Case No. 23-30879

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Wesley Pigott, on his own behalf and on behalf of his minor child K.P.; Mya Pigott,
Plaintiffs - Appellants
v.
Paul Gintz, Shield No. 91581,
Defendant - Appellee

On Appeal from the United States District Court
For the Western District of Louisiana,
USDC No. 1:21-cv-1015,
Hon. David C. Joseph, District Judge, and
Hon. Joseph H.L. Perez-Montes, Magistrate Judge, presiding

DEFENDANT - APPELLEE'S BRIEF
ON BEHALF OF
PAUL GINTZ, SHIELD NO. 91581,
Defendant - Appellee

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities pursuant to Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

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STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellee, PAUL GINTZ, respectfully suggests that the issues presented in this Appeal do not merit oral argument pursuant to Federal Rule of Appellate Procedure 34(a), and 5th Circuit Local Rule 34.2.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUES/ARTICLES/RULES/OTHER:

I. STATEMENT OF JURISDICTION

Jurisdiction over the claims made in the district court is found in 28 U.S.C. § 1331, 28 U.S.C. § 1343(a) and 28 U.S.C. § 1367(a). Further, the district court entered a Memorandum Ruling and a Judgment, which dismissed the federal claims with prejudice and the state law claims without prejudice [Doc. 62 and 63]. A timely Notice of Appeal was filed from the district court's Judgment under Fed. R. App. P. 4(a)(1)(A). [Doc. 65]. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUES

1. Was Defendant entitled to summary judgment where his actions did not violate the constitutional rights of Plaintiffs?

2. Was Defendant entitled to qualified immunity where he did not violate the constitutional rights of Plaintiffs?

3. Was Defendant entitled to qualified immunity where his alleged actions did not violate clearly established law?

4. Is the application of qualified immunity to civil rights cases settled law in the Fifth Circuit?

III. STATEMENT OF THE CASE

A. INTRODUCTION

On April 17, 2020, shortly before 9:00 p.m., a pickup truck with blacked out windows rolled through the parking lot of Rapides Parish Detention Center II (DC). Deputy Sanchez was outside the DC but inside the security fence making his rounds when he saw the truck and noticed that there was one person in the bed of the truck. Sanchez immediately radioed his observations to Deputy Gintz, who was the supervisor on the night shift.

After receiving the radioed report of a slow moving pickup truck with one person in the bed, Gintz spotted the truck with three people in the bed. Concerned that an escape was in progress, Gintz immediately radioed to his shift to lock down the prison and to perform a prisoner count in order to determine whether any inmates were missing.

As the truck drove away from the DC, Gintz decided that he would take his own truck and follow. Beyond escape, Gintz was concerned that the truck's occupants may have thrown contraband over the fence into the

secured area at the DC because of similar prior incidents. [1]

Gintz drove after the suspect truck and as he pulled out of the DC, he called Sgt. Cloud (patrol desk sergeant) on his cell phone and reported the events. Gintz told Sgt. Cloud that he was going to follow the truck and read off the license plate. Gintz also reported that he could not see who was in the truck because of the dark windows. After making several turns and merging onto MacArthur Drive in Alexandria, Gintz was close enough to see that the three people in the back of the truck were juveniles. Gintz continued to follow, saw Pigott drive the wrong way down a one-way street and then stop in a roadside parking lot. Gintz followed the truck, parked and got out of his truck. Gintz, in full uniform, gave several verbal commands to the driver of the truck (later identified to be Wesley Pigott). After giving several commands, Gintz drew his weapon and waited until the patrol deputy arrived on the scene in his marked patrol vehicle. [2]

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[1] Gintz knew that taking his personal vehicle violated policy but did so anyway because retrieving other keys would have taken too much time.

[2] The Plaintiffs testified that Gintz brandished his weapon in a threatening manner. For purposes of this appeal the descriptions of Gintz' actions between the time of the stop and the arrival of the patrol deputy are not disputed.

When Deputy Lacaze arrived on the scene the events were captured by his body worn camera (BWC). It is important to note that the BWC video does not show Gintz pointing his weapon at anyone nor does it show Plaintiffs were suffering from or that they reported any injury. Nor did they report that they had been threatened or that Gintz had pointed his weapon at the them.

B. PLEADINGS

On April 16, 2021, Wesley Pigott, his son K.P. Pigott and his daugther, Mya Pigott filed suit against Deputy Paul Gintz. [ROA 14]. The plaintiffs claim that on April 17, 2020, they were stopped/detained at gunpoint by Gintz. According to the Plaintiffs, the stop/detention was largely captured by a 9 minute and 26 second BWC video. However, during the course of the few minutes not shown on the video, the Plaintiffs claim that Gintz pointed his gun at all of them. [ROA 20-23].

The Pigotts sought relief pursuant to 42 U.S.C. § 1983 and § 1988, the Fourth and Fourteenth Amendments to the Constitution as well as the laws of Louisiana and made the following claims:

1) Count I - Excessive Force in Violation of the Fourth Amendment;

2) Count II - Unlawful Seizure in violation of the Fourth Amendment;

3) Count III - Intentional Infliction of Emotional Distress under Louisiana law;

4) Count IV - Negligent Infliction of Emotional Distress under Louisiana law;

5) Count V - Assault under Louisiana law; and

6) Count VI - Battery under Louisiana law.

ROA.24-30.

C. RULINGS BY DISTRICT COURT

The district court held that the stop of Wesley began when Gintz drew his weapon. The district court next noted that Gintz had the following information available to him at the time he drew his weapon:

1. During night time hours, an unidentified and unannounced truck drove slowly onto DC property, made a circle, and then drove slowly away, during a time period where several individuals had been arrested for throwing contraband over the prison fence;

2. One deputy reported seeing one person in the truck but Gintz saw three, leading to concerns that the truck was transporting an inmate or inmates away from the DC;

3. While following the Pigotts in his personal vehicle, Gintz was able to see into the bed of the truck at a red light and realized that the three people he had seen in the back of the truck were juveniles; and,

4. Gintz saw Wesley drive the wrong way down a one-way street, violating LSA-R.S. 32:78.

ROA.1327-1328.

