No. 19-13808

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Mamberto Real,

Plaintiff-Appellant,

v.

Michael Perry, in his individual capacity, et al.,

Defendants-Appellees,

On Appeal from a Final Judgment of the
United States District Court for the Middle District of Florida
Case No. 2:18-cv-331-JES-NPM, Hon. John E. Steele

OPENING BRIEF FOR APPELLANT MAMBERTO REAL

Monica L. Coscia
Student Counsel
Jackson Teague
Student Counsel

Brian Wolfman
Bradley Girard
GEORGETOWN LAW APPELLATE
COURTS IMMERSION CLINIC
600 New Jersey Ave NW, Suite 312
Washington, D.C. 20001
(202) 661-6582

Counsel for Plaintiff-Appellant Mamberto Real

February 14, 2020

No. 19-13808

Mamberto Real, Plaintiff-Appellant

v.

Michael Perry, et al., Defendant-Appellee

CERTIFICATE OF INTERESTED PERSONS

Under this Court's Rule 26.1-1, Appellant Mamberto Real states that the following people and entities have an interest in the outcome of this appeal:

Alley, Grant Williams

Burandt, Adamski, Feitchthaler & Sanchez, PLLC

City of Fort Myers

Coscia, Monica

Chappell, Sheri Polster, U.S. District Judge

Culhane, Timothy

Frazier, Douglas N., U.S. Magistrate Judge

Georgetown Law Appellate Courts Immersion Clinic

Girard, Bradley

Mirando, Carol, U.S. Magistrate Judge

Mizell, Nicholas P., U.S. Magistrate Judge

Perry, Michael

Real, Mamberto

Steele, John E., Senior U.S. District Judge

Teague, Jackson

Wolfman, Brian

February 14, 2020

Respectfully submitted,

/s/Brian Wolfman

Brian Wolfman
GEORGETOWN LAW APPELLATE COURTS
IMMERSION CLINIC
600 New Jersey Ave., NW, Suite 312
Washington, DC 20001
(202) 661-6582
wolfmanb@georgetown.edu

Counsel for Plaintiff-Appellant Mamberto Real

STATEMENT REGARDING ORAL ARGUMENT

Appellant Mamberto Real requests oral argument. The issue presented in this Section 1983 case is whether the district court erred in holding that Real failed to state a claim for excessive force when Officer Michael Perry brandished a gun in Real's face, called him a virulent racial slur, and threatened to shoot him. Oral argument would allow the Court to investigate the relationship between the facts and the elements of an excessive-force claim under the Fourth and Fourteenth Amendments.

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INTRODUCTION

Mamberto Real, a homeless Black man, was jolted awake one morning when Officer Michael Perry shined his flashlight into the car where Real was sleeping. "You have five seconds to leave," Perry declared, "or I'm going to shoot you NIGGER." Perry counted to five. Perry then drew his firearm and pointed it at Real's head. Real displayed his empty hands in fear of being shot. At that point, another officer felt compelled to intervene and stepped between Perry's firearm and Real.

As explained below, Real is a victim of excessive force at the hands of law enforcement in violation of the Constitution. But when Real sued Perry for using excessive force under Section 1983, the district court thought otherwise. It dismissed Real's suit on the ground that the force Perry used against Real was not excessive because Real was not subjected to physical force or formal arrest.

But the constitutional protection against excessive force extends beyond physical force alone. The Fourth Amendment prohibits a police officer from using gratuitous force when effectuating a seizure on an individual who is not resisting. And Fourteenth Amendment due process forbids an officer from using force disproportionate to the threat posed by the victim. Under both the Fourth and Fourteenth Amendments, Real has stated an excessive-force claim against Perry.

Decades of this Court's case law clearly establish Real's right to be free from gratuitous, malicious official force, so Officer Perry is not entitled to qualified immunity. No reasonable officer would believe that Perry's conduct was lawful—including the reasonable officer on the scene, Miller, who intervened to protect Real.

Affirming the district court's holding would make it constitutionally permissible for a police officer to brandish his firearm, point it at an innocent victim's head, call him a racial slur tied to centuries of violence against African-Americans, and threaten to shoot him—all in the absence of any threat to the officer or the public. As more fully explained below, the Constitution forbids such egregious official misconduct. This Court should reverse.

STATEMENT OF JURISDICTION

Appellant Mamberto Real sued appellee Officer Michael Perry in the Middle District of Florida under 42 U.S.C. § 1983. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. The district court's opinion and order and separate judgment were entered on September 19 and 20, 2019, respectively. App. 50-55, 56. The order disposed of all of Real's claims, including those dismissed in an earlier opinion and order entered on August 1, 2019. App. 27-38. Real filed a notice of appeal on September 24, 2019. Doc. 66. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

Whether the district court erred in holding that Mamberto Real did not state a claim for excessive force under the Fourth and Fourteenth Amendments when, without any threat from Real, Officer Michael Perry threatened to shoot him if he did not leave in five seconds, called him a virulent racial slur, and then pointed a gun at his head.

STATEMENT OF THE CASE

I. Factual background

This appeal arises from a grant of a motion to dismiss. This Court must liberally construe appellant Mamberto Real's pro se complaint, accept the facts pleaded in the complaint as true, and view those facts in the light most favorable to Real. *Dixon v. Hodges*, 887 F.3d 1235, 1237 (11th Cir. 2018).

During winter 2016, Mamberto Real was forced into homelessness when he lost his job and his apartment. App. 42. After Real became homeless, he began living out of his car in Fort Myers, Florida. *Id.* Real lived in a homeless shelter for two months until his "discharge" on February 10, 2017. *Id.* With no place to live, Real spent several nights sleeping in his car in the shelter's parking lot. *Id.*

Five days after leaving the shelter, in the early morning of February 15, Fort Myers police officers Michael Perry, Adam Miller, and Brittany Morris arrived at the parking lot while Real was asleep in his car. App. 42-43.

After the officers arrived, Perry approached Real's car and shined his flashlight into the car's interior, awakening Real. App. 42. Officer Perry stated, "Hey you they do not want you here, I already know you have [a] driver license, you have five (5) seconds to leave or I am going to shoot you NIGGER." App. 42-43. Real is Black. App. 22.

