailey from the porch to inside the home to make the arrest. The case was remanded for trial on that specific issue.

At the second trial, the parties testified as above. Bailey claimed that he and Swindell "in an instant"

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in analysis of the false arrest claim. In the second trial Swindell protested consideration of such a claim in the trial as it had not been pled and the district court remarked that the Eleventh Circuit had indeed "divined an unlawful entry claim" into the complaint, to the benefit of Bailey. (Not included in the appendix but found at trial transcript, Day 2, p. 288). Bailey ultimately obtained a verdict in his favor based on the appellate court having inferred this claim for him.

went from outside the home to inside the home. Swindell testified that he formed probable cause to arrest Bailey outside the home, based in part on Bailey turning to leave the detention on the porch, and that he reached out and placed his hand on Bailey's shoulder to stop him, with Bailey knocking it away. Consistent with Bailey, Swindell testified that he "immediately" pursued Bailey into the residence to complete the arrest. (Swindell testimony, App., p. 260).

Prior to submission of the case to the jury, the defense moved for judgment as a matter of law based on qualified immunity. The district court took the issue of qualified immunity for Swindell's entry into the home under advisement. (App., pp. 290-99).

The case was submitted to the jury in the form of qualified immunity fact-based interrogatories and general verdict questions as to liability and damages. The first question was whether Swindell had reasonable suspicion to detain Bailey for a law enforcement investigation, and the jury answered "yes." The jury was next asked whether there was probable cause for the arrest and the jury again answered "yes." (App., pp. 17-18).

The jury was then given a list of possible offenses for which it found probable cause. The options were: (1) "Willfully, maliciously, and repeatedly following, harassing, or cyberstalking another person"; (2) "Knowingly resisting, obstructing, or opposing a law enforcement officer who was engaged in the lawful execution of a legal duty"; (3) "Knowingly and willfully resisting, obstructing, or opposing a law enforcement officer who was engaged in the lawful execution of a

legal duty by offering to violence or doing violence to the officer"; and/or (4) "Battery on a law enforcement officer." The jury checked the response of "Knowingly resisting, obstructing, or opposing a law enforcement officer who was engaged in the lawful execution of a legal duty"; which under Florida law, §843.02, Fla. Stat., is a first-degree misdemeanor. (App., p. 18)

The jury was then asked, "Where was the arrest *initiated*?" (emphasis in original). They were given two options, "inside the home" or "outside the home." The jury chose "outside the home." (App., p. 19).

The jury was next asked whether there was exigency justifying warrantless entry into the home and the jury answered "no." (App., p. 19). The jury had earlier been instructed that "[e]xigent circumstances justify a law enforcement officer's warrantless entry into a home without an occupant's consent where either the arrest was set in motion in an area that is open to public view, which includes a front porch, and the person flees into a home, and the officer immediately follows the fleeing suspect into the home from the scene of the crime; the officer has an urgent need to enter the home to prevent the imminent instruction of evidence, or the officer has specific and articulable facts to support the belief that the person is armed and immediate entry is necessary for safety."[5] (App., p. 315).

The jury was given a list of possible exigencies, which were "hot pursuit of a fleeing suspect into a home,"

5. The jury was instructed that exigency was an affirmative defense, with the burden of proof on Swindell to show by a preponderance the presence of exigency. (App. p. 315)

"urgent need to enter the home to prevent the imminent destruction of evidence," and "specific and articulable facts supported by a belief that the suspect was armed and immediate entry into the home was necessary for safety." As the jury had answered "no" to the question of exigency, the jury did not select from that list of exigent circumstances. (App., pp. 19-20).

The jury was then asked whether Swindell's conduct caused Bailey injuries, and the jury answered "yes." The jury also answered "yes" to the question "Do you find that Kenneth Bailey should be awarded compensatory damages?" and the jury awarded Bailey damages of $625,000. (App., p. 20).[6] Judgment was entered in favor of Bailey in that amount. (App., p. 42).

Post-trial, Swindell timely renewed his motion for judgment as a matter of law or for remittitur under Federal Rules of Civil Procedure 49, 50, 59(e) and 60. (App., pp. 69-107). In ruling on the motion and interpreting all of the verdict form answers, and with the benefit of having sat through the trial, the district court noted that Swindell initiated the arrest of Bailey while Bailey was "completely *outside* his parents' home." (App., p. 30). There was no question but that the criminal offense, itself, occurred when Bailey was on the porch, in public view.

As to qualified immunity, the district court distinguished between the question of whether Swindell's

6. Nearly all of Bailey's damages related to his claim that Swindell used excessive force in arresting him, a claim Swindell prevailed on in the first jury trial, which Bailey did not appeal. Swindell maintains it was improper for the jury to even consider such damages. This issue is presently before the trial court and is not a part of this Petition.

entry into the home without exigency or a warrant was unconstitutional, versus the subsidiary but more salient question of whether entry was *clearly established* to be unconstitutional under these circumstances.

> Applying these principles here, the dispositive question for qualified immunity purposes is whether it was clearly established on September 11, 2014 that the specific situation confronting Deputy Swindell—that is, after the deputy initiated a warrantless but lawful misdemeanor arrest *outside a home*, the arrestee (here, Bailey) retreated into the home in an attempt to depart the encounter—did not constitute exigent circumstances allowing him to follow Bailey into the home to complete the warrantless arrest. In other words, was it clearly established that exigent circumstances did not exist? Based on applicable precedent, the answer is no.

(Order granting judgment as a matter of law, App., pp. 30-31).

Because the jury found that a lawful arrest was initiated outside, the only issue remaining was whether it was clearly established that the gravity of the underlying offense—resisting arrest without violence, a first-degree misdemeanor—justified entry into the home. While there was no "hue and cry" through the streets, there was a pursuit of some kind, and the fact that it ended almost as soon as it began did not alter that fact. (App., p. 30, Order, citing *Santana* and citing *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984)).

Although the jury had not found exigency and had not found "hot pursuit," even under Bailey's own testimony Swindell had followed him from the porch into the home "in an instant." The district concluded that the question of whether there had been a "hot pursuit" and whether it justified entry into the home to arrest Bailey was not "clearly established" to the point that Swindell should be denied qualified immunity on these facts. "To date, however, there has been little clarity on the contours of the hot pursuit doctrine in the context of fleeing misdemeanants." (App., p. 30). The order pointed out that "for many years, federal and state courts across the country have been 'sharply divided' on the question of whether an officer with probable cause to arrest a suspect for a misdemeanor may constitutionally enter a home without a warrant in hot pursuit of that suspect." (App., p. 31, citing *Stanton v. Sims*, 571 U.S. 3, 6 (2013); *Lange*, 141 S.Ct. at 2017).

The court also noted that neither this Court nor the Eleventh Circuit had squarely decided the issue as of September 11, 2014, the date of the incident. (App., p. 31). To the contrary, the district court observed that, after the trial, this Court had decided in *Lange* that the circumstances under which a law enforcement officer could follow a misdemeanant into a home to make an arrest were most assuredly *unsettled* even as of 2021. This Court stated in *Lange* that "[c]ourts are divided over whether the Fourth Amendment always permits an officer to enter a home without a warrant in pursuit of a fleeing misdemeanor suspect. Some courts have adopted such a categorical rule, while others have required a case-specific showing of exigency." (footnote omitted). 141 S.Ct. at 2017.

The district court concluded that it would not have been clearly established to a reasonable deputy in Swindell's shoes that he could not immediately enter the home so as to complete an arrest, which had been initiated outside the home, on the porch, just feet from the front door. Based on lack of clearly established law, the district court thus granted Swindell judgment as a matter of law based on qualified immunity. "In short, Bailey has not cited—and this Court has not found—a single authority in existence on September 11, 2014 that clearly established the unlawfulness of a warrantless home entry and arrest on the facts found by the jury here." (App., p. 37). Judgment for Bailey was vacated and judgment was then entered in favor of Swindell. (App., p. 38).

Bailey appealed yet again. In the opinion submitted for review to this Court, *Bailey II*, the Eleventh Circuit set aside the district court's interpretation of the verdict form and the jury's answer that the arrest was initiated outside the home, substituting its own conclusion that Bailey was completely inside the home when the arrest was initiated. Citing what it believed was an inconsistency as between 1) the jury's finding that the arrest was initiated *outside* the home, with 2) the jury's finding of lack of exigency and hot pursuit, plus the jury's rejection of the crime of battery as supporting probable cause, the Eleventh Circuit held that the jury must have believed Bailey's testimony and concluded that Bailey was entirely *inside* the home when the arrest was initiated. *Bailey II*, 89 F. 4th at 1330.

In doing so, the Eleventh Circuit did not even consider that the jury's finding of no exigency was based upon Bailey's testimony that when he turned to enter the home he did not *subjectively* believe he was fleeing because he did not realize he was detained or was about to be

arrested. Having misconstrued the jury's determination that the arrest was initiated outside the home as meaning that Bailey was actually inside the home when the arrest was initiated, the Eleventh Circuit concluded that Swindell's entry was a violation of clearly established law under *Payton*. *Bailey II*, 89 F.4th at 1331.

Critically for purposes of this petition, the Eleventh Circuit failed to acknowledge in *Bailey I* or *II* that Bailey's offense of resisting Swindell's investigation occurred on the front porch, in public view, when during questioning by Swindell Bailey abruptly turned to go inside. Indeed, the sole basis of the Eleventh Circuit's rejection of Swindell's claim to qualified immunity in this case was their interpretation of the jury's factual findings as meaning—directly opposite to the interpretation of the district court—that Bailey was completely inside the house when Swindell initiated the arrest. (Compare, District Court Order on Judgment as a Matter of Law, App., p. 30, stating that the jury found that "Deputy Swindell initiated a lawful misdemeanor arrest while Bailey was standing completely outside his parents' home," with the Eleventh Circuit's conclusion in *Bailey II*, 89 F.4th at 1330 that "Bailey was inside the house" when Swindell "started or initiated his charge toward Bailey.").

Swindell timely petitions this Court for certiorari review.

REASONS FOR GRANTING OF THE PETITION

In *Bailey I*, the Eleventh Circuit cited *Payton* and held that under Bailey's version of events Swindell could not constitutionally have pursued him inside the home

to complete the arrest. Swindell, however, had testified that the arrest was initiated while Bailey was *outside*, on the porch, just feet from the front door. Swindell's entry into the home to complete the arrest would be more akin to *Santana* than *Payton* because Bailey was exposed to public view when probable cause arose. Bailey's retreat into the residence would not make an otherwise lawful arrest unlawful because "a suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place." *Santana*, 427 U.S. at 43.

Based on this conflict in the parties' renditions of events, the Eleventh Circuit held in *Bailey I* that a trial was required on the factual question of where the arrest was initiated: inside or outside. The *very purpose* of the second trial was therefore to determine where Bailey was when the arrest was initiated. The jury was asked that question and answered "outside the home."

The district court interpreted that answer in the full context of the trial to mean that Bailey was outside the home, on the porch, when the arrest was "initiated." In this sense, additional exigency in the form of concerns over evidence destruction or escape was immaterial. Every witness at trial testified that the "pursuit" was instantaneous, moving from the porch to just inside the front door, covering a distance of mere feet. Given these facts and the uncertainty in the law as to pursuit of a fleeing misdemeanant into a home, as most recently recognized in *Lange*, the district court granted judgment to Swindell based on qualified immunity.

A. The Court should grant the petition and hold that, because Bailey was outside the home when he committed a misdemeanor offense in Swindell's immediate presence, the case is controlled by *Santana* and Swindell's entry into the home to arrest Bailey did not violate the Constitution, even absent a secondary exigency beyond pursuit into the home. At a minimum, under *Lange*, the Court should grant the petition and hold that it was not clearly established that Swindell could not immediately pursue Bailey into the home to complete the arrest such that Swindell is entitled to qualified immunity.

The issue in this case is qualified immunity for Swindell's entry into the home to arrest Bailey. For the immunity to be forfeited, Swindell would have had to commit a constitutional violation *and* the violation would have to have been of clearly established law. *Pearson v. Callahan*, 555 U.S. 223 (2009) (to defeat qualified immunity, the facts must demonstrate a violation of a constitutional right *and* the right must have been "clearly established" at the time of defendant's alleged misconduct; court may address those questions in either order).

Specificity of the "clearly established" law, in application to a given set of facts at a given point in time, is the measure of qualified immunity. *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality."); *Wilson v. Layne*, 526 U.S. 603, 615 (1999) ("[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.").

Under the reasoning of *Santana*, when a person commits a crime in public view that person may not defeat an otherwise lawful arrest simply by retreating into a home.[7] A law enforcement officer may constitutionally pursue that person into the home to make an arrest and such entry does not violate the Fourth Amendment. Somewhat inconsistently, in *Lange*, a divided Court held that there is no categorical rule that a law enforcement officer may always enter a home to arrest a fleeing misdemeanant.

But even under *Lange*, the precise contours of when, and exactly what, exigent circumstances are required to enter are unclear and are evaluated on a case-by-case basis. Consistent with either *Santana* or *Lange*, the Court should grant the petition, review the case, and determine that Swindell is at least entitled to qualified immunity for his entry into Bailey's parents' home to arrest Bailey.

The majority opinion in *Lange*, authored by Justice Kagan, held that the question of whether an intrusion into a home to complete a misdemeanor arrest is constitutionally permissible should be evaluated on a case-by-case basis

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7. A claim premised on an alleged Fourth Amendment violation is judged from the perspective of a reasonable officer and is based on the objective facts, not from the subjective perceptions of the subject. See, e.g., *Kinglsey v. Hendrickson*, 576 U.S. 389, 399 (2015); *Graham v. Connor*, 490 U.S. 386 (1989). Thus, flight of an arrestee in this case is properly judged from Swindell's perspective, not Bailey's. Even if Bailey, as he turned to go inside, did not himself subjectively believe he was being detained, or did not realize that Swindell was initiating an arrest, a reasonable officer in Swindell's shoes would be entitled in that moment to believe on the objective facts that Bailey was fleeing into the home to thwart his investigation and arrest.

considering such circumstances as imminent risk of violence, destruction of evidence, or risk of escape from the home. *Lange*, 141 S.Ct. at 2024. *Lange* is a criminal case and the consequence of this conclusion in the §1983 context is that qualified immunity should protect a deputy in Swindell's shoes when he has to make a decision in an instant and reasonably could believe, based on the fact of pursuit alone, that he could enter to complete the arrest of Bailey.

In just the few years since the 2021 decision in *Lange*, at least three district courts have agreed with Petitioner's argument that *Lange* means that the law on this point was not clearly established such as to compel the grant of qualified immunity to law enforcement officers when they entered a residence in immediate pursuit of a misdemeanant. *Cogar v. Kalna*, Case No. 2:21-CV-6, 2022 WL 949902 * 4 (N.D. W.Va. March 29, 2022) (citing *Lange*: "Defendant Kalna is entitled to a qualified immunity defense. As a matter of law, the alleged constitutional violation was not clearly established and the law regarding the pursuit of a fleeing suspected criminal into a home was not 'beyond debate' in March 2015 and, therefore, Defendant Kalna did not violate clearly established constitutional or other rights that a reasonable officer would have known."); *Woods v. Barnies*, Case No. 2:21-cv-00364, 2023 WL 6390662 * 5 (D.Me. October 2, 2023) (report and recommendation adopted, 2023 WL 7081505) (Officer entitled to qualified immunity for pursuing fleeing misdemeanant into home; "The Supreme Court's acknowledgement in *Lange* of the split of authority on the question as to when an officer may enter a home to arrest a fleeing misdemeanor suspect demonstrates that the 'contours of the right' were not sufficiently clear at

the time Defendant entered the apartment."); *Miller v. Pugliese*, Case No. 20-10660. 2023 WL 6202373 * 7-8 (D. Mass. September 22, 2023) (granting qualified immunity on a claim of unconstitutional entry to arrest a fleeing misdemeanant: "That the rights concerning a hotly pursued fleeing misdemeanant were not clearly established at the time of the March 4, 2017 incident has been repeatedly and explicitly recognized by the Supreme Court.") (citing *Stanton* and *Lange* for the proposition that, because the exact contours of the constitutional prohibition on pursuit of a misdemeanant into a home are not clearly established, the defendant officers are entitled to qualified immunity on an unconstitutional entry claim). On the basis that the law was not clearly established on this point, alone, Swindell ought to receive the benefit of qualified immunity.

Petitioner additionally maintains that his immediate entry into the home to arrest Bailey, even in the absence of exigency beyond the fact of pursuit, itself, was not a violation of the Constitution in the first place. In his concurring opinion in *Lange,* Chief Justice Roberts, joined by Justice Alito, cited *Santana* and disagreed with the majority as to the need for additional exigency on top of the fact of hot pursuit to justify entry. Chief Justice Roberts wrote that the fact of pursuit of a fleeing misdemeanant will, itself, justify entry into a home to make an arrest, quite apart from any additional exigency appearing in the situation.

> The Fourth Amendment and our precedent—not to mention common sense—provide a clear answer: The officer can enter the property to complete the arrest he lawfully initiated

outside it. But the Court today has a different take. Holding that flight, on its own, can never justify a warrantless entry into a home (including its curtilage), the Court requires that the officer: (1) stop and consider whether the suspect—if apprehended—would be charged with a misdemeanor or a felony, and (2) tally up other "exigencies" that *might* be present or arise, *ante*, at 2025-2026, 2027, before (3) deciding whether he can complete the arrest or must instead seek a warrant—one that, in all likelihood, will not arrive for hours. Meanwhile, the suspect may stroll into the home and then dash out the back door. Or, for all the officer knows, get a gun and take aim from inside.

The Constitution does not demand this absurd and dangerous result. We should not impose it. As our precedent makes clear, hot pursuit is not merely a setting in which other exigent circumstances justifying warrantless entry might emerge. It is itself an exigent circumstance. And we have never held that whether an officer may enter a home to complete an arrest turns on what the fleeing individual was suspected of doing before he took off, let alone whether that offense would later be charged as a misdemeanor or felony. It is the flight, not the underlying offense, that has always been understood to justify the general rule: "Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect." *Kentucky v. King*, 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865

> (2011). The Court errs by departing from that well-established rule.

Lange, 141 S.Ct. at 2028 (Roberts, C.J., concurring)

In his discussion of the issue in *Lange,* Chief Justice Roberts was far less concerned with where the parties were when the arrest process officially began, than he was focused on where the offense occurred. If the offense occurred in public and is witnessed by an officer, then an immediate pursuit into the home to make the arrest, if supported by probable cause and otherwise lawful, would not violate the Fourth Amendment. In the instant case it is beyond dispute but that on the objective facts Bailey's offense occurred in public view, on the front porch, such that Swindell's immediate entry into the home to arrest Bailey as he retreated inside was not unconstitutional.

Where the interaction between police and the suspect begins outdoors, the offense occurs outdoors, and pursuit for arrest immediately continues inside a residence then there is no expectation of privacy and *Santana* should control. *United States v. Gori*, 230 F.3d 44, 54 (2d Cir. 2000) (*Santana* depends on the suspect's "actual expectation of privacy" and "[o]nce the (door) was opened to public view by the defendants in response to the knock of an invitee, there was no expectation of privacy as to what could be seen from the hall."). Again, Bailey could not defeat a lawful arrest for his crime committed in public "by the expedient of escaping to a private place." *Santana*, 427 U.S. at 43.

A law-enforcement officer may make a warrantless entry into private property to arrest a suspect who is attempting to avoid arrest by fleeing into private property.

Santana, 427 U.S. at 42-43. In order for this rule to apply the arrest must have been "set in motion in a public place." *Id*. The attempt to apprehend must involve the "immediate or continuous pursuit of the suspect from the scene of a crime," *Welsh v. Wisconsin*, 466 U.S. 740, 753 (2011). The jury's finding that the arrest was initiated outside clearly establishes Bailey's arrest was set in motion in a public place and the parties all agree Swindell instantaneously responded to Bailey's entering into the home by attempting to physically seize him.

Other precedents from this Court observe that the fact of hot pursuit, itself, is an exigency or may otherwise authorize entry into a residence to complete an arrest for a crime committed in public. See *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (listing examples of exigency, including the need to fight a fire or avoid destruction of evidence, "*or* to engage in 'hot pursuit' of a fleeing suspect") (citing *Santana*) (emphasis added). Flight alone, as its own exigent circumstance, is well documented in the law. As Chief Justice Roberts' concurring opinion in *Lange* observed, there have been many cases issued by this Court which have so held. *Id*., at 2029-30. "We have repeatedly and consistently reaffirmed that hot pursuit is itself an exigent circumstance. . . . These cases, it bears repeating, have not viewed hot pursuit as merely the background against which *other* exigencies justifying warrantless entry might arise." (emphasis in original) (collecting cases).

In *Bailey II*, the Eleventh Circuit concluded that the jury rejected "hot pursuit" as an exigency, *Bailey II*, 89 F.4th at 1326. But that phrase was not defined for the jury. Instead, the jury was told that exigency included "a law enforcement officer's warrantless entry into a home

without an occupant's consent where () the arrest was set in motion in an area that is open to public view, which includes a front porch, and the person flees into a home, and the officer immediately follows the fleeing suspect into the home from the scene of the crime." (App., p. 315). The Eleventh Circuit improperly concluded that the jury's answer that there was no exigency must have meant that the jury concluded that Bailey was inside when the arrest began. *Bailey II*, 89 F.4th at 1330. But the jury's findings that the arrest was initiated outside the home and that there were no exigencies can more easily be harmonized by the conclusion that Bailey did not realize he was about to be arrested after he turned to enter the home, and thus Bailey subjectively did not believe he was fleeing into his home.

Bailey's own subjective belief as to whether he was being detained or arrested, or his subjective belief as to where the arrest technically or officially began, is all irrelevant to the Fourth Amendment inquiry. The question is whether, on the objective facts, Swindell could, in the moment he had to react, reasonably believe that Bailey was attempting to evade arrest by retreating inside the home.

As noted in Chief Justice Roberts' concurring opinion in *Lange*, the question of where the arrest is "set in motion" matters only to the extent it tells us where the offender was when probable cause arose that he had committed an offense. The relevant fact under the Chief Justice's analysis is not that the arrest was in some respect officially "started" or "initiated" outside, but rather that the offense was committed outside in public view of the officer and the person to be arrested has retreated inside. This is in perfect accord with *Santana*.

That the jury did not formally recognize this as "hot pursuit" does not change the fact that the circumstances of the case met the substance of the law because, without question and based on the jury's verdict, Bailey turned to leave his investigatory encounter with Swindell and Swindell then had probable cause to arrest him for doing so. "Pursuit implicates substantial government interests, regardless of the offense precipitating the flight. It is the flight, not the underlying offense, that justifies the entry . . . Flight is a direct attempt to evade arrest and thereby frustrate our society's interest in having its laws obeyed." *Lange*, 141 S.Ct. 2030-31 (Roberts, C.J., concurring) (internal quotations and citations omitted). "Law enforcement is not a child's game of prisoners base, or a contest, with apprehension and conviction depending upon whether the officer or defendant is the fleetest of foot." *Id.*, citing *Commonwealth v. Jewett*, 31 N.E.3d 1079, 1089 (2015) (quoting *State v. Ricci*, 144 N.H. 241, 245, 739 A.2d 404, 408 (1999)).

Chief Justice Robers also cited *Santana* for the proposition that whether the offense was a felony or a misdemeanor is immaterial and that in cases where the offense occurs in public then a deputy like Swindell may pursue the suspect into a home to make an arrest even absent some other articulable exigency. "Today, the Court holds that hot pursuit merely sets the table for other exigencies that may emerge to justify warrantless entry, such as imminent harm. This comes as a surprise. For decades we have consistently recognized pursuit of a fleeing suspect as an exigency, one that *on its own* justifies warrantless entry into a home." *Lange*, 141 S.Ct. at 2029 (Roberts. C.J., concurring) (emphasis added).

This is exactly what the Eleventh Circuit got wrong in this case. Bailey's offense was committed in public, on the porch, and Swindell had probable cause to arrest him while Bailey was on the porch. This is not in dispute. Where the parties subjectively believe the arrest "began"—inside or outside—is quite beside the point. Bailey turned to go back inside and Swindell followed him "in an instant" into the home to arrest him. Bailey's actions constituted exigency justifying entry, and the Eleventh Circuit was incorrect in requiring a showing of "extra exigency" on top of the fact of Bailey's retreat into the home.

Even if one sets aside Chief Justice Roberts' conclusion that such an entry is permitted under the Fourth Amendment and one assumes for the sake of argument that under the majority's conclusion in *Lange* that additional exigency was required for Swindell to have made entry to arrest Bailey, that does not answer the qualified immunity inquiry. This is because, under the majority opinion in *Lange*, if upon later examination it turned out that Swindell's entry was unconstitutional as unsupported by exigency, it was not clearly established as to what specific exigency would have had to exist, or even whether exigency would be required at all.

The district court in this case concluded that it was not clearly established in September 2014 that Swindell's immediate entry into the residence to pursue Bailey for the first-degree misdemeanor offense of resisting Swindell's lawful investigation was unconstitutional. The district court found that Bailey's criminal offense:

> also supports a finding of exigency in this case, at least when viewed through the lens

> of objective reasonableness that governs the qualified immunity analysis. Here, the underlying offense was resisting an officer without violence, a first-degree misdemeanor punishable by up to one year of imprisonment in Florida. *See* Fla. Stat. §§ 854.02; 775.082. In the Court's view, it cannot be said that reasonable officers would have understood that this offense was not sufficiently serious to justify a continuous hot pursuit entry into a home without a warrant, at the time of Bailey's arrest on September 11, 2014.

(District Court Order, App., p. 31).

The district court noted that there is sharp division in the courts as to "whether an officer with probable cause to arrest a suspect for a misdemeanor may constitutionally enter a home without a warrant in hot pursuit of that suspect." (District Court Order, App., p. 31, citing *Stanton*, 571 U.S. at 6; *Lange* 141 S.Ct. at 2017 (2021)). If the law on this point was not clearly established as of this Court's decision in *Lange* in 2021, the district court was certainly correct when it concluded that the law was not clearly established in 2014 that Swindell could not, "in an instant" go into the home to arrest Bailey for an offense Bailey just committed on the porch, in public.

The Eleventh Circuit decision at issue in this case, *Bailey II*, mentions *Lange* only in passing and only for the limited purpose of giving an example of exigency in the form of assisting an injured occupant. *Bailey II*, 89 F.4th at 1331. There is no discussion in *Bailey II* as to the district court's conclusion that, based on this Court's majority

decision in *Lange*, the law was not clearly established in 2014 that Swindell's entry into the home to complete the arrest of Bailey was unconstitutional.

Chief Justice Roberts' concurrence in *Lange* acknowledged the difficulty deputies would have in assessing the threshold need for, or the amount of, exigency required to justify entry *Lange*, 141 S.Ct. at 2028 (Roberts, C.J., concurring). Petitioner submits that this case exemplifies the plight of law enforcement alluded to by Chief Justice Roberts in that it is decidedly *unreasonable* to expect Swindell, in the moment, to have been able to navigate all of the parameters of whether exigency on top of pursuit was required, in what form it must have taken, and how "serious" it must be have been, so as to justify entry to in a moment enter the home to arrest Bailey.

B. The Court should grant the petition and hold that the Eleventh Circuit erred in its tortured reconstruction of the facts to conclude that Swindell was not entitled to qualified immunity. The district court's interpretation of the jury's verdict was in accord with the evidence at trial and reasonably resolved any inconsistency between the interrogatory answers and the verdict for Bailey.

Under the reasoning of Chief Justice Roberts in his concurrence in *Lange*, the location of the start of the arrest of Bailey is not dispositive of whether there was a Fourth Amendment violation in this case. Rather, because Bailey's offense was committed in public view and Swindell immediately pursued Bailey into the home to arrest him, then the Fourth Amendment is not implicated. The stark divergence between the district court and the Eleventh

Circuit about the meaning of the jury's finding that the arrest was initiated outside the home, as it relates to Bailey's location at that moment, has no bearing on the critical point that Bailey was outside with Swindell when he committed the offense.

Nonetheless, in *Bailey I* the Eleventh Circuit, believing that Bailey's location at the start of the arrest process dictates whether the case is governed by *Payton* or *Santana*, remanded the case for a trial on the question of where the arrest was initiated, inside or outside, for the court in *Bailey I* clearly understood that if a jury found the arrest was initiated outside then that meant ab initio that Bailey was outside the home with Swindell when the arrest was initiated. Swindell had already won the first trial, on the excessive force claim. The second jury subsequently answered the question as to where the arrest was initiated and found it was initiated outside the home.

In its order granting Swindell's Motion for Judgment as a Matter of Law, the district court harmonized the jury's findings by focusing on the fact that the issue at hand was qualified immunity for Swindell. The district court correctly held that the jury's funding of lack of exigency did not matter if the jury found that the arrest was supported by probable cause and was initiated outside. The testimony was universal that Swindell's entry into the home occurred immediately after Bailey turned to go a few feet, back inside the home. Not every deputy in Swindell's shoes would understand that the constitutionality of his immediate entry to arrest Bailey would depend on the presence of exigency, let alone an exigency over and above pursuit of a suspect fleeing a lawful investigatory detention and a lawful arrest.

The Eleventh Circuit in *Bailey II* ignored the district court's reasoning on this point. The Eleventh Circuit cited *Lange* only in passing and did not discuss the district court's conclusion that, given the uncertainty in the law in 2014, Swindell's entry into the home to arrest Bailey under these circumstances may not have been unconstitutional at all, and was by no means clearly established to have been so.

The Eleventh Circuit instead concluded that, notwithstanding the jury's answer that the arrest was initiated outside, because no exigency was found by the jury then that must have meant that the jury found that Bailey was inside when the arrest was initiated. But because the jury instructions did not define whether "fleeing" was based on the subjective intentions or awareness of the arrestee, versus the objective observations of the arresting officer, the jury's finding of no exigency is more plausibly explained by the jury having determined that Bailey did not subjectively understand that he was lawfully detained when he turned to enter the home, or that he did not know he was about to be arrested as he entered the home.

The use of special interrogatories to a jury is recognized as a means of resolving disputed questions of fact. See e.g. *Gallick v. Baltimore & O.R. Co.*, 372 U.S. 108 (1963). In the context of individual capacity claims under 42 U.S.C. §1983, the circuit courts have endorsed the use of special interrogatories to establish particular facts, with the district court then applying the law to those facts in order to determine whether qualified immunity protects a given defendant. "A tool used to apportion the jury and court functions relating to qualified immunity

issues in cases that go to trial is special interrogatories to the jury. Qualified immunity is a legal issue to be decided by the court, and the jury interrogatories should not even mention the term. Instead, the jury interrogatories should be restricted to the who-what-when-where-why type of historical fact issues" with the court then applying the law to those facts. *Johnson v. Breeden*, 280 F.3d 1308, 1318 (11th Cir. 2002), abrogation on other grounds recognized by *Kirby v. Sheriff of Jacksonville, Fla.*, Case No. 22-11109, 2023 WL 2624376 * 3 (11th Cir. March 24, 2023) (quoting *Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996)).

In situations where there remains uncertainty as to the facts given a jury's answers to interrogatories, in particular where an inconsistency is perceived to exist in the answers to those questions, the courts must make an effort to reconcile them. "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Gallick*, 372 U.S. at 119. Before disregarding a jury's special verdict, "[w]e therefore must attempt to reconcile the jury's findings, by exegesis if necessary . . . " *Id.*, citing *Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360 (1957); *McVey v. Phillips Petroleum Co.*, 288 F.2d 53 (5th Cir. 1961); *Morris v. Pennsylvania R. Co.*, 187 F.2d 837 (2d Cir. 1951).

"Not only must the answers to multiple special interrogatories be interpreted consistently with each other, but the answers to special interrogatories must be harmonized with the general verdict whenever reasonably possible." *Warlick v. Cross*, 969 F.2d 303, 305 (7th Cir.1992) (citing *Jewell v. Holzer Hosp. Found., Inc.*, 899 F.2d 1507, 1510 (6th Cir.1990)). Under Federal Rule of Civil Procedure

49(b)(3), however, when a jury's answers to verdict form interrogatories "are consistent with each other but one or more is inconsistent with the general verdict, the court may: (A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict; (B) direct the jury to further consider its answers and verdict; or (C) order a new trial."

Here, the district court focused on the point that the issue before it was qualified immunity. Because the arrest was initiated outside the home it was not clearly established that Swindell needed exigent circumstances to constitutionally justify entry. It was thus not necessary for the district court to account for or "explain away" the jury's answer that there was no exigency to pursue Bailey into the home, particularly in light of the Eleventh Circuit's clear instruction in *Bailey I* that the case was remanded for a jury to resolve whether the arrest was initiated inside or outside the home.

The Eleventh Circuit on the other hand took the "no" answer to exigency and inferred from it that the jury found no hot pursuit, leapfrogging to the conclusion that the jury must have silently found that Bailey was inside the home when the arrest was initiated such that Swindell's entry to complete the arrest was a clear violation under *Payton*. That court did not consider the more plausible explanation that the jury concluded that Bailey was outside, on the porch, when the arrest was initiated but that, because Bailey did not subjectively realize he was leaving a valid detention when he turned to enter the home, Bailey did not in turn realize that he was fleeing, and therefore his (Bailey's) entry into the home did not from his own perspective qualify as flight.

Objectively, Bailey's offense occurred in public, on the porch. The jury determined that the arrest was initiated outside, i.e., still in public. The district court concluded, based on these facts and the trial evidence that Bailey was outside the home when the arrest process began. This would place the case into the realm of *Santana*. At the very least, based on *Lange*, the law was not clearly established that Swindell could not immediately pursue Bailey into the home to complete the arrest under these circumstances.

The Eleventh Circuit in *Bailey II* applied a de novo standard of review to the district court's entry of judgment as a matter of law for Swindell. but did not articulate a standard of its review for the district court's interpretation of the jury's answers to the verdict form questions, showing no deference to the district court's superior vantage point in interpreting those answers in the context of all of the evidence at trial. The district court determined based on the jury's answers to the verdict form questions, and in the context of the remainder of the evidence, that Bailey was outside the home when the arrest process began. This was consistent with both the answers to the verdict form interrogatories and the evidence, correctly resulting in judgment for Bailey under either Rules 50 or 49(b)(3)(A).

The use of an interrogatory verdict form splits the role of the jury as fact finder and the trial court's role in applying the law to the facts. *Johnson*, 280 F.3d at 1318. Thus, there may be tension between a general verdict result for plaintiff, but facts compelling judgment for a defendant law enforcement officer based on qualified immunity.

In *Aczel v. Labonia*, 584 F.3d 52, 56 (2d Cir. 2009), for example, a jury found that a defendant officer used excessive force and awarded plaintiff damages. But the jury answered interrogatories which entitled the officer to qualified immunity as a matter of law. The district court entered judgment for the officer and the appellate court affirmed. See *Heard v. Municipality of Bossier City*, 215 F.3d 1079 (5th Cir. 2000) (Table) (despite general verdict for plaintiff on use of excessive force, jury's findings resulted in qualified immunity to defendant); *Montero v. Nandlal*, 682 Fed.Appx. 711, 717 (11th Cir. 2017) (affirming grant of qualified immunity to deputy sheriff based on jury's answers to interrogatories despite general verdict for plaintiff; "Because the jury's finding that (the deputy) made an objectively reasonable mistake was supported by evidence in the record, the district court was well within the scope of its discretion to enter judgment according to the special interrogatory notwithstanding the general verdict.").[8]

Based on the jury's answers to the verdict form questions, the district court in this case was justified in

8. The Eleventh Circuit's decision in *Montero* also discusses the difference between entry of judgment in such a scenario under Rule 49, rather than Rule 50. 682 Fed. Appx. 716-717. As in *Montero* the district court order here also did not distinguish between entry of judgment for Swindell under Rules 49 or 50. But, as in *Montero*, the analysis in this scenario would not differ because the legal issue is whether the jury's answers to the verdict form questions could be harmonized with the general verdict, and here, as in *Montero,* they could be because the ultimate legal issue was not whether Swindell's entry into the home was unconstitutional, but whether it was clearly established that his entry into the home was unconstitutional.

setting aside the general verdict for Bailey and entering judgment for Swindell based on qualified immunity. That conclusion is supported in the facts by the jury's verdict and the trial evidence, and in the law by *Santana* and *Lange*.

CONCLUSION

Based on the reasoning of Chief Justice Roberts' concurrence in *Lange*, the Court should grant the petition for writ of certiorari and hold that Swindell did not violate the Fourth Amendment when he immediately pursued Bailey inside the home to arrest Bailey for an offense Bailey had just committed on the porch, in public view and in Swindell's immediate presence. At a minimum, the Court should hold that the law was not clearly established that the Fourth Amendment precluded Swindell from doing so such that Swindell is at least entitled to qualified immunity.

If the constitutionality of Swindell's entry into the home to arrest Bailey turns, not on where Bailey's offense occurred, in public view, but on where Bailey was when the arrest was "initiated," inside or outside the home, the Court should grant the petition and hold that the Eleventh Circuit's construction of the facts so as to conclude that Bailey was inside the home when the arrest process began should yield to the district court's harmonization of the verdict form answers and setting aside of the general verdict for Bailey. The district court's interpretation of the verdict form answers to conclude that Bailey was outside when the arrest was initiated "outside the home" was reasonable, consistent with other answers on the verdict form, and the trial evidence and should not be

disturbed. As the district court concluded based on the majority opinion in *Lange*, the law was unsettled in 2021 (and therefore also in 2014) as to whether Swindell could pursue Bailey into the home in these circumstances and Swindell is therefore entitled to qualified immunity.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JANUARY 8, 2024

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

No. 21-14454

KENNETH BAILEY,

Plaintiff-Appellant,

v.

SHAWN T. SWINDELL,
IN HIS INDIVIDUAL CAPACITY,

Defendant-Appellee,

MICHAEL RAMIREZ, *et al.*,

Defendants.

January 8, 2024

Appeal from the United States District Court
for the Northern District of Florida,
D.C. Docket No. 3:15-cv-00390-MCR-HTC

Before Lagoa and Brasher, Circuit Judges, and Boulee,* District Judge.

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* Honorable J. P. Boulee, United States District Judge for the Northern District of Georgia, sitting by designation.

Appendix A

Lagoa, Circuit Judge:

This Section 1983 case is before us for a second time. *See Bailey v. Swindell*, 940 F.3d 1295 (11th Cir. 2019) ("*Bailey I*"). After being arrested at his parents' home, Kenneth Bailey filed suit against the arresting officer, alleging that Deputy Shawn Swindell violated his civil rights when Swindell tackled him through the door of the house and then arrested him. In *Bailey I*, the district court granted summary judgment in favor of Swindell on qualified immunity grounds. We reversed the district court and held that when the evidence was viewed in the light most favorable to Bailey, the non-moving party, Swindell violated clearly established law when he entered Bailey's parents' home to arrest him without a warrant or exigent circumstances. *See id.* at 1298. And we concluded that Swindell was not entitled to qualified immunity for his violation of Bailey's Fourth Amendment rights. *Id.* at 1303-04.

Following remand, the case went to trial.[1] The jury returned a verdict for Bailey and awarded Bailey $625,000

1. To be clear, this was the second trial in this case. Before *Bailey I*, the district court granted summary judgment in favor of Swindell as to Bailey's false arrest claim. The case then went to trial only on the issue of excessive force, which had not been resolved on summary judgment. Following trial, Bailey appealed the earlier grant of summary judgment on the false arrest claim but not the verdict on the excessive force claim. After we issued *Bailey I* and remanded the case to the district court, the parties proceeded to a second trial on questions of probable cause and exigent circumstances to justify warrantless entry into Bailey's home.

for his injuries. In a post-trial motion, Swindell moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). The district court granted Swindell's motion for judgment as a matter of law and set aside the jury's verdict.

Bailey appeals the district court's order granting judgment as a matter of law for Swindell on his false arrest claim under 42 U.S.C. § 1983. On appeal, Bailey argues that: (1) the district court erred by granting Swindell qualified immunity after the jury found that the hot pursuit exigency did not apply to his warrantless arrest, and (2) the district court erred in considering exigent circumstances when it was not one of the grounds for Swindell's earlier motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a).