Given the facts known to Gintz, the district court held that Gintz had identified specific and articulable facts that led him to believe that the Plaintiffs were involved in criminal activity at the time of the seizure. ROA.1329. Even though Gintz was subsequently able to see that the people in the bed of the truck were juveniles and therefore unlikely escapees, there was still reasonable suspicion that the people in the truck had thrown contraband over the facility fence. ROA.1329. Accordingly, the district court held that Gintz's seizure of the Plaintiffs was reasonable at its inception. ROA.1329. The district court also held that Gintz's use of his weapon was reasonable to protect his own safety, giving the appropriate deference to Plaintiffs' testimony. ROA.1330. In rejecting the Plaintiffs' excessive force claims, the district court further held:

> that it did not violate clearly established law for Deputy Gintz to use a moderate amount of non-deadly force (displaying his firearm) for the three -to- five minutes he waited, outnumbered, for backup to arrive, where no shots were fired and no one was arrested or physically touched. And while hindsight may show that there was no need to point a gun at Mr. Pigott, Deputy Gintz's brandishing his firearm falls squarely under a display of force for officer safety in the course of duty. Given these particularized facts - even assuming the

> Plaintiffs' version of events - Mr. Pigott has not shown that Deputy Gintz violated a clearly established right under the circumstances of this case.
> ROA.1342.

The district court went on to hold that even if Gintz was not entitled to qualified immunity the Plaintiffs produced no evidence supporting their claims of injury. ROA.1343.

D. FACTS

1. Deposition of Paul Gintz

At the time of the incident, Gintz had worked in corrections for the Rapides Parish Sheriff for approximately 13 years. ROA.517-518. Gintz is a sergeant, still in corrections, and is a shift supervisor over seven deputies. ROA.518. On the night of the incident Gintz was the supervisor over the night shift. ROA.537. [3] Gintz first learned of the Pigotts when two deputies radioed that they saw a truck pull into the DC parking lot, make a circle, driving real slow. ROA.537. The deputies reported seeing one person in the bed of the truck. ROA.537. After hearing the radioed report, Gintz walked out of the DC and saw the truck exiting the parking lot.

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[3] Gintz did not wear a BWC while on duty.

ROA.537. At that time, Gintz saw three people in the bed of the truck but could not see how old or young they were. ROA.537.

After seeing the truck and the three people in its bed, Gintz radioed to the shift to lock down the DC and to do an immediate count of the inmates. ROA.537. By then Gintz had made it to the parking lot and his truck. While he was pulling out of the parking lot in his own truck he called the main office and talked to the desk sergeant, Sgt. Cloud. ROA.538. He also reported to Cloud that people had driven through the parking lot and thrown contraband over the fence in the past. After Gintz reported what he had seen he told Cloud that he was going to follow the truck and read out the license plate, once he got close. ROA.538.

Gintz found it suspicious for a truck to pull through the DC parking lot at night as other people had thrown contraband over the fence before. ROA.538. Gintz also told Cloud that some deputies had seen one person in the bed of the truck but that Gintz had seen three. He further reported he could not see inside the truck because it had dark windows. ROA.540. As he was following the truck, Gintz could not see anything other than the three people in the bed. He could not tell if the people were male or female. ROA.538.

Once the truck pulled up to a red traffic light, he was close enough to see three male juveniles in the bed but he still could not see into the cab of the truck. ROA.538. While Gintz followed Wesley's truck down MacArthur Drive and then onto the service road (in front of Popeyes) he reported the movements to Cloud. ROA.540. [4]

Once Wesley parked his truck he got out but leaned back into it. In response, Gintz gave verbal commands for Wesley to show his hands because Gintz could not see them. Not long after Gintz stopped, a marked patrol vehicle driven by Lacaze pulled up, while Gintz still had his pistol drawn. ROA.526-27.

2. Deposition of Wesley Pigott

While driving on Highway 28 in Alexandria, Mya told Wesley that she wanted to see the DC, so Wesley turned off of Highway 28 and drove to it. Once there, he turned around in the parking lot and drove out. ROA.613. After turning onto Highway 28, Mya told Wesley that she had noticed a truck following them. ROA.614. Wesley continued on Highway 28, merged onto MacArthur Drive and drove to the red light near Popeyes.

[4] Gintz saw Wesley drive the wrong way on a one-way road, committing a traffic offense. ROA.544.

ROA.613. Because Popeyes drive-thru was busy he decided to "... pull over and see what this guy wants." ROA.613.

After Wesley drove by Popeyes he continued on the one-way road to see if the truck would follow him. ROA.615. Next, Wesley pulled into a parking lot and as soon as he got out of the truck he looked back and saw a pistol pointed at him. ROA.615. According to Wesley, Gintz said "get the fuck out of the truck", so he did. He also put his hands up because Gintz told him to.

According to Wesley he kept turning around to face Gintz who said "if you turn around again, I'm going to blow your fucking head off". ROA.616. Gintz asked Wesley why he was at the DC and what he was doing. ROA.616. Wesley testified that he felt the barrel of the gun on the back of his head. ROA.617.

When the second deputy drove up everyone had their hands up, Gintz still had his weapon out, but holstered it after the second deputy arrived. After Gintz and the second deputy spoke the second deputy came over to Wesley, frisked him and told him about the problem with drugs at the DC. Wesley then volunteered that they could search his truck. After a cursory search of the truck the second deputy spoke with Gintz, walked

over and told Wesley they could leave. ROA.617. While Wesley was talking to the second deputy, he admitted his actions at the DC were suspicious. ROA.615.