After counting to five, Officer Perry removed his firearm from his holster and pointed it at Real's face, even though Real displayed his empty hands, had no weapons in his car, and did not present a physical threat to the officer. App. 43. Then, Officer Miller intervened, placing his body between the gun and Real. *Id.* Real maintains that

Miller's intervention saved his life. *Id.* After Miller de-escalated the situation, Real left the parking lot on his own without immediate physical injury or arrest. *Id.* [1]

Later that morning, Real filed a complaint against Perry at the Fort Myers Police Department. App. 43. An internal investigation cleared Perry of wrongdoing. *Id.* An officer at the police station told Real that Perry's body camera was allegedly broken at the time of the incident, so there was no recording at the scene. *Id.*

Perry's actions caused Real to become distraught, triggering serious emotional distress and humiliation. App. 45. As a result of this emotional trauma, Real automatically defecates when approaching any police officer. *Id.*

II. Procedural background

Real sued Perry and the City pro se under 42 U.S.C. § 1983, alleging violations of his Fourth, Eighth, and Fourteenth Amendment rights. App. 7-12. Real filed a motion to amend his complaint. Doc. 11. The court granted this motion and directed Real to file an amended complaint that pleaded each claim as a separate count. App. 13-15. Real did so, claiming that Perry and the City violated the Fourth and Fourteenth Amendments. App. 16-26. The district court then granted Real's motion for leave to proceed IFP. Doc. 16 (Oct. 19, 2018).[2]

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[1] Officer Miller has since died in the line of duty. App. 43.

[2] Real had earlier sued Perry and the City of Fort Myers. The district court dismissed that suit without prejudice to the filing of the present action. Op. and Order, *Real v. City of Fort Myers*, 2:17-cv-117 (M.D. Fla. May 7, 2018), ECF No. 51.

Perry moved to dismiss on the grounds that he was entitled to qualified immunity and had "sufficient probable cause to stop, frisk or question" Real. Doc. 29 at 4. The City also moved to dismiss. Doc. 30.

The district court granted both motions to dismiss without prejudice, granting Real leave to amend "[b]ecause [Real] may be able to allege a plausible cause of action." App. 38. The district court stated that because, in its view, Real had not been seized, the Fourth Amendment was inapplicable. App. 32 n.2. The district court addressed Real's excessive-force claim under a Fourteenth Amendment substantive-due-process framework, holding that Perry's actions did not amount to excessive force because Real "was not touched, arrested, or injured." App. 34. Finding no constitutional violations on Perry's part, the court did not reach the issue of qualified immunity. App. 36.

Following the district court's dismissal of Real's Fourth Amendment claim, Real filed a second amended complaint omitting that claim. App. 39-49. He realleged the facts from his previous complaints and added two new facts: that Officer Brittany Morris was present at the scene and that Perry's bodycam was broken during the incident. App. 43. Perry and the City filed motions to dismiss the second amended complaint. Docs. 60, 61. Reaffirming the reasoning from its prior decision, App. 31-34, the district court granted both motions to dismiss and held that Real still had not stated a claim for excessive force under the Fourteenth Amendment. App. 54-55.[3]

[3] After the district court issued these final rulings on the merits, still acting pro se, Real moved the district court to continue his IFP status on appeal, not recognizing that he did not need to do so to maintain that status (absent the district court's sua sponte withdrawal of that status or some statutory prohibition). *See* Fed. R. App. P. 24(a)(3). The district court denied Real's renewed motion to proceed IFP, finding that, although Real "continues to qualify to proceed without prepayment of costs," Real's

III. Standard of review

This Court reviews an order granting a motion to dismiss de novo, applying the same standards that the district court must use. *West v. Warden, Comm'r, Ala. DOC*, 869 F.3d 1289, 1296 (11th Cir. 2017). All of the complaint's plausible factual allegations must be accepted as true and construed in the light most favorable to the plaintiff. *Id.* A motion to dismiss does not test the merits of a case, but requires only that "the plaintiff's factual allegations, when assumed to be true, 'must be enough to raise a right to relief above the speculative level.'" *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1303 (11th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). This Court "also construe[s] *pro se* pleadings," such as Real's, "liberally." *Dixon v. Hodges*, 887 F.3d 1235, 1237 (11th Cir. 2018).

SUMMARY OF ARGUMENT

I. Officer Perry seized Real, and that seizure was effectuated with excessive force in violation of the Fourth Amendment.

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appeal "is not in good faith" for the reasons provided in its earlier merits opinion. Doc. 70 at 2 (Sept. 26, 2019); *see* Fed. R. App. P. 24(a)(3)(A).

Real retained undersigned appellate counsel who, on Real's behalf, moved this Court to authorize Real to proceed IFP, maintaining that Real was financially eligible for IFP status and was pursuing this appeal in good faith. Motion for Leave to Proceed IFP at 2 (Oct. 23, 2019). The Court denied that motion on frivolity grounds in a single-judge order. *See* Order (Jan. 17, 2020). Real later tendered the filing fee, *see* App. 6 (Jan. 22, 2020 docket entry), and shortly thereafter this Court set the briefing schedule. We respectfully disagree with the order denying Real's IFP motion. Undersigned counsel believes not only that Real is proceeding in good faith, but also that, for the reasons provided in this brief, Real's appeal is meritorious and the district court's judgment should be reversed.

A. A seizure occurs when a citizen yields to an officer's show of authority that would make a reasonable person feel that he was not free to go about his business. A reasonable person would not feel free to go about his business when an officer threatens his life, calls him a racial slur, and points a weapon inches away from his face. It would ignore the unquestionable power imbalance to suggest that Real, who had been approached by three armed officers, would have felt free to end the encounter. A seizure thus occurred when Real yielded to Perry's authority by showing his hands and listening to Perry's commands.

B. Perry used excessive force when he seized Real. An officer uses excessive force when the force used to seize is disproportionate to what is needed under the circumstances of the encounter. Officer Perry did not need to use force because Real was not resisting, did not pose a threat to anyone, and was suspected of, at most, a nonviolent misdemeanor.

The amount of force Perry used was both gratuitous and severe. Perry brandished his weapon, threatened Real's life, and called Real a racial slur for one reason: to inflict pain on Real. Real now suffers anxiety, emotional distress, and automatically defecates when around police officers. This gratuitous infliction of pain, coupled with the lack of need for it, shows that Perry used excessive force when he seized Real.