After careful review, and with the benefit of oral argument, we reverse the district court's grant of judgment as a matter of law for Swindell on Bailey's unlawful arrest claim and reinstate the jury's verdict in favor of Bailey.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

In September 2014, Bailey and his wife, Sherri Rolinger, were going through a divorce. On the night of September 11, 2014, Deputy Shawn Swindell received a

2. Because this case arises on the appeal of the district court's judgment as a matter of law for Swindell, we take and construe the facts in the light most favorable to Bailey. *See Bishop v. City of Birmingham Police Dep't*, 361 F.3d 607, 609 (11th Cir. 2004).

call from Deputy Andrew Magdalany, who had responded to a call at Bailey's former marital home following a verbal altercation between Rolinger and Bailey. Magdalany relayed Rolinger's complaints that Bailey was harassing her, including coming to the home unannounced, turning photographs face down, leaving cigarette butts, and even installing cameras in the home without Rolinger's knowledge. Magdalany also explained that Rolinger stated that Bailey was not "acting right" and "had snapped." At the time of the call, Magdalany had not yet determined whether Bailey had committed any crime. Swindell headed to Bailey's parents' residence, where he was living at the time, to investigate.

Bailey voluntarily came out of his parents' home onto the front porch to talk with Swindell. Although Bailey repeatedly asked Swindell why he was there, Swindell never explained what he was investigating, but rather insisted that they go to his patrol car to talk. At some point, Bailey said "Okay, if you're not going to tell me why you're here, I'm going to turn around and go inside." Bailey crossed the threshold of the door and went inside the house. At trial, Bailey and his family testified that Swindell then ran toward Bailey and tackled him through the doorway of the house while exclaiming, "I am going to tase you." At trial, Swindell testified to a different version of events, stating that he put his arm on Bailey's shoulder and told him he was not free to leave because he could be arrested on charges of domestic violence, all before Bailey entered the house. Swindell also testified that Bailey struck Swindell with his arm while they were still on the front porch.

Once inside the house, Swindell and Bailey ended up on the floor. After a physical conflict, more deputies arrived on scene, arrested Bailey, and took him to the Santa Rosa County jail. As a result of the arrest, Bailey suffered injuries, including herniated disks in his neck.

The second trial focused on the moments before Bailey's arrest. On the third day of trial, the jury was instructed on the law of exigent circumstances. The district court explained that "[e]xigent circumstances justify a law enforcement officer's warrantless entry into a home without an occupant's consent where either the arrest was set in motion in an area that is open to public view, which includes a front porch, and the person flees into a home, and the officer immediately follows the fleeing suspect into the home from the scene of the crime." At the conclusion of the trial, the jury was given a verdict form that combined general questions and special interrogatories.[3] Because the verdict form included a question on where the arrest was "initiated," Swindell's counsel requested a definition for "initiate" from the district court. The district court denied the request, reasoning that there is no legal definition of the word and that the word "initiate" is a "commonly understood term."

Before deliberations, the district court instructed the jury that they "are the judges of the facts in this case." The first question on the verdict form asked, "Did Deputy Shawn T. Swindell have reasonable suspicion to detain Mr. Kenneth Bailey for a law enforcement investigation?"

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3. *See* Appendix.

The jury answered yes. The verdict form next asked, "Did Deputy Swindell have probable cause to arrest Mr. Bailey?" The jury answered yes, which prompted them to indicate which of the following supported their finding of probable cause: (1) "Willfully, maliciously, and repeatedly following, harassing, or cyberstalking another person;" (2) "Knowingly resisting, obstructing, or opposing a law enforcement officer who was engaged in the lawful execution of a legal duty;" (3) "Knowingly and willfully resisting, obstructing, or opposing a law enforcement officer who was engaged in the lawful execution of a legal duty by offering to violence or doing violence to the officer;" and/or (4) "Battery on a law enforcement officer." Given the choice to select multiple options, the jury checked only the second: "Knowingly resisting, 3 *See* Appendix. obstructing, or opposing a law enforcement officer who was engaged in the lawful execution of a legal duty."

The next question asked, "Where was the arrest *initiated*?" with choices: (1) "Outside the home" or (2) "Inside the home." The jury chose "Outside the home." The verdict form next asked, "If you determined that the arrest was *initiated outside* the home, did exigent circumstances justify Deputy Swindell's warrantless entry into the home?" The jury answered no. Because the jury found that exigent circumstances did not justify the warrantless entry into the home, they were prompted to skip the next question identifying which of the following exigent circumstances justified the entry: (1) "Hot pursuit of a fleeing suspect into the home;" (2) "Urgent need to enter the home to prevent the imminent destruction of evidence;" (3) "Specific and articulable facts supported a

belief that the suspect was armed and immediate entry into the home was necessary for safety."

Because the jury found that no exigent circumstances justified Swindell's warrantless entry into the home, they proceeded to answer the next question: "Did Deputy Shawn T. Swindell's conduct cause Kenneth Bailey's injuries?" and "Do you find that Kenneth Bailey should be awarded compensatory damages?" The jury answered that Swindell did cause the injuries and that Bailey should be awarded damages in the form of $625,000.00. There were no objections to the jury's verdict.

After the clerk read the verdict, Swindell asked for a ruling on a previously raised motion for judgment as a matter of law. The district court denied it as moot but advised that the parties could file post-trial motions. A judgment in accordance with the jury's verdict was entered on June 7, 2021.

Swindell filed a renewed motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b), arguing that the jury's finding that Swindell initiated the arrest of Bailey outside the home compelled entry of judgment in Swindell's favor on qualified immunity grounds. Because the jury found that the arrest was initiated outside the house, Swindell argued it was "inexplicabl[e]" for the jury to also conclude that there were not exigent circumstances. Bailey opposed the motion, arguing that the jury had expressly rejected exigency. Given the jury's finding that Swindell's actions violated a constitutional right, Bailey contended that

the only question remaining was whether that right was clearly established.

On this question, the district court reasoned that it must decide whether the law on the date of the incident gave Swindell clear notice that his conduct was unconstitutional for purposes of qualified immunity. And because "[t]he contours of the hot pursuit doctrine in the context of fleeing misdemeanants was an open legal question at that time," the district court determined that the law was not clearly established and granted Swindell's motion. The district court vacated the jury's judgment in favor of Bailey and entered judgment as a matter of law in favor of Swindell. This appeal followed.

II. STANDARD OF REVIEW

We review a district court's granting of a motion for judgment as a matter of law de novo, considering only the evidence that may properly be considered and the reasonable inferences drawn from it in the light most favorable to the nonmoving party. *Rossbach v. City of Miami*, 371 F.3d 1354, 1356 (11th Cir. 2004). Judgment as a matter of law is appropriate when a court finds that "a reasonable jury would not have a legally sufficient evidentiary basis to find for [a] party on [an] issue." Fed. R. Civ. P. 50(a)(1). "We will not second-guess the jury or substitute our judgment for its judgment if its verdict is supported by sufficient evidence." *EEOC v. Exel, Inc.*, 884 F.3d 1326, 1329 (11th Cir. 2018) (quoting *Lambert v. Fulton Cnty.*, 253 F.3d 588 594 (11th Cir. 2001)). "In determining whether a government official is entitled to qualified

immunity following a jury verdict, we view the evidence in the light most favorable to the party that prevailed at trial." *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1290 (11th Cir. 2000) (citing *Priester v. City of Riviera Beach*, 208 F.3d 919, 925 n.3 (11th Cir. 2000)). "In so doing, we give deference to the jury's 'discernible resolution of disputed factual issues.'" *Id.* (quoting *Iacobucci v. Boulter*, 193 F.3d 14, 23 (1st. Cir. 1999)).

III. ANALYSIS

Although qualified immunity presents a question of law, "resolution of this question can sometimes turn on issues of fact." *Simmons v. Bradshaw*, 879 F.3d 1157, 1163 (11th Cir. 2018). When it is not evident from the allegations of the complaint alone that the defendants are entitled to qualified immunity, the case will proceed to the summary judgment stage. *Johnson v. Breeden*, 280 F.3d 1308, 1317 (11th Cir. 2002). "Even at the summary judgment stage, not all defendants entitled to the protection of the qualified immunity defense will get it." *Id.* As relevant here, "if the evidence at the summary judgment stage, viewed in the light most favorable to the plaintiff, shows there are facts that are inconsistent with qualified immunity being granted, the case and the qualified immunity issue along with it will proceed to trial." *Id.* A defendant in those circumstances is, however, "not foreclosed from asserting a qualified immunity defense at trial." *Vaughan v. Cox*, 343 F.3d 1323, 1333 (11th Cir. 2003). At trial, the jury itself decides issues of fact that are determinative of the qualified immunity defense but does not apply the law of qualified immunity to those facts. *Breeden*, 280 F.3d at 1318.

In *Bailey I*, this Court, accepting Bailey's version of events as true, reversed the grant of summary judgment in favor of Swindell because Swindell arrested Bailey without a warrant, consent, or exigent circumstances. 940 F.3d at 1300. The case went to trial, where the jury resolved the factual disputes surrounding Bailey's arrest and determined that the arrest was initiated outside the home but that no exigent circumstances existed allowing for a warrantless entry into the home. It is these factual findings made expressly by the jury that the district court should have used in reaching its conclusions of law about qualified immunity. *See Simmons*, 879 F.3d at 1164 ("[T]he question of what circumstances existed at the time of the encounter is a question of fact for the jury – but the question of whether the officer's perceptions and attendant actions were objectively reasonable under those circumstances is a question of law for the court.").

When reviewing a district court's decision on qualified immunity following a jury verdict, we give deference to the jury's discernable resolution of disputed factual issues. *Oladeinde*, 230 F.3d at 1290. Here, the jury was asked to determine whether exigent circumstances existed to allow Swindell to enter the home without violating Bailey's constitutional rights. Particularly, the jury was instructed that exigent circumstances exist where "the arrest was set in motion in an area that is open to public view, which includes a front porch, and the person flees into a home, and the officer immediately follows the fleeing suspect into the home from the scene of the crime." The jury expressly found that exigent circumstances did not justify Swindell's warrantless entry into the home. Despite the

jury's clear rejection of exigent circumstances, Swindell insists such a conclusion is impossible because the arrest began outside and ended inside – facts which, Swindell seems to believe, compel a finding of "hot pursuit." But the jury, as the trier of fact, expressly found the opposite: that no exigent circumstances (hot pursuit or otherwise) justified Swindell's warrantless entry into the home, even though the arrest was initiated from outside.

The jury, which was not instructed on the meaning of "initiated," simply believed the testimony from the Bailey family that Swindell was outside the house, while Bailey was already inside, when Swindell formed the intention to arrest Bailey and set it in motion. As commonly understood, the word initiate applies logically to this version of events.[4] Although Bailey was inside the house, Swindell was outside when he started or initiated his charge toward Bailey. Far from inexplicable, the jury's factual finding that the arrest was initiated outside the home and that no exigent circumstances applied is consistent with the testimonies given at trial.

And as evidenced by the jury's verdict form, the jury found Bailey's version of events more credible than Swindell's testimony. Despite Swindell's testimony that Bailey struck Swindell outside the house prior to his arrest, the jury explicitly rejected such a finding when it concluded on the verdict form that neither "Battery on a law enforcement officer" nor "Knowingly and willfully

4. "To begin, commence, enter upon; to introduce, set going, give rise to, originate, 'start' (a course of action, practice, etc.)" *Initiate, Oxford English Dictionary* (2d ed. 1989).

resisting [a law enforcement officer] . . . by offering to violence or doing violence to the officer" supported probable cause. The jury chose to believe Bailey's testimony. We are not at liberty to second guess their decision.

Swindell argues that the jury's finding was legal, not factual, because the jury did not answer whether hot pursuit existed, but rather that exigency did not *justify* entry into the home. Swindell's argument is without merit. The district court instructed the jury that exigent circumstances would apply and "justify a law enforcement officer's warrantless entry into a home without an occupant's consent" if the person "flees [from arrest] into a home, and the officer immediately follows the fleeing suspect into the home." At trial, Bailey testified that he was not running away from the scene and that Swindell had given no indication that he was under arrest until Bailey was inside the home. By answering "no" to the exigent circumstances question in the special interrogatories and by not checking the box for "[h]ot pursuit of a fleeing suspect into the home," the jury found that this circumstance did not exist. Simply put, the jury found that the arrest was initiated outside the house, but that there was no hot pursuit. There is no confusion that the jury answered a question of fact. Indeed, after the verdict, neither side claimed that the jury's findings were inconsistent, nor did they seek to return the matter to the jury before it was discharged.

Given the jury's binding factual findings, the correct question for the district court to ask in deciding whether qualified immunity applied was whether it was clearly

established that an officer violates the Constitution when he "initiates" an arrest outside of a home and then enters the home without a warrant to complete the arrest in the absence of exigent circumstances. And the answer is yes.

"A right is clearly established when the state of the law gives the defendants fair warning that their alleged conduct is unconstitutional." *Patel v. Lanier Cnty.*, 969 F.3d 1173, 1186 (11th Cir. 2020) (cleaned up). The Supreme Court has "repeatedly told courts not to define clearly established law at too high a level of generality." *City of Tahlequah v. Bond*, 595 U.S. 9, 11, 142 S.Ct. 9, 211 L.Ed.2d 170 (2021). The contours of the rule must be so well-defined that it is obvious to a reasonable officer that his conduct was unconstitutional under the circumstances. *Id.*

Bailey's right to be free from a warrantless arrest in his parents' home absent exigent circumstances was clearly established. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." As the text suggests, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). And the Constitution generally requires that officers obtain judicial warrants before entering a home without permission. *Groh v. Ramirez*, 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004). There are, however, exceptions to that warrant requirement. *Brigham City*, 547 U.S. at 403, 126 S.Ct. 1943.

The relevant exception is for exigent circumstances. This exception applies when "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (quoting *McDonald v. United States*, 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153 (1948)); *see also Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.").

The Supreme Court has identified several exigencies that may justify a warrantless search of a home. *See Brigham City*, 547 U.S. at 403, 126 S.Ct. 1943. For example, an officer "may 'enter a home without a warrant to render emergency assistance to an injured occupant[,] to protect an occupant from imminent injury,' or to ensure his own safety." *Lange v. California*, — U.S. —, 141 S.Ct. 2011, 2017, 210 L.Ed.2d 486 (2021) (alteration in original) (quoting *Brigham City*, 547 U.S. at 403, 126 S.Ct. 1943). An officer may also make a warrantless entry to "prevent the imminent destruction of evidence." *Brigham City*, 547 U.S. at 403, 126 S.Ct. 1943; *see also United States v. Holloway*, 290 F.3d 1331, 1334 (11th Cir. 2002) (noting that the exigent circumstances doctrine extends to situations involving "danger of flight or escape, loss or destruction of evidence, risk of harm to the public or the police, mobility of a vehicle, and hot pursuit"). In those circumstances, the delay required to obtain a warrant would bring about

"some real immediate and serious consequences" and so the absence of a warrant is excused. *Welsh v. Wisconsin*, 466 U.S. 740, 751, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). But as this Court explained in the case's first appeal: "Unless a warrant is obtained or an exigency exists, 'any physical invasion of the structure of the home, by even a fraction of the inch, [is] too much.'" *Bailey I*, 940 F.3d at 1302 (alteration in the original) (quoting *Kyllo v. United States*, 533 U.S. 27, 37, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001)). This rule is "not only firm but also bright." *Kyllo*, 533 U.S. at 40, 121 S.Ct. 2038.

On the question of whether the Constitution forbids warrantless arrests absent exigent circumstances, the law speaks clearly. The line against such arrests "was drawn unambiguously in *Payton*, traces its roots in more ancient sources, and has been reaffirmed repeatedly since." *Bailey I*, 940 F.3d at 1303; *see also Kirk v. Louisiana*, 536 U.S. 635, 636, 122 S.Ct. 2458, 153 L.Ed.2d 599 (2002); *Kyllo*, 533 U.S. at 40, 121 S.Ct. 2038; *Welsh*, 466 U.S. at 754, 104 S.Ct. 2091; *Johnson v. United States*, 333 U.S. 10, 15, 68 S.Ct. 367, 92 L.Ed. 436 (1948) (all reaffirming the unconstitutionality of warrantless in-home arrests absent exigent circumstances). "As *Payton* makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home." *Kirk*, 536 U.S. at 638, 122 S.Ct. 2458. And "the Supreme Court has re-inked *Payton*'s firm line on numerous subsequent occasions." *McClish v. Nugent*, 483 F.3d 1231, 1242 (11th Cir. 2007). Because the law on this question is clearly established and gave Swindell fair warning that his treatment of Bailey was unconstitutional,

Swindell was not entitled to qualified immunity and the district court erred in holding otherwise.

IV. CONCLUSION

For these reasons, we reverse the district court's grant of judgment as a matter of law for Swindell and reinstate the jury's verdict for Bailey.[5]

REVERSED and REMANDED for reinstatement of jury verdict.[6]

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5. Because we reverse the district court's judgment on these grounds, it is unnecessary to address Bailey's argument that the district court improperly heard Swindell's motion for judgment as a matter of law.

6. Swindell also argues for a remittitur for damages in a footnote. Because a jury in *Bailey I* found that he did not use excessive force, Swindell argues that even if we reverse, the only damages available are the damages flowing from the unlawful entry alone, which would be de minimis nominal damages. Swindell is mistaken. Section 1983 defendants "are, as in common law tort suits, responsible for the natural and foreseeable consequences of their actions." *Jackson v. Sauls*, 206 F.3d 1156, 1168 (11th Cir. 2000). Swindell might not be liable for the excessive force claim, but he is liable for any and all reasonably foreseeable damages caused by his unlawful entry. As the district court instructed the jury before deliberations, "any force that Deputy Swindell used to effectuate the unlawful arrest was a violation of the Fourth Amendment." Injuries resulting from a physical arrest are certainly foreseeable consequences of an unlawful arrest in someone's home.

Appendix A

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No. 3:15cv390/MCR/CJK

KENNETH BAILEY,

Plaintiff,

v.

SHAWN T. SWINDELL,

Defendant.

VERDICT

We, the Jury, in the above entitled and numbered case, return the following unanimous verdict by a preponderance of the evidence:

A. Did Deputy Shawn T. Swindell have reasonable suspicion to detain Mr. Kenneth Bailey for a law enforcement investigation?

Yes ✓ No

Note: After answering this question, proceed to the next question.

B. Did Deputy Swindell have probable cause to arrest Mr. Bailey?

Yes ✓ No

Note: If you answered YES, proceed to the next question. If you answered NO, proceed to question C.

1. Please indicate whether either or both of the following supports your finding of probable cause.

Willfully, maliciously, and repeatedly following, harassing, or cyberstalking another person

✓ Knowingly resisting, obstructing, or opposing a law enforcement officer who was engaged in the lawful execution of a legal duty

Knowingly and willfully resisting, obstructing, or opposing a law enforcement officer who was engaged in the lawful execution of a legal duty by offering to violence or doing violence to the officer

Battery on a law enforcement officer

Note: After answering this question, proceed to the next question.

Appendix A

2. Where was the arrest *initiated*?

   ✓ Outside the home

   Inside the home

Note: If you "OUTSIDE THE HOME," proceed to the next question. If you answered "INSIDE THE HOME," proceed to question C.

3. If you determined that the arrest was *initiated outside* the home, did exigent circumstances justify Deputy Swindell's warrantless entry into the home?

   Yes No ✓

Note: If you answered YES, proceed to the next question. If you answered NO, proceed to question C.

4. Please identify which exigent circumstance(s) justified Deputy Swindell's warrantless entry into the home.

   Hot pursuit of a fleeing suspect into the home

   Urgent need to enter the home to prevent the imminent destruction of evidence

Specific and articulable facts supported a belief that the suspect was armed and immediate entry into the home was necessary for safety

Note: Once you have answered this question, your deliberations are complete, and the foreperson should sign and date the last page of this Verdict Form. You need not answer the remaining questions.

C. Did Deputy Shawn T. Swindell's conduct cause Kenneth Bailey's injuries?

Yes ✓ No

Note: If you answered "NO," your deliberations are complete, and the foreperson should sign and date the last page of this Verdict Form. You need not answer the remaining questions. If you answered "YES," proceed to the next question.

D. Do you find that Kenneth Bailey should be awarded compensatory damages?

Yes ✓ No

If you answered YES, in what amount? $625,000.00

Note: Once you have answered this question, you deliberations are complete, and the foreperson

should sign and date the last page of this Verdict Form.

SO SAY WE ALL, this 4th day of June, 2021.

/s/_____
Foreperson's Signature

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, PENSACOLA DIVISION, FILED DECEMBER 4, 2021

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No. 3:15cv390/MCR/HTC

KENNETH BAILEY,

Plaintiff,

v.

SHAWN T. SWINDELL,

Defendant.

December 4, 2021

ORDER[1]

Defendant Shawn T. Swindell's Renewed Motion for Judgment as a Matter of Law, or Alternatively, Motion for Remittitur, is now before the Court. *See* ECF No. 283. Having considered the law, the record, and the parties' arguments, the Court rules as follows.

1. The Court assumes the parties' familiarity with the claims, defenses, and evidentiary record in this case. Thus, this Order recites only those facts necessary to the resolution of Defendant Shawn T. Swindell's motion for judgment as a matter of law.

Appendix B

This is an action for deprivation of civil rights. As relevant to the instant motion, Plaintiff Kenneth Bailey alleged that Defendant Shawn T. Swindell, a deputy employed by the Santa Rosa County Sheriff's Office, detained him without reasonable suspicion, arrested him without probable cause, and entered his home to initiate the arrest without a warrant or exigent circumstances justifying the warrantless entry. Based on those allegations, Bailey asserted claims for false arrest/unlawful entry under federal and state law against Deputy Swindell.[2] This Court granted summary judgment to Deputy Swindell on the false arrest/unlawful entry claims on the basis of qualified immunity, and the Eleventh Circuit reversed and vacated that judgment. *See Bailey v. Swindell*, 940 F.3d 1295, 1303-04 (11th Cir. 2019). More specifically, the Eleventh Circuit held that Deputy Swindell was not entitled to qualified immunity at the summary judgment stage because the record at that time—viewed in the light most favorable to Bailey—showed that the deputy initiated Bailey's arrest while he was "completely inside his parents' home," *see id.* at 1301, without a warrant or exigent circumstances justifying a warrantless entry, which "violated clearly established

2. Bailey's complaint also asserted claims for excessive force, battery, and stalking against Deputy Swindell, as well as claims against the Santa Rosa County Sheriff (false arrest, battery, and a public records violation under state law) and another Sheriff's deputy (stalking and assault). His excessive force and battery claims previously went to trial and the jury returned a verdict in favor of Deputy Swindell; Bailey never challenged that verdict on appeal. The remaining state law claims were remanded to state court.

Fourth Amendment . . . protection[s] against unreasonable seizures," *see id.* at 1303-04. With qualified immunity removed from the case (for summary judgment purposes, at least), Bailey's false arrest/unlawful entry claims were reinstated for a trial on the merits.

A four-day jury trial was held on June 1-4, 2021. At the close of Bailey's case-in-chief, Deputy Swindell moved for judgment as a matter of law on the basis of qualified immunity, among other issues. *See* ECF No. 282-3 at 73. The Court took the motion under advisement. Consistent with Federal Rule of Civil Procedure 49(a), special verdict interrogatories were given to the jury on each issue of fact to be resolved in connection with its verdict. *See* Verdict Form, ECF No. 273. The jury returned a verdict in favor of Bailey, specifically finding as follows: (1) Deputy Swindell had reasonable suspicion to detain Bailey for a law enforcement investigation; (2) Deputy Swindell had probable cause to arrest Bailey for knowingly resisting, obstructing, or opposing a law enforcement officer who was engaged in the lawful execution of a legal duty; (3) the arrest was initiated outside of Bailey's parents' home; (4) no exigent circumstances justified Deputy Swindell's warrantless entry into the home to complete the arrest; (5) Deputy Swindell's conduct caused Bailey's injuries; and (6) Bailey should be awarded $625,000 in compensatory damages. *See id.* Deputy Swindell has now filed a renewed motion for judgment as a matter of law on grounds that the jury's verdict compels a finding that he is entitled to qualified immunity.

The doctrine of qualified immunity shields government officials performing discretionary functions from personal

liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Recognition of qualified immunity "reflects an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Simmons v. Bradshaw*, 879 F.3d 1157, 1162 (11th Cir. 2018). To that end, the doctrine gives officials room to make reasonable but mistaken judgments about open legal questions. *See Malley v. Briggs*, 475 U.S. 335, 343 (1986). When properly applied, it protects "all but the plainly incompetent or those who knowingly violate the law." *Id.* at 341.

The availability of the qualified immunity defense is a legal question to be decided by the court and cannot be submitted to a jury. *Simmons*, 879 F.3d at 1163; *Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996). Where, as here, qualified immunity was denied at summary judgment based on a determination that its availability turned on a genuine issue of material fact, the defense "remains intact," the case proceeds to trial, and a jury decides the historical facts bearing on qualified immunity. *See Simmons*, 879 F.3d at 1164. However, the jury does not apply the law of qualified immunity to the historical facts it finds. *See id.* at 1166. Rather, on a defendant's timely motion for judgment as a matter of law under Rule 50, the court uses the jury's factual findings to render its

legal determination on the issue of qualified immunity. *See id.* at 1164-65. "In other words, the question of what circumstances existed at the time of the encounter is a question of fact for the jury—but the question of whether the officer's perceptions and attendant actions were objectively reasonable under those circumstances[, in light of clearly established law,] is a question of law for the court." *See id.* at 1164.

For qualified immunity to apply, a government official first must establish he was acting within his discretionary authority when the allegedly unlawful acts occurred. *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002). Once this showing is made, the burden shifts to the plaintiff to show that the official is not entitled to qualified immunity. *Id.* To overcome qualified immunity, the plaintiff must establish that: (1) the official's conduct violated a statutory or constitutional right; and (2) the right at issue was clearly established at the time of the violation such that every reasonable official would have understood his conduct was unlawful in the circumstances he confronted. *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001).

A right is clearly established where existing precedent "placed the statutory or constitutional question beyond debate and thus g[ave] the official fair warning that his conduct violated the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *Gates v. Khokhar*, 884 F.3d 1290, 1296 (11th Cir. 2018). Fair warning is most commonly provided by "materially similar precedent" from the Supreme Court or, for cases in this district, the Eleventh Circuit or the Supreme Court of Florida. *See Gates*, 884

F.3d at 1296; *McClish v. Nugent*, 483 F.3d 1231, 1237 (11th Cir. 2007). "However, a judicial precedent with identical facts is not essential for the law to be clearly established." *Gates*, 884 F.3d at 1296. "Authoritative judicial decisions may establish broad principles of law that are clearly applicable to the conduct at issue." *Id.* "And occasionally, albeit not very often, it may be obvious from explicit statutory or constitutional statements that the conduct is unconstitutional." *Id.* at 1297. "In all of these circumstances, qualified immunity will be denied only if the preexisting law by case law or otherwise makes it obvious that the defendant's acts violated the plaintiff 's rights in the specific set of circumstances at issue." *Id.*

In this case, there is no dispute that Deputy Swindell was acting within his discretionary authority when he arrested Bailey. Therefore, the burden lies with Bailey to show that Deputy Swindell's actions violated a constitutional right and that the right was clearly established at the time. Based on the jury's answers to the special interrogatories, which are binding, *see Simmons*, 879 F.3d at 1164, the first criterion is met. The jury found Deputy Swindell violated Bailey's constitutional right to be free from an unreasonable seizure by arresting him—for a misdemeanor offense under Florida law—with probable cause, but without a warrant or exigent circumstances, inside his parents' home.[3] *See* Verdict Form, ECF No.

3. Again, the jury found that Deputy Swindell had probable cause to arrest Baily for knowingly resisting, obstructing, or opposing a law enforcement officer who was engaged in the lawful execution of a legal duty. *See* Verdict Form, ECF No. 274 at 2; *see also* Fla. Stat. § 843.02.

274. Significantly, however, the jury determined that the arrest was *initiated outside* of the home and that the constitutional violation occurred only when Deputy Swindell, without a warrant or exigent circumstances, pursued Bailey into the home after he retreated there in an attempt to depart the encounter. *See id.* at 3. Accordingly, the Court must decide whether the state of the pertinent law on September 11, 2014 would have given Deputy Swindell "fair and clear notice" that his conduct was unconstitutional. *See Bates v. Harvey*, 518 F.3d 1233, 1248 (11th Cir. 2008).

When assessing the state of the law on the date of a law enforcement encounter, specificity—with respect to both the facts and the law—is a court's guiding principle. *See Mullenix v. Luna*, 577 U.S. 7, 12 (2015) ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality."); *Wilson v. Layne*, 526 U.S. 603, 615 (1999) ("[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established."). "The dispositive question is whether the violative nature of *particular* conduct is clearly established." *Id.* This inquiry "must be undertaken in light of the specific context of the case, not as a general proposition." *Id.*

Applying these principles here, the dispositive question for qualified immunity purposes is whether it was clearly established on September 11, 2014 that the specific situation confronting Deputy Swindell—that is, after the deputy initiated a warrantless but lawful misdemeanor arrest *outside a home*, the arrestee (here,

Bailey) retreated into the home in an attempt to depart the encounter—did not constitute exigent circumstances allowing him to follow Bailey into the home to complete the warrantless arrest. In other words, was it clearly established that exigent circumstances did not exist? Based on applicable precedent, the answer is no.

"When it comes to warrantless arrests, the Supreme Court has drawn a firm line at the entrance to the house." *Bailey*, 940 F.3d at 1300 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)). Law enforcement officers may constitutionally arrest a person in a public place—outside a home, for example—without a warrant if they have probable cause to believe the person has committed a crime. *See id.* at 1300-01. However, warrantless arrests inside a suspect's home, even if supported by probable cause, are presumptively unreasonable under the Fourth Amendment, subject only to a few "jealously and carefully drawn" exceptions. *See McClish*, 483 F.3d at 1240 (quoting *Georgia v. Randolph*, 547 U.S. 103, 109 (2006)). One exception applies where "the exigencies of [a] situation make the needs of law enforcement so compelling that a warrantless [entry] is objectively reasonable." *Smith v. LePage*, 834 F.3d 1285, 1292 (11th Cir. 2016); *see also McClish*, 483 F.3d at 1240 ("[E]xigent circumstances [are] situations in which the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action."). Courts have recognized "hot pursuit" of a fleeing suspect as one such exigent circumstance, among others, that may justify an officer's warrantless entry into a home.[4] *See Smith*, 834 F.3d at 1292-93. To

4. Other well-established exigent circumstances justifying an officer's warrantless entry into a home include the need to

date, however, there has been little clarity on the contours of the hot pursuit doctrine in the context of fleeing misdemeanants.

Briefly, the Supreme Court has identified two factors to consider in determining whether hot pursuit creates an exigency justifying warrantless entry into a home: (1) the gravity of the underlying offense and (2) whether there was "immediate or continuous pursuit of the [suspect] from the scene of the crime." *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984). Only the first factor is ultimately at issue in this case, given the jury's factual finding that Deputy Swindell initiated a lawful misdemeanor arrest while Bailey was standing completely outside his parents' home. *See* Verdict Form, ECF No. 274 at 2-3. When Bailey responded by retreating into his parents' home in an attempt to depart the encounter, Deputy Swindell "immediate[ly]" and "continuous[ly]" pursued him from the scene of the misdemeanor offense—a public place—into the home to complete the arrest. *See Welsh*, 466 U.S. at 753. There was no "extended hue and cry in and about the public streets," but there was "some sort of a chase" from outside the home into it. *See United States v. Santana*, 427 U.S. 38, 42-43 (1976). "The fact that the pursuit . . . ended almost as soon as it began did not render it any the less a 'hot pursuit' sufficient to justify the warrantless entry into [Bailey's parents'] house," for purposes of the second factor. *See id.* at 43.

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provide emergency assistance, "danger of flight or escape, loss or destruction of evidence, [and] risk of harm to the public or the police." *See Smith*, 834 F.3d at 1292-93.

The first factor—again, the gravity of the underlying offense—also supports a finding of exigency in this case, at least when viewed through the lens of objective reasonableness that governs the qualified immunity analysis. Here, the underlying offense was resisting an officer without violence, a first-degree misdemeanor punishable by up to one year of imprisonment in Florida. *See* Fla. Stat. §§ 854.02; 775.082. In the Court's view, it cannot be said that reasonable officers would have understood that this offense was not sufficiently serious to justify a continuous hot pursuit entry into a home without a warrant, at the time of Bailey's arrest on September 11, 2014.

For many years, federal and state courts across the country have been "sharply divided" on the question of whether an officer with probable cause to arrest a suspect for a misdemeanor may constitutionally enter a home without a warrant in hot pursuit of that suspect. *See Stanton v. Sims*, 571 U.S. 3, 6 (2013); *see also Lange v. California*, 141 S. Ct. 2011, 2017 (2021). Some courts adopted a categorical rule that pursuit of a fleeing misdemeanant always qualifies as an exigent circumstance, while others required a case-specific showing of exigency. *See Lange*, 141 S. Ct. at 2017 n.1 (collecting cases). Neither the Supreme Court nor the Eleventh Circuit had resolved the divide as of September 11, 2014. At most, the Supreme Court had stated that the hot pursuit exception should "rarely" be applied to "extremely minor" offenses, such as "noncriminal, traffic offenses." *See Welsh*, 466 U.S. at 753; *Illinois v. McArthur*, 531 U.S. 326, 336 (2001) (observing that *Welsh* distinguished between jailable and nonjailable

offenses, not felony and misdemeanor offenses). And as recently as 2018, albeit in an unpublished opinion, the Eleventh Circuit affirmed an officer's hot pursuit of a fleeing misdemeanant into a third-party's residence. *See United States v. Concepcion*, 748 F. App'x 904, 906 (11th Cir. 2018) (citing *Stanton*, 571 U.S. at 9).

It was not until earlier this year, on June 23, 2021, after the trial in this case, that the Supreme Court explicitly weighed in on the issue. In *Lange v. California*, the Court held that pursuit of a fleeing misdemeanant does not always—that is, categorically—supply the exigency required for a warrantless home entry. *See* 141 S. Ct. at 2021. Rather, the Court explained that there must be a "case by case [assessment of] the exigencies arising from a misdemeanant['s] flight" to determine whether the totality of the circumstances present a "law enforcement emergency" authorizing a warrantless entry. *Id.* at 2021-22. Notably for our purposes, the Court again observed, as it did in *Stanton* just eight years before, that courts at that time remained divided on whether the Fourth Amendment permits an officer to enter a home without a warrant in hot pursuit of a fleeing misdemeanant. *Id.* at 2017. In other words, the law of exigent circumstances based on hot pursuit of a misdemeanant was not clearly established as of June 2021. Moreover, given the "case by case" standard articulated by the Supreme Court in *Lange*, the precise contours of the hot pursuit doctrine in the context of misdemeanors remain unsettled. In light of this legal landscape, the constitutionality of Deputy Swindell's actions cannot be considered "beyond debate"

as of September 11, 2014.[5] *See Stanton*, 571 U.S. at 5 ("[B]efore concluding that the law is clearly established, . . . existing precedent must have placed the statutory or constitutional question beyond debate."); *Wilson*, 526 U.S. at 618 ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

Unsurprisingly, Bailey disagrees. He cites a series of cases that he argues put law enforcement officers, like Deputy Swindell, on fair and clear notice that "both probable cause and exigent circumstances are required to make an in-home warrantless arrest." Pl. Brief, ECF No. 284 at 21. Although this is an accurate statement of constitutional law as far as it goes, it defines the test for "clearly established law" at far too high a level of generality for this qualified immunity analysis. *See Mullenix*, 577 U.S. at 12 ("[The 'clearly established'] inquiry must be undertaken in light of the specific [factual] context of the case, not as a broad general proposition.") (internal marks omitted). As already explained, and as framed at the level of specificity that the Supreme Court mandates in this context, the dispositive question is whether the particular situation confronting Deputy Swindell at the time of the warrantless home entry here did not constitute exigent circumstances under clearly established law. None of the cases relied on by Bailey "fairly or clearly" resolve this

5. Again, Deputy Swindell initiated a warrantless but lawful misdemeanor arrest in a public place (i.e., outside a home); the arrestee retreated into the home in an attempt to depart the encounter; and Deputy Swindell immediately and continuously followed the arrestee into the home to complete the arrest.

question, as all of them are materially distinguishable from this case.

Payton v. New York, for example, is not an exigent circumstances case at all. In *Payton*, the Supreme Court first established the constitutional principle that warrantless arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. However, the Court "explicitly refused" to consider whether the warrantless home entry in *Payton* might have been justified by exigent circumstances or to otherwise define "the sort of emergency or dangerous situation[s]" that might qualify as exigent for purposes of the warrant exception, because those issues were not before them.[6] *See Welsh*, 466 U.S. at 742 (citing *Payton*, 445 U.S. at 583).

Hardigree v. Lofton, 992 F.3d 1216 (11th Cir. 2021), had yet to be decided when Deputy Swindell's alleged misconduct occurred in 2014, so it could not have clearly established the law at that time or provided Deputy Swindell "fair warning" that his warrantless home entry was unlawful. *See Terrell v. Smith*, 668 F.3d 1244, 1256 n.5 (11th Cir. 2012) (decisions issued after the events in dispute occurred cannot clearly establish the law for purposes of

6. More specifically, the Supreme Court noted that while it was "arguable" that the warrantless arrest in *Payton* might have been justified by exigent circumstances, none of the lower courts had relied on any such justification and so the Court had "no occasion to consider the sort of emergency or dangerous situation . . . that would justify a warrantless entry into a home for the purpose of either arrest or search." *Payton*, 445 U.S. at 583.

overcoming qualified immunity); *Belcher v. City of Foley, Ala.*, 30 F.3d 1390, 1400 n.9 (11th Cir. 1994) (same). Even if *Hardigree* had predated the instant case, it would not preclude qualified immunity here. For starters, *Hardigree* involved an appeal of competing motions for summary judgment on an unlawful entry claim, and the Eleventh Circuit concluded that neither side—that is, neither the arresting officer defendant nor the plaintiff alleging unlawful entry and arrest—was entitled to prevail because of disputed material facts that a reasonable jury could decide either way. In other words, the court held that a jury *could* reasonably find that probable cause and exigent circumstances justified the officer's warrantless home entry.

More significantly, the *Hardigree* plaintiff 's version of events included critical facts not present in Bailey's case (and not acknowledged in Bailey's briefing). Briefly, as relevant here, the plaintiff in *Hardigree* was standing inside a residence near its open front door when narcotics officers, who were standing outside the door, asked to search the residence. The plaintiff declined, saying it was his sister's house. According to the plaintiff, "an officer told him to call his sister for permission to search the home," so he "announced he was going to do so," and then turned and walked away from the door to retrieve his phone. *Hardigree*, 992 F.3d at 1228. The Eleventh Circuit held that those facts, accepted as true for summary judgment purposes, "do not even arguably arouse" officer safety or destruction of evidence concerns, primarily because the plaintiff only walked further into the home "to comply with the orders of an officer," an act that could not

reasonably be viewed as "suspicious" or "fl[ight]" under the circumstances. *Id.* at 1229. Nothing remotely analogous to this occurred in Bailey's case.

McClish v. Nugent, another case cited by Bailey, also is factually distinguishable. There, an officer knocked on the door to a home and the suspect opened the door but remained "standing completely inside" the living room of his home. 483 F.3d at 1236. The officer "reach[ed] through [the suspect's] open doorway," *id.* at 1241, "physically hauled [him] out of his home" onto the porch, *id.* at 1248, and arrested him. The Eleventh Circuit unambiguously held that a warrantless home entry and arrest under those circumstances violates the Fourth Amendment because it was initiated while the suspect was "entirely within" his home, *id.*, and there were no exigent circumstances—"no retreat; no hot pursuit; no concerns with spoilation of evidence[;] . . . and no hint of any threat to officer safety," *id.* at 1245-46.[7] But that is not what happened here, based on the jury's binding factual determination that Bailey was outside the home—not inside the home, as in *McClish*—when his arrest was set in motion, and the undisputed evidence that Bailey did retreat into his home. Consequently, *McClish* cannot be read as "clearly establishing" the unconstitutionality of Deputy Swindell's conduct.

Neither can *Hamilton v. Williams*, 8:18-cv-885, 2019 WL 5653450 (M.D. Fla. Oct. 1, 2019), an unpublished and

7. The Eleventh Circuit also held that unconstitutionality of the officer's conduct was not clearly established at the time of the arrest in *McClish*. *See McClish*, 483 F.3d at 1248-49. After *McClish*, however, it was.

nonbinding district court decision entered five years *after* Bailey's arrest, in which there was no "immediate or continuous pursuit" of the suspect from the crime scene because officers first approached the suspect's home to arrest him 31 hours after the alleged underlying offense occurred, and they had spent the interim researching his criminal history and organizing the use of a K-9 unit rather than obtaining a warrant for his misdemeanor arrest. *Id.* at *6. Yet again, not what happened here.