No one in his family saw any kind of counselor because of what happened. ROA.617. Wesley never missed any work because of any issues due to the stop and he never took medical leave after the incident. ROA.619. Wesley did not go to see a doctor or health care provider after the incident for any purpose. ROA.619.

3. Deposition of Mya Pigott

While driving on Highway 28, Mya asked her father if she could see where inmates were housed. Her father drove to the DC, turned around and drove back towards Highway 28. ROA.648. When they turned around in the DC parking lot, Mya was in the guest passenger seat with her tinted window rolled up. ROA.648.

While passing through the parking lot Mya saw a man she later learned was Gintz sitting outside in a chair. ROA.648. After she saw Gintz, her father turned around and drove back to Highway 28. Once on the highway, Mya noticed a truck following them but was unable to see into it. ROA.649. While looking backwards she saw that her brother and

his two friends were sitting down in the truck's bed, and that no parts of their bodies were higher than the tailgate or the side rails of the truck. ROA.650.

They had planned to stop at Popeyes but did not because the line was too long. So, they continued driving down the frontage road until her father pulled into a parking lot. ROA.650. Once they reached the parking lot, her father parked the truck, as the other truck parked behind them. After her father opened his door she heard someone say "put your hands in the air". She turned, saw Gintz with a gun in his hand but did not see that he was wearing a uniform. ROA.651. Mya watched as Gintz approached her father with his gun still pointing at the back of his head. ROA.651. Mya saw Gintz's gun touch the back of her father's head. ROA.652.

Gintz also pointed his gun at her, K.P. and his two friends and told them to put their hands up. Gintz then pointed the gun back at her dad and told him to turn around. ROA.653. Mya heard him question her father as to why were they at theDC. ROA.653. The man also said, "I will blow your head off." ROA.653.

Mya never sought medical care or treatment because of the incident. She explained that she did not seek medical care because she was joining the Air Force. She claimed that she did not say anything about her issues from the incident during her intake process because she believed she would not have gotten into the Air Force. ROA.656. She claims that she suffered nightmares, sleeplessness, and fear of the police. ROA.656.

4. Deposition of Khalee Pigott ("K.P.")

Wesley picked K.P. and two of his friends up from fishing. When Wesley pulled up, K.P. and his friends hopped into the bed and they headed home. ROA.680. Once they got onto the highway Wesley opened the back window of the pickup and asked if they wanted to eat and K.P. suggested Popeyes. ROA.680.

Unexpectedly, they turned off the highway headed to the DC. ROA.680. When they reached the DC they kind of stopped at the front entrance, made a u-turn and then drove out of the parking lot. At this time, K.P.'s back was against the cab with his youngest friend sitting next to him. His other friend was sitting on the bed with his back against the tailgate. ROA.681. At the time Wesley parked, K.P. and his younger friends were still in the same spots in the bed. ROA.683.

Once both trucks were stopped Gintz stepped out of his truck. ROA.683. Gintz then walked to Wesley's window and told him to get out, while holding the gun about two inches from Wesley's head. He heard Gintz tell Wesley to get the "fuck out of the truck". ROA.684. While Gintz was asking questions about why they were at the DC, Wesley kept turning his head. Gintz got fed up and said "if you move one more time, I'm gonna blow your fucking head off". ROA.684.

Next, a second deputy pulled up in a marked Explorer. That deputy assessed Wesley, pulled Gintz aside and both walked to the second deputy's truck and talked. After the talk, the second deputy walked back to Wesley and asked if there were any drugs or weapons and Wesley said no. ROA.684. The second deputy also told Wesley that they had been having incidents at the DC where people would come and throw drugs over the walls. Wesley opened the back door of his truck so the second deputy could see inside it. ROA.685.

When the second deputy got out of his marked truck, Gintz's pistol was still at Wesley's head. ROA.685. As the second deputy approached Gintz and Wesley, Gintz was still holding the weapon to his Wesley's head. ROA.685. While Gintz had the gun to Wesley's head K.P. called out,

repeatedly "Please don't shoot my dad".[5] ROA.686.

5. Deposition of Matt Cloud

On April 17, 2020, Cloud was working as the night shift desk sergeant in the patrol division. ROA.707. While on duty he received a cell phone call from Gintz and was told that a truck had just made a circle through the parking lot at the DC and that contraband had possibly been transferred to that facility. ROA.707. Gintz told Cloud that he was driving his own truck and was following the suspicious truck. Cloud told Gintz that he would dispatch a patrol deputy to Gintz's location. The patrol deputy assigned to Gintz's call was Lacaze. ROA.707. Cloud told Gintz to keep a visual on the truck that he was following until the patrol unit could intercept and make a traffic stop. ROA.707.

6. Deposition of Clayton Lacaze

On April 17, 2020, Lacaze was a patrol deputy on the night shift in a marked vehicle and was wearing a BWC. ROA.716, 719. The dispatcher radioed to Lacaze that Gintz was in his own truck and was following a truck that had been on the property of the DC. ROA.719. Lacaze was told

[5] None of these "facts" are shown by Lacaze's BWC video.

by the dispatcher where Gintz and the other truck could be found. ROA.720. When Lacaze saw Gintz and Wesley in the parking lot, he pulled in and turned on his emergency lights, which activated his BWC. ROA.720.

When Lacaze arrived he saw Gintz three or four feet behind Wesley with his weapon at a low ready position. ROA.720. A low ready position is where the weapon is drawn but is pointed at the ground. ROA.720. Upon his arrival, he saw what looked to be three juveniles in the bed of the pickup. ROA.720. When Lacaze arrived the people in the back of the truck had their hands up and Wesley's hands were on his head. ROA.720. After Lacaze arrived on the scene no one was doing anything threatening and there was not a lot of fear or panic. ROA.722. When Lacaze arrived, Gintz appeared to be calm and handling the situation properly. ROA.722. Wesley willingly allowed his truck to be searched. ROA.723.