II. If this Court finds that no seizure occurred, Real has stated a claim for excessive force under the Fourteenth Amendment, which protects against police misconduct in a non-seizure context. Applying the four factors this Court uses to assess a Fourteenth Amendment excessive-force claim, Perry violated Real's right to due process when he threatened to shoot Real, called him a racial epithet, and pointed a gun in his face.

First, Perry had no need to use force when he approached Real. Real did not physically or verbally threaten Perry or the other officers, did not brandish a weapon, and did not try to escape—in fact, he showed his hands to indicate that he did not have a weapon and posed no threat. Second, the force used against Real was disproportionate to any legitimate interest in maintaining order, as the facts pleaded show. Faced with an unarmed man sleeping in his car, Perry terrorized Real with a deadly weapon, a racial slur, and a death threat. Third, Real sustained serious injuries as a result of Perry's use of force, including emotional distress and automatic defecation upon approaching any police officer. Fourth, Perry's actions were malicious and sadistic, because his purpose was to harm and intimidate Real. Perry's conduct was so egregious that Officer Miller had to intervene to save Real's life.

III. Officer Perry is not entitled to qualified immunity because no reasonable officer would conclude that it is lawful to use a racial slur, threaten a citizen's life, and point a weapon in his face when the citizen has done nothing threatening, has not resisted arrest, and has complied with the officer's demands. This conclusion is underscored by the intervention of Officer Miller, who understood that Perry's conduct was unreasonable. This Court has decided a "body of cases" clearly establishing that "'gratuitous use of force when a criminal suspect is not resisting arrest constitutes excessive force.'" *Sebastian v. Ortiz*, 918 F.3d 1301, 1308 (11th Cir. 2019) (quoting *Hadley v. Gutierrez*, 526 F.3d 1324, 1330 (11th Cir. 2008)). Indeed, this Court has observed that pointing a weapon at an unarmed civilian "can certainly sustain a claim of excessive force." *Croom v. Balkwill*, 645 F.3d 1240, 1252 n.17 (11th Cir. 2011). These precedents clearly establish that an officer may not approach an unarmed person, threaten his life,

and shove a loaded weapon in his face for the sole purpose of inciting fear in that person.

ARGUMENT

In the pages that follow, we explain why Officer Michael Perry violated Mamberto Real's constitutional rights when he brandished a gun in Real's face, called him a racial slur, and threatened his life. In an excessive-force case, a court must look to the "explicit textual source" of the constitutional violation, here, the Fourth Amendment, before it considers the more general rubric of due process. *West v. Davis*, 767 F.3d 1063, 1069 (11th Cir. 2014) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

First, Officer Perry violated Real's Fourth Amendment right to be free from an unreasonable seizure. Second, if the Court finds that no seizure occurred, Officer Perry violated Real's Fourteenth Amendment right to due process. Finally, because the pleadings allege that Officer Perry violated Real's clearly established constitutional rights, Perry is not entitled to qualified immunity.

I. Officer Perry violated Real's Fourth Amendment rights when Perry used excessive force while seizing Real.

Just as the Fourth Amendment forbids an officer from seizing a person without justification, it prohibits seizing a person with unreasonable force. *Graham v. Connor*, 490 U.S. 386, 395 (1989). That reasonableness requirement is the Fourth Amendment's touchstone, and it enshrines the common-law understanding that the force an officer uses to apprehend a suspect must not be "disproportionately severe" to the offense that was committed. *Tennessee v. Garner*, 471 U.S. 1, 15 (1985). To plead an excessive-force violation under the Fourth Amendment, the plaintiff must allege that (1) a seizure

occurred, and (2) the force used to effect the seizure was unreasonable. *Corbitt v. Vickers*, 929 F.3d 1304, 1315 (11th Cir. 2019).

A. A seizure occurred.

Officer Perry seized Real when he pointed a gun in his face, threatened his life, and called him a racial slur. To be sure, not every encounter with an officer constitutes a seizure. An officer may approach someone and seek a "consensual encounter," so long as the person would feel free to terminate the conversation. *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984). But when the officer intentionally uses physical force or a show of authority to restrain a person's freedom of movement, a seizure occurs. *Brendlin v. California*, 551 U.S. 249, 254 (2007). Where, as here, a seizure occurs through a show of authority, there must be (1) an officer's conduct that indicates to a reasonable person he is not free to go about his business, and (2) that person's submission to the officer's authority. *United States v. House*, 684 F.3d 1173, 1199 (11th Cir. 2012).

1. When determining whether an officer's show of authority is sufficiently coercive to turn a consensual encounter into a seizure, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *United States v. Baker*, 290 F.3d 1276, 1278-79 (11th Cir. 2002) (quotation marks omitted) (quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991)). A court considers a number of factors when asking whether a person would feel free to go about his business. Though no individual factor is dispositive, factors of particular relevance here include the display of a weapon by an officer; the use of

language or tone of voice indicating that compliance with the officer's request might be compelled; and the power imbalance between the person and the officer. *See United States v. Perez*, 443 F.3d 772, 778 (11th Cir. 2006). Taken together, these factors establish that Officer Perry's conduct was consistent with a coercive seizure, not a consensual conversation.

Officer Perry spoke to Real in a way that would indicate that Real was not free to go about his business. It is well-established that when an officer speaks in a way that shows that "compliance with the officer's request might be compelled," a seizure likely occurred. *Kaupp v. Texas*, 538 U.S. 626, 630 (2003) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). Here, Officer Perry approached Real and shined a flashlight into his car. *See Leroy v. State*, 982 So. 2d 1250, 1252 (Fla. Dist. Ct. App. 2008) (holding that an officer's shining of a flashlight is a factor that would communicate to a reasonable person that he or she was not free to leave). He then told Real, "you have five (5) seconds to leave or I am going to shoot you NIGGER." App. 42-43. Far from engaging in respectful, polite, or nonthreatening conversation consistent with a consensual encounter, *see Perez*, 443 F.3d at 778, Perry used a racial epithet that is inextricably linked to violence and unequivocally conveyed to Real that he would be killed if he did not immediately heed Perry's command. With his life possibly on the line, Real's compliance with Perry's demands was not merely requested, it was unquestionably required.