In short, Bailey has not cited—and this Court has not found—a single authority in existence on September 11, 2014 that clearly established the unlawfulness of a warrantless home entry and arrest on the facts found by the jury here. Moreover, this Court's legal determination that those facts provided an objectively reasonable basis for believing that exigent circumstances were present is wholly consistent with the Eleventh Circuit's earlier decision in this case. At that stage, the Eleventh Circuit was required to accept Bailey's version of the facts as true, *see Underwood v. City of Bessemer*, 11 F.4th 1317, 1331 (11th Cir. 2021) ("[A]t [summary judgment,] the court must accept the nonmoving party's version of the facts as true and make all reasonable inferences in favor of that party."), so it assumed that Bailey was "completely inside his parents' home before [Deputy] Swindell arrested him, and that Swindell neither physically nor verbally, and neither explicitly nor implicitly, initiated the arrest until Bailey had retreated fully into the house." *See Bailey*, 940 F.3d at 1301. On those facts, the court concluded that "Bailey's arrest . . . [could not] qualify as a true hot pursuit" because it "wasn't initiated in public"—"a crucial

element" of the hot pursuit exception—and instead was first "set in motion *inside* a home." *Id.* at 1302. However, as is often the case, the facts as found by the jury at trial differed from those taken in the light most favorable to Bailey at the summary judgment stage.[8] At the post-trial stage, the jury's factual finding that Bailey's arrest was initiated *outside* the home controls.[9] And as already shown, that factual finding compels an entirely different result under Fourth Amendment jurisprudence.

Based on the foregoing, the Court finds there was no clearly established law on September 11, 2014 that would have given notice to Deputy Swindell that the situation he confronted that day—again, after initiating a warrantless but lawful misdemeanor arrest outside a home, the arrestee retreated into the home in an attempt to resist the lawful encounter—did not constitute exigent circumstances justifying a warrantless entry into the

8. *See Lee*, 284 F.3d at 1190 ("As this Court has repeatedly stressed, the facts, as accepted at the summary judgment stage of the proceedings, may not be the actual facts of the case.") (internal quotation omitted).

9. *See Kelly v. Curtis*, 21 F.3d 1544, 1546 (11th Cir. 1994) ("[W]hat we state as 'facts' . . . for purposes of reviewing the rulings on the summary judgment motions are the 'facts for present purposes,' but they 'may not be the actual facts.' For that reason, a defendant who does not win summary judgment on qualified immunity grounds may yet prevail on those grounds at or after trial on a motion for judgment as a matter of law."); *Swint v. City of Wadley, Ala.*, 5 F.3d 1435, 1439 (11th Cir. 1993) ("Any qualified immunity defenses that do not result in summary judgment before trial may be renewed at trial, where the actual facts will be established.").

home to arrest Bailey. Stated differently, there were no "explicit statutory or constitutional statements" or "[a]uthoritative judicial decisions" establishing that a misdemeanor offense such as resisting an officer without violence was not sufficiently serious to satisfy the hot pursuit exception to the warrant requirement. *See Gates*, 884 F.3d at 1296-97. The contours of the hot pursuit doctrine in the context of fleeing misdemeanants was an open legal question at that time, and arguably remains so today. Under those circumstances, it cannot reasonably be said that Deputy Swindell was "plainly incompetent" or that he "knowingly violat[ed] the law." *See Malley*, 475 U.S. at 341. Consequently, Deputy Swindell is entitled to qualified immunity with respect to Bailey's false arrest/unlawful entry claims. Although a harsh result in light of the jury's verdict, the undersigned nonetheless believes it is the correct result under binding constitutional jurisprudence.

Accordingly, Deputy Swindell's renewed motion for judgment as a matter of law on that basis, ECF No. 283, is GRANTED.[10] The Clerk is directed to vacate the judgment entered on June 7, 2021, ECF No. 276, and enter judgment as a matter of law in favor of Deputy Swindell, consistent with this Order.[11]

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10. Because the Court has found that Deputy Swindell is entitled to qualified immunity, his alternative motion for remittitur is not addressed.

11. The Clerk is also directed to terminate the pending motion for leave to file a reply, ECF No. 285, as moot.

DONE AND ORDERED, on this 4th day of December 2021.

/s/ M. Casey Rodgers
M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, PENSACOLA DIVISION, FILED DECEMBER 23, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No. 3:15-cv-390-MCR/HTC

KENNETH BAILEY,

Plaintiff,

v.

SHAWN T. SWINDELL,

Defendant.

JUDGMENT

This action came before the Court with the Honorable M. Casey Rodgers presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is entered as a matter of law in favor of the Defendant, SHAWN T. SWINDELL.

JESSICA J. LYUBLANOVITS,
CLERK OF COURT

December 23, 2021
DATE

s/ Jeremy Wright
Deputy Clerk

APPENDIX D — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PENSACOLA DIVISION, FILED JUNE 7, 2021

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No. 3:15cv390-MCR-HTC

KENNETH BAILEY,

Plaintiff,

vs.

SHAWN T. SWINDELL,

Defendant.

FINAL JUDGMENT

This action came before the Court for a jury trial with the Honorable M. Casey Rodgers presiding. The issues have been tried, resulting in a jury verdict in Plaintiff's favor on June 4, 2021.

Accordingly, it is ORDERED AND ADJUDGED that final judgment is entered in favor of the Plaintiff, KENNETH BAILEY, and against Defendant SHAWN T. SWINDELL, in the amount of $625,000.00, together with costs taxed against Defendant.

Appendix D

JESSICA J. LYUBLANOVITS
CLERK OF COURT

June 7, 2021
DATE

/s/ Susan Simms
Deputy Clerk: Susan Simms

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MARCH 6, 2024

KENNETH BAILEY,

Plaintiff-Appellant,

v.

SHAWN T. SWINDELL,
IN HIS INDIVIDUAL CAPACITY,

Defendant-Appellee,

MICHAEL RAMIREZ, *et al.*,

Defendants.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 3:15-cv-00390-MCR-HTC

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

Before LAGOA and BRASHER, Circuit Judges, and BOULEE,* District Judge.

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 also is DENIED. FRAP 40.

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* Honorable J. P. Boulee, United States District Judge for the Northern District of Georgia, sitting by designation.

APPENDIX F — RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

42 U.S.C. §1983 provides in relevant part that:

"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 …."

Appendix F

U.S. Const. amend. IV provides that:

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

APPENDIX G — PETITION FOR PANEL OR EN BANC REHEARING, BY APPELLEE SHAWN T. SWINDELL, FILED JANUARY 29, 2024

Case No.: 21-14454-C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KENNETH BAILEY,

Plaintiff/Appellant,

v.

SHAWN T. SWINDELL,

Defendant/Appellee.

Appeal from the United States District Court
for the Northern District of Florida, Pensacola Division
Case No.: 3:15-cv-00390-MCR-HTC

PETITION FOR PANEL OR EN BANC REHEARING, BY APPELLEE SHAWN T. SWINDELL

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Appendix G

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Andrews, Crabtree, Knox & Longfellow – Counsel for Defendant/Appellee

Andrews, Jeannette M. – Counsel for Defendant/Appellee

Bailey, Kenneth – Plaintiff/Appellant

Boyd Ginger – Counsel for Defendant/Appellee

Broad and Cassel, PA – Former counsel for Defendant/Appellee

Cannon, Hope T. – U.S. Magistrate Judge in case below

Corona, Lacey – Counsel for Defendant/Appellee

DeBevoise & Poulton, P.A. – Counsel for Defendant/Appellee

Florida Sheriffs Risk Management Fund – Liability Coverage for Defendant/Appellee

Hall, C. Phil – Former counsel for Plaintiff/Appellant

Kahn, Jr., Charles J. – U.S. Magistrate Judge in case below

Knox, John Craig – Counsel for Defendant/Appellee

Kozan, Margaret E. – Counsel for Plaintiff/Appellant

Landy, Riley – Counsel for Defendant/Appellee

Longfellow, III, Joe – Counsel for Defendant/Appellee

Appendix G

Nelson Mullins Riley & Scarborough LLP – Counsel for Defendant/Appellee

Phil Hall PA – Former counsel for Plaintiff/Appellant

Poulton, Thomas W. – Counsel for Defendant/Appellee

Revell, Ramsey – Counsel for Defendant/Appellee

Rodgers, M. Casey – U.S. District Judge in case below

Swindell, Shawn T. – Defendant/Appellee

Taylor, Warren, Weidner & Hancock, PA – Counsel for Plaintiff/Appellant

United States of America Department of Defense – Subrogation interest in any recovery arising from the medical care furnished to Kenneth Bailey

Warren, J. Phillip – Counsel for Plaintiff/Appellant

Weidner, Keith W. – Counsel for Plaintiff/Appellant

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-5, Defendant/Appellee Shawn T. Swindell has no corporations to disclose.

Appendix G

11th Cir. R. 35-5(c) Certification

I express a belief, based on a reasoned and professional judgment, that the current panel decision in this matter, *Bailey v. Swindell*, 89 F.4th 1324 (11th Cir. 2024) is contrary to the following decision of the Supreme Court of the United States and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

> *Lange v. California,* 594 U.S. ___, 141 S.Ct. 2011 (2021)

I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

> Whether this Court's adherence to a categorical rule that, absent consent or a warrant, a law enforcement officer may never pursue a fleeing misdemeanant into a residence without a showing of exigency, is in conflict with the Supreme Court's express decision in *Lange v. California,* 594 U.S. ___, 141 S.Ct. 2011 (2021), that there is in fact no such categorical rule.
>
> Whether, given the Supreme Court's holding in *Lange* that exigency is not always required to pursue a fleeing misdemeanant into a residence, and that whether exigency is required is reviewed on a case-by-case basis, Swindell is by definition entitled to qualified immunity

because the law was not clearly established on the point at the time of this arrest incident and under these circumstances.

s/ Thomas W. Poulton
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[TABLES OMITTED]

Appendix G

STATEMENT OF THE ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION

En banc review of the panel opinion in this §1983 case is necessary because the panel opinion squarely and materially conflicts with the 2021 opinion of the United States Supreme Court in *Lange v. California,* 594 U.S. ___, 141 S.Ct. 2011, 2021-25 (2021), as to the conditions under which a law enforcement officer may pursue a fleeing misdemeanant into a residence.

Defendant Santa Rosa County Sheriff's Deputy Shawn Swindell initiated a 2014 misdemeanor arrest of Plaintiff Kenneth Bailey on the front porch of Bailey's mother's home. The jury verdict and the evidence established that Swindell had probable cause to arrest Bailey under §843.02, Fla., Stat., for resisting Swindell's questions during a lawful detention of Bailey on the front porch. The parties differ as to whether the force of the arrest propelled Swindell and Bailey into the home, or whether Swindell pursued Bailey into the home such that the arrest physically began with Bailey entirely inside the residence.

The jury did not find exigency on top of the fact of pursuit of Bailey into the residence so as to independently justify entry. But, the district court correctly held that *even if* the arrest process physically began with Bailey completely inside the home, the law was not clearly established in 2014 that Swindell had to show exigency to enter the home so as to arrest Bailey for the offense which had just occurred on the front porch. The court therefore granted qualified immunity to Swindell.

Appendix G

The panel reversed, holding that it was clearly established in 2014 that it was unconstitutional for Swindell to enter the residence in the absence of a warrant, consent, or exigency. Consent and a warrant are not at issue here. The panel determined that under his best case Bailey was completely inside the residence when the arrest actually began and that, in the absence of exigency, Swindell's entry into the residence was clearly unconstitutional.

This simply cannot be squared with *Lange*. The Supreme Court recognized in *Lange* that there was to that point in time substantial disagreement amongst the courts as to whether and under what circumstances the Fourth Amendment allowed an officer to pursue a fleeing misdemeanant into a home, with some courts holding that hot pursuit into the residence is *always* permissible, with other courts taking a case-by-case approach to the subject. "Courts are divided over whether the Fourth Amendment always permits an officer to enter a home without a warrant in pursuit of a fleeing misdemeanor suspect. Some courts have adopted such a categorical rule, while others have required a case-specific showing of exigency." *Id.*, p. 2017 (footnote omitted).

Discussing the role of exigency in such pursuits, the Court recognized that not all misdemeanors are created equal; that in some cases the severity of the crime at issue and mere fact of the pursuit, itself, would justify entry without a warrant, consent, or an additional showing of exigency. The Court thus declined to adopt a categorical rule that either all such pursuits are constitutional in the absence of exigency, or that none are. Instead, the Court

opted, *in the future*, for a case-by-case examination of the circumstances of the incident to determine whether pursuit into the home is constitutional.

> Our Fourth Amendment precedents thus point toward assessing case by case the exigencies arising from misdemeanants' flight. That approach will in many, if not most, cases allow a warrantless home entry. When the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting. *And those circumstances, as described just above, include the flight itself.* But the need to pursue a misdemeanant does not trigger a categorical rule allowing home entry, even absent a law enforcement emergency. When the nature of the crime, the nature of the flight, and surrounding facts present no such exigency, officers must respect the sanctity of the home—which means that they must get a warrant.

Lange, 141 S. Ct. at 2021-22 (emphasis added) (footnote omitted).

The instant matter, however, is not about the state of the law moving forward, after *Lange*. It is instead about the confused and contradictory state of the law in 2014, when this incident occurred. The district court correctly found that, under *Lange*, the state of the law on whether Swindell could pursue Bailey into his mother's home

under these circumstances was not clearly established in 2014. The district court thus correctly granted Swindell qualified immunity. The panel opinion here is simply incorrect in its conclusion that the law was clearly established to the contrary in 2014.

Given the Supreme Court's observation in *Lange* that a requirement for exigency in order to enter the home in such circumstances was unclear, and is even now case-by-case, Swindell is entitled to qualified immunity. The panel or the Court en banc should withdraw the opinion in this case and, pursuant to the Supreme Court's decision in *Lange*, affirm the district court's grant of qualified immunity to Swindell.

STATEMENT OF COURSE OF PROCEEDINGS AND DISPOSITION

Bailey sued Swindell alleging excessive force and unlawful arrest. (Dkt. 1, pp. 9-10). Bailey alleged in his complaint that when Swindell attempted to gain physical control of Bailey "the momentum of Defendant's charge pushed the two of them inside the home." (*Id.*, ¶ 21-23). Swindell filed his Answer and Affirmative Defenses, including qualified immunity as to the federal claims against him. (Second, Sixth, and Seventh Affirmative Defenses, Dkt. 6, pp. 6-7).

The district court denied summary judgment to Swindell on the excessive force claim (Dkt. 105) and that claim was tried in July of 2018. The first jury determined that the force used by Swindell was not excessive. (Dkt.

174). Bailey then appealed the earlier grant of summary judgment on the unlawful arrest claim.

In *Bailey v. Swindell*, 940 F.3d 1295 (11th Cir. 2019) (hereinafter *Bailey I*),[1] this Court reversed the district court's grant of summary judgment to Swindell on Bailey's Fourth Amendment claim of unlawful arrest, holding that based on Bailey's version of events, "Bailey's arrest was effectuated inside Bailey's home without a warrant, consent, or exigent circumstances" making the arrest unlawful regardless of presence of probable cause. *Id.*, p. 1300.

The Court cited two United States Supreme Court cases, *Payton v. New York*, 445 U.S. 573 (1980), and *United States v. Santana,* 427 U.S. 38 (1976) as framing the issue. *Bailey I*, 940 F.3d at 1300-03. This Court held that *Santana* did not apply to the facts of this case to allow entry into the home because the arrest in *Santana* "began in a public place" (*Bailey I*, p. 1301) whereas under Bailey's version of events, the arrest in this case occurred "completely inside" his parents' home. *Bailey I*, 940 F.3d at 1301 (emphasis added). This distinction presented the key issue for the second trial: a jury decision was necessary on the question of whether the arrest was initiated outside the residence, as in *Santana*, or occurred "completely inside" the residence, as in *Payton*.

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1. The opinion at issue in this petition is published. *Bailey v. Swindell*, 89 F.4th 1324 (11th Cir. 2024). As there was a prior appeal in this case, 940 F.3d 1295, the panel opinion at issue in this petition is referred to as *Bailey II*. And, for ease of review, and pursuant to 11th Cir. Rules 35-5(k) and 40-1, the published opinion is attached to this petition as the opinion sought to be reheard.

Appendix G

The jury in the second trial found that Swindell had reasonable suspicion to detain Bailey for a law enforcement investigation, had probable cause to arrest Bailey for the misdemeanor offense of resisting arrest without violence, and that the arrest was initiated *outside* the residence. (Dot. 273, pp. 1-3). The jury also found that there were no separate exigent circumstances for Bailey to have entered the home. (*Id.*, p. 3). The jury answered general questions in Bailey's favor, awarding him substantial damages.

On renewed motion for judgment as a matter of law, the district court noted that the Supreme Court in *Lange* had held that the question of whether exigency is required to pursue a fleeing misdemeanant into a residence was far from clear, at least as of 2021. The district court found that the absence of exigency in this case was therefore irrelevant because it was not *clearly established* on September 11, 2014, that Swindell's entry into the home in completing the misdemeanor arrest was unlawful. (Dot. 293). Given that lack of clarity, the district court granted Swindell qualified immunity, set aside the verdict, and entered judgment for Swindell.

STATEMENT OF FACTS

On the evening of September 11, 2014, Deputy Swindell responded to a call from another deputy concerning investigation into a domestic disturbance which involved Bailey. Deputy Swindell went to Bailey's mother's residence to speak to Bailey. (Day 1 Transcript, Testimony of Swindell, p. 99, lines 6-19). Bailey was on the front porch and Swindell was just off it, about 6-7 feet away

from Bailey. (*Id*., p. 104, lines 11-24; Exhibit 2 at trial, p. 176 of Appellant's Appendix Volume I).

This is the residence in question:

Deputy Swindell asked Bailey to come to his car, out on the street, to speak to him alone, but Bailey refused. *Bailey II*, 89 F.4th at 1327. Swindell at that point had decided to detain Bailey to further investigate. Bailey turned around and started to walk back into the residence. Bailey and his family testified that Bailey had "crossed the threshold of the door and went inside the house" when Swindell "ran toward Bailey and tackled him through the doorway." *Bailey II*, 89 F4th at 1327. The witnesses thus diverged as to where the arrest physically started, but the jury expressly found in an answer to a special interrogatory that it was "initiated" outside the home. (Verdict Form, Dot. 273, p. 2).

Critically, all of the witnesses and the parties did agree that the arrest and its entry into the home were instantaneous and inseparable. For example, Kenneth Bailey testified at trial that he turned to go back inside the home and that Deputy Swindell tackled him into the living room, and up against a couch. (Day Two Transcript, p. 185, lines 1-13). Asked about how much time elapsed, Bailey testified that it was an "instant" between hearing Swindell say he was going to tase him and feeling Swindell hit him in the back of the neck. (*Id.*, p. 184, line 25 through p. 185, line 13).

As discussed in *Bailey II*, the jury found that Swindell had reasonable suspicion to detain Bailey (Verdict Form, Dot. 273, p. 1) and that Swindell had probable cause to arrest Bailey for Bailey's actions on the porch in turning around to go inside while Swindell attempted to question him. (*Id.*, p. 2). The jury was asked to select from a list of possible crimes those for which it found probable cause, and the jury checked the misdemeanor offense for resisting an officer under §843.02, Fla. Stat., by "[k]knowingly resisting, obstructing, or opposing a law enforcement officer who was engaged in the lawful execution of a legal duty." (*Id.*).

Next, the jury was asked in Question B.2 "Where was the arrest *initiated*?" (*Id.*) (emphasis in original). The jury had two options, "outside the home" or "inside the home" and the jury answered "outside the home." (*Id.*, p. 3). The jury was then asked in Question B.3 whether exigent circumstances justified Swindell's entry into the home. The jury answered "No" to that question. (*Id.*).

The jury thus skipped Question B.4, which provided a list of exigencies. The jury found causation in response to Question C and awarded Bailey $625,000 in compensatory damages in response to Question D. (*Id*., p. 4).

Swindell timely renewed a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) (and also Rule 49), to alter or amend judgment under Rule 59(e), or in the alternative for remittitur, citing Rules 59(e) and 60. (Dot. 283). Swindell noted that, just a little over two weeks after the trial in this case, the Supreme Court expressly observed in *Lange v. California*, ___ U.S. ___, 141 S.Ct. 2011 (2021), that the law was unsettled on the point of whether a misdemeanor pursuit requires a showing of exigency to allow warrantless entry. (Dkt. 283, p. 20).

The district court analyzed relevant caselaw to determine the precise contours of the right presented here – was it clearly established that it was unconstitutional for Swindell to enter the residence to complete the arrest which had just begun on the porch, but without exigency. This included review of *Santana, Payton,* and *Lange*, as well as this Court's opinions in *Bailey I*, *Smith v. LePage*, 834 F.3d 1285 (11th Cir.2016), and *McClish v. Nugent*, 483 F.3d 1231 (11th Cir. 2007).

The district concluded that "[t]o date, however, there has been little clarity on the contours of the hot pursuit doctrine in the context of fleeing misdemeanants." (*Id*., p. 9). The order pointed out, "for many years, federal and state courts across the country have been 'sharply divided'

on the question of whether an officer with probable cause to arrest a suspect for a misdemeanor may constitutionally enter a home without a warrant in hot pursuit of that suspect." (*Id*., p. 10) (citing *Stanton v. Sims*, 571 U.S. 3, 6 (2013); *Lange*, 141 S.Ct. at 2017).

The district court also noted that neither the Supreme Court nor the Eleventh Circuit had decided the issue as of September 11, 2014, the date of the incident. (*Id*., pp. 10-11). In fact, the district court noted that as recently as 2018 this Court cited *Stanton* in *United States v. Concepcion*, 748 F.App'x. 904, 906 (11th Cir.2018) affirming entry into a third party's residence in hot pursuit of a fleeing misdemeanant. (Order, Dkt. 293, p. 11).

ARGUMENT AND AUTHORITIES

In answering a combination of general questions and special interrogatories on the verdict form, the jury in this case found: 1) that Swindell had reasonable suspicion to detain Bailey; 2) that Bailey resisted the deputy-- a misdemeanor under §843.02, Fla. Stat. – when Bailey turned to leave the porch; and 3) that the arrest was initiated outside the home. The jury also found that there was no *independent* exigent basis for Deputy Swindell to have entered the home, on top of the fact of the effort to arrest Bailey.

Post-trial the district court concluded that, *under the circumstances of this case*, Swindell was entitled to qualified immunity because on the date of the incident, September 11, 2014, it was not clearly established that

entry into the home to pursue a fleeing misdemeanant, but without additional exigency or a warrant, was unconstitutional. The district court thus set aside the verdict and entered judgment for Swindell. The panel has disagreed with this result and reversed, reinstating the verdict in favor of Bailey.

The panel, or the Court en banc, should reconsider this result. First, the jury made a conclusive finding that the arrest was initiated *outside* the home. *Bailey II*, 89 F.4th at 1328. The panel impermissibly substituted its own speculation as to what the jury meant when it did not find exigency to hold that the arrest began inside the home. *Bailey II*, 89 F.4th at 1330-31.

The panel opinion stated that "[w]hen reviewing a district court's decision on qualified immunity following a jury verdict, we give deference to the jury's *discernable resolution* of disputed factual issues." *Bailey II*, 89 F.4th at 1329 (emphasis added) (citing *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1290 (11th Cir.2000). Here, the panel reasoned that, because the jury had rejected the existence of exigent circumstances on the verdict form, and the jury instructions defined exigency as including an arrest "set in motion" outside the home, then the jury must have determined that the arrest physically started with Bailey already inside the home. *Bailey II*, 89 F.4th at 1330.

This is unjustified speculation that by "initiated" the jury meant only that Swindell began the arrest by subjectively deciding to make the arrest while outside,

versus the arrest physically beginning in the home. For purposes of the panel decision under review here, the Court concluded that under Bailey's best case, the arrest occurred after he was already inside.

Even if one assumes that the panel was correct that the arrest physically began with Bailey entirely across the threshold of the doorway, that entirely misses the relevant legal question. It is undisputed that the crime of resisting occurred *outside* the front door, when Bailey turned to leave. The panel has held that Swindell violated the Fourth Amendment when he entered the home without exigency, apart from the effort to apprehend Bailey, for that offense. The district court in setting aside the verdict correctly cited *Lange* for the proposition that it was not clearly established until 2021 that Swindell could not go into the home to complete the arrest of Bailey, regardless of the presence or absence of additional exigency.

The panel or the Court en banc should rehear the matter on this point. In *Lange*, the Supreme Court expressly observed that the law in fact was *not* clearly established that the Fourth Amendment precludes an officer from pursuing a fleeing misdemeanant into a residence, without exigency apart from the fact of the pursuit, itself. *Lange*, 141 S.Ct. at 2017 (collecting cases and discussing the divide amongst the courts as to whether an officer may pursue a misdemeanant into a residence without exigency).

The Court in *Lange* concluded that the situation is case-by-case: "The flight of a suspected misdemeanant

does not always justify a warrantless entry into a home. An officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter—to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so—even though the misdemeanant fled." *Id.* at 2024.

The Supreme Court in *Lange* discussed a number of factors that would go into this calculus, on a case-by-case basis, to decide whether exigency would be required to pursue and make the arrest. One of them is the severity of the misdemeanor offense at issue. *Lange*, 141 S. Ct. at 2021-22.

In its order on the issue, the district court in this case observed that resisting an officer might well be the type of misdemeanor that would justify entry, even without a showing of exigency. Specifically, the district court held that "the underlying offense was resisting an officer without violence, a first-degree misdemeanor punishable by up to one year of imprisonment in Florida. *See* Fla. Stat. §§ 854.02; 775.082. In the Court's view, it cannot be said that reasonable officers would have understood that this offense was not sufficiently serious to justify a continuous hot pursuit entry into a home without a warrant, at the time of Bailey's arrest on September 11, 2014." Dkt. 293, p. 10.

At least two district courts have also made this exact observation so as to grant officers qualified immunity in similar circumstances: that the law was unsettled prior

to the 2021 decision in *Lange* as to whether the Fourth Amendment prohibited an officer from pursuing a fleeing misdemeanant into a home without exigency. *Cogar v. Kalna*, Case No. 2:21-CV-6, 2022 WL 949902 * 4 (N.D. W.Va. March 29, 2022) (citing *Lange*: "Defendant Kalna is entitled to a qualified immunity defense. As a matter of law, the alleged constitutional violation was not clearly established and the law regarding the pursuit of a fleeing suspected criminal into a home was not 'beyond debate' in March 2015 and, therefore, Defendant Kalna did not violate clearly established constitutional or other rights that a reasonable officer would have known."); *Woods v. Barnies*, Case No. 2:21-cv-00364, 2023 WL 6390662 * 5 (D.Me. October 2, 2023) (report and recommendation adopted, 2023 WL 7081505) (Officer entitled to qualified immunity for pursuing fleeing misdemeanant into home; "The Supreme Court's acknowledgement in *Lange* of the split of authority on the question as to when an officer may enter a home to arrest a fleeing misdemeanor suspect demonstrates that the 'contours of the right' were not sufficiently clear at the time Defendant entered the apartment.")

The panel opinion in this case, to the extent it holds that the law was clearly established on this issue in 2014, is in direct conflict with the holding in *Lange* that the issue was unsettled, at least through 2021. The simple fact is that *Lange* shows that the United States Supreme Court has rejected the categorical rule endorsed by the panel in this case as to when and under what circumstances exigency on top of pursuit of a fleeing misdemeanant allows entry into a home under the Fourth Amendment.

It is worth noting that the Supreme Court was itself conflicted on the issue, with Chief Justice Roberts, joined by Justice Alito, concurring in the judgment, but concluding that: "The Fourth Amendment and our precedent—not to mention common sense—provide a clear answer: The officer can enter the property to complete the arrest he lawfully initiated outside it." *Lange*, 141 S.Ct. at 2028.

Finally, the panel or the Court en banc should place the disagreement between the district court, the panel, and *Lange* as to when exigency is required to pursue a misdemeanant into a residence in the context of the facts of this case so as to honor two basic principles of qualified immunity: first, that application of the immunity is based on the facts of the individual case; second, that the immunity protects all but the plainly incompetent or those who knowingly violate the law. "… [L]aw enforcement officers are not charged with knowing legal technicalities and nuances, but with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Hutton v. Strickland*, 919 F.2d 1531, 1541 (11th Cir.1990) (internal quotation marks omitted).

If the district court and the panel of this Court cannot agree on how to frame the question presented on qualified immunity, and if the district court and the panel cannot even agree on the state of the law on these points as it existed in 2014, and if, as the Supreme Court observed in *Lange* in 2021, the question of whether a deputy could pursue a fleeing misdemeanant into a residence without exigency was unsettled, it is surely unreasonable to have

expected Swindell to pick the right side of the debate under these rapidly evolving circumstances.

CONCLUSION

The panel, or the Court en banc, should withdraw the opinion in this case and follow the Supreme Court's instruction in *Lange* that the law was unsettled, until at least 2021, as to whether and under what circumstances a law enforcement officer could enter a residence in pursuit of a fleeing misdemeanant. Even if one assumes that Bailey was entirely in the home at the time Swindell physically began the arrest, and that Swindell chased Bailey inside, given that the law was not clearly established in 2014 as to whether and under what circumstances Swindell could enter the home in pursuit of Bailey, the Court should conclude that the district court correctly granted Swindell qualified immunity.

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to FRAP 35(b)(2) and 11th Cir.R. 35-1 regarding type volume limitations, according to the word processor program used to create the foregoing, this Petition for Panel or En Banc Rehearing by Defendant/Appellee Shawn T. Swindell contains 3,896 words, exclusive of those portions identified in 11th Cir.R. 35-1.

This petition complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because this petition has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman Font.

Appendix G

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of January 2024, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: Keith W. Weidner, Esq. and J. Phillip Warren, Esq., *kweidner@twwlawfirm.com* and *pwarren@twwlawfirm.com*, Taylor, Warren, Weidner & Hancock, P.A., 1700 W Main Street, Suite 100, Pensacola, Florida 32502; and Margaret E. Kozan, Esq., *amie@kozanlaw.com*, Margaret E. Kozan, P.A., 803 Maryland Avenue, Winter Park, Florida 32789.

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[EXHIBIT OMITTED]

APPENDIX H — RENEWED MOTION FOR JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION, FILED JULY 6, 2021

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO.: 3:15-cv-390-MCR/CJK

KENNETH BAILEY,

Plaintiff,

vs.

SHAWN T. SWINDELL,

Defendant.

SWINDELL'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR ALTERNATIVELY, MOTION FOR REMITTITUR

Defendant, Shawn T. Swindell (Swindell), pursuant to Fed. R. Civ. P. 49, 50, 59(e), and 60, moves this Court to enter an order granting his Renewed Motion for Judgment as a Matter of Law because the jury's unaltered verdict compels a finding that Swindell is entitled to qualified immunity as a matter of law. There was no constitutional violation based on the law clearly established at the time.

Further, pursuant to *Bailey v. Swindell*[1], which is binding law of the case, the unaltered jury verdict compels a judgment in Swindell's favor. The evidence also establishes Swindell's hot pursuit of Bailey into his home, following the initiation of the arrest, was immediate and continuous—falling squarely within the holdings of *United States v. Santana*[2] and *Caldwell v. Albano*.[3] Consequently, Swindell is entitled to a judgment as a matter of law.

Alternatively, if this Court denies Swindell qualified immunity or his Renewed Motion for Judgment as a Matter of Law, then this Court should remit Bailey's damages award to $0. Swindell is entitled to a remittitur because Bailey introduced no evidence of damage from unlawful entry that was not foreclosed by the jury verdict and judgment from the first jury trial in this case.

INTRODUCTION

Swindell initially prevailed on summary judgment on claims of false arrest and detention of Kenneth Bailey (Bailey), then proceeded to trial on the remaining excessive force claim. The jury returned a defense verdict, finding the force used was reasonable. Bailey waived his right to appeal the jury verdict and judgment on the excessive force claim and only appealed the pre-trial order granting summary judgment on the federal false arrest claim.

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1. 940 F.3d 1295 (11th Cir. 2019).

2. 427 U.S. 38 (1976).

3. 2018 WL 3586143 (July 26, 2018).

Appendix H

The Eleventh Circuit narrowly reversed the entry of summary judgment against Bailey on the false arrest claim. The Court presumed Swindell possessed both reasonable suspicion and probable cause to arrest without a warrant. The Court took the disputed facts in the light most favorable to Bailey—the warrantless arrest was initiated inside of Bailey's residence, resulting in a *Payton* violation. However, the Eleventh Circuit's opinion was clear that had the arrest been initiated outside on the front porch, instead of inside Bailey's residence, Swindell would've prevailed.

Last month, the parties tried the false arrest claim. The jury determined Swindell had: (1) reasonable suspicion to detain Bailey; (2) probable cause to arrest Bailey for resisting arrest without violence; and (3) initiated his arrest of Bailey outside Bailey's home. These findings require entry of judgment in his favor.

The jury further found Swindell did not possess exigent circumstances to enter Bailey's home to complete the otherwise lawful arrest. Based upon this legally incorrect determination, the jury awarded Bailey $625,000. Bailey's claimed damages all related to personal injuries he claims he sustained from the excessive use of force claim, not a technical *Payton* violation. The damage award is without legal basis and should be remitted to $0, at a minimum.

In summary, the jury's findings in the second trial, combined with the law of the case as established by (1) the unappealed judgment in Swindell's favor on the excessive

force claim following the first trial, (2) the Eleventh Circuit's opinion, and (3) the district court's undisturbed initial determination that Swindell possessed arguable cause to arrest and detain Bailey, compels entry of judgment as a matter of law in Swindell's favor because Swindell is entitled to qualified immunity; the Eleventh Circuit's opinion requires entry of judgment in Swindell's favor; the evidence established at trial, notwithstanding the jury's incorrect legal conclusion to the contrary, establishes as a matter of law that Swindell possessed exigent circumstances to enter Bailey's residence to consummate the arrest lawfully initiated moments before on the porch when Bailey fled into his residence to avoid arrest.

UNDISPUTED MATERIAL STATEMENT OF FACTS

The second trial occurred June 1-4, 2021. On June 3, 2021, the case was submitted to the jury.

> The jury instructions[4] on Bailey's unreasonable seizure claim read:
>
> To succeed on his claim, Mr. Bailey must prove each of the following facts by a preponderance of the evidence:
>
> First: Deputy Swindell intentionally committed acts that violated Mr. Bailey's constitutional right to be free from an unreasonable seizure by:

4. Doc. 272.

(a) Detaining him for an investigation without reasonable suspicion;

(b) Arresting him without probable cause; and/or

(c) *Arresting him with probable cause, but without a warrant inside his parents' home, with no exigent circumstances present.*[5]

The jury was further instructed:

If you find there *was* probable cause for the arrest, you must next determine where the arrest was *initiated*.

If you determine that the arrest was *initiated outside* of Mr. Bailey's parents' home, then you must next decide whether there were exigent circumstances that permitted Deputy Swindell to pursue Mr. Bailey into his parents' home without a warrant.[6]

Exigent circumstances justify a law enforcement officer's warrantless entry into a home without an occupant's consent where [. . .]:

5. Doc. 272, pp. 12-13.

6. Doc. 272, pp. 17-18.

(a) The arrest was set in motion in an area that is open to public view, which includes a front porch, and the person flees into a home, and the officer immediately follows the fleeing suspect into the home from the scene of the crime . . . .[7]

The Verdict Form[8] asked the following questions:

A. Did Deputy Shawn T. Swindell have reasonable suspicion to detain Mr. Kenneth Bailey for a law enforcement investigation?

B. Did Deputy Swindell have probable cause to arrest Mr. Bailey?

1. Please indicate whether either or both of the following supports your finding of probable case.

___ Willfully, maliciously, and repeatedly following, harassing, or cyberstalking another person

___ Knowingly resisting, obstructing, or opposing a law enforcement officer who was engaged in the lawful execution of a legal duty

7. Doc. 272, pp. 22 (emphasis added).

8. Doc. 273.

___ Knowingly and willfully resisting, obstructing, or opposing a law enforcement officer who was engaged in the lawful execution of a legal duty by offering to violence or doing violence to the officer

___ Battery on a law enforcement officer

2. Where was the arrest initiated?

___ Outside the home

___ Inside the home

3. If you determined that the arrest was initiated outside the home, did exigent circumstances justify Deputy Swindell's warrantless entry into the home?

4. Please identify which exigent circumstance(s) justified Deputy Swindell's warrantless entry into the home.

___ Hot pursuit of a fleeing suspect into the home

___ Urgent need to enter the home to prevent the imminent destruction of evidence

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___ Specific and articulable facts supported a belief that the suspect was armed and immediate entry into the home was necessary for safety[9]

On June 4, 2021, the jury returned a verdict.[10] The jury found Swindell had reasonable suspicion to detain Bailey.[11] The jury found Swindell *had probable cause to arrest* Bailey for knowingly resisting, obstructing, or opposing a law enforcement officer who was engaged in the lawful execution of a legal duty.[12] The jury found the arrest was *initiated outside the home*.[13] Pursuant to the Eleventh Circuit's Opinion, these three findings compelled a finding in favor of Swindell. Yet, despite these findings, the jury made an incorrect legal determination there were no exigent circumstances to justify Swindell's warrantless entry into the home.[14]

Following the verdict, the undersigned requested a ruling on Swindell's Motion for Judgment as a Matter of Law. The Court ruled it was denied as moot, and Swindell's Motion for Judgment as a Matter of Law was based solely on reasonable suspicion and probable cause—which the

9. Doc. 273.

10. Doc. 273.

11. Doc. 273.

12. Doc. 273.

13. Doc. 273.

14. Doc. 273.

undersigned disagreed. The Court stated Swindell could file a post-trial motion. Post-trial Motions are due 28 days from the final judgment order.

On June 7, 2021, the court entered Final Judgment.[15] 28 days from the filing of the Final Judgment would be July 5, 2021; however, it was a federal holiday, so this Motion is not due until 11:59 p.m. (CST) on July 6, 2021.

Trial Testimony on the events of September 11, 2014

On September 11, 2014, Swindell was called to investigate domestic violence allegations involving Bailey and his estranged wife[16] Swindell spoke to Deputy Magdalany, who interviewed Ms. Bailey, on the phone and was told Bailey and his wife had separated for approximately three months, and Bailey had left the marital home and was living with his mom and dad.[17] He was told they were going through a nasty custody dispute[18] and was told Bailey's wife had reported prior incidents of harassment, stalking, and domestic violence by Bailey.[19] Bailey's wife recounted a variety of incidents with Bailey. It was not clear when they had occurred.[20]

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15. Doc. 276.

16. Bailey Day 2 Transcript 87:12-20.

17. Bailey Day 1 Transcript 123:8-124:12.

18. *Id.*

19. Bailey Day 1 Transcript 123:8-124:12; Bailey Day 2 Transcript 86:3-87-25.

20. Bailey Day 2 Transcript 85:25-87:20.

Deputy Magdalany told Swindell he was still investigating whether a crime had been committed.[21] He also told him, according to Bailey's wife, Bailey wasn't acting right, and he had snapped.[22]

Swindell was asked to go to Bailey's parents' house on Kincheon Street to further investigate whether a crime had been committed.[23] Per policy, Swindell had to thoroughly investigate domestic disturbances.[24] Shortly after 10:16 p.m., Swindell approached Bailey's parents' house at 5384 Kincheon Street and Bailey's mother came to the door.[25] Swindell arrived in a marked vehicle, wearing his Sheriff's uniform and identified himself.[26] Swindell asked to speak to Bailey and he came out onto the porch to speak with him.[27] Based on the information Deputy Magdalany told Swindell over the phone, Swindell had reasonable suspicion to detain Bailey for an investigation.[28] Bailey, his brother, and his mother stood on the front porch, in front of the front door to the house.[29]

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21. Bailey Day 1 Transcript 123:8-124:12.

22. *Id.*

23. Bailey Day 1 Transcript 127:1-11.

24. Id.

25. Bailey Day 2 Transcript 96:22-97:17.

26. Bailey Day 1 Transcript 127:12-128:6 & 129:10-22.

27. Bailey Day 2 Transcript 97:18-98:4.

28. Doc. 273; Bailey Day 2 Transcript 87:17-25.

29. Bailey Day 2 Transcript 98:2-15 & 145:5-9.

Swindell identified who he was and announced that he was there to conduct an investigation.[30] Swindell asked Bailey to come out to his car out on the street and speak with him quite a few times and Bailey refused.[31] Swindell determined this refusal was a violation of the law and constituted resisting without violence.[32] Swindell asked Bailey's mother and brother to go into the house but they refused.[33] Swindell was approximately 7 feet from Bailey when he spoke with him—asking him to answer questions.[34]

While Swindell was conducting an investigative detention, Bailey announced he was going in the house.[35] Just before Bailey turned around to walk inside his parents' home, Swindell went to arrest him—immediately and continuously pursuing him.[36] Bailey turned around

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30. Bailey Day 1 Transcript 129:10-143:10; Bailey Day 2 Transcript 99:10-19 & 100:10-16.