7. Deposition of Jessie Sanchez

Deputy Sanchez was on duty at the DC when he saw a large, dark four-dour pick-up truck pull into the parking lot. Sanchez then radioed Gintz and told him that a truck had pulled into the parking lot, that there was a person in the bed of the truck but that he could not see into the cab.

ROA.733, 735-36. At the time he saw the truck he was walking outside the DC buildings but inside the fence. ROA.736. The truck in the parking lot at the DC was suspicious because of the time of night. ROA.736.

After Sanchez made his report, Gintz instructed him to do a head count of the inmates, to lock down the DC and to rack all the inmates. When the DC is in lock down every inmate must go to their assigned bed and each inmate is identified to make sure the right inmate is in the right place. ROA.737. The count was done to make sure that none of the inmates were in the truck that left the parking lot. ROA.737.

8. Affidavit of Matt Cloud

On April 17, 2020, Cloud was a sergeant and supervisor of the patrol deputies on duty at 8:51:48 p.m. ROA.742. On the day of the incident, Cloud listened to the radio traffic between the dispatcher and deputies on patrol beginning at 8:51:48 p.m. through 9:03:43 p.m. ROA.742. Based on that recording and Cloud's recollection: Gintz called at 8:51:48 p.m. ROA.743. Unit 115 [Lacaze] was dispatched at 8:54:45 p.m. ROA.743. [Lacaze] arrived at the scene at MacArthur Drive/MacArthur Drive entrance, Jackson Street, Alexandria at 8:54:52 p.m. ROA.743. [Lacaze] reported he was available for service at 9:03:43 p.m. meaning that the call

involving Gintz was over. ROA.743.[6]

9. Deputy Lacaze's Body Worn Camera Footage

During the course of the events of April 17, 2020, BWC video was taken by Lacaze. ROA.512. The full video is approximately 9 minutes and 23 seconds long and begins with Lacaze driving to the scene. Shortly after the audio portion begins, at approximately 1:09 of the video, Lacaze arrived at the scene of the incident. As Lacaze exited his vehicle and approached Wesley's parked truck, Gintz was standing a few feet behind Wesley with his firearm drawn in his right hand and held at a downward angle. As Lacaze approached the scene, he asked Wesley whether he had anything on him and where he is coming from, as he conducted a pat down search. (Approximately 1:35). Gintz holstered his firearm (approximately 1:45) as Wesley explained why he drove by the DC. Lacaze explained the DC's recent issues with contraband and Wesley provided his drivers license. (Approximately 2:20). While Lacaze was discussing Wesley driving through the DC's parking lot, Wesley acknowledged that it looked

[6] The call lasted approximately twelve (12) minutes and roughly eight (8) minutes passed after Lacaze arrived on the scene. Gintz observed Lacaze wearing a BWC when Lacaze stepped out of his vehicle. ROA.747. Gintz has reviewed that video and knows that it accurately showed the events that occurred after Lacaze arrived. ROA.512.

suspicious. (Approximately 3:30). Wesley offered to let the deputies search his truck, and then opened the back door to allow Lacaze to visually check it.(Approximately 4:00). After roughly five minutes of interaction with Wesley, Lacaze and Gintz moved back towards their vehicles. (Approximately 5:55). After the deputies discussed the facts, they decided that Wesley would not be charged with anything and Lacaze told Wesley that he was free to go. (Approximately 9:00).

IV. SUMMARY OF THE ARGUMENT

On April 16, 2021, Pigott drove through the parking lot of the DC in his pickup truck at night. Mya and Kaley Pigott were passengers. The truck was seen by Gintz. Gintz knew of recent issues with drugs being introduced into the facility and being suspicious of same from the truck, got into his personal vehicle and followed. Gintz followed Wesley until he went the wrong way down a one-way street and parked his truck. Gintz also parked and exited his vehicle to speak to Wesley. Shortly after exiting his vehicle, Gintz drew his firearm and questioned Wesley about the drive through the DC parking lot until LaCaze arrived scant minutes later. LaCaze's body camera footage shows that after minimal additional questioning, Wesley was allowed to leave without citation.

Wesley and his children filed the instant lawsuit, claiming that the short encounter with Gintz violated their constitutional rights and caused injury. Gintz filed a Motion for Summary Judgment, arguing that the Pigotts' rights be free from unlawful search and seizure and excessive force were not violated, and that he was entitled to qualified immunity. The district court granted summary judgment in favor of Gintz and the Pigotts appealed.

Gintz avers that the district court properly granted his summary judgment motion. He argues herein, as he did below, that Wesley committed a criminal offense in front of Gintz, that no unlawful search and seizure occurred as he could have conducted a lawful Terry stop, that no excessive force was used as the injuries complained of are *de minimis*, and that he is entitled to qualified immunity. He further responds to Plaintiffs' arguments against the validity of qualified immunity.

V. LAW AND ARGUMENT

A. STANDARD OF REVIEW

The district court's grant of summary judgment is reviewed *de novo*, Darden v. City of Fort Worth, Texas, 880 F.3d 722,727 (5th Cir. 2018),

Aguirre v. City of San Antonio, 995 F.3d 395 (5th Cir. 2021), and Cope v. Cogdill, 3 F.4th 198 (5th Cir. 2021). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact." Meaning "the movant is entitled to judgment as a matter of law." Darden, 880 F.3d at 727, Aguirre, 995 F.3d at 407. "A fact is 'material' if it 'might affect the outcome of the suit under the governing law.'" Bazan ex rel. Bazan v. Hidalgo Cnty. 246 F.3d 481, 489 (5th Cir. 2001).