Perry then took his verbal demands a step further, pointing his gun in Real's face. It is settled precedent that an officer brandishing a weapon is a strong indication that a seizure occurred. *House*, 684 F.3d at 1199. And though no factor alone is dispositive, a

consensual encounter often becomes a seizure the moment an officer draws his weapon. *Lundstrom v. Romero*, 616 F.3d 1108, 1122 (10th Cir. 2010); *see Baptiste v. State*, 995 So. 2d 285, 295 (Fla. 2008) (holding that "Baptiste was seized when Officer Williams stopped him at gunpoint," but also noting that Baptiste was ordered to lay on the ground). In this case, Officer Perry approached Real, threatened his life, and put a weapon in his face. "It strains logic," *Baptiste*, 995 So. 2d at 295, to suggest that a man would feel free to go about his business and ignore Perry's demands with a loaded weapon just inches from his face.

The disparity in power between Real and Perry further shows that Real had no choice but to submit to Perry's show of force. The power imbalance could not be clearer: Real was outnumbered three-to-one by armed officers. *See Perez*, 443 F.3d at 778. And even a Fourth Amendment scholar—much less a homeless man who had been awaken just seconds before—would not feel free to assert his right to end the encounter with a weapon in his face and his life at risk. These facts, when coupled with Perry's egregious actions, show that a reasonable person in Real's position would not feel free to ignore Perry's commands and go about his or her business.

2. Real immediately yielded to Perry's show of authority. A seizure occurs when a citizen actually yields to an officer's show of authority. *California v. Hodari D.*, 499 U.S. 621, 626 (1991). Showing one's hands is a universal sign of surrender. *See, e.g.*, *Escobar v. Montee*, 895 F.3d 387, 394 (5th Cir. 2018) (observing that placing hands in air and complying with commands is "unambiguous[] surrender[]"); *Rahn v. Hawkins*, 73 F. App'x 898, 900 (8th Cir. 2003) (noting that plaintiff was "raising his hands above his head in a position of surrender"); 1 Int'l Comm. of the Red Cross, *Customary*

International Humanitarian Law: Rules, Ch. 15, Rule 47, at 168 (reprt. 2009).[4] And of particular relevance here, showing one's hands demonstrates that a suspect is surrendering to an officer's show of authority. *McCoy v. City of Monticello*, 342 F.3d 842, 847 (8th Cir. 2003); *see Fils v. City of Aventura*, 647 F.3d 1272, 1289 (11th Cir. 2011). Here, Real did just that, showing his hands in surrender and submitting to Officer Perry's commands. Such continuous acquiescence shows that Real yielded to Perry's show of authority.

It is inconsequential that Real eventually left the scene. "A seizure is a single act," *Hodari D.*, 499 U.S. at 625 (quoting *Thompson v. Whitman*, 85 U.S. 457, 471 (1873)), that "can be accomplished in an instant." *West v. Davis*, 767 F.3d 1063, 1070 (11th Cir. 2014). In turn, "[t]he restraint on one's freedom of movement does not have to endure for any minimum time period before it becomes a seizure for Fourth Amendment purposes." *Id.* at 1069. It does not matter that Real was told to leave before the situation escalated, and it does not matter that Real left after it de-escalated. Thus, with all respect, it does not matter that Perry threatened Real with his gun at point-blank range "only briefly," Order Denying IFP, at 2 n.1 (Jan. 17, 2020), because Real's seizure was "accomplished in [the] instant" Perry aimed his gun at Real. *West*, 767 F.3d at 1070. When Real's life was being threatened with a weapon in his face, no reasonable person, no matter how brave, would feel free to ignore the officer's commands. It was the instant Real responded to Perry's threats by raising his hands that he was seized within the meaning of the Fourth Amendment.

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[4] https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf

B. Officer Perry used excessive force when he seized Real.

An officer violates the Fourth Amendment when he or she uses excessive force to seize someone. *Graham v. Connor*, 490 U.S. 386, 394 (1989). When determining whether an officer used excessive force, a court must look to the Fourth Amendment's reasonableness standard. *Id.* at 395. Though the right to seize "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it," *Lee v. Ferraro*, 284 F.3d 1188, 1197 (11th Cir. 2002) (quoting *Graham*, 490 U.S. at 396), the amount of force used by an officer in seizing a suspect must be reasonably proportionate to the need for that force. *Stephens v. DeGiovanni*, 852 F.3d 1298, 1324 (11th Cir. 2017). To determine whether the amount of force used by a police officer was proper, a court must consider all relevant circumstances and ask whether a reasonable officer would believe that the level of force used is necessary in the situation. *Kesinger ex rel. Estate of Kesinger v. Herrington*, 381 F.3d 1243, 1248 n.3 (11th Cir. 2004). Determining whether the force used is reasonable thus requires balancing the officer's need to use force against the severity of the intrusion on the individual's Fourth Amendment interest. *Graham*, 490 U.S. at 396.

1. There was no need for force in this case.

No factor justifying increased force was present here. When evaluating whether force was needed, courts examine several factors, including (1) the severity of the alleged crime, if any; (2) whether the individual posed an immediate threat to the safety of the officers or others; and (3) whether the individual actively resisted or tried to evade arrest by flight. *Graham*, 490 U.S. at 396.

The potential crime at issue is not severe. The severity of the crime weighs heavily in determining whether force was proportional or excessive, and, generally, more force is appropriate for more serious crimes, and less force is appropriate for less serious crimes. *Lee v. Ferraro*, 284 F.3d 1188, 1198 (11th Cir. 2002).

Here, the only offense that Real possibly could have been suspected of is trespass on a property other than a structure or conveyance. *See* Fla. Stat. Ann. § 810.09. In Florida, a person's mere presence on a property constitutes misdemeanor trespass only when notice "against entering or remaining is given, either by actual communication to the offender or by posting, fencing, or cultivation." *Id.* § 810.09(1)(a)1. If, however, notice is not given, the "offender" does not commit a trespass under the statute unless he "defies an order to leave" that is "personally communicated" to the "offender." *Id.* § 810.09(2)(b). Taking Real's complaint as true, as the district court was required to do at the motion-to-dismiss stage, Real was in the shelter's public parking lot. Drawing all reasonable inferences in Real's favor, as is also required at the pleadings stage, no posting or fencing informed Real that he was not permitted to be there. Further, Real was not prohibited from being there through any actual communication. Thus, Real did not commit any offense at all, because he left the property when Perry approached (and threatened) him and demanded that he leave.