31. Bailey Day 1 Transcript 129:10-143:10; Bailey Day 2 Transcript 99:10-100:1 & 127:9-24.

32. Bailey Day 1 Transcript 129:10-143:10; Bailey Day 3 Transcript 167:7-13.

33. Bailey Day 1 Transcript 129:10-143:10; Bailey Day 2 Transcript 146:13-221 & 167:21-169:6.

34. Bailey Day 1 Transcript 129:10-143:10; Bailey Day 2 Transcript 98:16-21.

35. Bailey Day 2 Transcript 184:6-11 & 168:4-7.

36. Bailey Day 3 Transcript 148:4-5, 167:14-18 & 168:4-9.

towards the door.[37] Swindell then moved forward to put his hand on his right shoulder.[38] Swindell placed his left hand on Bailey's right shoulder and advised him he was not free to leave.[39] Still on the porch, Bailey turned around and struck Swindell with his hand.[40]

Bailey then took a fighting stance.[41] Swindell went to grab a hold of him, Bailey started to back up and they ended up in the house.[42]

All three family members—Bailey, Jeremy Bailey and Evelyn Bailey—testified the entire action was quick, immediate and continuous, although they all claimed Swindell initiated the arrest inside the home. Bailey testified as follows: "[s]o as I walk to the door, I hear, I'm going to tase you. Then like I turned to look over my shoulder, and then he's coming down onto like the back of my neck with the taser like full steam, tackled me into the couch." And "[w]hen he said I'm going to tase you and then he came down across my neck, it was *full charge* at this point. So he tackled me into the living room . . ."[43]

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37. *Id.*

38. Bailey Day 1 Transcript 129:10-143:10; Bailey Day 2 Transcript 103:22-105:16.

39. Bailey Day 1 Transcript 129:10-143:10.

40. Bailey Day 1 Transcript 129:10-143:10.

41. Bailey Day 1 Transcript 129:10-143:10.

42. Bailey Day 1 Transcript 129:10-143:10.

43. Bailey Day 2 Transcript 184:25-185:12.

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Bailey's mother testified when Bailey turned around and stepped through the door, "that's when he was coming at Kenny, and it was - - and I think I even equated it at the time to a rabid dog. It was just like, he had his arms up and he was running towards Kenny, after him . . . ."[44]

Bailey's brother testified: "He charged at him." "He just sprinted right at him. You know, he turned around, he went inside, and he just charged right at him and just went for him . . . . He ran right at him, knocked my mom aside because, you know, she's like right there by the door. This isn't a big door at all, and it's a small porch. So he runs right at him and just like attacks him."[45] Bailey's brother, Jeremy Bailey, further testified he told law enforcement "maybe [Swindell] thought he [Bailey] was running away.[46]

During the trial, the location of the initiation of the arrest—inside vs. outside the house—was hotly disputed. The jury agreed with Swindell and determined the arrest was initiated outside the house. However, one issue not in dispute was the timing of the arrest. Everyone agreed as soon as Swindell initiated the arrest, Swindell's actions were immediate and continuous until Swindell placed Bailey under arrest.

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44. Bailey Day 2 Transcript 148:12-21.

45. Bailey Day 2 Transcript 103:22-104:10.

46. Bailey Day 2 Transcript 132:16-133:3.

Appendix H

STANDARD OF REVIEW

A. Rule 49 and Its Special Application to Qualified Immunity Defenses

"Federal Rule of Civil Procedure 49 governs the analysis" on qualified immunity.[47] The Eleventh Circuit explained in *Johnson v. Breeden*,

> [I]f the evidence at the summary judgment stage, viewed in the light most favorable to the plaintiff, shows there are facts that are inconsistent with qualified immunity being granted, the case and the qualified immunity issue along with it will proceed to trial.
>
> Defendants who are not successful with their qualified immunity defense before trial can re-assert it at the end of the plaintiff's case in a Rule 50(a) motion. That type of motion will sometimes be denied because the same evidence that led to the denial of the summary judgment motion will usually be included in the evidence presented during the plaintiff's case, although sometimes evidence that is considered at the summary judgment stage may turn out not to be admissible at trial . . .
>
> It is important to recognize, however, that a defendant is entitled to have any evidentiary

47. *Montero v. Nandlal*, 682 Fed.Appx. 711, 715 (11th Cir. 2017).

> disputes upon which the qualified immunity defense turns decided by the jury so that the court can apply the jury's factual determinations to the law and enter a post-trial decision on the defense.
>
> ***
>
> A tool used to apportion the jury and court functions relating to qualified immunity issues in cases that go to trial is special interrogatories to the jury.[48]

The Eleventh Circuit has long held "[w]here the defendant's pretrial motions are denied because there are genuine issues of fact that are determinative of the qualified immunity issue, special jury interrogatories may be used to resolve those factual issues"[49] and "[i]f the jury finds facts that establish the qualified immunity defense, the defendant is entitled to judgment as a matter of law."[50]

> Because the central issue is whether the jury's factual findings entitle the defendant to prevail on the defense of qualified immunity—not the sufficiency of the evidence—judgment is more properly viewed as entered pursuant to Rule 49, rather than Rule 50. *See, e.g., Chaney v.*

48. 280 F.3d 1308, 1317-18 (11th Cir. 2002).

49. *Cottrell v. Caldwell*, 85 F.3d 1480, 1487 (11th Cir. 1996).

50. *Montero*, 682 Fed.Appx. at 716.

City of Orlando, Fla., 483 F.3d 1221, 1227 (11th Cir. 2007) ("[I]n deciding on a Rule 50 motion a district court's proper analysis is squarely and narrowly focused on the sufficiency of evidence.").

Moreover, Rule 49 provides guidance when a jury's special interrogatory answers are inconsistent with the general verdict. The rule states,

> When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may: (A) approve, for entry under Rule 58, an appropriate judgement according to the answers, notwithstanding the general verdict; (B) direct the jury to further consider its answers and verdict; or (C) order a new trial.

See Fed. R. Civ. P. 49(b). A verdict is inconsistent, "if answers given by the jury may not fairly be said to represent a logical and probable decision on the relevant issues as submitted. *Wilbur*, 393 F.3d at 1200

If the district court enters judgment pursuant to Rule 49(b)(3)(A), the decision should ordinarily be affirmed when the jury's findings on the special interrogatories are supported

> by evidence in the record, and the only inconsistency results from the general verdict. *See Wilbur*, 393 F.3d at 1204 (affirming a district court's entry of judgment as a matter of law when substantial evidence supported the jury's answers to each of the special interrogatories and that the general verdict was the only source of inconsistency).[51]

B. Rule 50

Under Rule 50(b), after a party moves for judgment as a matter of law under Rule 50(a)[52], "the movant may file a renewed motion for judgment as a matter of law."[53] Under Rule 50(b), a party may renew its motion for judgment as a matter of law after the jury returns its verdict "if there is no legally sufficient basis for a reasonable jury to find for the non-moving party."[54]

The primary difference between the evidence at the time Swindell initially moved for judgment as a matter of

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51. *Montero*, 682 Fed. Appx. at 716-717.

52. It's no longer necessary to renew Rule 50(a) motions at the close of all evidence. Fed. R. Civ. P. 50, Advisory Committee Notes to 2006 Amendment.

53. Fed. R. Civ. P. 50; *Barraza v. Pardo*, 2015 U.S. Dist. LEXIS 94006, *4-5 (July 20, 2015); *Nebula Glass Int'l, Inc. v. Reichhold, Inc.*, 454 F.3d 1203, 1210 (11th Cir. 2006).

54. *Optimum Technologies, Inc. v. Henkel Consumer Adhesives, Inc.*, 496 F.3d 1231, 1251 (11th Cir. 2007); *Comprehensive Care Corp. v. Katzman*, 2011 U.S. Dist. LEXIS 57083, *11 (M.D. Fla. May 27, 2011).

law, pre-verdict, and now is the jury determined Swindell had reasonable suspicion to detain Bailey, had probable cause to arrest Bailey, and initiated the arrest outside the home. Prior to the verdict, the court had to view all three issues in the light most favorable to the plaintiff. However, postverdict and post-judgment, as the prevailing party on these three issues, the court is required to view the evidence and all inferences concerning the lawfulness of the detention, the lawfulness of the arrest and location of the initiation of the arrest in the light most favorable to Swindell, even though he is the movant.[55]

The standard for reviewing Rule 50(b) post-trial motions is precisely set out by the Eleventh Circuit in *McGinnis vs. American Home Mortgage Servicing, Inc.*, wherein, it held

> Federal Rule of Civil Procedure 50(a)(2) provides that a party may move for judgment as a matter of law "before the case is submitted to the jury." Fed. R. Civ. P. 50(a)(2). "The motion must specify the judgment sought and the law and facts that entitled the movant to the judgment." *Id.* If a district court does not grant the motion, the movant may file "a renewed motion," under Rule 50(b), after trial. Fed. R. Civ. P. 50(b).

55. *Montero*, 682 Fed.App. at 716 ("It is important to recognize, however, that a defendant is entitled to have any evidentiary disputes upon which the qualified immunity defense turns decided by the jury so that the court can apply the jury's factual determinations to the law and enter post-trial decision on the defense.").

"The standard for granting the renewed motion for judgment as a matter of law under Rule 50(b) is precisely the same as the standard for granting the pre-submission motion [under 50(a)]." *Chaney v. City of Orlando*, 483 F.3d 1221, 1227 (11th Cir. 2007) (alteration in original) (quoting 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2537 (2d ed. 1995)). Thus, as with motions under Rule 50(a), the question before a district court confronting a renewed Rule 50(b) motion is whether the evidence is "legally sufficient . . . to find for the party on that issue." Fed. R. Civ. P. 50(a)(1).[56]

[However], '[w]here the defendant's pretrial motions are denied because there are genuine issues of fact that are determinative of the qualified immunity issue, special jury interrogatories may be used to resolve those factual issues.' *Cottrell v. Caldwell*, 85 F.3d 1480, 1487 (11th Cir. 1996). If the jury finds facts that establish qualified immunity defense, the defendant is entitled to a judgment as a matter of law. *See id.*[57]

[Again, a] verdict is inconsistent 'if the answers given by the jury may not fairly be said to represent a logical and probable decision on

56. 817 F.3d 1241, 1254-55 (11th Cir. 2016).

57. *Montero*, 682 Fed.Appx. at 716.

> the relevant issues as submitted. *Wilbur*, 393 F.3d at 1200.[58]

With respect to Swindell's Motion for Remittitur as well as his assertion the jury erred in determining exigent circumstances did not exist, the Eleventh Circuit held, in affirming a district court's grant of a Rule 50(b) motion, "if legal error is detected, the federal courts have the obligation and the power to correct the error by vacating or reversing the jury's verdict.'"[59]

"While the court must afford due deference to the jury's findings, it is axiomatic that such findings are not automatically insulated from review by virtue of the jury's careful and conscientious deliberation."[60] Rule 50 permits the "court to remove from the jury's consideration 'when the facts are sufficiently clear that the law requires a particular result.'"[61]

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58. *Id.*

59. *Comprehensive Care Corp.*, 2011 U.S. Dist. LEXIS 57083, at *12 (citing *Peer v. Lewis*, 2009 U.S. App. LEXIS 2428, at *2 (11th Cir. Feb. 10, 2009).

60. *Barraza v. Pardo*, 2015 U.S. Dist. LEXIS 94006, at *5-6 (S.D. Fla. July 20, 2015); *Johnson v. Clark*, 484 F.Supp.2d 1242, 1245-46 (M.D. Fla. 2007); *Reeves v. City of Jackson*, 532 F.2d 491, 494 (5th Cir. 1976) ("if, after full development of the facts the plaintiff's cause is too weak to string the Constitution's bow or unsheathe the sword provided for the redress of such grievances . . . it may be washed out . . . by J.N.O.V. after verdict.").

61. *Barraza*, 2015 U.S. Dist. LEXIS 94006, at *6 (citing *Weisgram v. Marley Co.*, 528 U.S. 440, 447 (2000)).

Accordingly, "'[a] Rule 50(b) motion is a renewal of a Rule 50(a) motion. This Court has repeatedly made clear any renewal of a motion for judgment as a matter of law under Rule 50(b) must be based upon the same grounds as the original request or judgment as a matter of law made under Rule 50(a) at the close of the evidence and prior to the case being submitted to the jury.'"[62] Even so, "the issues raised in a Rule 50(b) motion need not be identical to those raised in the Rule 50(a) motion. Nevertheless, the issues must be 'closely related' so that 'opposing counsel and the trial court may be deemed to have notice of the deficiencies asserted by the moving party.'"[63]

C. Rule 59(e)

Swindell alternatively moves to alter or amend the judgment based upon the jury's findings (1) he is entitled to qualified immunity and (2) under the law of the case, as set forth by the Eleventh Circuit's opinion, he is entitled to

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62. *U.S. S.E.C. v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 813 (11th Cir. 2015); *Barraza*, 2015 U.S. Dist. LEXIS 94006, at *5.

63. *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 2014 U.S. Dist. LEXIS 87772, *3, (M.D. Fla. June 27, 2014) (citing *Howard v. Walgreen Co.*, 605 F.3d 1239, 1243 (11th Cir. 2010)); *Montero*, 682 Fed.Appx. 711; *Howard*, 605 F.3d at 1243; *Chaney*, 2007 U.S. Dist. LEXIS 114078; *Rankin v. Evans*, 133 F.3d 1425, 1433 (11th Cir. 1998) (addressing the purpose of Rule 50 and finding its requirements is satisfied when grounds of both the original and renewed motions are "closely related" or address "the central issue in the case."); *Nat'l Indus., Inc. v. Sharon Steel Corp.*, 781 F. 2d 1545, 1548-49 (11th Cir. 1986).

judgment as a matter of law.[64] A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.[65]

LEGAL ARGUMENT

I. Swindell is Entitled to Qualified Immunity as a Matter of Law

The qualified immunity defense protects governmental officials from suit in their individual capacities for acts based on the use of their discretion.[66] Qualified immunity affords broad protection to "all but the plainly incompetent or those who knowingly violate the law."[67] Qualified immunity presents a question of law for the court regardless of the stage of the procedure.[68]

The defense of qualified immunity survives through trial when it cannot be resolved pre-trial.[69] The issue of qualified immunity is a question of law to be decided by

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64. Fed. R. Civ. P. 59(e).

65. Fed. R. Civ. P. 50.

66. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).

67. *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Hutton v. Strickland*, 919 F.2d 1531, 1537 (11th Cir. 1990); *Tillman v. Coley*, 886 F.2d 317 (11th Cir. 1989).

68. *Dartland v. Metropolitan Dade County*, 866 F.2d 1321 (11th Cir. 1989).

69. *Montero*, 682 Fed.Appx. at 716.

the court, but where there is a dispute of facts the court may use special jury interrogatories to resolve those disputes.[70] Accordingly, "[a] defendant who does not win summary judgment on qualified immunity grounds may yet prevail on those grounds at or after trial on a motion as a matter of law."[71]

In this case, there was a genuine dispute which remained unresolved until the conclusion of the trial as to whether Swindell initiated the arrest of Bailey on the front porch, or after Bailey had crossed the threshold into his home. It was this dispute which prompted the inclusion of the special interrogatory verdict question, and this interrogatory was conclusively answered by the jury—finding the arrest was initiated outside the home. The issue of qualified immunity regarding whether Swindell violated Bailey's constitutional rights and the reasonableness of Swindell's entry into the home, can now properly be determined by the Court.

One of the issues for the Court to decide post-verdict or post-judgment is whether an objectively reasonable officer possessing the same knowledge as Swindell could have reasonably believed that, where he initiated a lawful misdemeanor arrest for the charge of resisting or obstructing an officer without violence outside a home, on the front porch, as the arrestee was attempting to flee into the doorway of his home, mere feet away, he could complete

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70. *Id.* at 716; *Cottrell*, 85 F.3d at 1487; *Johnson*, 280 F.3d at 1318.

71. *Cottrell*, 85 F.3d at 1487.

the already-initiated arrest by immediately following the arrestee into the home. An additional factor is whether Swindell was immediate and continuous in his attempt to effectuate the arrest from the moment he initiated the arrest outside the home until he secured Bailey for the arrest inside the living room. We must look at the totality of the circumstances and determine whether there was a constitutional violation. The facts in this case support Swindell's entry into Bailey's home did not violate Bailey's constitutional rights, either under the law as it existed on September 11, 2014, or today.

Fortuitously, sixteen days after judgment was entered, the United States Supreme Court issued *Lange v. California*, which conclusively establishes the law is still not clearly established that Swindell's entering Bailey's home to pursue Bailey and complete the arrest Swindell lawfully initiated outside the front door was unlawful.[72] In fact, the United States Supreme Court admitted the law on the hot pursuit of a fleeing misdemeanant was unsettled prior to its review in *Lange*.[73]

Thus, if Chief Justice Roberts got it wrong two weeks ago in his concurring opinion in *Lange* when he wrote exigent circumstances always exists to permit an officer to consummate an arrest of a misdemeanant who is fleeing into his home, then how could Swindell be expected to know seven years ago that following Bailey as he fled into his home in order to consummate Bailey's arrest for a

72. 2021 U.S. LEXIS 3396 (June 23, 2021).

73. 2021 U.S. LEXIS 3396, at *14.

misdemeanor offense initiated moments earlier outside the home on the front porch could possibly be a constitutional violation.[74]

Nevertheless, the United States Supreme Court majority went on to hold in *Lange* the analysis on whether an officer's hot pursuit of a fleeing misdemeanant into the suspect's home is based on the totality of the circumstances.[75] Even so, looking at the totality of the circumstance in this case, Swindell's hot pursuit of Bailey into his home was constitutional based on the evidence.

In this case, the arrest was initiated outside the home on the front porch. Swindell went to place his hands on Bailey outside the home. As a result of this interaction on the front porch and Bailey's efforts to enter his home, they ended up inside the home from what began as a hot pursuit on the porch, separated by a few feet of distance and less than a second in time. There can be no reasonable, rational, or logical dispute that Swindell was not justified or permitted to complete an arrest he initiated outside that led to a physical altercation and was completed inside Bailey's home after he fled. An officer cannot be expected to disengage from an arrest that evolves into a physical altercation and results in an officer entering the household to complete an arrest. At that point, the officer has a right to complete the arrest and it can be found that a safety issue is created by the suspect necessitating the

74. Even under *Lange*, Swindell's actions would not have been a violation of Bailey's constitutional rights.

75. *Id.* at 25.

completion of the arrest. Even if the court were to find otherwise, it is beyond dispute that the law was not clearly established on September 11, 2014 that entering a home under these circumstances to effectuate a warrantless misdemeanor arrest was unlawful.

In *Caldwell v. Albano*[76], an unidentified 9-1-1 caller reported a domestic incident at the address of plaintiff John Caldwell and stated a man named "John" and a woman named "Pamela" were fighting and running in and out of the apartment.[77] Shortly after arriving on scene, the defendant, Officer Albano , saw two people matching the descriptions provided by the 9-1-1 caller exiting the subject apartment.[78] Another officer on scene told Officer Albano the male wearing the yellow shirt was, in fact, named "John."[79]

Officer Albano, wearing a full police uniform, walked toward plaintiff and gave him repeated commands to "come here" and asked plaintiff for his name.[80] Plaintiff ignored Officer Albano and walked toward his apartment.[81] Officer Albano then gave him repeated commands not to

76. 2018 WL 3586143.

77. *Id.* at 5.

78. *Id.*

79. *Id.*

80. *Id.* at 6.

81. *Id.*

go inside.[82] Plaintiff ignored those commands as well and walked through a screen door into his apartment.[83] It was at this point Officer Albano reached across the threshold of plaintiff's apartment, pulled plaintiff outside, and placed him in handcuffs.[84] Plaintiff brought an action for deprivation of civil rights, alleging Officer Albano arrested him without probable cause and entered his home without a warrant.[85]

The *Caldwell* court, like the jury in our case, found Officer Albano had probable cause to arrest plaintiff for violating Florida Statute § 843.02 before plaintiff entered his home because plaintiff ignored defendant's attempts to question him and disobeyed his commands.[86] The court also found that, like Swindell, Officer Albano initiated the arrest before plaintiff entered his home and Officer Albano was prevented from arresting plaintiff in public only because plaintiff reached his apartment before the defendant reached plaintiff.[87] Therefore, the court held exigent circumstances justified Officer Albano's entry into plaintiff's home to effectuate the arrest under *Santana*.[88]

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82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 2.

86. *Id.* at 17.

87. *Id.* at 17-18.

88. *Id.* at 18.

Caldwell, which was decided 4 years after this arrest, shows Swindell was not on notice that his conduct was either unlawful or clearly established as unlawful. This is especially so when one considers that Swindell initiated the arrest which led to a physical altercation into the home, whereas Officer Albano in *Caldwell* did not. Equally important, under *Santana*, *Caldwell*, and *Lange* as well as the other cases cited, there could not have been a constitutional violation of Bailey's rights based on the totality of the circumstances. Therefore, Swindell is entitled to qualified immunity based upon the jury's resolution of the location of the initiation of the arrest in Swindell's favor.

II. Pursuant to the Eleventh Circuit's Opinion, which is the law of the case, the jury's finding that Swindell lawfully initiated the arrest of Bailey outside the home compels entry of judgment in Swindell's favor

The Eleventh Circuit held the only issue to be resolved was whether the arrest was initiated on the porch or inside the home.[89] The Court in its opinion clearly established that if the arrest was initiated on the porch, outside the home, then Swindell would prevail under *Santana*, both as a matter of law and pursuant to qualified immunity, because he was in hot pursuit as a matter of law because the arrest was "set in motion in a public place, a crucial element of the hot pursuit exception."[90]

Again, there can be no dispute now. The jury resolved the only possible material issue in dispute that prevented

89. 940 F.3d at 1302.

90. *Id.* at 1302.

the Eleventh Circuit from affirming this Court's prior entry of summary judgment on the false arrest claim based on qualified immunity—where the arrest was initiated. Unlike at the time summary judgment was granted, it is now established Swindell initiated the arrest outside the home.

In light of the jury's finding that Swindell had founded suspicion to detain, probable cause to arrest, and he initiated the arrest of Bailey outside the home, the only finding consistent, reasonable, logical, and practical under the Eleventh Circuit's opinion, which is the law of the case, is Swindell's entry into the home to arrest Bailey was lawful as a matter of law and he is entitled to qualified immunity. The evidence supports no other determination based on the case law. Hence, the jury's general verdict is inconsistent with its answers to the special interrogatories and inconsistent with the Eleventh Circuit's holding in *Bailey v. Swindell*. Accordingly, Swindell is entitled to judgment as a matter of law.

III. The Jury's Determination that Exigent Circumstances Did Not Exist Is Incorrect and Irrelevant as a Matter of Law

Though closely related to the above two arguments, this is a separate and distinct basis for entry of judgment, and the Court must correct this clear error.

"When it comes to warrantless arrests, the Supreme Court has drawn a 'firm line at the entrance to the house.'"[91] Although law enforcement officers do not

91. *Bailey*, 940 F.3d at 1300 (citing *Payton v. New York*, 445 U.S. 573, 590 (1980)).

need a warrant to make an arrest in a public place, the Fourth Amendment "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to" arrest him.[92] Thus, an arrest past the entrance of the home requires either a warrant, consent or an exigency.[93]

"Exigent circumstances exist when 'the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action.'"[94] "Recognized exigent circumstances include: 'danger of flight or escape; danger of harm to police officers or the general public; risk of loss, destruction, removal, or concealment of evidence; and 'hot pursuit' of a fleeing suspect.'"[95] Hence, a suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place.[96]

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92. *Payton*, 445 U.S. at 576.

93. *Bailey*, 940 F.3d at 1302; *Moore v. Pederson*, 806 F.3d 1036, 1050 n.14 (11th Cir. 2015) (observing that "*McClish* clearly established that an officer may not execute a warrantless arrest without probable cause and either consent or exigent circumstances, even if the arrestee is standing in the doorway of his home when the officers conduct the arrest"); *McClish v. Nugent*, 483 F.3d 1231, 1246 (11th Cir. 2007).

94. *Feliciano v. City of Miami Beach*, 847 F.Supp.2d 1359, 1370 (11th Cir. 2012).

95. *Feliciano*, 847 F.Supp.2d at 1370 (citing *U.S. v. Blasco*, 702 F.2d 1315, 1325 (11th Cir. 1983)); *Hazelton v. Trinidad*, 488 Fed. Appx. 349, 351 (11th Cir. 2012).

96. *Santana*, 427 U.S. at 41.

"Hot pursuit" only means some sort of a chase and "need not be an extended hue and cry in and about the public streets."[97] The fact that pursuit may end as soon as it begins does not render it any less a "hot pursuit" sufficient to justify the warrantless entry into a suspect's home.[98]

The chase must begin or be "set in motion in a public place."[99] Thus, if an arrest is initiated on the porch and the suspect retreats mere feet away into his home but the officer immediately follows the suspect into the house to complete the arrest, then the officer, or Swindell in this case, is justified in entering a home to complete the warrantless arrest of the fleeing suspect.[100]

More specifically, an officer may cross the threshold of a suspect's home to effect an arrest initiated outside of the home when a suspect disobeyed repeated commands of officers attempting to investigate by walking away from the officers and into his home.[101]

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97. *Id.* at 41 and 42 ("The fact that the pursuit here ended almost as soon as it began did not render it any the less a 'hot pursuit' sufficient to justify the warrantless entry into Santana's house."); *Hazelton*, 488 Fed.Appx. at 351.

98. *Santana*, 427 U.S. at 41 and 42.

99. *Id*. at 43; *Bailey*, 940 F.3d at 1302; *Hazelton*, 488 Fed. Appx. at 351.

100. *United States v. Hayes*, 334 F. App'x 222, 226 (11th Cir. 2009).

101. *Caldwell*, 2018 U.S. Dist. Lexis at *17-18.

Appendix H

This Court should enter an order granting Swindell's Renewed Motion for Judgment as a Matter of Law because there is neither a legal basis for the jury's finding of no exigent circumstances nor does the undisputed evidence, construed in Bailey's favor, support such a finding.

Again, there is no dispute the jury found the arrest was initiated outside the home; Bailey left the porch to retreat into his home—i.e., fled; and Swindell, who was in physical contact with Bailey on the porch, immediately followed Bailey into his home to complete the arrest of Bailey without hesitation. Hence, Swindell is entitled to judgment as a matter of law pursuant to Rule 50(b).

At the end of this trial, the jury was asked to determine where the arrest was initiated—inside or outside the home. If the jury found the arrest was initiated outside the home, then the jury was to determine if there were exigent circumstances. In the jury instructions, the Court defined what constituted exigent circumstances. The jury was instructed a hot pursuit was an exigent circumstance. The Court, in the jury instructions, defined hot pursuit as, "***The arrest was set in motion in an area that is open to public view, which includes a front porch, and the person flees into a home, and the officer immediately follows the fleeing suspect into the home from the scene of the crime***." This definition is in accordance with the case law cited above and the law of this Circuit, even the Supreme Court.

Here, the jury clearly found the arrest was initiated outside the home. There is no dispute the testimony at trial was Swindell immediately pursued Bailey once Swindell

initiated the arrest of him on the porch. In fact, Bailey, his mother, and his brother all testified as did Swindell that Swindell immediately followed Bailey inside his home following the initiation of the arrest on the porch.

These facts squarely fall well within this Court's definition and instruction of what constituted a hot pursuit, or more simply put, an exigent circumstance justifying the warrantless arrest of Bailey inside his home. Yet, the jury inexplicably did not find there were exigent circumstances—specifically an exception under the hot pursuit doctrine. This is not legally sound and violates not only this Court's clear jury instructions but also clearly established law, even the Eleventh Circuit's holding in *Bailey v. Swindell*. The jury's determination concerning exigent circumstances was an incorrect determination of law, not a factual finding. No reasonable jury could find or should have found there were no exigent circumstances in this case based on the undisputed evidence of immediacy and continuousness following the initiation of the arrest.

Instead, the only reasonable and legally supported verdict based on the evidence presented at trial is there were exigent circumstances—hot pursuit doctrine—justifying Swindell's warrantless entry. Again, the facts overwhelmingly, without dispute, establish Swindell immediately followed Bailey into his home from the porch, a public place, to complete the arrest of Bailey. No reasonable jury could arrive at a contrary verdict unless they clearly ignored the law. There is no other justification because the jury instructions, verdict form and evidence, in the light most favorable to Bailey, establish, without question, exigent circumstances.

Further, the jury's finding of a lack of exigency is irrelevant to the qualified immunity issue because the physical arrest began outside the home. Simply put, exigency was not a necessary condition to a lawful arrest here due to the fact that the arrest began outside. Therefore, this Court must grant Swindell's Renewed Motion for Judgment as a Matter of Law based on the law and evidence.

IV. Swindell is Entitled to Remittitur Because the Undisturbed Jury Verdict from the First Trial Precludes All Damages from Physical Injury

Even if the verdict stands, damages must be drastically reduced because Bailey suffered no more than nominal damages as he failed to prove illegal entry damages. The first trial established he suffered no damages from use of force. All his injuries were from a physical injury. Second, because there was probable cause, all damages from the arrest, including jail time, are not recoverable. No damages were proved from crossing the threshold, a technical violation.

In Bailey's closing argument, he asked to be awarded $1.5 million—$28,889.91 for past medical expenses; $635,840 for lost wages; $72,000 for past pain and suffering and $763,270.09 for future pain and suffering.[102] All of these damages flowed from physical injuries he claimed he sustained from the arrest. However, the jury

102. Bailey Day 3 Transcript 226:5-228.21.

awarded $625,000.[103] $625,000 far exceeds the value of a technical violation based on the evidence.

Remember, Swindell had probable cause to arrest Bailey when he crossed the threshold of the home—the jury determined this fact—and the only reason he crossed it was because as he was trying to effectuate his arrest of Bailey, they stumbled into the home. Bailey was going to get arrested as there was probable cause. At the time, Swindell initiated the arrest in a public place—not requiring a warrant, only probable cause. This is another determination made by the jury. It was Bailey who was resisting his arrest. It was Bailey who created the length of time Swindell was in the home. Hence, crossing the threshold was inadvertent and created because of Bailey's actions, not Swindell's.

As a general rule, "a remittitur order reducing a jury's award to the outer limit of the proof is the appropriate remedy where the jury's damage award exceeds the amount established by the evidence."[104] Prior to the trial, Bailey stipulated he was not seeking nominal damages.[105] The Court even clarified during the trial that it meant if the constitutional violation was technical or minor, then he would not be entitled to anything even if he prevailed.

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103. Doc. 273.

104. *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1448 (11th Cir.1985); *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1284 (11th Cir.2000).

105. Doc. 239.

Again, there is no dispute now the lawful arrest was initiated outside the home, Swindell immediately pursued Bailey once the arrest was initiated, and any violation of unlawfully entering Bailey's home was derivative of his lawful actions outside of the home and Bailey's refusal to comply with lawful commands and submit to his lawful arrest.

Nevertheless, even if it can be said there was a violation of Bailey's constitutional rights, at best, it can only be said the violation was technical, or minor—meaning any right Bailey may have had to be awarded damages was extinguished. A technical or minor violation means it was not intentional or deliberate, but inadvertent. There is no evidence Swindell intended on entering the home without a warrant. The evidence is contrary as it was Bailey's fault they entered the home—making the violation technical or minor, if it was even a violation. Consequently, this Court should decrease his damages award to $0 because his damages are nominal.

It is equally important to recall there was a trial on the claim for excessive force prior to this trial on false arrest. The prior trial resulted in a defense verdict and not appealed. There was also an unaltered finding of entitlement to sovereign immunity on the state law false arrest claim. The damages claimed in that trial were the same exact damages sought in this trial, and a jury found he was not entitled to those damages. Yet, in this trial, Bailey sought the same exact damages he was told by a jury were not caused by the force used by Swindell.

Remember, in the excessive force trial, the jury was told there was reasonable suspicion for the detention and probable cause for the arrest of Bailey, the only issue was whether force was reasonable. The same exact findings the jury in this case made when they deliberated and answered the Court's special interrogatories that there was reasonable suspicion to detain, probable cause to arrest Bailey, and the arrest was initiated outside the house. Under the law of the case, the verdict and judgment from the first trial conclusively resolved all issues of damages in Swindell's favor. At most, the entry into his house was nothing more than a technical or nominal violation caused by the initiation of a lawful arrest outside the home and the unlawful actions of Bailey. Again, the jury's award exceeds the outer limits of any reasonable award supported by the record evidence. Therefore, this Court should reduce the damages award to $0 because Bailey abandoned his nominal damages claim.

CONCLUSION

WHEREFORE, Swindell respectfully requests this Court enter an order finding he is entitled to qualified immunity based upon the jury's determination the arrest was initiated outside the home; or, alternatively, that, in light of the jury's finding, he is entitled to judgment pursuant to the Eleventh Circuit's order, which is law of the case; or, alternatively, granting his Renewed Motion for Judgment as a Matter of Law on the issue of exigent circumstances; or alternatively, should the court deny the above, reduce Plaintiff's damages to $0.

Appendix H

CERTIFICATE OF COMPLIANCE AND CONFERRAL

The undersigned certifies he has complied with N.D. Fla. Loc. R. 5.1 and 7.1. There are 7,970 words in the counted portions of this Motion under the Rule, and the font is Times New Roman 14. The Defendant has conferred with the Plaintiff and the Plaintiff opposes the Motion.

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Appendix H

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been electronically filed and a true and correct copy of the foregoing has been furnished via CM/ECF this 6th day of July 2021 to:

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APPENDIX I — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED OCTOBER 16, 2019

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13572

October 16, 2019, Decided

KENNETH BAILEY,

Plaintiff-Appellant,

v.

SHAWN T. SWINDELL, IN HIS INDIVIDUAL CAPACITY, MICHAEL RAMIREZ, IN HIS INDIVIDUAL CAPACITY, SHERIFF OF SANTA ROSA COUNTY FLORIDA,

Defendants-Appellees,

WENDELL HALL,

Defendant.

Appeal from the United States District Court for the Northern District of Florida. D.C. Docket No. 3:15-cv-00390-MCR-CJK.

Before WILSON and NEWSOM, Circuit Judges, and PROCTOR,[*] District Judge.

Opinion

NEWSOM, Circuit Judge:

What began as a relatively low-key consensual encounter between Santa Rosa County Sheriff's Deputy Shawn Swindell and Kenneth Bailey escalated quickly into a forceful arrest. Taking the facts in the light most favorable to Bailey, as we must given the case's procedural posture, the short story goes like this: Swindell showed up at Bailey's parents' home requesting to speak with Bailey about an earlier incident involving his estranged wife. When Bailey came to the door, Swindell asked to talk to him alone, but Bailey declined. After the two argued briefly, Bailey went back inside the house. Then, presumably fed up with Bailey's unwillingness to cooperate, Swindell pursued him across the threshold and (as Bailey describes it) "tackle[d] [him] . . . into the living room" and arrested him.

Bailey sued, arguing that his arrest violated the Fourth Amendment. The district court granted summary judgment in Swindell's favor, and Bailey now appeals on two grounds. First, Bailey disputes that Swindell had probable cause to arrest him in the first place. Second, Bailey contends that in any event—*i.e.*, even assuming

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[*] Honorable R. David Proctor, United States District Judge for the Northern District of Alabama, sitting by designation.

that probable cause existed—Swindell unlawfully arrested him inside his parents' home without a warrant. Unsurprisingly, Swindell disagrees on both counts and, further, asserts that he is entitled to qualified immunity.

Without deciding whether Bailey's arrest was supported by probable cause—or, as it goes in the qualified-immunity context, "arguable probable cause"—we reverse. Even assuming that Swindell had probable cause, he crossed what has been called a "firm" and "bright" constitutional line, and thereby violated the Fourth Amendment, when he stepped over the doorstep of Bailey's parents' home to make a warrantless arrest.

I

A

The seeds of the confrontation between Swindell and Bailey were planted when Swindell responded to a request from police dispatch to investigate an argument between Bailey and his estranged wife, Sherri Rolinger.[1] The argument had occurred when Bailey stopped by the couple's marital home to retrieve a package. Bailey no longer lived in the home with Rolinger and their two-year-old son, as the couple was embroiled in a contentious divorce. When Bailey rang the doorbell—seemingly more than once—he woke the boy, who started to cry. Rolinger

1. Because this case arises on the appeal of the district court's summary judgment for Swindell, we take and construe the facts in the light most favorable to Bailey. *See Skop v. City of Atlanta*, 485 F.3d 1130, 1136 (11th Cir. 2007).

came to the door but refused to open it and told Bailey to leave. Bailey responded that he wasn't leaving without his package, and Rolinger eventually informed him that she had put it in the mailbox. Bailey retrieved the package and departed.

Rolinger went to her mother's house and called 911 to report the incident to police. In response to the call, Deputy Andrew Magdalany was dispatched to interview Rolinger, and Swindell went to talk to Bailey. At some point before Swindell reached Bailey, he called Magdalany and gathered additional details about the encounter and the surrounding circumstances. Magdalany told Swindell, for instance, that in the three months since Bailey's separation from his wife, he had visited the marital residence repeatedly, moved items around in the house, and installed cameras without his wife's knowledge. Magdalany also explained that Rolinger was "fear[ful]" and believed that her husband had "snapped." Even so, he told Swindell that he had not determined that Bailey had committed any crime.

Armed with this information, Swindell approached Bailey's parents' home—where Bailey was living—knocked on the door, and told Bailey's mother Evelyn that he wanted to speak to Bailey.[2] Bailey came to the

2. Taking the facts in the light most favorable to Bailey, the district court imputed more knowledge to Swindell than it should have. Giving Bailey the benefit of the doubt, Swindell didn't know at the time that he approached Bailey that Bailey and his wife were "embroiled in a contentious divorce," that Bailey "banged on the closed front door and screamed at Sherri Rolinger," that this

door and stepped out onto the porch, accompanied by his brother Jeremy. Bailey, Evelyn, and Jeremy all remained on the porch during the encounter, although only Bailey spoke with Swindell. Swindell immediately advised Bailey that he was not under arrest. Shortly thereafter, Swindell retreated off the porch to establish what he described as a "reactionary gap" between himself and Bailey—a distance that Jeremy estimated could have been as far as 13 feet. Swindell asked Bailey to speak with him privately by his patrol car, but Bailey declined,

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disturbance was loud enough that "their two-year-son [sic] woke up crying," or that Rolinger was "'crying' and 'very distraught.'" We must assume that Swindell learned these facts only after arresting Bailey, and that before the confrontation Swindell knew only what dispatch and Magdalany had told him. Indeed, Swindell indicated that all the relevant information he had at the time that he confronted Bailey was contained in the first full paragraph of his offense report, which we reproduce here:

> While speaking with Dep. Magdalany he advised me of the following: [a]ccording to Sherri, she and Kenneth separated approximately 3 months ago[,] and Kenneth moved out. Since this time, Kenneth has continuously harassed Sherri by showing up at their marital home unannounced while she is home and while she is not home. During the incidents where Sherri is not home Kenneth will turn pictures face down, and move things inside the home to let his presence be known. During this time frame[,] Kenneth had cameras installed inside the home without her knowledge. Sherri also told Dep. Magdalany that Kenneth is not acting right and has "snapped". During tonight's incident, Sherri and Kenneth got into a verbal argument, but at this time Dep. Magdalany had not determined if a crime occurred and was still investigating the incident.

saying that he wasn't comfortable doing so. Swindell then told Evelyn and Jeremy to go back inside so that he could talk to Bailey alone, but they, too, refused. Bailey asked Swindell why he was there, but Swindell initially didn't respond; he eventually said that he was there to investigate, although he never clarified exactly what he was investigating. Frustration growing, Swindell then repeatedly demanded—at a yell—that Evelyn and Jeremy return to the house and that Bailey talk to him by his patrol car, but no one complied.

Bailey then announced that he was heading inside and turned back into the house. Without first announcing an intention to detain Bailey, Swindell charged after him and "tackle[d] [him] . . . into the living room," simultaneously declaring, "I am going to tase you." Importantly for our purposes, by that time Bailey was—as he, Evelyn, and Jeremy all testified—already completely inside the house. Swindell then proceeded to arrest Bailey.