This Court has construed the Supreme Court's instructions, found in Scott v. Harris, 550 U.S. 372, 381, 127 S. Ct. 1769, 167 L.Ed. 2d 686 (2007), to require a court to reject a party's description of the facts where the record discredits that description and instead to consider the facts in the light depicted by the video tape. Scott, 550 U.S. at 381,127 S. Ct. 1769, Carnaby v. City of Houston, 636 F.3d 183, 187 (5th Cir. 2011) and Poole v. City of Shreveport, 691 F.3d 624, 632 (5th Cir. 2012).

Despite the normal summary judgment standard, a defendant's "good-faith assertion of qualified immunity alters the usual summary judgment burden of proof, shifting it to the plaintiff to show that the defense is not available." Orr v. Copeland, 844 F.3d 484, 490 (5th Cir. 2016) (quoting Cass v. City of Abilene, 814 F.3d 721, 728 (5th Cir. 2016)).

To meet this burden, a plaintiff must establish a genuine dispute "as to whether the official's allegedly wrongful conduct violated clearly established law." Brown v. Callahan, 623 F.3d 249, 253 (5th Cir. 2010); see also Rich v. Palko, 920 F.3d 288, 294 (5th Cir. 2019) (quotation marks omitted), *cert. denied*, — U.S. —, 140 S. Ct. 388 (2019). "The plaintiff's burden is a formidable one." Roy v. City of Monroe, 950 F.3d 245 (5th Cir. 2020). A plaintiff bringing a constitutional violation claim has the ultimate burden to show that a defendant violated a constitutional right -- that is, the plaintiff must make this showing whether or not qualified immunity is involved. Joseph on behalf of Est.of Joseph v. Bartlett, 981F.3d 319,330 (5th Cir. 2020) and Morgan v. Swanson, 659 F.3d 359,371 (5th Cir. 2011).

If the Pigotts establish a violation of a right, they must still show that Gintz's actions were objectively unreasonable in light of clearly established constitutional law. "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he [or she] is doing violates that right.' 'We do not require a case directly on point, but existing precedent must have placed the

statutory or constitutional question beyond debate.'" Mullenix v. Luna, 577 U.S. 7, 11, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015)(per curiam) (quoting Reichle v. Howards, 566 U.S. 658, 664, 132 S. Ct. 2088, 2093, 182 L. Ed. 2d 985 (2012); Ashcroft v. al-Kidd, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)) (internal citations omitted). This is because qualified immunity is intended to give "governmental officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." Messerschmidt v. Millender, 565 U.S. 535, 546, 132 S. Ct. 1235, 1244, 182 L. Ed. 2d 47 (2012) quoting Ashcroft v. al-Kidd, 563 U.S. 731,741 131 S.Ct. 2074, L.Ed 2d 1149 (2011) (internal quotation marks omitted).

In Rivas-Billegas v. Cortesluna,595 U.S. 1, 142 S. Ct . 4, 211 L.Ed. (2021) and City of Tahlequah, Oklahoma v. Bond, 595 U.S. 9, 142 S. Ct. 9, 211 L. Ed. 170 (2021), the Supreme Court revisited qualified immunity and reversed the Ninth and Tenth Circuits, after each circuit had failed to grant qualified immunity to law enforcement officials. In City of Tahlequah, the Tenth Circuit reversed the grant of qualified immunity by the district court and held that the officers' actions recklessly created the situation that led to a fatal shooting. The Tenth Circuit, citing other Tenth

Circuit cases, held that the officers' conduct was unlawful and was clearly established at the time they acted. In reinstating the grant of qualified immunity, the Supreme Court observed:

> We need not, and do not, decide whether the officers violated the Fourth Amendment in the first place, or whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment. On this record, the officers plainly did not violate any clearly established law.
> Id. at 12.

After reviewing the principles of qualified immunity found in multiple Supreme Court cases, the Supreme Court held:

> Neither the [Tenth Circuit] panel majority nor the respondent have identified a single precedent finding a Fourth Amendment violation under similar circumstances. The officers were thus entitled to qualified immunity.
> Id. at 14.

Similarly, in Rivas-Billegas, the Supreme Court reversed the Ninth Circuit and held:

> Precedent involving similar facts can help move a case beyond the otherwise hazy borders between excessive and acceptable force and thereby provides an officer notice that a specific use of force is unlawful. (citations omitted).

> On the facts of this case, neither LaLonde nor any decision of this Court is sufficiently similar. For that reason, we grant Rivas-Billegas' Petition for Certiorari and reverse the Ninth Circuit's determination that Rivas-Billegas is not entitled to qualified immunity.
> Rivas-Billegas, 595 U.S. at 7-8.

B. FOURTH AMENDMENT CLAIM

1. Criminal Offense

In Plaintiffs' Preliminary Statement found in the Memorandum in Opposition to Defendant's Motion for Summary Judgment, it is confessed that Wesley:

> [D]rove the wrong way down a frontage road to see if the person following him would follow him that way. [ROA 1005].

Accordingly, Plaintiffs admit that Wesley had committed an offense. (LSA. R.S. 32:78).

2. Unlawful Seizure

The Plaintiffs repeatedly and erroneously argue that the detention was based upon an unreasonable belief that they had committed an offense at the DC. Again, the entirety of this argument fails to recognize the effect of the traffic offense that was committed by Wesley and that Wesley voluntarily stopped his truck in order to speak with Gintz. Since Wesley had, admittedly, committed an offense it was not a violation of any

right for Wesley to be questioned concerning the offense, his name, or that he could be asked to produce his drivers license. The argument also ignored the fact that Wesley volunteered to have his truck searched, which also served to lengthen his time with the deputies. These facts, together with all of the other factual findings of the district court, show that there was no Fourth Amendment violation for the detention.