But even assuming that Real had committed misdemeanor trespass, Perry's force was not justified. It is hard to imagine a less serious offense than a minor, outdoor trespass on public grounds, which is a nonviolent misdemeanor. *See Baysa v. Gualtieri*, No. 8:17-cv-00434-T-02SPF, 2018 WL 5279125, at *7 (M.D. Fla. Oct. 24, 2018), *aff'd in*

part, vacated in part on other grounds, 786 F. App'x 941 (11th Cir. 2019); *cf. Lee*, 284 F.3d at 1198.

Other factors that may justify police force did not present themselves here either. When there is no evidence that a citizen poses a threat to the safety of officers or others, and there is no evidence that the citizen attempted to resist or evade arrest, increased force is not justified. *Lee*, 284 F. 3d at 1198. Consistent with the nature of his (supposed) offense, Real did not pose an immediate threat to the safety of officers or others, nor did he attempt to resist or evade arrest. To the contrary, Real complied with Perry's orders throughout the encounter. He raised his hands to show that he was not dangerous and immediately left the scene when Officer Miller intervened and the gun was no longer in his face. For these reasons, at most only minimal force was justified here.

2. The intrusion on Real's Fourth Amendment interest was severe.

Taken together, Officer Perry's actions severely infringed on Real's Fourth Amendment interest in being free from government intrusion. Though an officer may carry out a seizure with minimal force, he "may not use force disproportionate to the amount required to secure a suspect," and, generally, greater force is not reasonable when the officer did not encounter "any danger or physical resistance that required him to escalate his use of force." *Scott v. City of Red Bay*, 686 F. App'x 631, 634 (11th Cir. 2017). Put another way, "gratuitous use of force when a criminal suspect is not resisting" constitutes excessive force. *Hadley v. Gutierrez*, 526 F.3d 1324, 1330 (11th Cir. 2008).

When Officer Perry approached Real's car, he was not responding to a threat of danger or physical resistance. Perry approached a sleeping man and awoke him with his flashlight. After he woke Real, Perry did not politely ask him to leave. Instead, he threatened his life and called him a racial slur that is tied to centuries of violence. Michele Goodwin, *Nigger and the Construction of Citizenship*, 76 Temp. L. Rev. 129, 193-94 (2003); Lanier F. Holt, *Dropping the 'N-Word': Examining How a Victim-Centered Approach Could Curtail the Use of America's Most Opprobrious Term*, 49 J. Black Stud. 411, 417 (2018) (explaining why "historically, the link between the use of the word and violent actions is inseparable"); Randall Kennedy, *Nigger* 5, 12, 33, 78-79 (2002). That slur, especially when used in conjunction with the threat to kill, illustrates that Officer Perry's actions were not a reasonable response to a threat, but rather, the gratuitous infliction of pain. *See Brown v. City of Hialeah*, 30 F.3d 1433, 1436 (11th Cir. 1994).

Perry's actions did not stop with a threat and a slur. Perry then brandished his weapon and pointed it just inches from Real's face. Under the Fourth Amendment, "point[ing] a gun at an unarmed civilian who objectively poses no threat to the officer or the public can certainly sustain a claim of excessive force." *Croom v. Balkwill*, 645 F.3d 1240, 1252 n.17 (11th Cir. 2011).[5] That is why this Court held that a reasonable jury

[5] The principle that "gun pointing when an individual presents no danger is unreasonable and violates the Fourth Amendment" has broad support in the circuits. *Baird v. Renbarger*, 576 F.3d 340, 345 (7th Cir. 2009); *see also Robinson v. Solano Cty.*, 278 F.3d 1007, 1014-15 (9th Cir. 2002) (en banc); *Holland v. Harrington*, 268 F.3d 1179, 1192-93 (10th Cir. 2001); *Jacobs v. City of Chicago*, 215 F.3d 758, 773-74 (7th Cir. 2000); *Petta v. Rivera*, 143 F.3d 895, 905 (5th Cir. 1998); *Baker v. Monroe Twp.*, 50 F.3d 1186, 1193-94 (3d Cir. 1995).

could find that officers used excessive force when they had their guns drawn and when plaintiffs had done nothing to threaten or argue with the officers. *Ortega v. Schramm*, 922 F.2d 684, 695-96 (11th Cir. 1991). And of particular relevance here, an officer violated the Fourth Amendment when he pointed a weapon at an unarmed, suspected misdemeanant who was outnumbered by armed officers and posed no threat to them. *Robinson v. Solano Cty.*, 278 F.3d 1007, 1014-15 (9th Cir. 2002) (en banc).

Here, Real posed no threat. Perry apparently knew that because he did not approach Real's vehicle with his weapon drawn. Instead, it was not until after he reached the car, counted to five, was just inches away from Real, and clearly able to see that Real was unthreatening, that he elected to brandish his gun and point it in Real's face. He did not do so in an attempt to alleviate danger—which is obvious given *when* he elected to brandish his gun—but rather, as a way to show that Perry was willing to make good on his threat to kill Real. Perry's conduct was so uncalled for that Perry's partner, Miller, neither drew his weapon in support of Perry nor stood by passively. Instead, he intervened to protect Real's life. Perry's decision to brandish his weapon was thus not a proportional response to danger, but a gratuitous attempt to inflict pain on Real.

The emotional pain Perry inflicted on Real was significant. The Fourth Amendment does not demand that a plaintiff suffer physical injury to state an excessive-force claim. *See, e.g.*, *Robinson*, 278 F.3d at 1014-15; *Baird v. Renbarger*, 576 F.3d 340, 345 (7th Cir. 2009). To do so would "be tantamount to a rule under which pointing a gun is always *per se* reasonable," no matter how minor the offense or how frightening the use of force. *Baird*, 576 F.3d at 346. Such a per se rule would be inconsistent with the Supreme Court's mandate that an excessive-force claim be examined in light of the totality of the

circumstances. *Graham*, 490 U.S. at 396. That is why the Fifth Circuit has held that "[a] police officer who terrorizes a civilian by brandishing a cocked gun in front of that civilian's face may not cause *physical* injury, but he has certainly laid the building blocks for a section 1983 claim against him." *Petta v. Rivera*, 143 F.3d 895, 905 (5th Cir. 1998) (citation omitted) (emphasis in original); *cf. Slicker v. Jackson*, 215 F.3d 1225, 1231 (11th Cir. 2000) (emotional damages are compensable under 42 U.S.C. § 1983); *see also Carey v. Piphus*, 435 U.S. 247, 264 (1978).