B

Bailey sued for false arrest under the Fourth Amendment, but the district court rejected his claim.[3] In particular, the court reasoned that when Bailey retreated into his house, he at least arguably obstructed Swindell in the lawful exercise of his duty, and thereby violated Fla.

3. Bailey brought other claims that are not before us on appeal. The district court allowed a Fourth Amendment excessive-force claim to go to trial, and the jury returned a verdict for Swindell. Bailey doesn't challenge that verdict on appeal. Nor does Bailey challenge the dismissal of his state-law claims.

Stat. § 843.02, which makes resisting an officer without violence a first-degree misdemeanor. Accordingly, the court granted Swindell qualified immunity and granted summary judgment in his favor.

Significantly, the district court failed to address Bailey's argument—which he reiterates on appeal—that even assuming that probable cause existed, Swindell violated "clearly established" law when he arrested Bailey inside his parents' home without a warrant.[4] We agree and accordingly reverse.

II

To obtain the benefit of qualified immunity, a government official "bears the initial burden of establishing that he was acting within his discretionary authority." *Huebner v. Bradshaw*, 935 F.3d 1183, 1187 (11th Cir. 2019) (citing *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002)). Where, as here, it is undisputed that this requirement is satisfied, the burden shifts to the plaintiff to "show both (1) that [he] suffered a violation of

4. The district court must have rejected this argument in reaching the result that it did, because Bailey clearly raised it. In particular, Bailey contended that "[i]t would not be enough that Deputy Swindell had a good faith belief, probable cause, or arguable probable cause that a misdemeanor crime had been committed . . . [as] Deputy Swindell was not free to enter Mr. Bailey's home for the purpose of either detaining him or arresting him." Continuing, Bailey argued that "it is not easy to see how the warrantless entry . . . is anything but a violation of an established right to be free from unreasonable seizure . . . in your own home."

a constitutional right and (2) that the right [he] claims was 'clearly established' at the time of the alleged misconduct." *Id.*

Bailey contends that his arrest violated clearly established Fourth Amendment law for two distinct reasons. First, he asserts that Swindell lacked probable cause to arrest him. Second, he argues that, in any event, Swindell impermissibly arrested him inside his home without a warrant.

A

It is clear, of course, that "[a] warrantless arrest without probable cause violates the Constitution." *Marx v. Gumbinner*, 905 F.2d 1503, 1505 (11th Cir. 1990) (citation omitted). But if "reasonable officers in the same circumstances and possessing the same knowledge as the [d]efendant[] could have believed that probable cause existed," then the absence of probable cause is not "clearly established," and qualified immunity applies. *Von Stein v. Brescher*, 904 F.2d 572, 579-80 (11th Cir. 1990). In that circumstance, what we have called "arguable probable cause" suffices to trigger qualified immunity. *Skop*, 485 F.3d at 1137.[5]

5. Some of our decisions have erroneously suggested that the "arguable probable cause" standard applies at the first step of the qualified-immunity analysis, in determining whether a constitutional violation has occurred. *See, e.g., Storck v. City of Coral Springs*, 354 F.3d 1307, 1317 (11th Cir. 2003) ("[V]iewing the facts in the light most favorable to Storck, she has not established a constitutional violation because, at the very least, McHugh had arguable probable

Swindell contends, and the district court held, "that Deputy Swindell had arguable probable cause to arrest Bailey for violating Fla. Stat. § 843.02." We needn't decide whether the district court was correct in so holding because we ultimately conclude that Bailey's arrest was effectuated inside Bailey's home without warrant, consent, or exigent circumstances. Such an arrest violates the Fourth Amendment even if supported by probable cause. For present purposes, therefore, we will simply assume—without deciding—that Swindell had probable cause.

B

When it comes to warrantless arrests, the Supreme Court has drawn a "firm line at the entrance to the house." *Payton v. New York*, 445 U.S. 573, 590, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Accordingly, while police don't need a warrant to make an arrest in a public place, the Fourth Amendment "prohibits the police from making a warrantless and nonconsensual entry into a suspect's

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cause."). Controlling case law makes clear, however, that "arguable probable cause" is a step-*two* standard. *See Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993) ("Sellers-Sampson is entitled to qualified immunity because he had arguable probable cause to arrest Lirio. Put differently, Lirio has not shown that the law of probable cause is so clearly established that no reasonable officer, faced with the situation before Sellers-Sampson, could have believed that probable cause to arrest existed."), *modified*, 14 F.3d 583 (11th Cir. 1994); *see also Huebner*, 935 F.3d at 1190 n.6 ("Accordingly, we needn't reach the question whether McDonough had 'arguable probable cause,' which comes into play only at the second, 'clearly established' step of the qualified-immunity analysis." (citation omitted)).

home in order to" arrest him. *Id.* at 576. Swindell doesn't dispute *Payton*'s rule as a general matter, but he insists that this case is controlled by the Court's pre-*Payton* decision in *United States v. Santana*, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976)—which, he says, holds that "standing in a doorway or on a porch is considered a public place, wherein there is no expectation of privacy or need to obtain a warrant to initiate an arrest." Br. for Appellee at 50. Although the facts of this case do bear some superficial similarity to those in *Santana*, we find ourselves constrained to reject Swindell's argument.

In *Santana*, officers who had just conducted a sting operation and arrested a heroin dealer returned to arrest the dealer's supplier. 427 U.S. at 40. As the officers approached, they saw the suspect, Dominga Santana, in her doorway roughly 15 feet away holding a brown paper bag. *Id.* The officers "got out of their van, shouting 'police,' and displaying their identification." *Id.* Santana retreated through the door and into her house, but the officers followed and took her into custody. *Id.* at 40-41. The Supreme Court approved the warrantless arrest because it was supported by probable cause and, importantly here, because it began in a "public place." *Id.* at 42 (quotation marks omitted). For the Court, the fact that the arrest continued into Santana's home after beginning on the threshold presented no difficulty because the police there were engaged in a case of "true hot pursuit"—an exigent circumstance that justifies a departure from the usual warrant requirement. *Id.* at 42-43 (quotation marks omitted).

While this case similarly involves an arrest in or around a doorway, *Santana* does not stand for the proposition that the Fourth Amendment authorizes any warrantless arrest that begins near an open door. Santana's arrest was initiated while she was standing—at least partly—outside her house, and she only subsequently retreated within it. Bailey, by contrast, was—again, taking the facts in the light most favorable to him—completely inside his parents' home before Swindell arrested him. Swindell neither physically nor verbally, and neither explicitly nor implicitly, initiated the arrest until Bailey had retreated fully into the house. As we will explain, that means that this case is controlled by *Payton*, not *Santana*.

Payton involved two consolidated cases. In the first, officers showed up at Theodore Payton's apartment to arrest him the day after they had "assembled evidence sufficient to establish probable cause" that he had murdered a man. 445 U.S. at 576. When Payton didn't answer his door, the officers broke in with the intention of arresting him. *Id.* Although they determined that Payton wasn't home, they discovered evidence of his crime in plain view, and Payton later turned himself in. *Id.* at 576-77. In the second case, officers obtained the address of Obie Riddick, whose robbery victims had identified as their assailant. *Id.* at 578. Without obtaining a warrant, the officers knocked on Riddick's door, saw him when his young son opened it, and entered the house and arrested him on the spot. *Id.* Both Payton and Riddick were convicted based on evidence discovered in the course of the officers' warrantless entries into their homes, and the New York Court of Appeals affirmed both convictions. *Id.*

at 579. The Supreme Court reversed both, holding that "[a]bsent exigent circumstances"—and even assuming the existence of probable cause—the threshold of the home "may not reasonably be crossed without a warrant." *Id.* at 590, 100 S.Ct. 1371.

Our precedent reconciling *Santana* and *Payton* is clear. We have expressly refused to read *Santana* "as allowing physical entry past *Payton*'s firm line . . . without a warrant or an exigency." *McClish v. Nugent*, 483 F.3d 1231, 1246 (11th Cir. 2007). *Santana*'s description of "the doorway of [a] house" as a "public place," 427 U.S. at 40, 42 (quotation marks omitted), we have said, shouldn't be misinterpreted to mean that officers have a right to enter and arrest anyone standing in an open doorway without a warrant. *McClish*, 483 F.3d at 1247. Instead, we have explained, it simply means that a person standing in a doorway is in "public" in the sense that he puts himself in the "the plain view" of any officers observing from the street. *Id.* (quoting *Hadley v. Williams*, 368 F.3d 747, 750 (7th Cir. 2004)). In so doing, the suspect "may well provide an officer with a basis for finding probable cause or an exigency," but he does not "surrender or forfeit every reasonable expectation of privacy . . . including . . . the right to be secure within his home from a warrantless arrest." *Id.*; *see also Moore v. Pederson*, 806 F.3d 1036, 1050 n.14 (11th Cir. 2015) (observing that "*McClish* clearly established that an officer may not execute a warrantless arrest without probable cause and either consent or exigent circumstances, even if the arrestee is standing in the doorway of his home when the officers conduct the arrest"). The bottom line, post-*Payton*: Unless a warrant

is obtained or an exigency exists, "any physical invasion of the structure of the home, by even a fraction of an inch, [is] too much." *Kyllo v. United States*, 533 U.S. 27, 37, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) (quotation marks and citation omitted).

In order to prevail based on *Santana*, then, Swindell would have to point to some exigent circumstance, but the exigencies present in *Santana* are absent here. *Santana* primarily involved the "hot pursuit" exception to the warrant requirement, and the Court there separately alluded to the risk that evidence would be destroyed. *Id.* at 43. Neither of those exigencies, however, can justify Bailey's arrest.[6]

In *Santana*, the suspect's arrest was "set in motion in a public place," a crucial element of the hot-pursuit exception. *Id.* at 43. It was only after officers shouted "police" that Santana retreated fully inside her house. *Id.* at 40. Bailey's arrest, by contrast, wasn't initiated in public, and therefore can't qualify as a "true hot pursuit." *Id.* at 42 (quotation marks omitted). Swindell gave no indication that he intended to arrest Bailey before he threatened to tase him and simultaneously tackled

6. Swindell arguably waived any argument that his warrantless arrest of Bailey was supported by exigent circumstances because he didn't raise the issue in his brief. *See United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) ("Parties must submit all issues on appeal in their initial briefs." (citations omitted)). Read charitably, his citation of *Santana* could be understood to invoke the exigencies on which the Court in that case relied, so we will analyze those circumstances here.

him from behind. Taken in the light most favorable to Bailey, the facts demonstrate that the threat and tackle occurred only *after* Bailey had retreated entirely into the house, so "hot pursuit" provides no justification for the warrantless entry here. If *Santana* were understood to cover warrantless arrests "set in motion" *inside* a home, then the hot-pursuit exception would quite literally swallow *Payton*'s rule.

The *Santana* Court also relied in part on "a realistic expectation that any delay would result in destruction of evidence." *Id.* at 43 (citation omitted). Swindell's counsel expressly disclaimed any reliance on this kind of exigency at oral argument—and with good reason, as the circumstances here posed no risk that any evidence would be destroyed. Indeed, with respect to the charge for which Bailey was arrested—resisting Swindell's initial effort to detain him, in violation of Fla. Stat. § 843.02—there wasn't any physical evidence; rather, all relevant evidence existed in the minds of Swindell, Bailey, Evelyn, and Jeremy.[7]

Because Swindell can point to no exigency, he violated the Fourth Amendment when he crossed the threshold to effectuate a warrantless, in-home arrest.

* * *

7. Although Swindell didn't present any exigent-circumstances arguments in his brief, he did raise a concern about officer safety at oral argument, contending that Swindell feared that Bailey would return to the porch with a weapon. That argument is not only waived, *see Nealy*, 232 F.3d at 830, but also wholly speculative, as there was no evidence to suggest that anyone had a weapon pre-arrest.

Of course, Swindell loses the cover of qualified immunity only if the constitutional right that he violated was "clearly established" at the time of the events in question. *McClish*, 483 F.3d at 1237. It was.

Qualified immunity "operates 'to protect officers from the sometimes hazy border[s]'" of constitutional rules. *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (quotation mark omitted) (quoting *Saucier v. Katz*, 533 U.S. 194, 206, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)). In so doing, it "liberates government agents from the need to constantly err on the side of caution." *Holmes v. Kucynda*, 321 F.3d 1069, 1077 (11th Cir. 2003). Here, though, Swindell crossed a constitutional line that—far from being hazy—was "not only firm but also bright." *Kyllo*, 533 U.S. at 40. That line—no warrantless in-home arrests absent exigent circumstances—was drawn unambiguously in *Payton*, traces its roots in more ancient sources, and has been reaffirmed repeatedly since. *See, e.g., Kirk v. Louisiana*, 536 U.S. 635, 636, 122 S. Ct. 2458, 153 L. Ed. 2d 599 (2002); *Kyllo*, 533 U.S. at 40; *Welsh v. Wisconsin*, 466 U.S. 740, 754, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984); *see also Johnson v. United States*, 333 U.S. 10, 15, 68 S. Ct. 367, 92 L. Ed. 436 (1948). And to be clear, Swindell can't point to *Santana* as a source of uncertainty in the law. The defendant in *McClish* ruined that chance; he made the same "What about *Santana*?" argument, and we indulged it there, 483 F.3d at 1243, but in so doing we expressly rejected it on a going-forward basis, *id.* at 1243-48. Finally, to the extent that any ambiguity remained, we expressly reiterated *McClish*'s holding in *Moore*,

explaining—in terms that apply here precisely—that a warrant (or exception) is *always* required for a home arrest "even if the arrestee is standing in the doorway of his home when the officers conduct the arrest." 806 F.3d at 1050 n.14.

Because Swindell violated clearly established Fourth Amendment law, he is not entitled to qualified immunity.

III

We hold that Swindell violated the Fourth Amendment's protection against unreasonable seizures when he arrested Bailey inside his home. We further hold that Bailey's right to be free from a warrantless, in-home arrest was clearly established and that no exception to the warrant requirement even plausibly applies in this case. Accordingly, we **REVERSE** the district court's judgment and **REMAND** for further proceedings consistent with this opinion.

APPENDIX J — JURY TRIAL — DAY 2 IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, PENSACOLA DIVISION, JUNE 2, 2021

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No: 3:15cv390/MCR

KENNETH BAILEY,

Plaintiff,

v.

SHAWN T. SWINDELL,

Defendant.

Pensacola, Florida, June 2, 2021, 8:03 a.m.

JURY TRIAL—DAY 2

BEFORE THE HONORABLE M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE
(Pages 1 through 298)

APPEARANCES:

For the Plaintiff: Taylor Warren & Weidner, PA
by: J. Phillip Warren and
Keith W. Weidner

Appendix J

For the Defendant: Andrews Crabtree Knox & Longfellow, LLP
by: Joe Longfellow, III and Riley M. Landy

* * *

[181] admissible for impeachment purposes; it was left open, that I might consider that. Okay.

(End of bench conference.)

THE COURT: Mr. Weidner, whenever you're ready.

MR. WEIDNER: Yes, Your Honor.

DIRECT EXAMINATION

BY MR. WEIDNER:

Q. Mr. Bailey, I want to bring you straight to September 11th, 2014, on the Kincheon Street. Starting with the moment you first realized there's a deputy at the door who wants to speak to you, can you tell us where you were in the house?

A. Yeah. So, that night I was doing some homework for a promotion class I was going through. I was sitting at the kitchen table at my computer working on some of that work.

Q. So you were working at your computer for a promotion class; is that right?

A. That's correct.

Q. Promotion for what? Gives us a little background there.

A. So I had just been selected to be promoted from E4 to E5, and there are some things you have to accomplish before you can put that rank on. So this class was the administrative portion, you know, that basically teach you to do paperwork and stuff like that.

Q. Okay. At some point you learned there was a deputy at the door who wants to speak to you, correct?

[182] A. That's correct.

Q. Okay. Tell us what you did.

A. Went to the door, stood on the porch.

Q. Okay. And do you recognize today the person who was at the porch?

A. I do.

Q. Okay. And who was that?

A. Swindell.

Q. Okay. What did Deputy Swindell say to you?

A. When I stepped out, he told me that he wanted me to step out to his car. He asked me to step to his car

on the street to talk to him, and I told him I didn't feel comfortable with that.

Q. Okay. Can you describe for the jury where was that he was asking you to step towards?

A. I can. It was out at the street like parallel to the yard, across the street like under a tree. It was dark out there.

Q. Did you believe that you had the right to not speak to a deputy?

A. Yes.

Q. When Deputy Swindell asked you to step away from your property to speak to him, what did you tell him?

A. I told him I didn't feel comfortable with that.

Q. Did Deputy Swindell tell you that if you don't come out to my car, that I'm going to arrest you?

A. He did not.

[183] Q. Did he tell you that it was an order that you were required to follow to come out to his car?

A. No.

Q. Can you tell me what happened between you and Deputy Swindell after you said that you didn't feel comfortable with that?

A. So after he asked me to step to the street to his car, my brother and mother were standing next to me on the front porch, so he asked them—or asked me if I would have them go inside, and I told him I didn't feel comfortable with that either.

Q. What did Deputy Swindell say in response?

A. He told me—or he asked me how old I was. I told him I was 28. He goes, Do you need your mommy? I said no but I wanted a witness.

Q. And after you said that, what happened next?

A. He asked me to step out to the car at the road again.

Q. At this point, had the deputy told you why he was there?

A. No, not at all.

Q. Did you ask him?

A. I asked him repeatedly. So in between each time, he would ask me to do something else, walk to the street or from my parents—my family to go in, I would ask him, you know, why were you there. And he would just ask me something, like ask me to go to the street or ask my parents to go in. It was like a cycle.

[184] Q. Okay.

A. He wouldn't tell me why he was there.

Q. And at some point did you make an announcement to the deputy?

A. Yes.

Q. Tell us what you said.

A. So I kept asking why he was there and he wouldn't tell me, so I just said, Okay, if you're not going to tell me why you're here, I'm going to turn around and go inside, so.

Q. Okay. And describe your motions towards the door.

A. I just turned around and walked inside.

Q. Did you run inside?

A. No.

Q. Were you running away from the scene?

A. No.

Q. And before you walked inside, did Deputy Swindell tell you to stop? Freeze?

A. No.

Q. Did he say, You're under arrest?

A. No.

Q. Did he say, You're being detained?

A. No.

Q. You crossed the threshold of the door. Tell me the next thing that you recall happening.

A. So as I walk in the door, I hear, I'm going to tase you. [185] Then like I turned to look over my shoulder, then he's coming down onto like the back of my neck with the taser like full steam, tackled me into the couch.

Q. Can you tell the jury in time? You heard, I'm going to tase you and you felt something.

A. Right.

Q. How much time elapsed between those two things?

A. It was like instant.

Q. What happened after you were hit in the back of the neck?

A. Well, like I said, when he said I'm going to tase you and then he came down across my neck, it was a full charge at this point. So he tackled me into the living room up against the couch.

Q. During this trial you heard some testimony that at the door Deputy Swindell went to grab you and put his hands on you and said you're being detained, and then you took up a fighting stance. Is that what happened?

A. No.

Q. Can you tell us what happened, please?

A. He tackled me into the living room. He told me he was going to tase me. While he was hitting me in the back of the neck, almost the simultaneous tackle into the living room against the couch, and then he immediately straddled me and started beating me.

Q. Okay. By the time you're on the floor and Deputy Swindell [186] is straddling you like they did over here, had the taser been deployed yet?

A. Yes.

Q. The taser had already been deployed by the time he got on top of you?

A. The taser was deployed when he hit me across the neck.

Q. And can you tell the jury where your head was pointing in relation to that TV that we've seen in the demonstrative aid?

A. Sure. My head was away from the TV.

Q. What's Deputy Swindell doing to you now?

A. What's that?

Q. When he's on top of you, tell us what Deputy Swindell is doing to you.

A. After he gets on top of me, he straddles me and he starts punching my neck, my back, and my arms.

Q. How many times did he punch you in the back of your head?

A. Repeatedly. Too many to count.

Q. At some point, did a taser end up in your hand?

A. Yes.

Q. Can you tell the jury about that?

A. So while he's punching me on the back of the head, back of the neck, my arms, my hands, he reaches over and grabs the taser and he puts it in my hand. Then he starts yelling, Stop resisting. Then he pulls out his gun. And I remember it because he put the gun to the back of my head, the corner. And [187] I turned up to look and see what it was, and I remember seeing the gun and—yeah.

Q. So you felt the gun?

A. Right.

Q. And then you saw the gun?

A. Right.

Q. What did you do now?

A. I thought he was about to kill me, so I panicked.

Q. Tell us what your panic looked like.

A. I called for my dad.

Q. Did your dad come out?

A. He did.

Q. Can you tell us what you recall about your dad coming out to the living room area?

A. I'm sorry?

Q. Can you tell us about what happened when your dad came out?

A. So when Dad came out, I heard him yelling—Swindell yelling, he's got a gun. Then I heard my brother talking to my dad to take him back to the bedroom. Yeah.

Q. And after your dad left to return his gun, what do you recall happening next?

A. So Dad put the gun away, came back, and Swindell's still got the gun pointed at my head the whole

time. And it wasn't long after he started yelling, He's got a gun, He's got a gun, that more deputies started showing up.

[188] Q. Okay. And other deputies came into your living room; is that correct?

A. That's correct.

Q. What happened then?

A. So Swindell's still straddling me. When the deputies come in, I still got the taser in my hand, so they reached down and take that out of my hand.

Q. Okay. Were you fighting to hold onto that taser at that point?

A. No. He had put a gun to my head, so I was—he put a gun into my head and told me to stop resisting, stop moving. I was—I wasn't moving.

Q. All right. And at some point you were placed in handcuffs and put into a patrol car; is that correct?

A. That's correct.

Q. Where were you taken at that point?

A. To Santa Rosa County jail.

Q. When you got to the jail, tell us what happened.

A. So they make you take your belt off, your shoes, socks. They put you up against the wall and search you, and then they walk you inside and place you in the jail cell.

Q. Do you recall how long you had to wait in jail?

A. I do.

Q. How long was that?

A. Five hours.

[189] Q. Do you know why you were in the jail for five hours?

A. I do. They have a little—like a little buzzer button next to the door that you can buzz to speak to the person at the desk. And, like, every so often, I would push the buzzer and ask them if I could make a call, talk to a lawyer, call my family. And every time I would ask, they'd say—they would say you can't, you can't make a call until we figure out what we're going to charge you with.

Q. At some point you were released from the jail cell; is that correct?

A. That's correct.

Q. And you walk out. Who's the first people you see?

A. My flight chief, my first sergeant, my mother, and my aunt.

Q. Okay. So your mother, your aunt, and your Air Force command?

A. Correct.

Q. When you saw your Air Force command was there, what was going through your mind?

A. So I—I was literally in the first day of my promotion class to be promoted to a—to staff sergeant, to NCO. And, yeah, I was thinking like, well, I've lost the promotion and my career's probably over at this point.

Q. Were you able to make it to work that day?

A. I was.

Q. Okay. Tell us what happened when you got to work.

[190] A. So as soon as I got out, my aunt drove me home, I immediately jumped in the shower, threw my uniform on, and drove to work.

Q. When you got to work, did you have to tell your command what had just happened?

A. Well, not my command, because my command was there. Because I had started promotion class, my duty assignment for that day was the promotion class, so I had to tell the people in charge of the promotion class why I was late and, you know, what had happened.

Q. What did they end up telling you to do?

A. They canceled my promotion class for that period, told me it could be rescheduled later, and they sent me home for the day.

Q. When you got home, what did you do?

A. So after I got home, I told Mom, like, my neck was hurting. My mom said you need to go to the doctor, and I was like, I don't know. So she basically made me go to the doctor. So we went to the Santa Rosa Medical Center ER.

Q. Okay. Mr. Bailey, I want to bring your attention to earlier in the night, or earlier that day, when you went to the marital home to retrieve an Amazon package. Can you explain to the jury why you went there that evening?

A. Right. Like I said, I just sat down to do my promotion work, homework for the promotion class. I was sitting at the [191] computer, and I had ordered a hard drive, right, that I was going to save my work on. And I ordered it on Amazon. So when I ordered it, I wasn't even paying attention, I just clicked "Send" or, you know, the one click thing, and it ended up sending it to my house, the marital house.

Q. Okay. And you were alerted that the package had been delivered, correct?

A. Right. Amazon said that it had been delivered and placed on the front porch.

Q. Okay. So what was your plan going over to the marital house at that point?

A. Just going to drive up there and go grab it off the front porch.

Q. Okay. When you drove up to the marital house on Harvest Way, what did you see?

A. So I pulled up into the driveway. The lights were on. I walked up to the front porch, looked, package wasn't there.

Q. Okay. Were you able to see inside the house?

A. I could.

Q. Tell us what was going on inside the house.

A. So, I mean, the lights were on, right, so you could see all the way through the living room. I couldn't see any activity, but I could hear Oliver playing, and then I decided I was—you know, I rang the doorbell.

Q. You rang the doorbell to your own house, correct?

[192] A. Right.

Q. Did you have a key with you?

A. I did.

Q. Did you try to enter the house?

A. No.

Q. And your ex-wife's name is—or was—Sherri Bailey, correct?

A. That's correct.

Q. She was referred to as Sherri Rolinger and Sherri Castro. Is that the same person?

A. That is the same person, yes.

Q. Your ex-wife, did she come to the door when you rang the doorbell?

A. Not at first. Oliver came to the door first.

Q. Okay. Was Oliver crying and screaming and upset?

A. No. He had been playing. He was on the other side of the house. He was still wearing the same clothes he had worn that day.

Q. Did you find out where your package was?

A. After I asked her, you know, or told her that I was there to get the package, she told me it was in the mailbox.

Q. Okay. Did she text you to tell you that she had moved the package?

A. No.

Q. So once you learned where the package was, what did you do?

[193] A. I went to the mailbox, grabbed the package.

Q. And did you leave?

A. I did.

Q. And when you left, did you have any idea that your wife was going to call 9-1-1?

A. No. No.

Q. You heard some testimony that said that you had installed hidden cameras in the house. Did you hear that?

A. I did.

Q. Did you install hidden cameras in the house?

A. No.

Q. What's the cameras about?

A. There's no cameras. There's one camera, and it was a baby cam, and it had been the only camera in the house since Oliver was born.

Q. At the time of this incident, was your wife working, ex-wife?

A. She was.

Q. What was her occupation?

A. She's a correctional officer.

Q. When you left the house with the package, did you go straight home, or did you run any errands?

A. Before I left, Mom and Dad had asked if I would stop and get some milkshakes—excuse me, if I would stop and get some milkshakes for them, so I stopped and got some milkshakes after [194] I left and picked up the package and then I went home, to my mom's house.

Q. You were going through a contentious divorce, correct?

A. That's correct.

Q. What were some of the things that—without going into a lot of detail, were you—the two of you fighting over custody of Oliver?

A. That was part of it, yes.

Q. Was this arrest used against you at that custody dispute?

A. Immediately.

Q. All right. I want to change topics for a few minutes here. I want to talk about your military career in the Air Force. Do you recall what year you joined the Air Force?

A. 2009.

Q. And can you tell the jury, you know, why you considered going into the military?

A. Sure. My grandfather was in the Navy, and I had two cousins that were in the Air Force.

Q. Did your grandfather retire from the Navy?

A. He did. After 20 years.

Q. When you first joined the Air Force, did you know what job you wanted to do?

A. I did.

Q. What job as that?

A. I wanted to do Intel.

[195] Q. And is that something that they had immediately available at that time?

A. No. So you have to go speak to the recruiter when you want to join. And there were no intel slots available, so I was put into the delayed enlistment program.

Q. Okay. So the delayed enlistment program, how long were you in that program waiting for the job to open up?

A. About a year.

Q. Why did you want to do intelligence?

A. Well, I had been going to school to—for computer science, right, and I've always been interested in that sort of field. But intel specifically interested me because you got to know things, you got to do certain things, while still kind of being in a similar environment to what, you know, I wanted to do.

Q. And I think that the occupational title was a geospatial intelligence analyst; is that correct?

A. That's correct.

Q. To the extent you're permitted, can you tell us what that occupation does?

A. Right. So a geospacial intel analyst analyzes various sources of information, oftentimes imagery, analyze those sources of information and then provide a finished product of, you know, analysis to our supported troops.

Q. And are you prohibited even today from talking about [196] certain things?

A. Yeah.

Q. And you're still honoring that obligation?

A. Of course.

Q. Did you have a security clearance?

A. I did.

Q. What clearance did you obtain?

A. Top secret.

Q. How does one go about getting a top secret clearance?

A. It's a thorough background check.

Q. Did you like your work in the Air Force?

A. I did.

Q. What type equipment did you use when you were an analyst in the Air Force?

A. Just computers.

Q. Did you carry a work—I'm sorry, did you carry a firearm when you went to work in the Air Force?

A. No, no.

Q. Were you provided any training on hand-to-hand combat?

A. No.

Q. Were you ever taught how to disarm someone—

A. No.

Q. —who's holding a firearm?

A. No.

Q. I think earlier you said that when this arrest occurred, [197] you were an E5 who got selected to become an E5; is that correct—I'm sorry, is that E4 to E5?

A. E4 to E5. That's correct.

Q. But in between those two things, you were arrested and charged with three felonies; is that correct?

A. Three serious felonies, yeah.

Q. Did you still get promoted anyway?

A. I did.

Q. During this time frame, had you reenlisted?

A. I did. I had just reenlisted.

Q. For how long?

A. For another four years.

Q. What were your plans in the—for your career in the Air Force at this point?

A. I mean, at this point my plans were to stick it out. I was going to do a full 20 and retire.

Q. Do you think you were on track to make that goal?

A. I believe so, yeah.

Q. Mr. Bailey, your Air Force career did come to an end; is that correct?

A. That's correct.

Q. Sooner than 20 years?

A. That's right.

Q. And involuntary—involuntarily; is that correct?

A. That's correct.

[198] Q. Can you tell us why it came to an end?

A. So I received some injuries that required me to go through a medical evaluation board that ultimately determined I would be discharged medically.

Q. Okay. Is the name of that document called a Physical Evaluation Board, or PEB?

A. That's right.

Q. What was the injury which made you unfit for the Air Force?

A. I had three herniated disks in my neck.

Q. When did you sustain that injury?

A. September 11, 2014.

Q. Who caused that injury?

A. Deputy Swindell.

Q. Before September 11, 2014, had you ever had any neck complaints?

A. No, I wouldn't have been promoted if I did.

THE COURT: Having a little trouble hearing, Mr. Bailey.

THE WITNESS: I'm sorry.

BY MR. WARREN:

Q. I think you said—and I'll just ask you. Would you have been deployed if you had a neck injury?

A. No.

Q. Would you have been able to complete and pass your physical fitness test?

[199] A. No.

Q. Now, the incident which caused the injury occurred on September 11, 2014. Do you know how long you had to wait before you found out your fate in the Air Force?

A. It was about two and a half years.

Q. What was it like having to wait to figure out what was going to happen to you?

A. Frustrating.

Q. Okay. What was the answer that you were hoping for that the MEB would come back?

A. I had been hoping—it's a long process, but I had been hoping they'd come back and say that I could stay in with some limitations.

Q. What answer did you get?

A. No, no, that they were going to discharge me.

Q. Okay. How did that make you feel?

A. It wasn't good.

Q. You had some things going on in your life at that point?

A. I did.

Q. Can you tell us about some of those things?

A. So I had just bought a house, right. Oliver.

Q. How old was Oliver at the time?

A. At the time, Oliver was two.

Q. And now you learned now you have to find a job?

A. Right.

[200] Q. All right. Mr. Bailey, I want to talk a little bit more detail about the injury itself. When was the first time that you he realized something was going on in the back of your neck?

A. Immediately.

Q. When was the first time you were able to see a doctor about your neck problem?

A. That next morning after I got out of jail.

Q. Where did you go?

A. Santa Rosa Medical Center.

Q. Did you tell them how you got that injury?

A. I did.

Q. How did they respond to that?

A. So when I told them what had happened, they told me that they were going to have to contact law enforcement after I told them what had happened, so they ended up calling the Milton Police Department.

Q. Did they say it's because you described an assault?

A. That's right.

Q. And did the Milton Police Department come out and take a statement?

A. They did.

Q. At some point did the Santa Rosa Medical Center facility do some imaging study on your neck?

A. They did.

[201] Q. And can you tell the jury—

A. Several types of images.

Q. Okay. Can you tell the jury what the results of those tests were?

A. They concluded that I had herniated disks in my neck.

Q. And what was the medical advice you were given at that point?

A. They referred me to one of their neurosurgeons.

Q. Were you able to go see that neurosurgeon?

A. No. Because I was in the Air Force, I had to go to my PCM first, explain to him what happened.

Q. Okay. And I think we heard the term PCM—

A. That's right.

Q. —earlier. Can you remind the jury what PCM stands for?

A. Primary care manager.

Q. Is that like a family practice physician?

A. Yes, sir.

Q. Primary care physician?

A. That's right. Primary care.

Q. And at the time, who was your primary doctor?

A. Dr. Cousineau.

Q. Can you tell me how Dr. Cousineau managed this injury?

A. Sure. At first, you know, I walked in, explained to him what was going on. You know, he felt around, he sent me for physical therapy, to do physical therapy for a while. That [202] wasn't working, so he referred me to a neurosurgeon, Dr. Powell.

Q. Okay. And is Dr. Powell an Air Force doctor as well?

A. That's right. He's on Eglin.

Q. Now, are you—do you get to choose who your doctor is, or does the Air Force choose your doctors for you?

A. No, not really.

Q. So what did Dr. Powell do for you?

A. So Dr. Powell did some more imaging, and then he referred me to pain management, Dr. Stein, in Pensacola.

Q. What did Dr. Stein do?

A. He did the injections in my neck.

Q. Did the injections fix your problem?

A. They did not.

Q. So what did you do after that?

A. So I went back to Dr. Powell, and Dr. Powell basically said this is it. Your only options are surgery, a disk replacement, or a fusion of my disks.

Q. Did you say fusion of your disks?

A. Fusion.

Q. How many times had you had a face-to-face meeting with Dr. Powell at this point?

A. Four, four or so.

Q. So at this point he's saying I'm recommending surgery for your neck; is that correct?

A. That's correct.

[203] Q. Did he go over the risks and benefits of that procedure?

A. He did.

Q. Can you tell the jury what you recall the risks being?

A. Sure. Well, obviously limited mobility, that it might not even work and relieve the pain; but like the

real big one was the risk of paralysis that I didn't want to deal with.

Q. Okay. Did you discuss those risks with Dr. Cousineau?

A. I did.

Q. And did he assist you with making the decision about whether or not to obtain the surgery?

A. Dr. Cousineau did, yeah.

Q. And was the fact that you were only 28 at this time frame, 29, have any bearing on whether or not you were going to get the surgery?

A. So Dr. Cousineau is the type to kind of recommend—like especially when you're younger—to just deal with it, you know. So he's a good doc, I trusted him, so I went with what he said.

Q. Were you told that if you have surgery at a young age you might need to have it again in the future?

A. That's right.

Q. Can you tell us what you remember from that?

A. Well, so in addition to telling me that even if—that it may not work even if I get it done, that even if it does work a little bit, you know, because I was so young, I would almost [204] definitely need to have it done in the future.

Q. Short of surgery, what is your understanding? Is there any medical care that can do anything for you, short of surgery?

A. No.

Q. Do you still have problems with your neck even today?

A. I do.

Q. Can you kind of help the jury understand what it is, your neck pain on a good day?

A. On a good day, it's kind of like today. I can just—you know it's there but you can get through it, you can deal with it.

Q. How about explain what a bad day is like.

A. Bad day, like you—you don't feel like you can even get out of bed.

Q. How often are you having those?

A. Maybe a couple times a year.

Q. And what about like an in-between day, can you describe an in-between day, between a good and bad?

A. Sure. It's in between. So you can get up and you can do things, but it's not go going to feel good.

Q. Can you explain to the jury how this injury has had an impact on your work life, you know, besides being asked to leave the military?

A. Sure.

Q. On your post military work life?

[205] A. How the injury has?

Q. Yeah.

A. Sure. So as soon as I got out of the Air Force, I got a job at the post office because it was, you know, they were the first place to offer me employment after. And, you know, lot of lifting heavy packages, you know, hurts.

Q. We also heard some testimony about a company called Zel Technologies. Do you remember that?

A. I do.

Q. Can you tell us what that was and how long you worked there?

A. So I only worked there for a couple months. I heard about the—an opening for a job doing what was supposed to be similar to what I was doing when I was in. But it was with a contracting company, so I went there for a couple months, and it just—it didn't provide the stability.

Q. When you got there, was it actually like what you were doing before?

A. No.

Q. And I understand you were also awarded some VA disability benefits related to this injury, correct?

A. That's correct.

Q. So you received some benefits for the injury?

A. That's correct.

Q. But you're still working anyway?

[206] A. That's correct.

Q. Where are you currently working now?

A. The Milton bakery.

Q. And what do you do there?

A. I bake cakes.

Q. Do you have to lift some heavy things?

A. Sometimes, yeah.

Q. What do you have to lift that's kind of heavy?

A. The heaviest is like the 50-pound bags of flour and stuff like that.

Q. Okay. Mr. Bailey, can you explain to the jury what this injury—what impact it's had on your family life?

A. Sure. My ability to play with my son is limited, and that would be it.

Q. Has your custody rights to your son ever been diminished or taken away?

A. No, not at all. 50/50.

MR. WEIDNER: I have nothing further, Your Honor.

THE COURT: All right. Thank you.

Mr. Longfellow.

MR. LONGFELLOW: Yes, Your Honor.

THE COURT: Mr. Longfellow, you can try it without the mic, but—

MR. LONGFELLOW: I'd prefer if I can. It seems to have worked a lot better for me.

[207] THE COURT: Use it or not use it?

MR. LONGFELLOW: To use it.

THE COURT: Okay. Very good.

MR. LONGFELLOW: I don't want to give you problems.

THE COURT: You won't hear any objection from me.

CROSS-EXAMINATION

BY MR. LONGFELLOW:

Q. Mr. Bailey, I believe I testified thus far that before going outside to speak with Deputy Swindell September 11, 2014, your mama told you to be respectful; is that correct?

A. That's correct, yeah.

Q. And you understood what it meant to be respectful to law enforcement; is that correct?

A. That's correct, yeah.

Q. And the reason you understood what it meant to be respectful to law enforcement is partly because you also served in the military; is that correct?

A. Well, that, and I have family in law enforcement, yes.

Q. Sure. And in the military, they teach you about the chain of command and respecting your superiors and following orders; is that correct?

A. That's correct.

Q. And following directives that your superior officers give you?

A. That's correct.

[208] Q. And it is important when a superior officer in the military give you a directive or an order that you follow it; is that correct?

A. It's also important that the order be clear. Yes.

THE COURT: Excuse me, I'm—

MR. LONGFELLOW: So is that a yes?

THE COURT: Wait. I didn't hear him, and I don't—I doubt if our court reporter heard him either, so I need you to repeat your answer to that—

THE WITNESS: Yes.

THE COURT:—question.

BY MS. LANDY:

Q. Now, you were asked at least three times on September 11, 2014, by Deputy Swindell to step out to his vehicle and speak with him; is that correct?

A. That's correct.

Q. And each time that he asked you to step out, you refused to actually step out there; is that correct?

A. I told him I didn't feel comfortable doing that, yes.

Q. I believe that's a yes; is that correct?

A. Yes.

Q. Okay. And when Deputy Swindell was there on September 11, he told you he was there to conduct an investigation; is that correct?

A. And then I asked him what he was doing, why he was there, [209] and he wouldn't tell me anything else.

Q. Okay. I just need to make sure this is very clear for the record. Is that a yes that he told you he was there to conduct an investigation?

A. Eventually, yes.

Q. Okay. Now, you've also testified that you were in a contentious divorce with your wife at the time?

A. That's correct.

Q. You two were having issues; is that correct?

A. That's correct.

Q. You had had prior issues before this night; is that correct?

A. That's correct.

Q. And prior to law enforcement coming, you had been at your wife's house; is that correct?

A. That's correct.

Q. You knew why Deputy Swindell was there, don't you?

A. No, I didn't.

Q. You didn't think it had anything to do with your wife?

A. I mean, aside from the fact that I've known him from, you know, hanging out with her family, then no.

Q. Now, had you had any interaction with Deputy Swindell as a law enforcement officer prior to September 11, 2014?

MR. WEIDNER: Your Honor, may we approach?

THE COURT: All right.

[210] *(Following conference held at the bench.)*

MR. WEIDNER: I'm concerned that question is going to open up the door for him to respond that he recognized him from a party with Deputy Ramirez.