The district court also correctly concluded that the brief detention was proper under Terry v. Ohio, 392 U.S. 1, 16, 88 S. Ct. 1868, 20 L. Ed. 2d 899 (1968), as follows:

> Here, the record shows that Mr. Pigott stopped his truck voluntarily, therefore Deputy Gintz did not conduct a traffic "stop" of the Plaintiffs' vehicle. At that time, Deputy Gintz was in his personal vehicle and the Plaintiffs had no reason to believe they were being pulled over. Rather, Plaintiffs argue – and the Court agrees – that the seizure of the Plaintiffs began when Deputy Gintz drew his weapon and commanded Mr. Pigott to get out of his truck, because at that point, Mr. Pigott and his children were not free to leave. See, e.g. Carroll v. Ellington, 800 F.3d 154, 170 (5th Cir. 2015), citing United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)(a "person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave").
> ROA.1327.

While the district court reached its holdings utilizing a Terry stop analysis, this analysis is not the only lawful basis for Wesley's detention. Instead, the admitted traffic offense gave Gintz the lawful authority to detain Wesley and to effect a full, custodial, arrest. During the lawful detention of Wesley, Gintz and Lacaze spoke with Wesley, conducted a consensual visual search of the truck at the urging of Wesley and then decided to release Wesley. Under either basis, the detention, search, investigation and then release did not violate the Fourth Amendment.

United States v. Pack, 612 F.3d 341 (5th Cir.), opinion modified on denial of reh'g, 622 F.3d 383 (5th Cir. 2010)), with a traffic stop of 35 plus minutes, shows that the duration of the detention here was not unreasonable.. The initial stop was for speeding: 78 mph in a 70 mph zone. After the initial stop at 8:45 a.m., the driver and the guest passenger were interviewed by the trooper. The trooper saw that the guest passenger was breathing heavily, his hands were shaking and his carotid artery was visibly pulsing. After moving the driver to his patrol car, the trooper informed her that she had been speeding and that he planned to issue her a warning. The trooper then asked her about her travel history.

At 8:48 a.m. the trooper radioed dispatch and requested check on

their licenses and criminal history. One minute later the dispatcher informed the trooper that the driver had a valid license but the guest passenger's license was suspended. The trooper returned and questioned the passenger who gave a conflicting story about their destination. Because of the conflicting stories, the highway's reputation as a drug trafficking corridor, and the guest passenger's nervousness the trooper believed that they were involved in criminal drug activity.

At 8:51 a.m. the trooper asked for permission to search the vehicle, which was denied. He then called for a K-9. During the course of conversation with the driver her story kept changing. At 8:57 a.m. the guest passenger joined the driver in the back of the patrol car. While the two were in the back of the patrol car the trooper continued to question them, and the guest passenger admitting to a criminal history. At 9:05 a.m. the dispatcher reported that the guest passenger had 4 prior arrests for theft. At 9:18 a.m. the K-9 arrived and alerted on the car's trunk, which was searched and found to hold 17.91 lbs. of marijuana and a pistol. The trial court denied a motion to suppress that evidence based upon the argument that the traffic stop was illegal and that the length of the detention was unreasonable. After reviewing the time line, this Court held

that the 35 minute stop was reasonable under the circumstances. Though the facts presented to the trooper in Pack are different than those herein, the case illustrates that a Terry stop for speeding 8 miles per hour over the limit, coupled with facts developed during the course of the stop, justified a 35 minute detention. Similarly, Gintz had reason to believe that an escape may have occurred and that contraband may have been introduced. Thus, the 10-12 minute detention did not violate the Fourth Amendment.

3. Excessive Force

The Plaintiffs also bring claims under the Fourth Amendment alleging that Gintz used excessive force. This claim was properly dismissed because the Plaintiffs were unable to show that Gintz's conduct violated their constitutional rights. Though much of Plaintiffs' testimony concerns events alleged to have occurred before Lacaze had begun recording the incident with his BWC, the video, which is clear and unambiguous, shows that a portion of the events described by K.P. did not occur. For example, the video clearly shows that Gintz's gun was pointed at the ground and not at the back of Wesley's head as K.P. testified. The video also shows the demeanor, emotional level, and voices of the

Plaintiffs and no one was distressed or upset. Even though Plaintiffs' testimony must be accepted as true, it was still proper for the district court to have dismissed all claims for injury because their comments, demeanor and emotional state seen in the BWC video, proves that whatever may have occurred before Lacaze arrived did not cause Wesley, K.P. and Mya any injury.

Similar facts and rulings are found in Martin v. City of Alexandria Municipality Police Dep't, No. CIV A 03-1282, 2005 WL 4909292, (W.D. La. Sept. 16, 2005), aff'd sub nom. Martin v. City of Alexandria, 191 F. App'x 272 (5th Cir. 2006), where the district court found that the plaintiffs, including two juveniles, could not prove any injury. Under previous jurisprudence a physical injury was required to prove excessive force but this is no longer the case as, "the Fifth Circuit has held that physical injuries are not required because purely psychological injuries may sustain a Fourth Amendment claim." Id. at *11. However, "[a]lthough a 'significant injury' is no longer required. . . the injury must be more than *de minimis*, evaluated in the context in which the force was deployed." Id. The district court held in Martin that the plaintiffs did not provide

competent evidence to show that they suffered the psychological injury necessary to prevail on their excessive force claims and as a result those claims were dismissed. Id. at *12.

In Strickland v. City of Crenshaw, Miss., 114 F. Supp. 3d 400 (N.D. Miss. 2016), the district court held that the alleged psychological injury caused by the plaintiffs having a gun pointed at them was insufficient to prove excessive force when the plaintiffs could not substantiate their claims with medical testimony. Similar to the plaintiffs in Martin and Strickland, the Plaintiffs have no medical evidence that they sustained any injury from the incident. Wesley testified that no one in his family saw any counselor because of what happened. ROA.617. He never missed work, took medical leave, or saw any healthcare provider due to what happened. ROA.619. Mya also never sought medical treatment because of the incident, nor did she disclose any psychological injury during psychological checks and/or evaluations when joining the Air Force. ROA.645. See Strickland, 114 F. Supp. 3d at 416 (finding that a plaintiff's mother was "not an objective observer regarding the issue" of psychological injury). Similarly, K.P. never sought healthcare because of the event. ROA.687. The district court also noted that other indicia of

psychological injury, including letters from teachers or report cards documenting K.P.'s claimed decline in academic performance could have been provided in corroboration but were not.