Here, Officer Perry terrorized Real. Perry approached Real when he suspected him of (at most) a wholly nonviolent misdemeanor. Though Real posed no danger and did not resist arrest, Perry shoved a gun in his face, called him a racial slur that is tied to centuries of violence, and threatened his life. That use of force caused Real to suffer emotional distress, humiliation, and "automatic defecation when approaching any police officer." App. 45. An officer may not flippantly invoke so much fear and terror. The Fourth Amendment demands more.

II. Officer Perry used excessive force against Real in violation of his Fourteenth Amendment right to due process.

The constitutional prohibition on police misconduct extends beyond specific conduct proscribed by the Fourth Amendment. *See Wilson v. Northcutt*, 987 F.2d 719, 722 (11th Cir. 1993). If this Court finds that Perry did not seize Real, Real has pleaded an excessive-force claim because the Fourteenth Amendment's substantive-due-process guarantee establishes a right to be free from excessive force during a non-seizure police encounter. *Id.* Therefore, the district court's reasoning that Real was not the victim of excessive force because he was not physically touched or arrested, App. 34; *see also* Order

Denying IFP, at 2 (Jan. 17, 2020), is, with all respect, beside the point. The heart of the substantive-due-process inquiry is whether the officer arbitrarily and unjustifiably infringed on an individual's constitutional rights, *see Carr v. Tatangelo*, 338 F.3d 1259, 1271 (11th Cir. 2003), *not* whether the officer "touched, arrested, or injured" the victim, App. 34.

This Court has long looked to the four factors set forth in *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), to determine whether a Section 1983 plaintiff has stated a Fourteenth Amendment excessive-force claim: (1) the need for force, (2) the relationship between the need for force and the amount of force used, (3) the extent of the plaintiff's injury, and (4) whether the force was applied in a good-faith effort to minimize a threat or, instead, employed maliciously and sadistically to cause harm. *Wilson*, 987 F.2d at 722; *see also Gilmere v. City of Atlanta*, 774 F.2d 1495, 1501 (11th Cir. 1985) (en banc) (citing cases). These factors are not an exhaustive list, but rather require a totality-of-the-circumstances assessment. *Cockrell v. Sparks*, 510 F.3d 1307, 1312 (11th Cir. 2007). Each factor favors reversal here.

A. Officer Perry had no need to use force against Real.

When a victim does not "exhibit any hostile action" and presents no physical threat to the police officer, the need to initiate force is minimal, and the first *Johnson* factor weighs in the victim's favor. *Popham v. City of Kennesaw*, 820 F.2d 1570, 1576-77 (11th Cir. 1987); *see also Gilmere*, 774 F.2d at 1501-02. When there is "little or no provocation," an officer's belief that he is in danger is objectively unreasonable, so there is no need for him to use force. *Compare Gilmere*, 774 F.2d at 1501-02 (no need for force when

victim did not resist officers), *with Carr v. Tatangelo*, 338 F.3d 1259, 1272 (11th Cir. 2003) (need for force when individuals threatened police officers with guns); *O'Neal v. DeKalb Cty.*, 850 F.2d 653, 656-57 (11th Cir. 1988) (need for force when individual threatened officers with a knife).

Perry had no need to use *any* force—let alone to threaten lethal force—because Real presented no physical threat to the officers. An officer could not reasonably believe that brandishing a firearm was necessary for his protection in this situation, because when Perry arrived on the scene, Real was asleep. When Real was awakened by Perry's flashlight shining into his car, Real did not brandish a weapon, did not physically or verbally threaten Perry (or any other officer), and did not try to escape. Quite the contrary: Real showed his empty hands to Perry in fear of being shot and possessed no weapons—visible to Perry or otherwise—in his car. App. 43. Real did not say anything to Perry and obeyed Perry's instructions to leave the parking lot. *Id.*

Additional circumstances eliminate the possibility that there was a need for force. As noted, Real had just woken up, making him even less dangerous to Perry or anyone else. *Cf. Gilmere*, 774 F.2d at 1502 (reasoning that a person's intoxication, indicating a diminished state of consciousness, and lack of a weapon rendered him nonthreatening to officers). Further, the incident happened in an outdoor parking lot, a location that posed no particular threat to Perry's safety. *See id.*

Nor could force have been justified by Real's alleged unauthorized presence in the parking lot. Even if Real had been committing a crime—which he was not, *see supra* 15—that would not have validated the use of force here. *See Fundiller v. City of Cooper City*, 777 F.2d 1436, 1441 (11th Cir. 1985). That Perry was responding to a call reporting

Real's presence in the parking lot did not create a need for force justifying brandishing a gun in Real's face and threatening his life. Under Florida law, unarmed trespass is a nonviolent misdemeanor. Fla. Stat. Ann. § 810.09; *see Baysa v. Gualtieri*, No. 8:17-cv-00434-T-02SPF, 2018 WL 5279125, at *7 (M.D. Fla. Oct. 24, 2018), *aff'd in part, vacated in part on other grounds*, 786 F. App'x 941 (11th Cir. 2019). Low-level property offenses, like trespass, are much less likely to endanger officers than are "violent crimes," so they do not necessarily create the need for force. *See Tennessee v. Garner*, 471 U.S. 1, 21-22 (1985) (contrasting property crimes with violent crimes in excessive-force context).

B. The amount of force Officer Perry used against Real was disproportionate to the need for force.

When a victim poses no threat to an officer, as here, an officer's use of *any* force is disproportionate, and this *Johnson* factor weighs in the victim's favor. *See H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1085-86 (11th Cir. 1986). In evaluating the relationship between the need for force and the amount of force used, this Court must weigh Perry's interest in "maintaining order" against the force used on the victim. *Bennett v. Parker*, 898 F.2d 1530, 1533 (11th Cir. 1990). Police conduct is disproportionate when an officer takes "an over-reactive … action for the situation relative to the response of the apprehended person." *Stephens v. DeGiovanni*, 852 F.3d 1298, 1317 (11th Cir. 2017).

Because there was no need for force, as established above (at 14-16), and the force Perry used against Real did not serve the interest of "maintaining order," *Bennett*, 898 F.2d at 1533, no amount of Perry's force was justified. Perry could have easily handled the situation without resorting to the use of force by simply asking Real to leave the parking lot because that would have served the interest in "maintaining order."