THE COURT: I don't understand why Mr. Bailey just gave the testimony he gave in response to the question that was nonresponsive. It was gratuitous. He added it. It wasn't necessary. Have you talked with him about my order?

MR. WEIDNER: I've—would like to talk to him again, make sure it's very clear.

THE COURT: I think you need to, or the jury's going to get a very clear, firm instruction about this, which I'd rather not have to give. That is my order. This idea that, you know, her family and Deputy Swindell and them hanging out together, it's—it's to be excluded. It's been excluded in the first trial.

MR. WEIDNER: I understand the Court's order. I just want to make sure that on cross-examination my client understands the Court's order. I don't want it opening up and then us having to try to fix it. And that's why I'm coming up to the bench to make sure he understands it as clearly as it's being explained to me now.

MR. LONGFELLOW: Are you talking to me?

MR. WEIDNER: No.

MR. LONGFELLOW: And just to make clear, that [211] question, I specifically said that in his capacity as a law enforcement, so that would in my mind—

MR. WEIDNER: It was very nuanced, I get it. I just don't know if my client was—picked up on the nuance. I

just don't want him to say something that in his mind is honest but is going to violate this Court's order.

THE COURT: Yeah, my understanding is that there is -there is no evidence that Mr. Bailey or his mother knew of any relationship between Ramirez and Swindell. It is all suspicion.

MR. WEIDNER: The evidence is, Your Honor, is that Kenneth Bailey was living with Michael Ramirez during a time frame. Michael Ramirez had a party where other officers from Santa Rosa County was there. Mr. Bailey testified that he recognized Swindell from that party.

THE COURT: Okay. But that—that's doesn't mean anything.

MR. WEIDNER: That's the basis for his belief.

THE COURT: I know.

MR. WEIDNER: I'm telling the Court that, just—

THE COURT: But that's why it's been excluded from both trials.

MR. WEIDNER: I just want to make sure it's still excluded, Your Honor. I'm just—don't want to—

THE COURT: It's very clear in my order. So he should have been aware of it. You need to step over and

speak to him, [212] please. And do it with your back to the jury.

MR. WEIDNER: Yes, ma'am.

MR. LONGFELLOW: Want him to maybe come over here and speak to him?

THE COURT: No, I don't. Thank you.

(Off-the-record discussion between Counsel and Mr. Bailey.)

MR. WEIDNER: Thank you, Mr. Longfellow.

MR. LONGFELLOW: You're welcome.

BY MR. LONGFELLOW:

Q. Now, prior to September 2014, you had never had any encounter with Deputy Shawn Swindell in his capacity as a law enforcement officer; is that correct?

A. That's correct.

Q. And when he appeared on September 11, 2014, he was there in a uniform; is that correct?

A. That's correct.

Q. He had a gun; is that correct?

A. He did, yes.

Q. He had a taser; is that correct?

A. That's correct.

Q. He showed up in a marked car; is that correct?

A. That's correct.

Q. He identified who he was; is that correct?

A. That's correct.

Q. Now, you knew that Deputy Swindell was there to conduct an [213] investigation. He told you that. So during the entire time that you're there outside with Deputy Swindell, why didn't you ever mention anything about the cameras or any of the issues about you and your wife?

A. I'm sorry?

Q. Why didn't you mention any of the issues that you and your wife were having?

A. What? Ask that again please.

Q. Yeah. So Deputy Swindell was there to conduct an investigation. You knew that. Is that correct?

A. That's correct.

Q. You had an—you knew you and your wife were having issues; is that correct?

A. That's correct.

Q. You had a pretty good idea that this could be related to your wife; is that correct?

A. That's correct.

Q. Okay. Why didn't you mention anything about some of the issues that you and your wife were having when Deputy Swindell told you I'm here to conduct an investigation?

A. I asked him why he was here.

Q. Why didn't you ask him if he was here about my wife?

A. Why should I know why he was there? I asked him why he was there.

Q. Well, he told you he was there to conduct an investigation?

[214] A. Yes, but that doesn't tell me anything.

Q. He told you he wanted to talk to you aside from anybody else; isn't that correct?

A. I had stepped out of the house to talk to him, yes.

Q. You stepped outside the house. And he asked you to step over to his vehicle and you refused; is that correct?

A. I did, yes.

Q. Okay. Now, after this injury on September 11, 2014, that you're claiming you sustained as a result of the incident that evening, at any point did you complete your PT test with the military afterwards?

A. I'm sorry. Ask that—

Q. Did you complete your PT test after September 11, 2014, at any point?

A. No.

Q. You never did any part of your PT examination?

A. Part of it is considered a waist measurement so, yes, I did the waist measurement.

Q. You didn't do any physical activity?

A. No.

Q. You did go running afterwards at all, at any time?

A. I mean, I tried until the doctor told me not to do it, yeah.

Q. What does it mean to try?

A. I mean, I didn't do the actual test, but I tried to [215] exercise, yes.

Q. So how did you try to exercise?

A. I mean, physical therapy is basically trying to exercise.

Q. You didn't go out on your own and go for a run or try to do situps or pushups or pullups at any time?

A. No.

Q. At no time after September 11?

A. No.

Q. Okay. Now, you've talked about your employment with the Milton bakery, and you said you have to lift 50-pound bags of flour; is that correct?

A. That's correct.

Q. And you have to lift 50-pound bags of sugar; is that correct?

A. That's correct.

Q. And do you lift those daily?

A. I do.

Q. Do you lift them on your own?

A. Sometimes, yes.

Q. Okay. Now, when you went to go work for the United States Postal Service, you had to fill out an application; is that correct?

A. That is correct.

Q. And on that application, it asked you if you could lift at least 70 pounds. What was your answer?

[216] A. My answer was yes.

Q. Okay. When you worked at the USPS, did you have to lift packages and mail that was at least 20, 30 pounds at times?

A. I did, yes.

Q. Did you do it?

A. I did.

Q. Did you ask for an accommodation?

A. I did not.

Q. You did it by yourself; is that correct?

A. That is correct.

Q. Okay. And when you were at the post office working there, you got into a fender-bender; is that correct?

A. That's correct.

Q. You got rear-ended?

A. That's correct.

Q. You filed a workers' comp claim; is that correct?

A. That's correct.

Q. And in that workers' comp claim, you revealed that you had a traumatic injury that occurred from this rear-end event; is that correct?

A. That's not correct.

Q. That's not correct. If I were to show you your employment file where there's this report of this traumatic injury, would that help refresh your memory?

MR. LONGFELLOW: May I approach, Your Honor?

[217] THE COURT: Yes.

MR. WEIDNER: Do you have a copy for me?

BY MR. LONGFELLOW:

Q. Let me know when you've had a chance to read that paragraph.

A. I did, yes.

Q. Did that refresh your memory?

A. Yes.

Q. Okay. So you did, in fact, report to the USPS that that fender-bender caused a traumatic injury; is that correct?

A. Yes.

Q. Now, I believe you have a motto; is that correct?

A. I'm sorry?

Q. A motto.

A. No.

Q. Okay. Now, do you know what a motto is?

A. I do.

Q. Okay. At any time do you recall adopting a motto by Winston Churchill: Never give in; never yield the force?

A. I do recall posting it on Facebook.

Q. Okay. Do you remember ever testifying that you had adopted that as your motto, to never give in to—never yield to force?

A. I think I said that my cousin had given it to me, and it helped me during a hard time so I posted it to Facebook.

Q. So let's do this. You gave a deposition in this case; is [218] that correct?

A. That's correct.

Q. You took an oath to tell the truth; is that correct?

A. That is correct.

Q. And you told the truth that day; is that correct?

A. That's correct.

Q. And your attorney was there; is that correct?

A. That's correct.

Q. And counsel for Deputy Swindell was there; is that correct?

A. That's correct.

Q. Okay. And you told the truth at that day; is that correct?

A. That's correct.

Q. I'd like to go to your March 22nd, 2016 deposition, and I'll—if I may I approach, Your Honor—

THE COURT: Yes.

MR. LONGFELLOW:—once I pull it up.

MR. WEIDNER: Mr. Longfellow, page and line?

MR. LONGFELLOW: I'm going to give this to him.

BY MR. LONGFELLOW:

Q. Now we're on page 163 of your March 22, 2016 depo. If you'll go to line 19, please.

A. Right.

Q. You were asked the question: Isn't it your motto never give in, never yield to force? Answer: That's Winston Churchill, but yeah, yeah. [219] That was your testimony, correct?

A. Then I said I can't claim it but I like it.

MR. LONGFELLOW: Your Honor, could you instruct the witness to answer the question.

THE COURT: Just answer the question, please.

THE WITNESS: Yes.

MR. LONGFELLOW: Thank you.

BY MR. LONGFELLOW:

Q. You wouldn't describe yourself as a submissive person, would you?

A. I'm sorry?

Q. Would you describe yourself as a submissive person?

A. No.

Q. And you work part time at the bakery in Milton; is that correct?

A. That's correct.

Q. Less than 20 hours; is that correct?

A. That's correct.

Q. Previously, you had worked at the United States Postal Service; is that correct?

A. That's correct.

Q. And you left in March of 2019; is that correct?

A. That's correct.

Q. And the reason you left is because there was no opportunity for advancement; is that correct?

[220] A. That's correct.

Q. And you also worked for a period of time at Zel Technologies?

A. That's correct.

Q. And you left there because—you said something about there was no stability; is that correct?

A. That's right.

Q. What does that mean?

A. Saying it was a contracting—it was contracting work, so.

Q. Let's talk about Zel. That was the first year of the contract that they had been awarded; is that correct?

A. I'm not sure.

Q. Okay. And you worked there for two months?

A. That's correct.

Q. You had no knowledge at that point that Zel Technologies was going to lose any type of contract, did you?

A. I did not, no.

Q. Okay. And then one day you just decided after about two months—you didn't give notice, you just didn't show up; is that correct?

A. I did. I told my supervisor that I—

THE COURT: Mr. Bailey, I'm having trouble hearing you.

THE WITNESS: I'm sorry.

THE COURT: Thank you.

[221] THE WITNESS: I told my supervisor there that I was -I was quitting, yeah.

BY MR. LONGFELLOW:

Q. And you went back to the United States Postal Service; is that correct?

A. That's correct.

Q. Okay. And you worked there after that—that little two-month hiatus—

A. That's correct.

Q. —up until March 2019; is that correct?

A. That's correct.

Q. And you had worked at the United States Postal Service as of March 2019 for approximately 20 months at least. Does that sound about right?

A. That sounds about right, yeah.

Q. I want to show you what's been marked as Exhibit 8D, as in dog.

THE COURT: Marked or admitted?

MR. LONGFELLOW: Marked and admitted. Yes, Your Honor. I apologize.

THE COURT: That's all right.

BY MR. LONGFELLOW:

Q. Have you seen this photo before?

A. I have.

Q. It looks—the color, right there where I circled, that's [222] your hands, correct?

A. That's correct.

Q. And they're holding a taser; is that correct?

A. That's correct.

Q. Your hands are wrapped around a taser; is that correct?

A. That's correct.

Q. And it looks like you've got Deputy Swindell's hand right here and right here; is that correct?

A. That's correct.

Q. And he's not putting his hands on your body at that point; is that correct?

A. That point, no.

Q. Okay. You'll agree, if you didn't want to hold that taser at that point, this photo is taken, you could have let go, right?

A. No.

Q. You couldn't let go of the taser?

A. He has a gun pointed to my head, and he's telling me not to move. There's no way I'm going to—I'm not doing anything.

Q. He's talking to you, he's got the gun pointed to your head. Is that your testimony?

A. He had been yelling—yes.

Q. Okay. And at any other time during this whole interaction, did you resist at all?

A. No.

[223] Q. And he just for whatever reason took his taser and put it in your hands?

A. Yes.

Q. And forced you to hold it?

A. Yes.

Q. Now, it's my understanding you were not present when Deputy Magdalany called Deputy Swindell to relay the information that your now-ex-wife Sherri had conveyed to Deputy Magdalany; is that correct?

A. That's correct.

Q. And you hadn't told Deputy Swindell at any time during the interaction anything about what had transpired at Sherri's house that evening, correct?

A. That's correct.

Q. Now, the decision to turn around and to leave, to go back inside the house, that was your decision, correct?

A. That's correct.

Q. You made that decision on your own; is that correct?

A. That's correct.

Q. You didn't ask permission to leave; is that correct?

A. I mean, no, I guess not.

Q. Okay. Now, I want to show you Exhibit 9. It's already been moved into evidence, and it's the video. I'm sure you've seen this video before. Is this correct?

A. That's correct.

[224] Q. And you saw it before today; is that correct?

A. That is correct.

MR. LONGFELLOW: Okay. I don't think the sound is connected.

THE COURT: We have to hear what volume it is on your device, and then we can address ours. So let's—can it go any louder for either of you?

DEPUTY CLERK: I've got it maxed all the way out.

THE COURT: What about on your end?

MR. LONGFELLOW: I'm maxed out.

COURT SECURITY OFFICER: Judge, they're not seeing it on here.

THE COURT: Hold on just a minute. I know what the problem is. Okay. Are you-all not seeing it?

(Off-the-record discussion.)

THE COURT: Okay. Ladies and gentlemen, we're going to take our afternoon recess. It's about that time anyway. We'll hopefully get an IT person up here and get this corrected. We'll be in recess for 20 minutes. Please don't discuss the case during the recess. Also please continue to keep an open mind about the merits. See you back in 20 minutes. I apologize for the inconvenience.

(Jury excused.)

THE COURT: Mr. Bailey, you may step down. Don't [225] discuss your testimony with anyone, including your lawyers.

THE WITNESS: Leave the paper and microphone?

THE COURT: Yes, please. It will be there when you get back. All right. I'll have IT up here and see if we can't fix it. We had a similar issue in the trial last week. So hopefully it's correctable.

(Recess taken from 3:19 p.m. to 4:19 p.m.)

Appendix J

THE COURT: All right. Ladies and gentlemen, I apologize for being inconvenienced, the disruption. Technology is a blessing and a curse, as I think we all know. And one of these days we're going to figure out what the glitches are with our system. But regardless, IT thankfully got it working finally, and we're ready to proceed. I hope it continues to work throughout the rest of this trial and the one I have for the next two weeks—and the one after that the following week. All right. Mr. Longfellow, you were still on your cross of Mr. Bailey. Mr. Bailey, you're still under oath. And I believe we had the video on when we—

MR. LONGFELLOW: We did. We're going to start somewhere else, if we can.

THE COURT: Oh, okay. All right. Your call.

MR. LONGFELLOW: Please and thank you.

[226] BY MR. LONGFELLOW:

Q. Now, before you went over to your wife's house over on—it was on Harvest; is that correct? Harvest Way?

A. Yes.

Q. Okay. On September 11, 2014, did you send her a text and say, hey, I'm coming over?

A. I did not.

Q. Did you give her a call or let her know that you were coming over to pick up a package?

A. No.

Q. Did you send her any kind of message prior to you going over that day saying, hey, I had a package from Amazon sent over there inadvertently?

A. I did not, no.

THE COURT: Mr. Bailey, I—Are you-all having trouble hearing? I know you want the jury to be able to hear. Please try to speak up.

THE DEFENDANT: Sorry.

BY MR. LONGFELLOW:

Q. Now, after you went and got your package, before you left to go get—go to Sonic, did you send your wife any text?

A. I did.

Q. You did. And did you tell her to stop neglecting your child?

[227] A. I did.

Q. Did she tell you to stop harassing you [sic]?

A. I believe she did, yes.

Q. Via text?

A. Yes.

Q. Okay. Now, I want to show you Exhibit 2. If we can publish this so the jury. It's already been moved into evidence.

THE COURT: Okay.

COURT SECURITY OFFICER: It's out again.

THE COURT: Oh, my gosh. I swear I'm going to issue a warrant for somebody's arrest. Okay. We need to at least finish out today and try to get a handle on this through the evening. So we're going to pull this monitor that's behind you. We're going to pull it out as far as we can. We recently ordered new cords for it so that it would extend farther out. I don't know that it's going to be far enough. Leonard, if you could help Ms. Simms out, I would appreciate that. And your chairs do swivel. I don't like, obviously, you having to turn your back to the witness and the attorney, but it may be our only option. Mr. Bailey, you'll have to speak up even louder, if that happens.

[228] MR. LONGFELLOW: I'm wondering if I'm the curse.

THE COURT: No. Well—

MR. LONGFELLOW: This keeps on getting to this—

THE COURT: This happened in the last trial last week. We thought it had been resolved.

(Off-the-record discussion.)

THE COURT: Go ahead.

MR. LONGFELLOW: You're fine, Your Honor.

THE COURT: Try again.

MR. LONGFELLOW: It's not your fault.

BY MR. LONGFELLOW:

Q. Mr. Bailey, if you'll look at your screen.

A. Yes.

Q. If you look at the top right—hopefully this will work. If you put your finger there and point to it, a button should come up that shows an arrow. If you push that arrow, there is a color pad down there. What color do you have?

A. Green.

Q. Okay. Excellent. If you just push back, it will go away. Will you mark on this photo where you were

standing when you were outside with your mom, your brother, and Deputy Swindell?

A. Sure.

Q. You can put like an X in that area.

A. Sure. I was right about here.

[229] Q. Okay. Was your mom?

A. Mom was about right here.

Q. And where was your brother?

A. Jeremy kind of moved around, but he was right here.

Q. Okay. And these chairs, were they all out there on the night of September 11, 2014?

A. I think so.

Q. Okay. You've seen the video of the incident that's been recorded, or the parts that have been recorded, prior to today; is that correct?

A. That's correct.

Q. I want to show you a part of the video. If we can—this is Exhibit 9. If we can publish this to the jury. Before we start this video, it looks like you're on the ground there; is that correct?

A. That's correct.

(Video recording played in open court.)

BY MR. LONGFELLOW:

Q. Okay. This is the door that you would have come in on and you would've exited the house at; is that correct?

A. That's correct.

(Video recording played in open court.)

BY MR. LONGFELLOW:

Q. Okay. At this point they're taking you outside to put you in Deputy Swindell's patrol vehicle; is that correct?

[230] A. That's correct.

Q. Okay. And when you went outside to—initially at the beginning of this incident, you went out that door; is that correct?

A. That's correct.

Q. And did your mom tell you to be respectful before or after you went through that door?

A. Before.

Q. Okay. Before you went out the door. And on your way out that door, you passed that chalkboard on the right; is that correct?

A. That's correct.

Q. Did you write "Sherri is a shank" on that chalkboard before you went out?

A. No, that was my sister.

MR. LONGFELLOW: Okay. No other questions.

THE COURT: All right. Redirect?

MR. WEIDNER: Yes, Your Honor. May it please the Court?

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. WEIDNER:

Q. Mr. Bailey, you were asked some questions about a workers' compensation claim. Do you recall that line of questions?

A. I do, yes.

[231] Q. And you were asked to look at one line in a document. Do you recall that?

A. That's right.

Q. May I approach the witness, Your Honor?

THE COURT: Yes.

MR. WEIDNER: Okay. Can you read this? Read that line. Not out loud, just to yourself.

THE WITNESS: Yeah, I'm fine.

BY MR. WEIDNER:

Q. Do you recall what it was that the rear-end, while you were driving the postal truck, what you would have report?

A. Yeah. I reported that I had an aggravated injury to it already, you know, an aggravation to an already-sustained injury.

Q. Okay. Did you end up pursuing that claim for workers' compensation?

A. No, I didn't.

Q. Do you know what percentage your VA rating is?

A. Cumulative, it's 50 percent.

Q. Mr. Longfellow asked you some questions about sending a text message before you went to your wife's house. Do you recall that?

A. Before, no. I mean, recall the questioning, yes.

Q. Whose house was that?

A. It was the marital home, so it was our house.

[232] Q. Prior to this night, had you ever been in a physical fight in your life?

A. Never, no.

Q. On the porch before you turned around to walk to go inside your house, were you ever told you were under arrest?

A. No.

Q. Were you ever told you're not free to leave?

A. No.

Q. Did you consent for Deputy Swindell to come into that house?

A. No.

Q. Did he have a warrant?

A. No.

Q. In relationship to the front door, where was your body the first time Deputy Swindell touched you?

A. I was inside.

MR. WEIDNER: Nothing further, Your Honor.

THE COURT: All right. Sir, you may step down.

(Witness excused.)

MR. WEIDNER: And your next witness.

MR. WARREN: Your Honor, we're going to be reading the transcript of Dr. Neil Powell from June 2019.

THE COURT: All right.

NEIL POWELL TESTIMONY READ INTO THE RECORD

* * *

APPENDIX K — JURY TRIAL — DAY 1 AND DAY 3 IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, PENSACOLA DIVISION, JUNE 1, 2021 AND JUNE 3, 2021

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No: 3:15cv390/MCR

KENNETH BAILEY,

Plaintiff,

v.

SHAWN T. SWINDELL,

Defendant.

Pensacola, Florida, June 1, 2021, 8:06 a.m.

JURY TRIAL—DAY 1

BEFORE THE HONORABLE M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE
(Pages 1 through 178)

APPEARANCES:

For the Plaintiff: Taylor Warren & Weidner, PA
by: J. Phillip Warren and
Keith W. Weidner

Appendix K

For the Defendant: Andrews Crabtree Knox & Longfellow, LLP
by: Joe Longfellow, III and Riley M. Landy

* * *

[97] *(JOINT EXHIBITS 1–22: Received in evidence.)*

THE COURT: Those are in the records. You may use any of them.

MR. WARREN: The plaintiff calls Shawn Swindell, Your Honor.

THE COURT: Okay.

SHAWN SWINDELL, PLAINTIFF WITNESS, DULY SWORN

DEPUTY CLERK: Be seated. Please state your full name, and spell your last name for the record.

THE WITNESS: Deputy Shawn Swindell. Last name is S-W-I-N-D-E-L-L.

THE COURT: All right. Mr. Warren, go ahead when you're ready.

Appendix K

DIRECT EXAMINATION

BY MR. WARREN:

Q. Good afternoon, Deputy Swindell.

A. Good evening, sir.

Q. I want to go back to September 11, 2014. You were working the midnight shift, true?

A. That's correct.

Q. All right. And the hours of the midnight shift are from 2100 to 7:00 a.m.?

A. That's correct.

Q. And 2100, that's 9:00 p.m. to 7:00 a.m.?

A. That's correct.

[98] Q. Deputies typically begin patrol around 9:30.

A. It depends on the shift muster as far as the—prior to the shift.

Q. All right. Let's talk about the night of this event when Kenneth Bailey came out onto his porch. It was 2216 when you stepped out of your patrol car, correct?

A. I don't know specifically what time I stepped out of my patrol car, sir.

Q. Okay. Well, what we can do is I can give you a copy of the CAD report. Would that help you refresh your recollection?

A. Yes, sir.

Q. All right. Terrific.

All right. I'm going to show you a copy of what's been admitted into evidence as Joint Exhibit Number 3.

MR. WARREN: Your Honor, may I approach the witness?

THE COURT: Yes.

BY MR. WARREN:

Q. Your counsel has indicated that you may have a copy of it up there already.

A. Not of the CAD report, sir.

Q. Deputy Swindell, now looking at the CAD report, does that refresh your recollection as to what time you stepped out of your car that evening?

A. Sir, I can't say that it was specifically that time that I stepped out of my car. I do remember calling dispatch because I [99] had to spell the street name when I advised them that I was out at that address. I was—actually had just turned onto the street.

Q. Okay. And your unit 136; is that correct?

A. That's correct, sir.

Q. All right. So at 1:30—I'm sorry. At 2216:49, as we look at the CAD report, it says, Out at 5384 Kincheon; is that true?

A. That's correct.

Q. So you would have asked for Kenneth Bailey at a time after that?

A. I'm sorry, sir?

Q. You would have asked for Kenneth Bailey after that time?

A. As far as stepping out of his house?

Q. Yes, sir.

A. Yes.

Q. And that was in response to a call to Sherri made about 45 minutes earlier?

A. That's correct.

Q. And you didn't have an arrest warrant that evening when you came to the Bailey front door, did you?

A. No, sir, I did not.

Q. And Kenneth Bailey voluntarily came out of the house, true?

A. That's correct.

Q. Kenneth Bailey didn't have any legal obligation to speak to [100] you, did he?

A. That's correct.

Q. And you never told Kenneth Bailey that he did not have to speak to you. You never made that statement, did you?

A. No, sir, I did not.

Q. And you didn't have any information at this point in time that a crime had been committed, correct?

A. No, sir.

Q. Just to be clear on the record, you did not have any information that a crime had been committed. Do I have that—did I say that correctly?

A. That's correct. I didn't have any specific information.

Q. All right. Now, Kenneth Bailey, he could have walked away at that point, true?

A. No, sir.

Q. Sir, do you remember giving a deposition on March 23rd, 2016, and testifying to something differently?

A. I remember my testimony, yes, sir.

Q. Okay. I'm going to refer you to page 77 of your deposition, line 16. When you gave your deposition—first of all, looks like you have a copy of it; is that correct?

A. Yes, sir, I do.

Q. When you gave that testimony, you were under oath the same as you are today?

A. That's correct.

[101] Q. All right. And on page 77, line 16—I'm sorry, line 18, question: He could have walked away. Answer: Yes.

That was your testimony then?

A. That's correct.

Q. Did you also testify in that deposition that Kenneth Bailey was free to walk away from you?

A. If you give me one second, sir. I apologize.

Q. If you want to take a look at the next page on page 78, line 6.

Appendix K

THE COURT: Do you have a question?

MR. WARREN: Yes, ma'am. I'll rephrase it. Thank you.

THE COURT: Okay.

BY MR. WARREN:

Q. That night Kenneth Bailey was free to walk away from you,

Deputy Swindell?

A. No, sir, he wasn't.

Q. Do you recall testifying in that same deposition under oath to something differently?

A. Looking at my deposition here, I see that I stated, Yes, at that moment in time he was.

Q. Just to be clear for the record, on page 78, line 6, question: So he's free to walk—was Kenneth Bailey free to walk away from you at this point? Answer: At this particular moment in time, yes. [102] You told Kenneth Bailey on the front porch that he was not under arrest; is that true?

A. That's correct.

Q. And you advised Kenneth Bailey at that time that Sherri was completing a statement?

A. That's correct.

Q. You told Kenneth that he could be subject to arrest if Sherri provided information that a crime had been committed. Did you tell Kenneth Bailey that if Sherri provided information that a crime could be committed, that he could be placed under arrest?

A. Yes, that's correct.

Q. You asked Kenneth Bailey to speak to you alone at your car out on the street; isn't that true?

A. That's correct as well.

Q. And you claim in your offense report, the supplemental version, that Kenneth Bailey gave you an intimidating stare?

A. Yes, sir. I believe so.

Q. All right. And that was something that you stated for the first time in your supplemental report, correct?

A. Yes, sir.

Q. When you were out there on the porch, you were speaking with Kenneth Bailey, you also asked him how old he was; isn't that true?

A. That's correct.

[103] Q. You asked that because Kenneth Bailey wanted his mother to remain present?

A. That's correct.

Q. Now, you didn't obtain any new information that Kenneth Bailey committed any crime after you told Kenneth Bailey that he could be subject to arrest.

A. That's correct.

Q. But you decided to detain Kenneth Bailey, right?

A. I did.

Q. All right. And the moment when Kenneth Bailey turned around to walk back into his parents' home, that's when you decided to detain Kenneth Bailey.

A. Just before that, yes, sir.

Q. All right. And you claim that you put your hand on Kenneth Bailey's shoulder?

A. Yes.

Q. And that at the same time you said, You're not free to leave?

A. Yes.

Q. That's the first time you ever told Kenneth Bailey that he was not free to leave; isn't that true?

A. That's correct.

Q. You did not obtain any new information that Kenneth Bailey committed any crime before Kenneth Bailey turned around to walk back in his parents' home?

[104] A. That is correct.

Q. You didn't have any information that Kenneth Bailey was a flight risk, did you?

A. Not at that time.

Q. And Kenneth Bailey didn't make any comment that he was going to abscond or hide from you, did he?

A. Not specifically that comment, no, sir.

Q. And you didn't have any facts that Kenneth Bailey had a weapon, did you?

A. No, sir.

Q. Before deciding to apprehend Kenneth Bailey, when you were speaking with Kenneth Bailey, asking him if he would answer your questions, you yourself were not on the porch, were you?

A. No, sir, I was not.

Q. You were about 7 to 8 feet away?

A. 6 to 7 feet, yes, sir.

Q. All right. And the distance is called a reactionary gap?

A. That's correct.

Q. That's something you're trained to maintain?

A. They teach that in the academy, yes, sir.

Q. And at the time that Kenneth Bailey turned around and began to walk back into the home, Kenneth Bailey, he had been standing on the porch.

A. He was on the porch, yes, sir.

Q. Once he turned around and you were able to close that [105] distance on Kenneth Bailey, was he kind of on the inside of the doorway?

A. No, sir.

Q. Where was he?

A. He was still on the front porch.

Q. And you agree that Kenneth Bailey turned around very quickly to go back in the house?

A. Yes.

Q. And in that moment, that's when you made the decision to apprehend him.

A. That's correct.

Q. You don't recall how many steps it took for you to get to him to apprehend him, do you?

A. No, sir, I don't.

Q. But the first part of Kenneth Bailey that you touched when you said, You're not free to leave, was his shoulder?

A. That's correct.

Q. Kenneth Bailey was able to walk a couple of feet before you put a hand on him?

A. I don't recall exactly how far he walked.

Q. Okay. Take a look at your deposition on page 82. That's your deposition on March 23rd, 2016, line 13.

A. Sorry, sir. You said 82?

Q. Yes, sir, line 13.

THE COURT: Just read it to yourself, Deputy Swindell.

Appendix K

[106] A. (Witness reviews document.) Okay.

BY MR. WARREN:

Q. Did you read from lines 13 through 19?

A. Yes, sir, I did.

Q. Okay. Does that refresh your recollection as to how far Kenneth Bailey had gone?

A. Based on this statement, yes.

Q. And it was a couple of feet, correct?

A. Yes, sir.

Q. You claim that when you touched Kenneth Bailey's right shoulder, he turned back around?

A. That's correct.

Q. And that Kenneth Bailey struck your arm?

A. That's correct.

Q. And took up that fighting stance?

A. That's correct as well.

Q. Now, it's also your testimony under oath that it was only after this that Kenneth Bailey began to back into the residence?

A. I'm sorry. Say it one more time.

Q. Is it your testimony that it was only after that time that Kenneth Bailey backed into the residence?

A. Yes.

Q. And through a struggle that followed, you took Mr. Bailey off his feet?

A. I attempted to.

[107] Q. All right. And Kenneth Bailey kind of fell over the arm of the couch?

A. We both did, sir.

Q. And you guided Kenneth Bailey down to the ground?

A. We both went to the ground at the same time, yes, sir.

Q. But did you guide him? Is that your testimony?

A. Yes, sir.

Q. And you ended up on top of Kenneth Bailey.

A. That's correct.

Q. At some point you unholstered your Taser over here on your left side?

A. That's correct.

Q. And you pointed your Taser at Kenneth Bailey?

A. I did.

Q. And that was while you were on top of Kenneth Bailey?

A. That's correct.

Q. And your testimony in this courtroom is that Kenneth Bailey took your Taser away from you; is that right?

A. That's correct.

Q. You were—you were on top of Kenneth Bailey, kind of straddling him; is that right?

A. That's correct.

Q. You didn't call for another unit until you were already in the house; isn't that true?

A. That's correct.

[108] Q. And Mr. Bailey, he was on the floor and you were on top of him?

A. Yes, sir.

Q. And you did that after Kenneth Bailey allegedly struck you.

A. Did what, sir? I'm sorry.

Q. Got on top of Kenneth Bailey on the floor of the living room.

A. Yes, sir.

Q. You called for another unit before Frank Bailey, Kenneth's father, came out with his gun; isn't that true?

A. That's correct.

Q. Can we agree that there were no other officers present when any of these events happened that you've testified about?

A. That's correct.

Q. You didn't have a body camera, did you?

A. No, sir.

Q. And Deputy Schultz, was he the first one on the scene?

A. Yes, sir.

Q. And that was after you were already inside the house, on top of Kenneth Bailey.

A. That's correct.

Q. Now, during this scuffle where you ended up on the ground and that Kenneth Bailey took your Taser away from you, you weren't injured in any part of this, were you?

A. No, sir.

[109] Q. Now, let's take a look at your offense report that's been admitted into evidence as Joint Exhibit Number 1. I want to ask you some questions. Do you have a copy up there with you?

A. Yes, sir, I do.

Q. Okay. I want to turn your attention on the offense report to where it indicates where you open the report, at what date and time.

So we're looking at page 2, at the bottom there. You just let me know when you get there.

A. Okay.

Q. All right. The offense reports that you open this incident on your computer on September 11th, 2014, at 2339 hours, correct?

A. That's correct.

Q. That's 11:39 p.m.

A. Correct.

Q. And we know that by looking here on the report, where we see that date and the time indicated; is that true?

A. Yes.

Q. It also shows that the officer reporting is Shawn Thomas Swindell. You were the report taker on this offense report, correct?

A. Yes, sir—well, report—I'm the one that initiated the report itself, yes, sir.

Q. And you do that through your computer?

[110] A. Yes.

Q. All right. I want to see—I want to move to where it says report taker.

Okay. So when we look at these lines, we see date, time, type. Do you see that there on the screen?

A. Yes, sir.

Q. And then we see officer reporting, S Swindell Shawn Thomas, and then we see call number 136. That was your patrol number that night, right?

A. Correct.

Q. And then we see rep taker. Who's listed there?

A. S Swindell.

Q. And so that means you were the one that actually typed up the report, right?

A. Correct.

Q. And it shows that the report was editing at 6:32 a.m.?

A. That's correct.

Q. That would have been close in time to when you were getting off shift?

A. Yes, sir.

Q. Now, before that edit at 6:32 a.m., dispatch informed you that Sherri Bailey wanted to speak with you, correct?

A. Correct.

Q. Dispatch received that call about 5:52 a.m.?

A. I don't know if I have that specific time frame, sir.

[111] Q. Okay. Well, let me get you the CAD report from that call.

A. Is that the one you gave to me earlier?

Q. No, sir. It's a different—

A. Okay.

Q. —CAD report because she called in at a separate time. So just give me one moment.

MR. WARREN: For the record, it is Exhibit Number 4 in evidence.

May I approach, Your Honor?

THE COURT: Yes.

A. Thank you, sir.

BY MR. WARREN:

Q. Deputy Swindell, does that refresh your recollection as to what time that Sherri Bailey contacted dispatch asking to speak with you?

A. Yes, sir.

Q. What time is that?

A. Shows 0552 and 30 seconds.

Q. Okay. And that was 5:52 in the morning.

A. Yes, sir.

Q. All right. And you returned Sherri's call on your cell phone on at 5:54 a.m.

A. I don't know what specific time I returned her phone call.

It shows that I was on scene on that call. That's all.

Q. Do you remember testifying about what time that she—that [112] you returned the call?

A. No, sir.

Q. Okay. I'm going to point you to your deposition testimony on March 23rd, 2016, page 136, line 7. Just take a moment, read that to yourself, and see if that refreshes your recollection.

A. I'm sorry. Which line was it again, sir?

Q. Beginning at line 7.

A. Okay. (Witness reviews document.) Okay.

Q. Does that refresh your recollection as to what time you returned the call?

A. It doesn't say specifically what time I returned the call, sir.

Q. Well, let's talk about when you closed the call out. That was at 6:57 that morning that you closed out the call that Sherri had made asking for you at dispatch; isn't that true?

A. Yes, sir.

Q. So you would have called dispatch and advised them to code out the call from Sherri at that time?

A. That's correct.

Q. And that was—that call that's being closed out is the one that was received by dispatch where Sherri called asking for you at 5:52?

A. That's correct.

Q. And about 5 minutes, if I have my math right, before you advised dispatch to code out the call from Sherri, that's when [113] the edit to your report that we had previously looked at in Exhibit 1 occurred?

A. Can you repeat that one more time.

Q. Yes, sir.

A. I was looking at the notes.

Q. I'm going to pull up your report, page 4, 6:32 a.m. That's when that edit was made to your offense report that's Exhibit Number 1. Do you recall that?

A. Yes, sir.

Q. All right. So when you called dispatch to close out the call that Sherri had made to dispatch asking for you, that was about 5 minutes before you made this edit at 6:32 a.m., right?

A. I guess I'm still not seeing the 5-minute time difference here, sir.

Q. All right. Well, we'll take a look at it. We can add it up later. But that's what the documents say in terms of the time, right? You don't dispute anything on the documents—

A. I don't dispute anything on the document. I'm just looking for the specific time you were talking about again, sir. I apologize.

Q. Now, you discussed arresting Kenneth Bailey when you spoke with Sherri Bailey that morning on the call; isn't that true?

A. Yes.

Q. Now, your supervisor approved the offense report here that we're looking at that's Exhibit Number 1. You can see it on the [114] screen here where it says status, approved. Do you see that?

A. Yes, sir.

Q. And that's on September 12th, 2014, at—it looks like—

I think it's a little bad copy, but 6:38 a.m.; is that correct?

A. Yes, sir.

Q. And your supervisor at that time was Sergeant Rickmon?

A. That's correct.

Q. Those wasn't the last time, though, that changes were made to this report, was it?

A. No.

Q. You did that supplement?

A. Yes, sir.

Q. And that was six days later?

A. Yes, sir.

Q. So you added details to the report six days later, and you did that because you had a memory recollection?

A. That's correct.

Q. And other than the memory recollection, there's not anything that transpired between the time of your

initial report and the time six days later when you did the supplement?

A. And I apologize, sir. Can you say it one more time?

Q. Yeah. No problem. In terms of between the time that you finalized your report at 6:32 a.m.—

A. Yes, sir.

[115] Q. —when that edit was made, and the six days later that you did the supplement and added the additional information, other than having a memory recollection, there were no events that occurred.

A. Oh, no, sir. No, sir.

Q. So let's take a look at when you completed your supplemental report. That's on page 11.

All right. So if we look at the—if we look at it, we got the same columns here at the top. We've got the date. We've got the time. We got the supplement. We've got the person making the report. We got your number, and then we've got the report taker. And then we've got the date, and then we've got the time it was finalized.

So looking at this supplemental report, it was completed at 2239. Do you see that?

A. Yes, sir.

Q. And that would have been 10:39 p.m.?

A. Yes, sir.

Q. It says here on this one JRR was the notetaker for this supplemental report that was done. Do you see that?

A. I do.

Q. Have you denied in the past that you knew who JRR was?

A. Yes. I didn't know—I didn't know the initials JRR at the time.

Q. And your sergeant was Sergeant Jason Roger Rickmon? That [116] was your supervisor at the time?

A. That's correct.

Q. And he was the supervisor who also approved this supplemental report.

A. That's correct.

Q. And Sergeant Rickmon approved your supplemental report at exactly—or within a minute of when the report—supplemental report was done; isn't that true?

A. Yes. That's what it appears.

Q. But you didn't speak to your supervisor, Sergeant Rickmon, about any of the events that took place between

the time of the initial report and the supplement being done. Is that your testimony?

A. I did not speak to him, no, sir.

Q. All right. I want to talk to you for a minute about what you knew and what you didn't know before you ever stepped on the Bailey property. Okay?

A. Okay.

Q. Now, you didn't have any allegations in the CAD report that there had been any physical sort of dispute, true?

A. That's correct, sir.

Q. And there was no knowledge that anyone was armed, no weapons, correct?

A. That's correct.

Q. And you didn't have any knowledge that there was any [117] alcohol involved in this dispute.

A. That's correct.

Q. Deputy Magdalany told you that Sherri and Kenneth had had a verbal argument?

A. That's correct.

Q. And "verbal" means they're verbally arguing, not physically fighting, correct?

A. Correct.

Q. Now, when you respond to a call, you had those call notes from dispatch in your car on the computer. The CAD report? Is that true?

A. That's correct.

Q. Let's talk about the call notes that evening on your computer before you stepped outside to ask for Kenneth Bailey. So we're going to go back and we're going to look at Exhibit 3 again if you still have it there. I want to give you a moment so you have the opportunity to get it in front of you, or you can look on the screen.

So according to the CAD notes when we look at the entry at 2137:11 male was yelling at the complainant through the door, and the complainant has taken to her mother's house. Do you see that?

A. Yes.

Q. And dispatch changed this from a family disturbance to a police assist; isn't that true?

[118] A. That's correct.