None of the Plaintiffs have any evidence to support the degree of injury necessary to show that their constitutional rights were violated by allegedly excessive force. Because they are unable to show a constitutional violation, Gintz is again entitled to summary judgment on the merits.

Assuming that the Plaintiffs meet the first prong of the qualified immunity defense, Gintz would still be entitled to qualified immunity because his use of force was not clearly excessive to the need of the situation and was not objectively unreasonable. The Plaintiffs seek to convince this Court that the brandishing of a gun for approximately 3-4 minutes is inappropriate during a stop for nothing more than a minor traffic offense. The following, undisputed facts show that the district court was correct in evaluating all of the facts and circumstances present at the time of Gintz's actions:

1) Prior to April 17, 2020, arrests had been made of people who threw contraband over the DC fence;

2) On April 17, 2020, at 9:00 p.m. a 4-door pickup truck, with blacked out windows, drove slowly through the parking lot of the DC;

3) There was no reason for the pickup to drive through the parking lot;

4) Two deputes saw one person in the bed of the pickup truck and reported this to Gintz;

5) Moments later, Gintz saw three people in the bed of the pickup truck;

6) The pickup truck's windows were blacked out so that no one could see into the cab of the pickup truck until the doors were open;

7) Gintz ordered the DC staff to conduct an immediate head count to determine whether an escape had occurred;

8) Gintz reported everything he knew to a desk sergeant who decided to dispatch a marked patrol unit to effect a traffic stop;

9) Gintz followed the suspicious truck and reported its travel path and position so the patrol deputy could respond;

10) The driver of the suspicious truck violated the law when he drove the wrong way down a one-way lane;

11) The driver of the suspicious truck stopped in a parked lot next to the road;

12) Gintz followed the suspicious truck, parked his truck, stepped out of his truck and immediately began giving verbal commands to the driver and the occupants;

13) Initially, Gintz saw the driver and the three juveniles in the bed of the pickup truck but could not see into the cab of the truck;

14) Gintz did not know how many occupants were in cab of the truck;

15) Gintz drew his gun after he saw the driver and the three juveniles in the bed of the truck;

16) The driver and the three juveniles complied with Gintz's verbal instructions to put their hands up and/or put their hands on their head; and,

17) Approximately 3-4 minutes from the beginning of the interaction between Gintz and Wesley, the patrol deputy arrived on the scene.

The Plaintiffs contrast the actions of Gintz to those of Lacaze, arguing that Gintz's actions were unreasonable. However, Lacaze was not confronted with the same circumstances that Gintz had been. For example, the four visible occupants of the truck had complied with Gintz's verbal instructions because Lacaze could see that all of their hands were empty and above their heads. Accordingly, the threat presented by the people in the truck was much lower when Lacaze arrived. Lacaze's presence, in uniform and armed, also served to lower any threat or risk. Based upon the circumstances present, it was certainly reasonable for Lacaze to only use verbal commands because Gintz had already gained

compliance and had reduced the threat. Looking to the totality of the facts and circumstances known and confronted by Gintz, it was imminently reasonable for him to use a moderate amount of force (displaying his gun) for the three-four minutes he waited, outnumbered, for backup to arrive. See Campbell v. Sturdivant, No. 3:20-CV-00068, 2020 WL 7329234, at *1 (W.D. La. Nov. 25, 2020), report and recommendation adopted, No. 3:20-CV-00068, 2020 WL 7323904 (W.D. La. Dec. 11, 2020)(brandishing firearm not excessive force on motion to dismiss).

Plaintiffs further argue that it was unreasonable to use the gun because Wesley was not actually guilty of attempting to introduce contraband into the DC, but such an argument should not be considered as it impermissibly relies on 20/20 hindsight. Instead, judging the facts and circumstances from the perspective of a reasonable officer, Gintz's force was not excessive to the needs of the situation and not objectively unreasonable. Plaintiffs also repeatedly argue that the "children" presented no risk to Gintz and should never have had a gun pointed at them. In evaluating this argument it is acknowledged that Mya (17 yrs old) and K.P. (15 yrs old) were Wesley's "children" but to call them "children" and then argue that they were no threat misses the mark. As

this Court is aware teenagers between the ages of 15 and 17 can be dangerous and were a potential risk of harm to Gintz. In the few minutes before the patrol deputy arrived, Gintz gained compliance from the known occupants of the truck but still could not see into the back seat of the truck, due to the blacked out windows. Certainly, the teenagers' threat level had been assessed by Gintz but the potential threat(s) from within the truck were still unknown.

Finally, to the extent that Wesley's claim for excessive force alleges that Gintz touched the back of his head with the firearm, such an action does not constitute excessive force either. This is seen in Elphage v. Gautreaux, 969 F. Supp. 2d 493, 508 (M.D. La. 2013), where one plaintiff "testified that the deputies detaining him threatened him with canines and put the barrel of a shotgun on the side of his face." In Elphage, claims were made by a detainee, an arrestee and bystanders for a variety of alleged violations of their rights. In the magistrate judge's report and recommendation, adopted by the district court, an excessive force claim was evaluated using the traditional use of force analysis with the observation that "the extent of injuries inflicted may be considered in determining whether the officers used excessive force." Id. (citing Deville

v. Marcantel, 567 F.3d 156, 168 (5th Cir. 2009)).