But instead of handling the situation calmly, Perry went to an extreme. Faced with an unthreatening man sleeping in his car, who then displayed his hands to show that he was unarmed, Perry responded with a potent combination: brandishing his gun in Real's face, calling him a racial slur, and threatening to kill him if he did not leave the parking lot in five seconds. The conduct here was overreactive relative to Real's response and thus disproportionate to the need for force.

C. Real sustained significant injuries as a result of Officer Perry's use of excessive force.

A victim's emotional injuries resulting from an officer's use of force can sustain an excessive-force claim under the Fourteenth Amendment. *Davis v. Locke*, 936 F.2d 1208, 1211, 1213 (11th Cir. 1991). The district court mistakenly held that Perry did not use excessive force against Real because he did not "injure[]" Real. App. 34. Respectfully, the Court's order denying Real *in forma pauperis* status made the same error. Order Denying IFP, at 2 (Jan. 17, 2020). Real suffered emotional anguish, humiliation, and, as if to underscore these harms, a physical injury as well: automatic defecation upon approaching any police officer. App. 45. These wrongs, including the emotional injuries, are compensable in a Section 1983 excessive-force case. *Slicker v. Jackson*, 215 F.3d 1225, 1231 (11th Cir. 2000); *see also Carey v. Piphus*, 435 U.S. 247, 264 (1978).

Pointing a gun at someone will, by its nature, cause fear of imminent bodily injury, *see Vanderhoef v. Dixon*, 938 F.3d 271, 281 (6th Cir. 2019), and can plague the victim with extended emotional distress after the incident, as shown by the automatic defecation alleged here. The "extent of injury" *Johnson* factor, therefore, weighs in Real's favor: not

only has he sustained severe emotional trauma, but his injuries are manifested physically and recur every time he sees a police officer. App. 45.

D. Officer Perry used force against Real maliciously and sadistically.

An officer tips the final *Johnson* factor in favor of the victim when he uses force "maliciously and sadistically for the very purpose of causing harm," rather than for the purpose of maintaining order. *Cockrell v. Sparks*, 510 F.3d 1307, 1311 (11th Cir. 2007) (quotation marks omitted) (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). The use of force is malicious and sadistic when the officer employs it with "little or no provocation" from the victim. *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1438, 1440 (11th Cir. 1985) (quoting *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1501 (11th Cir. 1985)).

Several elements of Perry's conduct indicate his malicious and sadistic intent to intimidate and harm Real, rather than to minimize a threat. Perry's words—"You have five seconds to leave or I am going to shoot you NIGGER"—are malicious for two reasons. First, verbal threats to harm a victim are evidence that the officer's conduct was malicious. *See Bozeman v. Orum*, 422 F.3d 1265, 1271-72 (11th Cir. 2005), *abrogated on other grounds by Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2019). Second, an officer's use of a racial slur, together with threats of physical harm, support a finding that his conduct was malicious and sadistic. *See Davis v. Locke*, 936 F.2d 1208, 1212-13 (11th Cir. 1991).

What's more, the particular racial slur that Perry used is "[f]ar more than a mere offensive utterance [because] the word 'nigger' is pure anathema to African-Americans." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001) (cleaned up). The word "ranks as perhaps the most offensive and racial slur in English," a "word expressive of

racial hatred and bigotry." *Merriam Webster's Collegiate Dictionary* 837 (11th ed. 2006); *see also Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013); *LaGrande v. DeCrescente Distrib. Co.*, 370 F. App'x 206, 210-11 (2d Cir. 2010); *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 356 (8th Cir. 1997); *Rodgers v. W.S. Life. Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993). The word's inseparable association with official misconduct against African-Americans gives "nigger" profound "wounding power." Michele Goodwin, *Nigger and the Construction of Citizenship*, 76 Temp. L. Rev. 129, 193-94 (2003). Today, when an African-American person is called a "nigger"—especially by an authority figure carrying a deadly weapon—it reinforces his "notions of inferiority," triggering memories of violence against Black people and causing intense psychological damage. *Id.* at 141. Perry's use of "nigger" to deride and insult Real, a Black man, thus bears on both the third and fourth *Johnson* factors: its "wounding power" reflects both the seriousness of Real's injuries and Perry's flagrant maliciousness.

Another way to put this is that Perry's "malicious and sadistic use of force" "shock[ed] the conscience" in violation of Real's Fourteenth Amendment right to due process. *Detris v. Coats*, 523 F. App'x 612, 616 (11th Cir. 2013). The Fourteenth Amendment protects against "egregious official conduct" that cannot be justified "by any government interest." *Wendell v. Hendry Cty. Sheriff's Office*, 329 F.3d 1300, 1305 (11th Cir. 2003). Perry's conduct was "egregious" and shocked the conscience because it combined a threat of deadly force, brandishing of a firearm, and an abhorrent racial slur in the absence of any threat from Real.

We know all of this because a reasonable officer's actions have told us so. Officer Adam Miller apparently found Perry's conduct so reprehensible (and dangerous) that

he intervened, placing himself between Perry's firearm and Real's body, underscoring in real-world terms the due-process violation here.

III. Officer Perry is not entitled to qualified immunity because no reasonable officer would believe that Perry's conduct was lawful.

Because Real has pleaded a violation of a clearly established right to be free from excessive force, Perry is not entitled to qualified immunity. An officer is not entitled to qualified immunity when (1) he has violated a civilian's constitutional right, and (2) the civilian's right not to be subjected to the unlawful conduct was clearly established. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (explaining that a court can address these two elements in either order). Because Real has already shown above a violation of his Fourth and Fourteenth Amendments rights, we demonstrate here that Perry's actions violated clearly established law.

For a right to be clearly established, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Because excessive force "is an area of the law in which the results depend very much on the facts of each case," *Kisela v. Hughes*, 138 S. Ct. 1148, 1152-53 (2018) (cleaned up), the point at which a right becomes "clearly established" occurs on a continuum, rather than upon completion of a legal checklist. An officer is not entitled to qualified immunity when general legal principles "squarely govern[]" the facts at issue and prohibit conduct similar enough to give "fair and clear warning to officers." *Id.* (cleaned up).