Q. All right. So that's a downgrade in priority, meaning a less important call?

A. Correct.

Q. And an example of a police assist would be a tire change?

A. That's one example, yes, sir.

Q. At 2202, according to this CAD report, if we look down, we talked about this previously where it stays 1097 on Harvest. At 2202:50, 101, it says, Have unit 136 PX me. That means Deputy Magdalany was asking for you to call him on his phone, right?

A. That's correct.

Q. You spoke to Deputy Magdalany?

A. I did.

Q. And Deputy Magdalany told you that he didn't have any evidence a crime had been committed, correct?

A. At that time, no, sir.

Q. Deputy Magdalany—excuse me. But at 2216, we talked about the fact that some point after that you got out of your car at Kincheon Street, right?

A. Yes, sir.

Q. Now 2219, if we go down a little bit—

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Maybe you can bring it up the screen, Mr. Weidner, please. Just a little bit. Thank you.

At 2219:56 it says 1004, question mark, 1004. That entry is you telling dispatch that you're okay. Right?

[119] A. That's correct.

Q. Their way of checking on you when you've gotten out of the car, make sure no one's done anything to you, correct?

A. Yes.

Q. And then when we go down to the next entry, at 2220:39, less than a minute later, you're asking for another unit, right?

A. Yes, sir.

Q. And that would have been inside the house?

A. Yes, sir.

Q. And that was because you were allegedly struck by Kenneth Bailey?

A. Yes, sir.

Q. So less than four minutes from arriving, you find yourself inside the home in a physical altercation with Kenneth Bailey?

A. Yes, sir.

Q. Now, later, even after you cross the threshold of the Bailey home, there was still no determination that any crime—anything other than a verbal dispute had happened between Kenneth Bailey and Sherri Bailey that night.

A. That's correct.

Q. And that was even after reviewing Sherri's statement that Deputy Magdalany brought you at the jail.

A. Later on that evening, yes, sir.

Q. In your offense report you also determined this was a verbal dispute between Sherri and Kenneth?

[120] A. Yes, sir.

Q. But you did charge Kenneth Bailey with battery on an officer?

A. Yes, sir.

Q. You also charged him with obstructing police?

A. Yes, sir.

Q. And with resisting an officer with violence.

A. Yes, sir.

Q. You arrested Kenneth Bailey on those charges?

A. Yes, sir.

Q. Placed him in handcuffs.

A. Yes, sir.

Q. Put him in the back of your patrol car.

A. Yes, sir.

Q. Took him down to the Santa Rosa County jail.

A. Yes, sir.

Q. Processed him in.

A. Yes, sir.

Q. I want to talk to you for a moment about what happened once you were inside the Bailey home wrestling with Kenneth Bailey. Frank Bailey came out with a firearm, right?

A. That's correct.

Q. And you've learned now that that was Frank Bailey, Kenneth Bailey's father?

A. Yes, sir.

Appendix K

[121] Q. Now, you claim that you pointed your firearm at Frank Bailey. That's why you had it out?

A. Yes, sir.

Q. And you continued to point your firearm at Frank Bailey until he left to go put the gun up? That's what your testimony is?

A. Yes, sir.

Q. And that you claim after that, then you holstered your firearm?

A. That's correct, sir.

Q. You also grabbed your radio after that?

A. Yes, sir.

Q. And your radio is on your left hip.

A. Left hip, yes, sir.

Q. And that's when you advised dispatch about a male having a gun?

A. Yes, sir.

Q. I'm going to show you what's been admitted into evidence as Exhibit Number 8B, 8 [sic] as in bravo.

All right. Deputy Swindell, I'm showing you what's been admitted into evidence as Joint Exhibit 8 bravo. Do you recognize that photograph?

A. Yes, sir, I do.

Q. That's you that evening in the Bailey home on the floor on top of Kenneth Bailey, right?

[122] A. Yes, sir.

Q. All right. And your service pistol, that's a .40-caliber?

A. At the time, yes, sir, it was.

Q. And it's in your right hand there?

A. Yes, sir.

Q. And it's aimed at Kenneth Bailey's head?

A. Yes, sir.

Q. You had a tactical light on the pistol?

A. Yes, sir.

Q. That illuminates wherever the firearm's aimed?

A. Yes, sir.

Q. All right. I'm going to show you what's been admitted as Joint Exhibit 8C. Do you recognize what's been admitted into evidence and what's being published as Joint Exhibit 8C, Deputy Swindell?

A. It's a picture. Yes, sir.

Q. That's also a picture from that evening, true?

A. Yes, sir.

Q. All right. You still have your pistol out with it illuminated on the back of Kenneth Bailey's head?

A. The light's illuminated on the backside of his head, yes, sir.

MR. WARREN: May I have a moment, Your Honor?

THE COURT: Yes.

MR. WARREN: No further questions at this time, Your [123] Honor.

THE COURT: All right. Thank you.

Mr. Longfellow.

MR. LONGFELLOW: Yes, Your Honor.

THE COURT: Okay.

Appendix K

CROSS-EXAMINATION

BY MR. LONGFELLOW:

Q. Deputy Swindell, before you went to the Kincheon address where the Baileys were at, where you encountered Mr. Bailey, did you speak to anyone via the phone?

A. I spoke with Deputy Magdalany.

Q. Okay. Now, did you write about that in your offense report?

A. Yes, sir, I did.

Q. Okay. What were you told during that phone call from Deputy Magdalany?

A. I was told that Mr. Bailey and Ms. Bailey had separated for approximately three months, that he had left the marital home. They were going through a nasty custody can dispute with their children, but he had moved out and he was living with his—potentially his mom and dad.

I was also told that he had continuously showed up at the marital home unannounced, whether she was home or not. And when she wasn't home, he would turn picture frames backwards or upside down, leave cigarette butts and ashes throughout the [124] house. I think she was allergic to the cigarette smoke or the ashes. That's what I recall. And that he actually had cameras installed inside the house as well without her knowledge.

Q. Were you told anything else?

A. I'm sorry, sir.

Q. Were you told anything else?

A. Yes, sir. I was also told that during the incident at the time that Deputy Magdalany was still investigating whether or not a crime had been committed or not rutting in domestic violence, he had also told me that according to Ms. Bailey, at the time, that Kenneth wasn't acting right and that he had snapped?

MR. WARREN: Your Honor, may we approach?

THE COURT: Yes.

(Following conference held at the bench.)

MR. WARREN: Your Honor, we had filed the motion in limine, which was denied, about what statements. We're just asking the Court to give a limiting instruction that things that the officers were told shouldn't be considered for the truth of the matter asserted because what Sherri told them is obviously hearsay, but I know the Court's ruled that they're entitled to ask it because of the effect on the officers. So I'm just asking that that instruction be given.

THE COURT: That was what I ruled in my order.

MR. LONGFELLOW: It was, and the only thing we would [125] dispute is it's not hearsay because it's being

used for the effect on the listener, but we agree you can give the limiting instructions.

THE COURT: Well, that's true. It's not hearsay. It's not hearsay, I suppose. It's not an exception.

MR. WARREN: Yes, Your Honor. I know it's not an exception. But the Court had ruled in the motion in limine that, in fact, the Court could be—excuse me, the jury would be instructed they're not to give consideration to that. I know the Court had given that instruction previously. So I don't know that there's any harm in it. I think there's more of a prejudice—

THE COURT: I think if I do this, I'm going to tell them that there's no indication that the evidence was—that the information was false. And I don't—

MR. WARREN: I don't have any objection to that.

THE COURT: Yeah. I'm sitting here listening to it right now, and I understand—I suspected that's why you were coming. But I don't know want the jury to be misled into thinking that—

MR. WARREN: I understand.

THE COURT: —that this was somehow, you know, inaccurate information that he was acting on.

MR. WARREN: I understand, Your Honor. And certainly if Ms. Bailey comes in and says something

different and Ken [126] Bailey testifies that it didn't happen, that'll be the jury—

THE COURT: Well, at that point there will be a dispute, but right now there's not.

MR. WARREN: I just don't want to being prejudiced by the jury being confused and believing because the deputy says that that's what she said, that, in fact, it was true. Again, I don't have any problem if the Court wants to say that we have to consider whether it's true or false, but just simply that's what the deputies knew and were told at that time.

THE COURT: All right. Okay.

(End of bench conference.)

THE COURT: Ladies and gentlemen of the jury, as to the testimony you just heard about what Deputy Swindell says he was told about the issues between Mr. Bailey and his ex-wife, Ms. Rolinger, you should not consider that for whether that information is actually true or not true or accurate or inaccurate, but you can consider it for the fact that it was—this information was relayed to Deputy Swindell, and you can consider the effect that it had on his state of mind at the time.

All right. Mr. Warren, is that sufficient?

MR. WARREN: Yes, ma'am. Thank you, ma'am.

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THE COURT: MR. Longfellow, go ahead.

MR. LONGFELLOW: Thank you, Your Honor.

BY MR. LONGFELLOW:

[127] Q. Deputy Swindell, after this phone call that you got from Deputy Magdalany, what happened next?

A. I was asked to go to the address of Kincheon Street to try to locate Mr. Bailey.

Q. And what was the purpose of you going to the Kincheon Street address?

A. To further investigate whether or not a crime had been committed on his side as well. It's a—we have to—by our policy we have to thoroughly investigate domestic disturbances and document everything that happens, or everything that said potentially occurred.

Q. Did you, in fact, go to the Kincheon Street address?

A. Yes, sir, I did.

Q. Okay. What happened once you arrive in your vehicle?

A. When I got out of my vehicle, I walked up the door and rang the doorbell. I stepped off the porch into the grass area, and then moments later a male subject

opened up the curtains to the window that was directly to the left of the front door, facing the front door. He opened up the curtains, closed the curtains, and then moments later a female came to the door.

Q. When you were at the house, what were you wearing?

A. My green sheriff's office uniform.

Q. You had your badge on?

A. Yes, sir.

Q. What kind of vehicle did you arrive in?

[128] A. It was a green-and-white Tahoe, Chevy Tahoe.

Q. Was it marked?

A. Yes, sir.

Q. What does that mean?

A. It has the sheriff's office insignia, the logo, identifying it as a sheriff's office vehicle.

MR. LONGFELLOW: Your Honor, if I may ask the witness to step off the stand to present to the jury so they can kind of visualize what actually happened once he knocks on the door up until the end of the encounter.

THE COURT: I don't have a problem as long as he's back a distance.

MR. LONGFELLOW: We'll do it over here, away from the—

THE COURT: That's fine. The monitor, if he stays in that vicinity of the monitor.

MR. LONGFELLOW: Would you step down?

THE WITNESS: (Complied).

BY MR. LONGFELLOW:

Q. So you just testified at this point that you knocked on the door and a female came to the door. What happens next?

A. When she came to the actual door—am I speaking loud enough?

THE COURT: Actually, I'm glad you raised that, Deputy Swindell. I'm going to ask both you and Mr. Longfellow to use [129] our lapel mics. You can put it in a pocket. As long as the green light is on, it will allow us to hear you a lot better, particularly when you're away from a microphone. But even by a microphone, it's a better projection.

Okay. Let's try that and see.

THE WITNESS: Is that better?

THE COURT: Much.

A. I'm sorry. Go ahead.

BY MR. LONGFELLOW:

Q. Yeah. So what happens when the female—what happens next after the female appears at the door?

A. As soon as she opened the door, first thing she said was, Yes? I identified myself as Deputy Swindell with the sheriff 's office.

Q. Okay. In relation to the door, where were you standing?

A. If this section of the bench here was the door, I was offset from the door.

Q. Okay. What happens next?

A. After I identified myself with the sheriff 's office, I advised her I was looking for a Kenneth Bailey. And she turned around and pointed to the table or looked to the table and said, Kenny, it's for you. And then Mr. Bailey came to the door.

Q. Okay. Then what happens?

A. He steps outside the—onto the porch, along with

his mother and what later determined—it was his brother as well, [130] Jeremy. They were all on the porch. And I asked Mr. Bailey if he would step to the car and—or I asked him if he was Mr. Bailey. He said he was. And I asked him if he would step to my patrol car to talk to me.

Q. Kind of give some context to where everyone's standing.

Can you kind of identify—if we suggest that right here is the door—

A. Yes, sir.

Q.—where is Mr. Bailey at?

A. At that point in time Mr. Bailey has stepped over off—he was almost in front of me from being offset from the doorway.

Q. Okay. Where was Ms. Bailey, his mama?

A. The best of my recollection, they were on either side of him, or they were next to each other on one side of him. I don't recall specifically where they were at.

Q. And you're using the word "them." Are you referring to an additional person?

A. I'm referring to Jeremy Bailey and his mom.

Q. Okay. So he comes out, and you ask him to step out to your car. What happens next?

A. First thing he says is, Nope.

Q. And then what happens?

A. I asked him if he meant nope, that he didn't mind stepping out to my car, or was he not going to step out to my car. And that's when he said he wasn't stepping out to my car for [131] anything.

Q. Okay. Then what happens?

A. I asked him to step off to the side for a second because at that point in time, his mom and his brother were both talking and interjecting information. I don't specifically recall what they were saying, but they were in the middle of my conversation with Mr. Bailey. So I asked him to step off to the side for a second, and he said no.

Q. So we get to this point. What happens next?

A. As I'm standing there, he yelled at me and said, You haven't even told me what the fuck this is about. And that's when I explained to him, I said, Well, I'm Deputy Swindell with the sheriff 's office. I'm here to investigate a disturbance between you and your soon-to-be ex-wife. I need to get your side of the story, find out what actually happened. And that's where I was at from there.

Q. Okay. Then what happens?

A. He said anything I had to say I could say in front of his mom and his brother. That's when I asked him, I

said, Well, sir, how old are you? He said, I'm 28 years old. And I said, Well, I just need you to understand that you're responsible for your own actions. Not your mom, not your brother, you. And also that your—that Sherri is—or your soon-to-be ex-wife is filling out a statement regarding a domestic violence complaint, and if we're given information that he—that [132] charges would be applicable, that he could be arrested for those charges.

Q. Okay. And at this time how far apart are you guys?

A. At that point in time, because he had escalated his voice and so forth, due to some other defensive tactics classes that I had taken personally, I actually stepped in a little bit and got closer to them, or to him, to the porch itself.

Q. Okay. Then what happens?

A. As soon as I explained that to him and told him he could be arrested for charges resulting in domestic violence, he said, Fuck that shit, and turned around to go back inside the house.

Q. Okay. So I'm going to act as though I'm—or I'll be Mr. Bailey. Can you kind of instruct me what I need to do so the jury can kind of visualize what you're seeing Mr. Bailey do?

A. Okay.

Q. So you said he turned around.

A. Yes, sir. He turned around to go back inside the house.

Q. Okay.

A. And as soon as he did, I moved forward to put my hand on his shoulder. I put my left hand on his shoulder and advised him he wasn't free to leave.

Q. Okay.

A. And at that point in time, that's when he turned around to his right and struck me with an arm strike. And as soon as he did that, that's when I reached in and started to engage him and [133] grab ahold of him to pull him back towards me and get him away from the house and get him away from his mom and his brother.

Q. Prior to that happening—or when did it happen that he had got into a fighting stance of some sort?

A. It was right after he hit me. Soon as he hit me, he took that fighting stance, and that's when I leaned—lunged forward to grab ahold of him. It was all simultaneously.

Q. What happens next?

A. As I went to grab ahold of him, he started to back up and ended up going into the house. And I continued to engage with him, following him into the house and

grabbing ahold of his shirt. I went to—at that point in time I was going to utilize a leg sweep to take him down to the ground. We both ended up losing our footing at that point in time, so we both ended up on the ground.

Q. So when you went to grab him—

A. Yes, sir.

Q. —where was Mr. Bailey standing? Was he in the house or outside the house?

A. With the—after he had already hit me?

Q. He hit you? You have the—

A. He started to back up into the house.

Q. Correct.

A. Yes.

Q. And you went to go grab him.

[134] A. Yes. So as I go to grab him, he starts backing up and backpedaling into the house.

Q. Are you outside at this point?

A. Initially, yes.

Q. Okay. And then you end up in the house.

A. Yes, sir.

Q. What happens once you end up in the house?

A. Once we end up in the house, I was able to grab ahold of him. He also put his hands on me, trying to get my hands off him. And again, like I said, I was going to utilize a leg sweep to take him down to the ground. Before I could get that far, again, we both kind of lost our balance; and we ended up falling over a chair of some sort or a little coffee table, a couch of some sort. We fell over and landed on the ground.

Q. Do you have—do you have your Taser at this point?

A. At this point in time, I—after we got—started to go—as we went to the ground, right after we got on the ground, that's when I pulled my Taser out.

MR. LONGFELLOW: With the Court's permission, we've got approval from the U.S. Marshal that it's okay to use this.

THE COURT: You have to get approval from me, and then I will ask you whether you had the marshals secure it, and you're telling me you did.

MR. LONGFELLOW: Yes, Your Honor.

THE COURT: And the marshals are okay with the [135] presentation of that, correct?

MR. LONGFELLOW: She said it was okay.

THE COURT: Okay. Very good. All right. I'll allow you to use it to demonstrate.

MR. LONGFELLOW: Thank you. Sorry.

THE COURT: Yes.

BY MR. LONGFELLOW:

Q. So walk us through what happens now as you're going into the house and you're falling down and you're pulling out your Taser.

A. When I pulled out my Taser, there would be a cartridge on this one, and then there'll be a battery pack that the—part of the battery itself hangs down not quite a full finger length, to hold another cartridge; but there's a cartridge on here as well.

When I pulled my Taser out from my hip here, we were on the ground; and I pointed my Taser at him.

Q. Okay. So you're on the ground now?

A. Yes, sir, we're on the ground.

Q. Let me get on the ground. Show me—was he on his back?

A. Yes, sir. He was fully on his back, and I was fully straddled over the top of him in a full mount.

Q. Can you show the jury what it looked like?

A. Yes, sir.

Q. So where is his hands?

[136] A. At this point in time, as I went and pulled my Taser out here, as soon as I pulled my Taser out, he immediately grabbed it with his left hand.

Q. Okay.

A. And he grabbed ahold—by this time my finger was in the trigger guard. He grabbed ahold of it with the right hand, and he immediately turned it to the other side—I'm sorry, I'm on your suit, sir.

Q. You're fine.

A. He turned it to the other side. At this point in time, because he squeezed, my finger actually deployed the Taser cartridge and shot it out into the couch. And at this point in time, out of fear for my finger to get stuck in the trigger guard or get broken, I was grabbing ahold of his hand, and I let go of it. And at this point in time, now we're fighting over my Taser to hold on to it.

Q. Okay. What happens next?

A. As we're continuing to fight, we're moving around. We ultimately ended up spinning around 180 degrees, and our head was actually that way.

Do you want to just pretend we're 180 degrees?

Q. Yeah.

A. So we're 180 degrees back the other way. Again, I'm still fighting for my Taser. At this point in time, he actually was able to get onto his side, so he was rolled over on his side.

[137] I'm still in a full mount on top of him at this point in time, and I've got his arms pinned to the ground so he cannot use my Taser against me because it's still effective. Got my Taser on the ground. I'm holding on to his hands on the ground; and at that point in time, that's when I called for backup and advised I needed assistance now.

Q. Then what happened?

A. His mom and his brother were still in my face, yelling, hollering, and screaming at me, telling me get out of their house, get off their son, I had no right being here. His mom picked up the telephone at one point in time and called somebody. And all I heard was, Marshall, I don't know who this bastard is, but get over here now. So now I was concerned as well that there was additional people coming to the house, possibly before my backup got there.

Again, we're still wrestling over my Taser. I'm giving him commands, Let go of my Taser, let go of my Taser, you're going to jail, give me my Taser. He continued to holler for his mom and brother to help him, and then at some point in time he yelled for his dad. Go ahead?

Q. Yeah. Then what happens?

A. At that point in time, or moments later, a male subject came down the hallway, kind of angled from the side, came down the hallway, and the first thing I saw in his hand was a gun.

So at that point in time I transitioned to my gun from here, and [138] transitioned to my gun, yelling and hollering and screaming for him to drop the gun, drop the gun.

His mom continued to yell at me, He doesn't have a gun, he doesn't have his gun. That's when his brother realized that Dad did have a gun. Jeremy walked his dad back to the bedroom. When his dad came back down the hallway, I holstered my gun. And that's when I realized that I was going to be able to hopefully call dispatch again. Called them, said, Dad just came down the hallway with a gun, holstered my radio, and I just maintained my position until the first deputy got there.

Q. And who was that?

A. Deputy Schultz.

Q. And what happened once Deputy Schultz arrived?

A. When Deputy Schultz got there, he looked at me. I said, He still has my Taser. That's the first thing I need to get away from him. So he attempted to pull my Taser out of his hands, out of Mr. Bailey's hands. He wouldn't

let go of it. I gave about three to four strikes to the top of his hand because his hands were kind of pinned on the ground like so. I gave three or four strikes on the top of hand where there's a nerve. He ultimately let go of it, and Deputy Schultz secured my Taser.

Q. And then what happens?

A. Deputy Schultz—I told Deputy Schultz, Let me try to deal with him. Now that he's not armed, I'll deal with him. And he can try to get the family out of my face so they weren't [139] interfering. They didn't want to listen anyway. And about that time I was able to start securing—I rolled him over and was able to secure Mr. Bailey with one arm behind his back, and then the other deputies started showing up as well.

Q. Did he continue to resist as you took him to his vehicle?

A. Yes, sir.

Q. Your vehicle?

A. Yes, sir. He was pulling away from me and screaming the whole time for his mom to help him, he didn't know what was going on. He just—his hands were behind his back. He kept turning and pulling away from me, trying to get away from my grip.

Q. And you had—we saw some pictures of a gun pointed at Mr. Bailey.

A. Yes, sir.

Q. Now, your gun, it had a tac light?

A. It did, sir.

Q. What's a tac light, for those of us that don't know?

A. A tactical light is just a light that goes on a gun, and it has several switches that you can use with your index finger on this side, or you can use your thumb so you can turn it on continuous, or you can pull down on it or push up on it and it'll light.

My particular gun, at that moment in time, actually had a pressure switch on the trigger guard—I mean on the [140] handle grip, where the thumb was. So anytime you grab ahold of gun and you're holding on to it, it illuminated a light. That prevented me from having to use two hands, one to turn the light on and one to turn the light—turn the light on and off. Pressure switch. Didn't matter when I—as soon as I grabbed ahold of it, the light came on.

Q. And what was the purpose of pulling out your weapon?

A. Because his father came down the hallway with a gun.

MR. LONGFELLOW: Do we need to we take it off ?

THE COURT: No, I would prefer you continue to use the mic. Yeah, I think so, just—unless we get some awful feedback or something, but I don't expect that.

MR. LONGFELLOW: Yes, ma'am.

BY MR. LONGFELLOW:

Q. Now, why did it take so long for you to call for backup once you got in the home?

A. I was in a fight at that moment in time.

Q. And so when you called, was that the soonest you could—you felt like it was safe enough to call for help?

A. Yes, sir.

Q. Now, you were shown some CAD notes about when you arrived on the scene as well as when you said you were—you were fine at the Kincheon address; is that correct?

A. Yes, sir.

Q. Okay. Now, you don't have any control over when the CAD [141] notes are actually entered into the CAD system; is that correct?

A. No, sir, I don't.

Q. And who decides to downgrade a call from a 2 to a 4, such as in this case?

A. Dispatch.

Q. Now, prior to arriving to the Kincheon address, did anyone tell you that the call had been downgraded from a 2 to 4?

A. No, sir.

Q. Okay. How would one find out if the call had been downgraded from a 2 to a 4?

A. I'd have to look at the computer screen in the car.

Q. Did you look at the computer screen in the car prior to getting out at Kincheon that night?

A. No, sir.

Q. Okay. You were also asked about some deposition testimony; is that correct?

A. Yes, sir.

Q. Where you were asked whether or not Mr. Bailey was free to go or free to walk around. Do you recall that testimony you just gave?

A. Yes, sir.

Q. Okay. Do you also recall being asked if—during that line of questioning whether this was a consensual encounter?

A. Yes.

Q. And what was your answer?

[142] A. No, sir.

Q. And then you were asked why not; is that correct?

A. Yes, sir.

Q. And what was your answer?

A. It was an investigative incident. Detention.

Q. So what did that mean?

A. Anytime that we are investigating an allegation of a crime, especially when it comes to domestic violence, the potential parties with regards to domestic violence, suspects, are not free to leave at that moment in time. So it's an investigative detention.

Q. At the end you were asked about the charges that you brought or—the charges that you brought against Mr. Bailey following this incident.

A. Yes, sir.

Q. Okay. What were the bases for those charges? What had transpired at that point during that night, that event at their house, that led you to believe that you could bring charges for those—those three charges, the physically resisting, the—

A. It was after he hit me, when I initially put my hand on his shoulder to tell him he wasn't free to leave, and he turned around to hit me. As soon as he struck me, it was battery on law enforcement. And then he continued to resist my efforts to detain him or arrest him at that moment in time. He put his hands on me numerous other times, and again, trying to get away [143] from me. And then he took me Taser away as well as.

Q. Did he refuse to cooperate with you as you were trying to conduct an investigation to find out if the allegations that Sherri Rolinger had made that evening were true?

A. Yes.

Q. How did he resist your ability to conduct that investigation?

A. Well, I asked him several times to step to my car, and also step to the side so that I could, you know, see if he wanted to talk to me and get his side of the story, and he refused.

MR. LONGFELLOW: I don't have any other questions for you.

THE COURT: All right. Thank you. Mr. Warren, redirect. Get—

MR. WARREN: I think I'm fine. Thank you, though.

THE COURT: I prefer that you use it, actually.

MR. WARREN: Yes, ma'am.

THE COURT: Thank you.

REDIRECT EXAMINATION

BY MR. WARREN:

Q. Deputy Swindell, you described, on the ground in your testimony with Mr. Longfellow, that you claim that Kenneth Bailey was able to grab your Taser and twist it and disarm you with it?

A. That's correct.

[144] Q. Deputy Swindell, you've had training about disarming someone that has a firearm, right?

A. That's correct.

Q. And that is a defensive tactics class that you've taken?

A. Yes, sir.

Q. And you were taught to move in and grab the firearm and twist it in exactly the same manner you claim that Kenneth Bailey did to you, right?

A. That's correct.

Q. Now, when you came up to the Bailey home, you didn't have a warrant for arrest, did you?

A. No, sir.

Q. And you didn't have a warrant to search anything, did you?

A. No, sir.

MR. WARREN: No further questions, Your Honor.

THE COURT: All right. You may step down, sir.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Your next witness.

MR. WEIDNER: May I approach the bench?

THE COURT: May you approach the bench?

MR. WEIDNER: Yes, ma'am.

THE COURT: One of you may and then Mr. Longfellow, if you want to join us.

(Following conference held at the bench.)

* * *

Appendix K

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No: 3:15cv390/MCR

KENNETH BAILEY,

Plaintiff,

v.

SHAWN T. SWINDELL,

Defendant.

Pensacola, Florida, June 3, 2021, 8:07 a.m.

JURY TRIAL—DAY 3

BEFORE THE HONORABLE M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE
(Pages 1 through 260)

APPEARANCES:

For the Plaintiff: Taylor Warren & Weidner, PA
by: J. Phillip Warren and
Keith W. Weidner

Appendix K

For the Defendant: Andrews Crabtree Knox & Longfellow, LLP
by: Joe Longfellow, III and Riley M. Landy

* * *

[145] why he's having his pain going down his right arm. So I did not have a reason why he is describing right arm pain.

Q. And you weren't asked by the people who hired you to give a diagnosis for his current pain either, were you?

A. I was asked to review the records and tell them what I thought.

Q. My question is a little different. You weren't asked to give a diagnosis, were you?

A. Not specifically, no.

MR. HALL: All right. Doctor, I appreciate your time.

(End of video deposition testimony.)

THE COURT: Okay. Your next witness.

MR. LONGFELLOW: Shawn Swindell.

THE COURT: All right. Just for your planning purposes, we will go until 12:30, and then we'll recess.

MR. LONGFELLOW: Yeah, I can work with that.

THE COURT: Okay.

Mr. Longfellow, I wasn't trying to limit your time. I just wanted you to know what I'm thinking about lunch. That's all.

MR. LONGFELLOW: Oh, I think I can make—I can make that work.

SHAWN SWINDELL, DEFENSE WITNESS, DULY SWORN

DEPUTY CLERK: Be seated.

THE COURT: All right. Go ahead, Mr. Longfellow.

[146] DIRECT EXAMINATION

BY MR. LONGFELLOW:

Q. Deputy Swindell, would you please share with us your credentials.

A. I'm currently a deputy with the Santa Rosa County Sheriff's Office, certified through the State of Florida.

Q. How long have you been a deputy?

A. 15 years.

Q. And over the course of your career, have you ever had any complaints against you that you're aware of, outside of this case, for false arrest or excessive force?

A. No.

Q. Okay. Now, on September 11th, 2014, you went to the Baileys' home; is that correct?

A. That's correct.

Q. I want to show you a photo that's been marked and introduced into evidence as Exhibit 2.

MR. LONGFELLOW: Can we publish this to the jury, Your Honor?

THE COURT: Yes. It's already in evidence.

MR. LONGFELLOW: It is, Your Honor.

BY MR. LONGFELLOW:

Q. Now, this is the front of the Baileys' home; is that correct?

A. That's correct.

[147] Q. If you will take your finger, and you go to the right top corner, there should come out a—there you go. Okay. Looks like it's green. So you can go ahead, if you like—would you please mark on this photo where Mr. Bailey was?

A. He was standing approximately here.

Q. Okay. Do you recall where Ms. Bailey was standing?

A. She was standing near the door right here.

Q. And do you know where Mr. Jeremy Bailey, his brother, was standing, approximately?

A. He was somewhere in between the two of them, the best I can remember, recall.

Q. And where were you in proximity to them?

A. I was out right up in—right in this area here of the yard.

Q. Okay. Now, when you arrived at the home of the Baileys that evening, when did you—and you had contact with Mr. Bailey, at any time did you have physically—did you have any moment wherein you thought he was not going to return, he was going to leave, or that you weren't done talking to him?

A. Yes.

Q. Okay. When did that occur?

A. When I asked him—or I advised him that Sherri Bailey, at the time, was filling out a complete sworn statement with another deputy and that he could—if she filled out that statement—or when she filled that statement out, if there was [148] information given at that time that domestic violence charges were applicable, that he could be arrested; and he turned around to say, Fuck that shit, and he went back in the house.

Q. At that point did you immediately pursue him?

A. Yes.

Q. And why is that?

A. I was concerned that he would either go back inside the house and not return back outside, if we did have charges. He also—there's also concern that he may go inside and retrieve a weapon. I don't know who's—whether or not there's weapons in these houses or not.

Q. Okay. Now, eventually you guys ended up in the house on the floor in a physical altercation; is that correct?

A. That's correct.

Q. Okay. At any time up to that point, where you're on the floor and you're having that physical altercation, had there been any other physical resistance shown by—or done by—performed by Mr. Bailey?

A. When he struck me in the arm. Is that what you're referring to, sir?

Q. Yes, sir.

A. Yes. Yeah. When he struck me in the—when I went to put my hand on his shoulder, he immediately turned around and knocked my hand off of his shoulder.

Q. Would that be a crime?

[149] A. Yes.

Q. Okay. What would you have been able to charge him with?

A. That's battery on law enforcement.

Q. Okay. Did he ever take your service weapon or your taser?

A. Yes, he did.

Q. Okay. Would that allow you to charge with anything?

A. Yes.

Q. What would you able to charge him with?

A. Depriving my use of the equipment that I have on my—at my disposal, my belt.

Q. At this time I want to go through some photos that have already been introduced into evidence. Exhibit 8A through D.

MR. LONGFELLOW: If we can publish this to the jury?

THE COURT: Yes. Publish.

BY MR. LONGFELLOW:

Q. Deputy Swindell, this is a photo of you; is that correct?

A. That's correct.

Q. What is this depicting?

A. I'm—to the right of me is the—well, to the right looking at the picture, to my actual left, would be the couch; and I am currently on top of Mr. Bailey, attempting to control his hands while I'm yelling at the same time.

Q. Who are you yelling at?

A. I'm yelling—it appears, based—looking at my eyes, I'm actually yelling at his mother and his brother, who were, again, [150] yelling at me as well.

Q. Okay. And at that time was it a chaotic scene?

A. Yes, sir.

Q. And how many people were you dealing with at that time?

A. At that moment in time I was dealing with three people.

Q. I want to show you what's been previously marked and introduced into evidence as Exhibit 8B. What was going on here?

A. At this moment in time, I observed Mr. Bailey—well, Frank Bailey, the father, I observed him come down the hallway. I observed his gun first, and I unholstered my gun. Again, the pressure switch on my firearm where my middle finger would be, it automatically illuminates the light. And I was in what's considered kind of a Sul position, where my gun—when my gun comes out, it comes up to here (indicating).

Q. It looks like you're speaking to someone; is that correct?

A. Yes, I'm actually yelling that he's—you know, get back, get—put the gun away, put the gun down, put the gun down.

Q. If we look at the bottom of that picture, right there—

A. Yes, sir.

Q.—do you see anything in Mr. Bailey's hands?

A. My taser.

Q. Okay. And it looks like it's his left thumb is around the taser holding it?

A. Yes, sir.

Q. Okay. I'm going to show you what's been previously entered [151] into evidence as 8C. Is this photo similar to the one we just saw?

A. Yes, sir.

Q. Okay. So it's around the same time?

A. Yes, sir.

Q. Okay. So how many people are you dealing with at this point?

A. At this point I had—I mean, it's hard to tell with—from the backside of it; but again, with my gun still out, there was Jeremy Bailey, Evelyn Bailey, Mr. Bailey on the ground, and potentially Frank Bailey as well.

Q. Is Mr. Bailey still resisting during this entire time?

A. Yes.

Q. And this has been previously introduced into evidence and marked as 8D. What's going on here?

A. It—I can't really tell if my—it looks like maybe my firearm is still in my hand, but I'm going to potentially holster my firearm. Based on how high it was, I was coming back around to holster my gun.

Q. And it looks like, if you look at the bottom right here—is he still holding the taser?

A. Yes, sir.

Q. During this whole encounter up to this point, have you given him directives to let go of your taser?

A. Numerous times.

[152] Q. And did he comply with those directives?

A. Not once.

Q. So he continued to resist.

A. Yes. Correct.

Q. At any time during this altercation with Mr. Bailey, did you ever take your service weapon and put it at the temple of his head?

A. No, sir.

Q. Did you ever threaten to kill him?

A. No, sir.

Q. Did you ever threaten to shoot him?

A. No, sir.

Q. Did you have any reason to shoot him?

A. No, sir.

Q. Had you had any prior encounters with Mr. Bailey at this point?

A. No, sir.

Q. This is the first time you'd ever been to his house.

A. That's correct.

Q. At the point Deputy Schultz arrives and he assists you with finally being able to finish up or complete the arrest of Mr. Bailey, what are the charges you could have charged him with at that point?

A. At that point, would have been battery on law enforcement, depriving me of my ability to, again, use my taser, depriving me [153] of my equipment, and also resisting with violence.

MR. LONGFELLOW: I don't have any other questions, Your Honor.

THE COURT: All right.

MR. WARREN: Your Honor, may we approach?

THE COURT: Yes.

(Following conference held at the bench.)

MR. WARREN: So one of the issues that came up during the pretrial, Your Honor, was Mr. Longfellow asked if we would agree to a motion in limine regarding prior complaints made against Deputy Swindell. And I advised him that we were okay with that as long as he didn't open the door and come into trial and say, Well, have you ever had any prior complaints?

Now, of course, I've noted he's tried to narrow it to domestic issues. We have a prior complaint we've received, from and Mr. Longfellow knows about it, where a complaint was lodged against Deputy Swindell on two—I'm sorry—against him to the Santa Rosa County Sheriff 's Office where he injected himself into a domestic violence situation. I would—I think it's—now that that question's been asked, it is only fair for us to be able to ask him that, in fact, he has had prior a complaint against him to the sheriff 's department where he injected himself into a domestic violence situation.

THE COURT: This is the first I'm hearing this. I'm going to take lunch now and talk about it. [154] You can go back to your tables.

(End of bench conference.)

THE COURT: All right, ladies and gentlemen. We're going to go ahead and recess for lunch now. We'll be in recess until 1:20. Please don't discuss the case during

the recess. Also, please don't begin to form any opinion about the merits. We'll see you back at 1:20. Thank you.

And that's 1:20, not 1:30. Thank you.

(Jury excused.)

THE COURT: All right. Deputy Swindell, you may step down. You'll be back on the stand at 1:20. Please don't discuss your testimony with anyone, including your lawyers.

THE WITNESS: Yes, ma'am. Is it okay to leave this here?

THE COURT: Yes.

All right. This is the first I've heard of anything about—first I've heard of anything like that, so—

MR. WARREN: Yes, ma'am. I understand. And we didn't anticipate that he was going to stand up—

THE COURT: Well, and you-all didn't make me aware of any agreement that you had between yourselves on this type of—on this issue.

MR. WARREN: Yes, ma'am. You know, it was something that I think we did put in the pretrial stip, that the parties had agreed—

[155] THE COURT: Well, I need to look. I don't—I don't—

MR. WARREN: The motion in limine—

THE COURT: Excuse me. Excuse me. I need to look at that. So before you continue, let me find—are you talking about your amended supplemental pretrial or your original?

MR. WARREN: No, ma'am. It would have been the original.

THE COURT: Tell me where it is in your original because I'm not—I'm sorry, I'm just not seeing it.

MR. WARREN: Yes, ma'am.

DEPUTY CLERK: I think it may be on page 24.

THE COURT: I just saw it. Yeah.

Okay. It's on page 24 of your—of Document 239. So in 3D, no mention of Deputy Swindell's other complaints of misconduct unless the issue is opened up during trial by defense.

So what are you—

MR. WEIDNER: Your Honor, I have a copy of the prior complaint. I think it would be appropriate for the Court to be able to read the—

THE COURT: Well, that's why I excused the jury.

MR. WARREN: Yes, ma'am. Would you like apply to approach with a copy?

THE COURT: Yeah. I would.

[156] All right. I don't recall the exact question that was asked. Do you recall your question, Mr. Longfellow?

MR. LONGFELLOW: I do.

THE COURT: Obviously I know it referenced complaints, but I don't—

MR. LONGFELLOW: I asked him, I said, Prior—outside of this complaint in this case, I said, have you had any other prior complaints of—against you for excessive force or false arrest? We specifically—

THE COURT: That was the question. So how is this—how does this fall under—or how does that open the door to this?

MR. WARREN: Because the stipulation doesn't say that he can only open the door if he—if he specifies false—you know, this particular one.

THE COURT: Well, but the question was limited to false arrest and excessive force. And so if you had a complaint that was within that scope, I would agree with you; but this isn't anything—this doesn't—it says he was rude to her. That—I don't think Mr. Longfellow's question opened the door to this.

MR. WARREN: Well, I think that in the context in the totality of the circumstances of the issues in this case, where there's been evidence presented that the former wife made a complaint to 9-1-1 and Deputy Swindell has injected himself into [157] a situation regarding a domestic violence, and there has been a—

THE COURT: He was the officer in the area. Do you have any evidence that he wasn't the officer in that area that night at the time the 9-1-1 call came in.

MR. WARREN: We have evidence that he was canceled and that he continued—dispatcher—

THE COURT: Right. And she said that happens. That happens. It's not uncommon.

MR. WARREN: Yes, ma'am, but that doesn't mean that he didn't cancel it—

THE COURT: We're not going here, Mr. Warren. This—the question that Mr. Longfellow asked did not open the door to this. This is a complaint that he was rude to someone and injected himself into, I guess, a domestic disturbance; but there's no indication that he was physical with anyone, that he arrested anyone unlawfully. There's no complaint of that nature; and so at a minimum, if there is any marginal probative value, it's 403. It's out.

MR. WARREN: Yes, ma'am.

THE COURT: That's my ruling.

Okay. Anything else we need to discuss? I'm going to get you the verdict form so you can take a look at that. And otherwise, I think the instructions are ready to go. I'll get you a copy of those with—there's bolded language on what's [158] been added.

You-all presented, just for—just so—you're going to see a change, another change that we haven't discussed. You-all presented instructions with, I think, both sides; but as far as the crime supporting the probable cause or the arrest, you submitted resisting without violence. But that's not what he was charged with. I don't think that's even appropriate on these facts, and it's not what he was charged with. So I'm going to change that to "with violence" as opposed to "without," unless there's some reason I—you can think of that—he just testified that it was with.

MR. LONGFELLOW: He has also testified that he was resisting when—we have an argument we can make to the jury, and the law allows us to do this, that he was resisting without violence. When he turned around—

THE COURT: Well, that's fine. Then I will—I can put in both, if that's your argument, but I'm not going to leave out "with"—

MR. LONGFELLOW: We'd like both of them in.