A. A right is clearly established when "every reasonable officer in [the defendant's] position would conclude the force was unlawful." *Priester v. City of Riviera Beach*, 208 F.3d

919, 926-27 (11th Cir. 2000) (citations omitted). In other words, an officer is not immune when his conduct stretches "so far beyond the hazy border between excessive and acceptable force that [the officer] had to know he was violating the Constitution even without case law on point." *Lee v. Ferraro*, 284 F.3d 1188, 1199 (11th Cir. 2002) (quoting *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997)). An officer's conduct constituting an "over-reactive, disproportionate action … is the sort of unconstitutional conduct that deprives an officer of qualified-immunity protection." *Stephens v. DeGiovanni*, 852 F.3d 1298, 1317 (11th Cir. 2017).

Here, every reasonable officer would conclude that what Perry did was unlawful, well "beyond the hazy border between excessive and acceptable force." *Lee*, 284 F.3d at 1199. It is outside the bounds of reason to suggest that it is appropriate to walk up to a citizen, call him a racial slur, shove a weapon in his face, and then threaten to shoot him when he has done nothing that poses a threat to anyone else. That is especially true here, where Real took active steps to show that he was not resisting. Every reasonable officer would recognize that Perry's actions were not a proportionate response to a threat, but rather, a gratuitous infliction of pain. In America, an officer cannot inflict pain solely for malicious reasons and without justification. As explained in Parts I and II above, the Constitution demands far more.

As indicated, excessive-force claims must be judged "from the perspective of a reasonable officer on the scene." *Post v. Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993) (quoting *Graham v. Connor*, 490 U.S. 386, 394 (1989)). Here, we need not speculate on the hypothetical "reasonable officer," because there was one present: Officer Adam Miller. When Perry brandished his firearm in Real's face and threatened to shoot, Miller

intervened by placing himself between Perry's firearm and Real. Miller's reaction demonstrates that "a reasonable officer" would find Perry's conduct objectively unlawful, because he physically intervened to stop Perry from shooting.

B. Moreover, there are materially similar cases predating the conduct here indicating that Perry's actions were unconstitutional. Material similarity between cases does not require factual duplication, and "officials can still be on notice that their conduct violates clearly established law even in novel factual circumstances." *Stephens v. DeGiovanni*, 852 F.3d 1298, 1316 (11th Cir. 2017) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). The focus is on whether the law gave the implicated official fair warning that his alleged treatment of the plaintiff was unconstitutional. *Id.* In determining whether a right is clearly established under this route, this Court must look to "decisions of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the relevant state," here, the Florida Supreme Court. *Corbitt v. Vickers*, 929 F.3d 1304, 1312 (11th Cir. 2019) (quoting *Griffin Indus. v. Irvin*, 496 F.3d 1189, 1199 & n.6 (11th Cir. 2007)).

This Court has a "body of cases" clearly establishing that "gratuitous use of force when a criminal suspect is not resisting arrest constitutes excessive force." *Sebastian v. Ortiz*, 918 F.3d 1301, 1308, 1311 (11th Cir. 2019) (quoting *Hadley v. Gutierrez*, 526 F.3d 1324, 1330 (11th Cir. 2008)).[6] Of particular relevance here, this Circuit has observed that "[a]n officer's decision to point a gun at an unarmed civilian who objectively poses

[6] *See also Stephens*, 852 F.3d at 1327-28; *Hadley*, 526 F.3d at 1330; *Lee*, 284 F.3d at 1200; *Smith*, 127 F.3d at 1419.

no threat to the officer or the public *can certainly sustain* a claim of excessive force." *Croom v. Balkwill*, 645 F.3d 1240, 1252 n.17 (11th Cir. 2011) (emphasis added).

Perry's pointing his firearm in Real's face and threatening to shoot him was "gratuitous" because, as shown above (at 13-15, 19-21), Real presented no threat to Perry or another person. Perry's misconduct was so disproportionate to the danger Real presented that Miller was forced to intervene. By so needlessly and maliciously pointing his weapon at Real, Officer Perry violated Real's clearly established right to be free from gratuitous force under the Fourth and Fourteenth Amendments.

C. Whether an officer is entitled to qualified immunity turns not only on the force he applies, but *when* he applies that force. *Merricks v. Adkisson*, 785 F.3d 553, 563 (11th Cir. 2015). Because officers are "often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving," *Graham*, 490 U.S. at 397, officers receive immunity when they make reasonable but mistaken judgments in fast-developing situations. *City and Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015). If, on the other hand, a person has "been fully secured, and any potential danger or risk of flight vitiated," qualified immunity will seldom be available. *Lee v. Ferraro*, 284 F.3d 1188, 1200 (11th Cir. 2002). That is why "[t]here is substantial case authority in the Supreme Court and this Circuit clearly establishing that harming a suspect after that suspect is compliant, cooperative, under control, or otherwise subdued is gratuitous and therefore, constitutionally excessive." *Merricks*, 785 F.3d at 563.

Far from presenting a "tense, uncertain, and rapidly developing situation," the circumstances here could not have been more controlled. Perry was not forced to make a split-second judgment. He instigated an encounter by approaching a man who was

asleep in his car and awoke him by shining a flashlight in his eyes. Perry then threatened to kill the man and waited until he showed his hands—unquestionably indicating submission—before pulling his weapon and placing it just inches away from Real's face. Far from a response to a "rapidly evolving" situation, *Graham*, 490 U.S. at 397, Perry's conduct was a gratuitous infliction of pain on a person who was "compliant, cooperative, and under control." *Merricks*, 785 F.3d at 563.

The denial of qualified immunity to an officer who inflicts pain on a compliant person is consistent with the doctrine's dual goals. "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan* 555 U.S. 223, 231 (2009). Here, Perry does not deserve protection from liability as an officer who performed his duties reasonably. Instead, he deserves to be held responsible for abusing his power by needlessly and willfully inflicting pain on a defenseless man.

CONCLUSION

The district court's judgment should be reversed and the case remanded for further proceedings on the merits.

Respectfully submitted,

/s/Brian Wolfman

Monica L. Coscia
Student Counsel
Jackson Teague
Student Counsel

Brian Wolfman
Bradley Girard
GEORGETOWN LAW APPELLATE
COURTS IMMERSION CLINIC
600 New Jersey Ave. NW, Suite 312
Washington, D.C. 20001
(202) 661-6582

Counsel for Plaintiff-Appellant Mamberto Real

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February 14, 2020

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I certify that, on February 14, 2020, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

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