THE COURT: Well, I'm not going to leave out "without"—"with violence." I mean, that was—

MR. LONGFELLOW: Yeah. I'm not asking you to leave it out. I want that in there in addition. I agree.

THE COURT: That's not what—you didn't submit "with violence," but you did submit "without," so I will—I'll have [159] to make that change.

MR. LONGFELLOW: When will we be able to make our actual judgments, or motions?

THE COURT: I don't know. Not right now.

MR. LONGFELLOW: Okay.

THE COURT: Anything else?

MR. WARREN: No, ma'am.

THE COURT: All right. We'll be in recess until 1:20.

(Luncheon recess taken from 12:25 to 1:21 p.m.)

AFTERNOON SESSION

(All parties present; jury not present.)

THE COURT: So we don't have to do this right now. I think it's more important to bring the jury in.

Deputy Swindell, come on back.

Is this your last witness?

MR. LONGFELLOW: It is, Your Honor.

THE COURT: You all have any rebuttal?

MR. WARREN: No, ma'am.

THE COURT: Okay. Then probably send the jury out, hear your motions very quickly, and look at the instructions and the verdict form one last time, and then how long are you thinking for your closing, Mr. Warren?

MR. WARREN: Probably 30 minutes for the initial closing and 10 to 15 for rebuttal.

THE COURT: Okay. Mr. Longfellow.

[160] MR. LONGFELLOW: Probably around 45. Maybe a little bit less.

THE COURT: Okay. Let's just see what time it is when you-all finish.

You can go ahead and bring them in.

(Jury present.)

THE COURT: We're ready to proceed, ladies and gentlemen. Deputy Swindell is on the witness stand, and Mr. Warren will begin with his cross.

Deputy Swindell, you're still under oath.

THE WITNESS: Yes, ma'am.

Appendix K

CROSS-EXAMINATION

BY MR. WARREN:

Q. Good afternoon, Deputy Swindell.

A. How are you, sir?

Q. Doing well. How about yourself ?

A. Doing good.

Q. All right. Can we agree that a law enforcement officer may not just simply shove have a citizen for no reason?

A. For no reason?

Q. Yes.

A. No, sir.

Q. I'm sorry?

A. That's correct, for no reason.

Q. And you didn't put in your offense report, when you [161] initially completed it, that you had shoved Kenneth Bailey, did you?

A. That's correct.

Q. And when you did the supplemental report six days later, and you added some new information, you also didn't put in report that you shoved Kenneth Bailey, did you?

A. That's correct.

Q. Your initial contact with Kenneth Bailey, you claim, was when you took your left hand and you placed it on his shoulder after he had turned around to go back in the residence.

A. That's correct.

Q. Now, before that time, or I guess at that time that Kenneth Bailey turned around to go back into the residence, you didn't have any information at that point that a crime had been committed?

A. No, sir.

Q. And you agree that Kenneth Bailey could have walked away?

A. No, sir.

Q. Do you recall testifying to something different under oath in a deposition, March 23rd—

A. Yes, sir.

Q. —2-16? I'm sorry?

A. Yes, sir.

Q. All right. And in that deposition you, in fact, testified that he could walk away, correct?

[162] A. Yes, sir.

Q. Mr. Bailey, at that point, was free to walk away from you, correct?

A. No, sir.

Q. Do you recall testifying in the deposition under oath March 23rd, 2016, that Kenneth Bailey could have walked away from you?

A. Yes, sir.

Q. You agree that Kenneth Bailey could have walked anywhere he wanted to go, correct?

A. No, sir.

Q. Do you recall testifying to something different in your deposition of March 23rd, 2016?

A. Yes, sir.

Q. In that deposition, under oath, you testified that Kenneth Bailey could have walked away—walked, excuse me, anywhere he wanted to go.

A. Yes, sir.

Q. Now, was there some urgent need to go into the Bailey home because you had some belief that Kenneth Bailey was going to go in there and destroy some sort of evidence?

A. No, sir.

Q. When Kenneth Bailey turned around and you made that (snaps fingers) split-second decision that you wanted to detain him, what crime was it that you suspected him of ?

[163] A. It was based on—there was no crime specifically.

Q. When you did that initial report, you did not put in there that you suspected Kenneth Bailey of stalking, did you?

A. I'm sorry?

Q. When you put—when you did that offense report that—and completed it over the course of your shift, you did not put any information in your offense report that you suspected Kenneth Bailey of the crime of stalking, did you?

A. There was information in there that led me to believe that there potentially could be a stalking—

Q. Did you—

A. —yes.

Q. I'm sorry. Did you specifically mention that you thought that he was—that he was stalking? Did you use the word "stalking" in your offense—

A. No, sir.

Q. And when you did your supplement six days later and you added some more information, you also didn't include the word "stalking," did you?

A. That's correct.

Q. You testified earlier about the struggle inside the Bailey home with Kenneth Bailey regarding your taser. Do you recall that?

A. Yes, sir.

Q. During the time that you were having this struggle that you [164] claim with a Kenneth Bailey on the floor with this taser, initially when you were on the ground, Kenneth Bailey's head was facing the television; isn't that true?

A. That's correct.

Q. And your—what you've testified to is that during the time of the struggle with the taser, that you spun around and Kenneth Bailey's head—that's how it ended up facing the other way?

A. That's correct.

Q. In terms of which way Kenneth Bailey's head was facing when the taser deployed, is it your testimony that the taser deployed when Kenneth Bailey's head was facing toward the television?

A. That's correct.

Q. And you agree that when you were standing on the porch of the Bailey home, you didn't have any knowledge that anyone was armed, correct?

A. At that time, no, sir.

Q. And when you wrote up your offense report later that night, you didn't include in your offense report any specific information supporting a belief that Kenneth Bailey had a weapon, did you?

A. No, sir.

Q. When you did that supplemental report six days later and you added in some more information, you also didn't put in the supplemental report that you had any knowledge or specific facts [165] to support that Kenneth Bailey had a weapon, did you?

A. No, sir.

Q. When you did the initial offense report that night, you also didn't include any specific facts regarding any

knowledge you had of a weapon inside the Bailey home, did you?

A. No, sir.

Q. Six days later, when you did the supplemental report and you added new information, you also didn't add any specific facts regarding any knowledge that you had that there was a weapon inside the Bailey home, did you?

A. No, sir.

MR. WARREN: May I have a moment, Your Honor?

THE COURT: All right.

BY MR. WARREN:

Q. Deputy Swindell, at the time of this incident, was there a policy in place at the Santa Rosa County sheriff's department regarding what is necessary if you detain someone, a stop-and-frisk?

A. Yes, sir.

Q. Okay. And part of that policy at the Santa Rosa County Sheriff's Office included that if you were going to detain someone and a stop-and-frisk, that you had to read them their *Miranda* rights, correct?

A. I don't recall specifically what the policy has on it.

MR. WARREN: May I approach, Your Honor?

[166] THE COURT: Yes.

BY MR. WARREN:

Q. Deputy Swindell, does that refresh your recollection regarding the policy?

A. Yes, sir.

Q. And it, in fact, states that you're to read the *Miranda* rights if you're stopping someone, detaining them under a *stop and frisk* situation, correct?

A. Yes.

THE COURT: Ladies and gentlemen, that may very well be the policy of the sheriff 's office, but it is not the law. I'm the only one that's going to be able to give you the law in this case.

MR. WARREN: No further questions, Your Honor.

THE COURT: All right. Redirect.

MR. LONGFELLOW: May I approach the witness? May I approach him again?

THE COURT: Yes.

MR. LONGFELLOW: I just need to look at that. I apologize.

Appendix K

REDIRECT EXAMINATION

BY MR. LONGFELLOW:

Q. That's an interesting question you were just asked. Wasn't complete, was it? What section are you looking at in that policy?

[167] A. Looks like Section—

Q. If you can provide us the name of it.

A. Stop-and-frisk.

Q. Were you conducting a stop-and-frisk on Mr. Bailey on September 11th, 2014?

A. No, sir.

Q. Okay. When Mr. Bailey, on September 11th, 2014, refused three times, at least, to step over to your vehicle and speak with you while you were conducting your detention, your investigative detention of him, was that a violation of the law?

A. Yes.

Q. What could you have charged him with?

A. It's considered resisting without violence.

Q. Okay. When you turned around on his own, was that a violation?

A. Yes.

Q. What would that be a violation of ?

A. Resisting without violence.

Q. When he began to walk away while you were detaining him, was that a violation?

A. Yes.

Q. Of what?

A. Resisting without violence.

Q. And when he went to open the door, was that a violation of the law?

[168] A. Yes.

Q. What could you have charged him with?

A. Resisting without violence.

Q. And just to make sure I understand it correctly, when he turned around to leave while you were conducting the investigative detention, when did you go after him?

A. Immediately when he turned around.

Q. Was that to initiate an arrest?

A. Yes.

MR. LONGFELLOW: No other questions, Your Honor.

THE COURT: All right. Sir, you may step down.

(Witness excused.)

THE COURT: All right. Your next witness.

MR. LONGFELLOW: The defense rests.

THE COURT: All right. Ladies and gentlemen, you've now heard all of the evidence that will be presented during Deputy Swindell's case.

Does the plaintiff have any rebuttal?

MR. WARREN: No, Your Honor.

THE COURT: All right. Ladies and gentlemen, you've now heard all the evidence to be presented during the trial. The next phase in the trial, as you know, will be your instructions on the law, followed by the closing arguments of counsel.

I have a few matters that I need to wrap up with [169] counsel in finalizing the instructions, so I'm going to excuse you to the jury room for a few minutes. We'll get those instructions finalized. We'll bring them back in. I'll give you the instructions. The attorneys will make their

closing arguments to you, and then you'll retire to begin your deliberations.

Please, no discussions. You have heard all the evidence, but the trial is not over yet. It's not time to deliberate. So no discussions, please, about the case during this recess. Thank you.

(Jury excused.)

THE COURT: All right. Be seated.

So let's first look at the instructions, and then I'll hear your arguments on the Rule 50. Go ahead, Mr. Weidner.

MR. WEIDNER: Can we just put on the motion—or the record a motion for directed verdict on exigent circumstances?

I know the Court will address it later, but I did want to make a motion for directed verdict on Defendant's defense of exigent circumstances.

THE COURT: Okay. Well, it's in the record. It's preserved. I'll hear argument on that in a few minutes.

MR. WEIDNER: Thank you.

THE COURT: So in terms of the instructions, not the verdict form yet but the instructions, is there anything you'd like to be heard on?

[170] MR. WEIDNER: We're—Plaintiff is okay with instructions.

THE COURT: All right. Thank you, Mr. Weidner. Mr. Longfellow.

MR. LONGFELLOW: Yes. The draft I had before—so let me see if it's the same page on the new ones. I was looking at page 20, and it's still on page 20.

We'd like to request a definition of the word "initiate" to make sure it's clear to the jury that to initiate an arrest doesn't mean you have to actually touch the person or put handcuffs on them but the act of going after him.

THE COURT: You're going to have to argue that. I'm not going to instruct the jury on that. I think "initiate" is a commonly understood term, a word. I don't think I need to instruct, and I'm not going to give them any legal instruction on it. I don't have any that law on that, and no one has testified to that.

MR. LONGFELLOW: Has testified to what?

THE COURT: To what "initiate" means.

MR. LONGFELLOW: Oh, the definition? Okay.

THE COURT: Right. Or even from a law enforcement perspective I haven't heard that.

MR. LONGFELLOW: He just got up and testified that he initiated his arrest; and when he initiated, it was

him beginning his—to immediately go after him.

[171] THE COURT: You did not ask him, What does the term "initiate an arrest" mean in the context of law enforcement? You didn't ask him that.

MR. LONGFELLOW: No, I did not ask that question.

THE COURT: He explained to you what he did. You can argue to the jury, but I'm not going to give them a legal definition without some law on it, and I've never—I don't know that I've ever seen a legal definition of "initiate" in the context of an arrest, other than the commonly understood definition of "initiate."

MR. LONGFELLOW: Okay.

THE COURT: So that will be—request is denied. Anything else?

MR. LONGFELLOW: On—we're just on the jury instruction, not the verdict form, correct?

THE COURT: Right.

MR. LONGFELLOW: No, then.

THE COURT: All right. Then let's turn to the verdict form.

Mr. Longfellow, let me—I understand you have—you

have made a comment to Ms. Jacobs about another crime supporting probable cause, that being the stalking?

MR. LONGFELLOW: And harassment, yes, Your Honor.

THE COURT: Okay. I think we missed that. I just heard from Ms. Jacobs that you did—you did include that

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APPENDIX L — TRANSCRIPT OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, PENSACOLA DIVISION, DATED JUNE 3, 2021

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No: 3:15cv390/MCR

KENNETH BAILEY,

Plaintiff,

v.

SHAWN T. SWINDELL,

Defendant.

Pensacola, Florida
June 3, 2021
8:07 a.m.

JURY TRIAL - DAY 3
BEFORE THE HONORABLE M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE
(Pages 1 through 260)

APPEARANCES:

For the Plaintiff: Taylor Warren & Weidner, PA
by: J. Phillip Warren and
Keith W. Weidner

Appendix L

For the Defendant: Andrews Crabtree Knox & Longfellow, LLP
by: Joe Longfellow, III and Riley M. Landy

* * *

[176] do. I'm sorry. Thank you. Go ahead.

Mr. Longfellow, I'll hear from you first.

MR. LONGFELLOW: Yes, Your Honor, we would move for judgment as a matter of law on the basis of qualified immunity in the initial detention of Mr. Bailey.

We've heard testimony in this case, on the plaintiff's case as well as on the defense's side of the case, that every one of them knew he was there to conduct an investigation. He had been given information from Deputy Magdalany. No one has disputed the information that was conveyed from Deputy Magdalany to Deputy Swindell. It was articulated that she was in fear. She's making complaints of harassment, of stalking. Been doing this for three months. They had not been fully able to determine everything, so the limited information he had was sufficient to go over there and conduct a legal investigation, which he did.

And because of such, he would be entitled to qualified immunity because the standard is not just reasonable suspicion, but it's arguable reasonable suspicion. It is a little bit of a lower, more lax standard; and any reasonable office would think they have a right to detain someone.

The plaintiff himself admitted he knew why he was there. It was to conduct an investigation. All the family members admitted they had a pretty good idea why he was there, in addition, to conducting the investigation that had to do with [177] Sherri Bailey and the divorce.

So we would move and ask this Court to grant us qualified immunity on the initial detention.

THE COURT: Okay.

MR. LONGFELLOW: Would you like me to move on.

THE COURT: Yes.

MR. LONGFELLOW: Okay. The second one, we'd move for qualified immunity on the arrest. We believe there was probable cause. Once you —

THE COURT: And I don't know — even — I mean, you know, I have to take the evidence in the light most favorable —

MR. LONGFELLOW: I do.

THE COURT: — to Mr. Bailey. But that aside, I don't — I don't see how there can be probable cause as a matter of law when that determination depends on issues of facts that are in dispute.

MR. LONGFELLOW: Well, there aren't issues that — the material issues that are at — before this Court on

that exact claim, they are not in dispute.

So if, in fact, there was reasonable suspicion or we're entitled to qualified immunity for the initial detention, his refusal, once he's there, to go to his car, his refusal to stay during that time of the legal detention, and to make that digs on his own to turn around, to walk away, to open the door, that's all evidence that is undisputed. He's testified to it. [178] That would support resisting arrest without violence. And so we — that would establish your probable cause at that point.

Now, when he turns around to leave, I get that we don't just have to have probable cause, but it's just not — probable cause that we have to have; it's only under qualified immunity. Arguable probable cause that we have to establish.

Now, if we can get past that, which I believe those facts support doing such, not to mention I also believe that there was enough information — maybe it doesn't get a conviction, but under arguable probable cause — to support an arrest also for harassment and stalking of Sherri Bailey.

Now, as soon as that officer, which he has testified to, made an immediate and continuous effort to go and grab, to arrest Mr. Bailey —

THE COURT: This is where the facts are in dispute.

MR. LONGFELLOW: Well, that isn't in dispute that

he made — detention — he...

THE COURT: Well, what's in dispute is what happened at the moment he put his hand on Mr. Bailey's shoulder.

MR. LONGFELLOW: But he didn't have — to initiate an arrest, you don't have to put your hands on his shoulder. As soon as he makes that first move to go after him —

THE COURT: Well, I understand that's what you're —

MR. LONGFELLOW: — that's where the initiation begins. And based on that alone, it doesn't matter whether the [179] touching happened outside the home or inside the home. That was — under the law, he was pursuing or in hot pursuit, a fresh pursuit, because Florida law allows if a suspect commits a misdemeanor in his presence, and as long as it is immediately continuous, and he goes after them right then and there, we're good to go. You can go and arrest them. You don't have to wait. You don't get the protection of saying, Aha, I'm in the house now. Can't get me because it's a misdemeanor.

THE COURT: Okay. Let me hear you — we need to move on. So anything else?

MR. LONGFELLOW: No, Your Honor.

THE COURT: Okay. All right. Thank you. You can respond, and then I'll hear your Rule 50.

MR. WEIDNER: Your Honor, as for the arguable reasonable suspicion, we think that the facts could show and a jury could find that there's no way that Deputy Magdalany had the information he alleges that he reported to Deputy Swindell.

Just by the sequence of time events, Deputy Swindell was only at the house for approximately six minutes, and he described that interaction as chaotic. She was just vomiting information, and it was very hard to get anything from her.

THE COURT: I though Deputy Magdalany said, you know, under oath here in the courtroom that he told him that she complained of harassment.

MR. WEIDNER: Deputy Magdalany said several things, [180] one of which was it was very difficult to get anything out of her initially. We also learned that in his offense report, on cross-examination, he was primarily communicating where Mr. Bailey had gone that evening; and that was what the traffic was. And a jury could find that the only thing during that time frame that could have been communicated was that Mr. Bailey had gone to his parents' house on Kincheon Street. We also have evidence of reports being altered, and we also have —

THE COURT: I don't — I don't — I don't recall that at all.

MR. WEIDNER: Okay.

THE COURT: The deputy was very clear that he did not supplement a supplement.

MR. WEIDNER: The time stamp that an edit was made was read to the jury. Deputy Swindell testified that, yes, the report was initiated at — you know, some time in the evening but completed at approximately — or edited again around 6:32 a.m., after speaking with Sherri Bailey.

We also know that Deputy Magdalany and Deputy Swindell met up after the fact, and we also know that Deputy Swindell spoke with Sherri and relied on the victim statement, all after the fact. And these reports were being edited.

I think a jury could find that based on the limited time that Deputy Magdalany had with Ms. Bailey, all the information that they allege could not possibly have been [181] communicated. And the only thing that was actually relayed was the location of where Mr. Bailey was at that time.

And this is further supported by the idea that when Deputy Swindell got on scene, he said, I had no information you've committed a crime. I have no reason to believe you're not free to go. The only thing I know is that if your wife tells us that a crime has been committed, then I can arrest you. And that's — and that's what he's testified to.

THE COURT: Okay. Move on to the probable cause, please.

MR. WEIDNER: That's just a factual dispute, Your Honor.

You know, in order to obstruct, he has to have known that there was obstruction. He's testified that he believed he was free to go, that when he turned around, he was inside the house. He had no idea that he was being detained. As far as the battery, you know, we dispute that happened as the way Deputy Swindell describes it. You know, we — and everyone has disputed that Mr. Bailey did not take up a fighting stance or strike his arm. He was actually hit from behind without knowledge that he was being seized.

THE COURT: Okay. All right. I'm going to take the motion under advisement. It's going to go to the jury. I'm going to take it under advisement, though, and defer my ruling.

I need to hear your Rule 50 on the exigent [182] circumstances.

MR. WEIDNER: Yes, Your Honor.

Your Honor, when Deputy Swindell was asked, you know, what particular crime — when he made the split-second decision of what you're going to arrest him for, he testified, I had nothing in particular. So that doesn't support the idea that he was on hot pursuit of a fleeing suspect in a home. All he said was, All I know, a crime had not been committed. I wanted to talk to him; and then when he turned away to go inside his house, I made

a split-second decision to go after him, but I couldn't tell you what the particular crime was.

Also — so there's no evidence which a jury could find that that hot pursuit of fleeing felon — or a fleeing suspect would be appropriate.

As to the urgent need to enter the home to prevent imminent destruction of evidence, he was asked what evidence were you needing to prevent destruction of? He said there was none. And I think as described, all of the information was in Mr. Bailey's head, which he, you know, was not going to give up.

And specific articulable facts supported a belief that suspect was armed. He said at that time that he went in the house, he had no specific knowledge that anyone had been armed. And so as such, there's no factual basis which a jury can find that exigent circumstances existed.

THE COURT: Well, there's also — now I have to take [183] the evidence in the light most favorable to Deputy Swindell. There's also no evidence — I mean, excuse me, there is evidence that Mr. Bailey struck Deputy Swindell. And so, you know, I don't know that Deputy Swindell has to articulate even himself at all. I mean, as long as a reasonable officer would have had probable cause to arrest for battering a law enforcement officer. If someone strikes an officer and turns around and runs into a house, an officer can certainly, you know, pursue that person. So I know you don't agree with those facts, but those facts are in the record.

MR. WEIDNER: I agree that those facts are in the record, yes, ma'am.

THE COURT: All right. So the motion will be denied on exigent circumstances, but I'm going to take the defendant's motion under advisement.

Anything else we need to discuss on Rule 50?

Okay. I'm going to step off the bench, get the instructions finalized as we just discussed, come back in and instruct the jury, and then you'll make your closings. 45 minutes apiece. That's 30 plus your 15. 45 for you-all, no more than that. Hour and a half.

MR. WARREN: Your Honor, will the Court let us know when I'm kind of close. I don't think I'm going to get up —

THE COURT: I can, sure. Yes. I will.

MR. WARREN: Thank you.

* * *

APPENDIX M — JURY TRIAL — DAY 3 IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, PENSACOLA DIVISION, JUNE 3, 2021

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No: 3:15cv390/MCR

KENNETH BAILEY ,

Plaintiff,

v.

SHAWN T. SWINDELL,

Defendant.

Pensacola, Florida, June 3, 2021, 8:07 a.m.

JURY TRIAL—DAY 3

BEFORE THE HONORABLE M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE
(Pages 1 through 260)

APPEARANCES:

For the Plaintiff: Taylor Warren & Weidner, PA
by: J. Phillip Warren and
Keith W. Weidner

Appendix M

For the Defendant: Andrews Crabtree Knox & Longfellow, LLP
by: Joe Longfellow, III and Riley M. Landy

* * *

[188] the jury came back with damages and the Court did not grant our qualified immunity argument on that issue for our judgment as a matter of law, or also did not grant our judgment notwithstanding the verdict after that point. So that's where we have some inconsistency.

THE COURT: Yeah. I mean, they're different claims. They're separate claims. They're separated legally and they're separated factually.

So anyway, let's kind of wait and see.

MR. LONGFELLOW: Thank you. I appreciate it.

THE COURT: We're going to keep our fingers crossed and wait and see what happens, that we don't have something in consistent.

All right. Would you bring them in, please.

(Jury present.)

THE COURT: Okay, ladies and gentlemen. Thank you for your patients.

Appendix M

In just a moment I'm going to give you your instructions on the law; but before I start, I'd like to take a moment and personally thank you-all very much for your service thus far during the trial. Although the trial's been relatively brief in duration, I want you to know that that doesn't in any way diminish the importance of your duty. Regardless of whether the trial lasts three days, three weeks or three months, a juror's duty and the importance of that duty are the same. And [189] it's been obvious to me, and I suspect to all those involved in the trial, that each and every one of you has taken your oath and your duty very seriously, and we know that you'll continue to do so, and we appreciate that very much.

Okay. Ladies and gentlemen, I'm going to instruct you on the rules of law that you must follow and apply in deciding this case. When I finish you'll go into the jury room and begin your discussions or what we call your deliberations.

As you can see, the instructions—I'm reading them to you. They will appear there on the monitor. You're free to follow along. Also, so that you know, each one of you will have a complete packet of instructions for your convenience and reference during your deliberations.

Now, your decision in this case must be based only on the evidence presented here, and you must not let your decision be influenced in any way by sympathy or by prejudice for or against anyone.

Appendix M

You must follow and apply all of the law as I explain it to you, whether you agree with the law or not. You must not single out or disregard any of the instructions on the law.

As I said, you should consider only the evidence. That is the testimony of the witnesses in this case and the exhibits that I've admitted. But anything the lawyers say is not evidence and is not binding on you.

Also, you should not assume from anything that I've [190] said that I've said that I have any opinion about any factual issue in this case. Except for my instructions to you on the law, you should disregard anything that I may have said during the trial in arriving at your own decision about the facts. Your own recollection and interpretation of the evidence is what controls or matters.

As you consider the evidence, both direct and circumstantial, you may use reasoning and common sense to make deductions and reach conclusions. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute; however, you need not be concerned about whether the evidence is direct or circumstantial because the law makes no distinction between the weight that you may gave to either district or circumstantial evidence.

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether

you believe what each witness had to say and how important that testimony was. In making that decision, you may believe or disbelieve any witness, in whole or in part.

Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any [191] witness, I suggest that you ask yourself a few questions:

Did the witness impress you as one who was telling the truth?

Did the witness have any particular reason not to tell the truth?

Did the witness have a personal interest in the outcome of the case?

Did the witness seem to have a good memory?

Did the witness have the opportunity and the ability to observe accurately the things that he or she testified about?

Did the witness appear to understand the questions clearly and to answer them directly?

Did the witness's testimony different from other testimony or other evidence?

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You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact, or whether there was evidence that at some other time the witness said or did something or failed to say or do something that was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So if a witness has made a misstatement, [192] you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

You should also ask yourself whether there was evidence tending to prove that a witness testified—excuse me. That's a repeat of that page. That's a repeat.

When scientific, technical, or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter; however, merely because such a witness has expressed an opinion does not mean that you must accept that opinion. As with any other witness's testimony, you must decide for yourself whether to rely on the opinion.

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When a witness is being paid for reviewing and testifying concerning the evidence, you may consider the possibility of bias and should view with caution the testimony of such witness where Court testimony is given with regularity and represents a significant portion of the witness's income.

In this case you've been permitted to take notes during the course of the trial; and most of you, perhaps all of you, have taken advantage of that opportunity and have made notes from time to time.

You will have your notes available to you during your deliberations, but you should make use of them only as an aid to [193] your memory. In other words, you should not give your notes any precedence over your independent recollection of the evidence or the lack of evidence; and neither should you be unduly influenced by the notes of other jurors.

I emphasize to you that notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

This case involves one claim, and one defense, which I'll explain in a moment. It is the responsibility of the party bringing a claim or a defense to prove every essential part of that claim or defense by a preponderance of the evidence. This is sometimes call the burden of proof or the burden of persuasion.

A preponderance of the evidence simply means an amount of evidence that is enough to persuade you that

the party's claim is more likely true than not true. If the evidence fails to establish any essential part of a claim or a defense by a preponderance of the evidence, you should find against the party making that claim or defense.

In deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

In this case, Kenneth Bailey claims that Deputy Shawn [194] T. Swindell, while acting under color of law, intentionally committed acts that violated Mr. Bailey's constitutional right to be free from an unreasonable seizure in three ways: one, by subjecting him to an investigatory detention without reasonable suspicion; second, by arresting him without probable cause; and/or third, by arresting him with probable cause but without a warrant inside his parents' home, with no exigent circumstances present.

Deputy Swindell denies these claims and asserts that he lawfully detained Mr. Bailey based on a reasonable suspicion that Mr. Bailey had been involved in criminal activity, that he lawfully arrested Mr. Bailey based on probable cause that Mr. Bailey was committing a criminal offense, that the arrest was initiated outside the Baileys—parents' home, and that exigent circumstances permitted him to pursue Mr. Bailey into his parents' home to complete the arrest.

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A person may sue in this Court for an award of money damages against anyone who, under color of law, intentionally commits act that violates the person's rights under the United States Constitution. Under the Fourth Amendment to the Constitution, the United States Constitution, every person has the right to be free from unreasonable seizures, which includes the right not to be subjected to an investigatory detention without reasonable suspicion, the right not to be arrested without probable cause, and the right not to be arrested with [195] probable cause but without a warrant inside a home, absent consent or exigent circumstances. If a seizure is unreasonable, then any use of force to effectuate that seizure violates the Fourth Amendment.

To succeed on his claim, Mr. Bailey must prove each of the following facts by a preponderance of the evidence:

first, Deputy Swindell intentionally committed acts that violated Mr. Bailey's constitutional right to be free from an unreasonable seizure by, one, detaining him for an investigation without reasonable suspicion; arresting him without probable cause; and/or arresting him with probable cause but without a warrant inside his parents' home with no exigent circumstances present;

second, that Deputy Swindell's acts were the legal cause of injuries sustained by Mr. Bailey;

and, third, at the time Deputy Swindell was acting under color of law. The parties have agreed or stipulated that Deputy Swindell acted under color of law, so you should accept that as a proven fact.

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Regarding the claim of unlawful detention, you must determine whether Mr. Bailey was subjected to an investigatory detention and, if so, whether the detention was unreasonable.

To help you determine whether Deputy Swindell had reasonable suspicion to detain Mr. Bailey for investigative purposes, I will first instruct you on the elements of the crime [196] for which Deputy Swindell asserts reasonable suspicion existed.

It is a criminal offense in Florida to willfully maliciously and repeatedly follow, harass, or cyberstalk another person. "Harass" means to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose. "Willfully" means knowingly, intentionally, and purposely.

In determining whether Mr. Bailey was subjected to an investigatory detention, you must decide whether his initial encounter with Deputy Swindell was consensual or, instead, a brief seizure or investigatory detention.

A consensual encounter occurs where a citizen voluntarily cooperates with requests and/or questions from a law enforcement officer. An encounter is consensual where a reasonable person would have felt free to decline the officer's requests or otherwise terminate the

encounter. If a reasonable person would have felt free to terminate the encounter, no seizure has occurred, and the Fourth Amendment is not implicated.

A consensual encounters becomes a seizure, either an investigatory detention or an arrest, when a reasonable person would no longer feel free to leave. The inquiry is what a [197] reasonable person would have believed under the same facts and circumstances, not what Mr. Bailey himself believed.

A reasonable person is a person of ordinary prudence. It is an objective standard. So the subjective thoughts of the specific people involved are irrelevant. It is for you to decide who is a reasonable person.

A citizen is detained or seized if his movement is restrained by the use of physical force or by a show of authority. A show of authority occurs where a reasonable person would understand that he is not free to decline the officer's requests or otherwise terminate the encounter. If you find that Mr. Bailey was subjected to an investigatory detention, you must determine whether the investigatory detention was reasonable or unreasonable.

A lawful, reasonable investigatory detention occurred if Deputy Swindell briefly detained Mr. Bailey to investigate a reasonable suspicion of criminal activity. The investigatory detention was unreasonable if Deputy Swindell did not have a reasonable suspicion that Mr. Bailey was involved in or was about to be involved in criminal activity.

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A reasonable suspicion is a particularized and objective basis for suspecting an individual of criminal activity. Reasonable suspicion does not require definitive knowledge or certainty that an individual has committed or is about to commit a crime. Indeed, it is a less demanding [198] standard than probable cause and requires a showing considerably less than preponderance of the evidence; however, the Fourth Amendment requires at least a minimal level of objective justification for an investigatory detention.

In making these determinations you should consider the totality of the circumstances and focus on all of the information available to Deputy Swindell at the time of the investigatory detention. The inquiry is what a reasonable law enforcement officer would have believed under the same facts and circumstances, not what Deputy Swindell himself believed.

Regarding the claim of unlawful arrest, I will first instruct you on the determinations that you'll be required to make, and then I'll then provide specific instructions on the law that applies to those determinations.

You must first determine whether Deputy Swindell arrested Mr. Bailey with or without probable cause. If you determine that probable cause did not support the arrest, then your verdict must be for Mr. Bailey on his unlawful arrest claim, and you will go on to determine the issue of compensatory damages.

If you find that there was probable cause for the arrest, you must next determine where the arrest was

initiated. If you determine that the arrest was initiated inside

Mr. Bailey's parents' home, then your verdict must be for Mr. Bailey on his unlawful arrest claim, and you will go on to [199] determine the issue of compensatory damages.

If you determine that the arrest was initiated outside of Mr. Bailey's parents' home, then you must next decide whether there were exigent circumstances that permitted Deputy Swindell to pursue Mr. Bailey into his parents' home without a warrant. If you determine that exigent circumstances existed, then your verdict must be for Deputy Swindell on the unlawful arrest claim. If you determine that exigent circumstances did not exist, then your verdict must be for Mr. Bailey on the unlawful arrest claim; and you will go on to determine the issue of compensatory damages.

I'll now provide specific instructions on the law that applies to the unlawful arrest claim. "Probable cause" means that at the time of the arrest, the facts and circumstances known to the law enforcement officer, based on reasonably trustworthy information, were sufficiently strong to support a reasonable belief that the person has committed, is committing, or is about to commit a criminal offense. It does not require definitive knowledge or certainty that a crime has been, is being, or will be committed.

In this case you should consider all of the facts and circumstances within Deputy Swindell's knowledge at the

time and decide whether those facts and circumstances would cause a reasonable law enforcement officer to believe that Mr. Bailey had committed, was committing, or was about to commit a crime.

[200] Whether Mr. Bailey was, in fact, guilty or innocent of the offense, without more, is not relevant because facts constituting probable cause for an arrest need not meet the standard of conclusiveness and probability required to support a conviction. Also, the inquiry is what a reasonable law enforcement officer would have believed under the same facts and circumstances, not what Deputy Swindell himself believed.

To help you determine whether Deputy Swindell had probable cause to arrest Mr. Bailey, I'll now instruct you on the elements of the crimes for which Deputy Swindell asserts probable cause existed.

As I already explained, it is a criminal offense in Florida to willfully, maliciously, and repeatedly follow, harass, or cyberstalk another person. "Harass" means to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose. "Court of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose. "Willfully" means knowingly, intentionally, and purposely.

It is also a criminal offense in Florida to knowingly resist, obstruct, or oppose any law enforcement officer

when the officer is engaged in the lawful execution of a legal duty. Physical acts that resist, obstruct, or oppose an officer's execution of a lawful duty are sufficient to constitute a [201] violation of this criminal law; however, words alone only constitute resistance, obstruction, or opposition if the officer is serving legal process, legally detaining a person, or asking a person for assistance with an ongoing emergency that presents a serious thread of imminent harm to person or property, or if, by the person's words or behavior, her physical presence amounted to resistance, obstruction, or opposition to the officer's performance of a lawful duty.

It is also a criminal offense in Florida to knowingly and willfully restrict, obstruct, or oppose a law enforcement officer engaged in the lawful execution of a legal duty by offering to do violence or doing violence to the officer.

It is also a criminal offense in Florida to knowingly commit a battery on a law enforcement officer while the officer is engaged in the lawful performance of his duties. A battery is committed where a person actually or intentionally touches or strikes a law enforcement officer against the officer's will or intentionally causes bodily harm to the officer.

As I've already explained, if you find that there was probable cause for the arrest, you must next determine where the arrest was initiated, that is, whether the arrest was initiated outside or inside Mr. Bailey's parents' home. Under the Fourth Amendment, a law enforcement officer with probable cause to arrest a person may not enter a

home to initiate an arrest, not even by a fraction of an inch, unless the officer has a warrant, [202] obtains voluntary consent to enter the home from an occupant, or exigent circumstances justify the officer's entry into the home.

Exigent circumstances justify a law enforcement officer's warrantless entry into a home without an occupant's consent where either the arrest was set in motion in an area that is open to public view, which includes a front porch, and the person flees into a home, and the officer immediately follows the fleeing suspect into the home from the scene of the crime; the officer has an urgent need to enter the home to prevent the imminent instruction of evidence, or the officer has specific and articulable facts to support the belief that the person is armed and immediate entry is necessary for safety.

If one or more of the exigent circumstances exist, then a law enforcement officer may pursue the person into the home to complete the arrest. Because the existence of exigent circumstances is a defense, Deputy Swindell has the burden of proving the defense by a preponderance of the evidence.

I'll now instruct you on the remaining elements of Mr. Bailey's claims.

Regarding the second element, Mr. Bailey must prove that he would not have been injured absent Deputy Swindell's conduct and that his injuries were a reasonably foreseeable consequence of Deputy Swindell's conduct.

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Regarding the third element, as I've already instructed you, the parties have agreed that Deputy Swindell [203] acted under color of law during the arrest. Therefore, you should accept that fact as proven.

If you find that Mr. Bailey has proved each fact by a preponderance of the evidence, you must then decide the issue of compensatory damages. If you find that Mr. Bailey has not proved each of these facts, then you must find for Deputy Swindell.

If you find in Mr. Bailey's favor on his claims, you must decide the issue of his compensatory damages. To recover compensatory damages, Mr. Bailey must prove, by a preponderance of the evidence, that he would not have been damaged without Deputy Swindell's conduct and that the damages were a reasonably foreseeable consequence of Deputy Swindell's conduct.

As I've already instructed, if you have found that Mr. Bailey was unlawfully arrested, then any force that Deputy Swindell used to effectuate the unlawful arrest was a violation of the Fourth Amendment.

You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all of Mr. Bailey's damages, no more, no less. You must not impose or increase these compensatory damages to punish or penalize Deputy Swindell, and you must not base these compensatory damages on speculation or guesswork; however compensatory damages are not restricted to

actual loss of money. They also cover the physical aspects of the injury.

[204] Mr. Bailey does not have to introduce evidence of a monetary value for intangible things like physical pain or mental anguish. You must determine what amount will fairly compensate him for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

You should consider the following elements of damages, and no others, to the extent you find Mr. Bailey has proved them by a preponderance of the evidence:

Past medical expenses related to the care and treatment of Mr. Bailey's neck complaints. The parties have stipulated that the amount of past medical expenses is $28,889.91; however, Deputy Swindell does not agree that the need for the care and treatment was caused by his actions.

Mr. Bailey's physical injuries, including ill health, physical pain and suffering, disability, disfigurement, discomfort, and any such physical harm that Mr. Bailey is reasonably certain to experience in the future.

Wages, salary, profits, and the reasonable value of working time that Mr. Bailey lost because of his inability or diminished ability to work, and the present value of such compensation that Mr. Bailey is reasonably certain to lose in the future because of his inability or diminished ability to work.

And finally, Mr. Bailey's mental and emotional distress, impairment of reputation, personal humiliation, and [205] any related harm that Mr. Bailey is reasonably expected to experience in the future.

Anyone who claims loss or damages as a result of an alleged wrongful act by another has a duty, under the law, to mitigate those damages, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So if you find that Deputy Swindell has proved by a preponderance of the evidence that Mr. Bailey did not seek out or take advantage of a reasonable opportunity to reduce or minimize the loss or damage under all the circumstances, you should reduce the amount of Mr. Bailey's damages by the amount that he could have reasonably received if he had taken advantage of such an opportunity.

Of course, the fact that I have given you instructions concerning the issue of Mr. Bailey's damages should not be interpreted in any way as an indication that I believe Mr. Bailey should or should not prevail in this case.

All right. Ladies and gentlemen, I have two final instructions that I'm going to give you following the closing arguments of counsel. Of course, you must consider all of my instructions on the law as a whole.

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Now will be the time for the attorneys to present their closing arguments to you. Please remember, if you take notes during the closing arguments, perfectly fine for you to do [206] that, but make a notation to yourself that this is lawyer argument. This is the lawyer's memory of the evidence that's been admitted during the trial; but ultimately, as I've already explained to you in the instructions, it is your own recollection and interpretation of the evidence that must control. So if you take notes, please make sure to note that this is not the actual evidence. This is the lawyer's memory of what the evidence was.

All right. We will start with Mr. Bailey, the plaintiff. Mr. Warren will make his closing argument, or on behalf of Mr. Bailey. Because Mr. Bailey has the burden on his claims, Mr. Warren gets to go first and he also gets the last word. So it'll be Mr. Warren, followed by Mr. Longfellow on behalf of Deputy Swindell, and then Mr. Warren again at the end.

All right. Mr. Warren, you may proceed.

MR. WARREN: Thank you, Your Honor.

Members of the jury, Deputy Swindell violated Kenneth Bailey's Fourth Amendment rights when he unlawfully arrested him and when he unlawfully crossed the threshold of the home without consent, a warrant, or exigent circumstances. Let me talk to you about the

evidence that you've heard during this trial that proves that.

You've heard that all the events that took place, for the most part they're really not in dispute. There's no material dispute. As I told you in the opening statement,

* * *