In Elphage, the incident arose after two deputies had been dispatched over the report of shots fired. Upon arrival at the dispatched location, the two deputies were met with a large crowd. But within a few minutes another deputy reported two suspects were potentially fleeing the area. During the course of the chaotic events, the excessive force plaintiff was detained in handcuffs and placed in the back of a police car. Even though the call for service involved the report of gunshots, nowhere in Elphage are there any facts that show that the plaintiff was actually seen or reported to have fired gunshots. However, he was still detained by a deputy who believed he was a suspect fleeing the shooting scene. Id. at 504.

The plaintiff's injury claim–being grabbed and violently thrown to the concrete, physically restrained, battered, threatened with a police dog, shotguns including a barrel being put to the side of his face, and verbally assaulted by deputies–was deemed not to be excessive and the motion for summary judgment was granted.

C. QUALIFIED IMMUNITY

1. Qualified Immunity Remains the Law of this Circuit

The Plaintiffs argue that qualified immunity should not be applied by this Court even though the Supreme Court continues to revisit and enforce the correct application of qualified immunity as is seen in Rivas-Billegas v. Cortesluna, supra, and City of Tahlequah, Oklahoma v. Bond, supra. This Court is obliged to follow that well settled Supreme Court jurisprudence.

Despite the reception Plaintiffs' textual argument regarding the original language of the Ku Klux Klan Act of 1871 may have found in the academic community, qualified immunity, as found by the Supreme Court in Pierson v. Ray, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967), and grounded in the law *as actually enacted* in 1874, remains the law of the land.

As the Plaintiffs acknowledge, "[i]n Pierson (v. Ray, 386 U.S. 547 (1967)), the Supreme Court reviewed the version of Section 1983 *found in the U.S. Code*, *id.* at 547 n.1," and established the line of jurisprudence which all courts still follow to this day when determining the application

of qualified immunity to §1983 matters. (Emphasis added). Nowhere do the Plaintiffs, or the Amicus, appear to argue that the statute at issue, 42 U.S.C. §1983, as passed by Congress in 1874, contains the seemingly all-important "notwithstanding clause" but instead only that *it should have, but did not.*[7] The source or purpose of the alleged error is irrelevant, because the effect of that statute, as passed by Congress, is well established and controlling here. This Court has acknowledged as much. Plaintiffs cite Rogers v. Jarrett, 63 F.4th 971 (5th Cir. 2023), cert. denied, 144 S. Ct. 193, 217 L. Ed. 2d 79 (2023), but never provide the most important quotation from Judge Willet's concurring opinion as applied to the case before the Court today: "Today's decision upholding qualified immunity is **compelled by our controlling precedent**." Id. at 979. (Emphasis added). Note that the opinion at issue is a concurring one, and the outcome of that case hinged on a continued application of qualified immunity. Similar applications of qualified immunity can be found in, for example, this Court's last three qualified immunity cases: Jose Castro,

[7] Similarly, arguments based on the derogation cannon simply Monday morning quarterback how the Court *should have* interpreted the statute, glossing over the precedential value of decades of jurisprudence following the Court's interpretation.

Plaintiff-Appellee, v. Kimberly Kory; Michael Thornton; Carl Kerawalla; Shawn King, No. 23-50268, 2024 WL 1580175, (5th Cir. Apr. 11, 2024); Culberson v. Clay Cnty., No. 23-60310, 2024 WL 1501551 (5th Cir. Apr. 8, 2024); Dawes v. City of Dallas, No. 22-10876, 2024 WL 1434454 (5th Cir. Apr. 3, 2024). As the application of qualified immunity to 42 U.S.C. §1983 actions is settled law, the Court should reject Plaintiffs' request to overturn over 50 years of Supreme Court precedent.

The Defendant also notes that the text of a statute passed in 1871 and repealed in 1874, is irrelevant. Through Title 74 §5596 of the Revised Statutes of 1874:

> All acts of Congress passed prior to said first day of December one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superceded by subsequent acts, or not being general and permanent in their nature: Provided, That the incorporation in said revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local, or temporary character, shall not repeal, or in any way affect any appropriation, or any provision of a private, local or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of Congress passed prior to said last-named day no part of which are embraced in said revision, shall be affected or changed by its enactment.
> U.S. Congress. U.S. Statutes at Large, Volume 18 -1875: 43rd

> Congress; Revised Statues in Force, Relating to D.C., and Post Roads; Public Treaties in Force. United States, - 1875, 1873. Periodical.(https://www.loc.gov/resource/llsalvol.llsal_018a/?sp=1158&st=image&r=-0.38,0.246,1.496,0.901,0)(last visited 4/22/24).

This provision repealed whatever language may have been included in the Ku Klux Klan Act of 1871, and the statute's language did not include the notwithstanding clause. Each of Plaintiffs' arguments against the application of qualified immunity– that the original language which was repealed abrogated common law defenses, that the substance of the current statute was not changed when their preferred language was directly repealed, that the burden of overcoming qualified immunity is improperly placed on plaintiffs–which rely upon this repealed language, are accordingly unpersuasive.

While the Plaintiffs argue that the clear, unambiguous language repealing any previous version of the Ku Klux Klan Act of 1871 does not really intend to repeal anything, that argument lacks merit. Plaintiffs cite Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968) for the proposition that a similar "notwithstanding clause" has been addressed by the Supreme Court and its deletion found irrelevant. However, a review of Jones shows that direct repeal language

as cited above was never addressed, providing limited value here.

Further, as William Baude highlights in his own discussion of the revision of §1983 by the Revised Statutes of 1874, the Supreme Court has found that the language of §1983, as enacted in 1874, should be applied as repealed in the case of Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980). Will Baude, Codifiers' Errors and 42 U.S.C. 1983VOLOKH CONSPIRACY(June 12, 2023, 8:31 AM), https://reason.com/volokh/2023/06/12/codifers-errors-and-42-u-s-c-1983/. There, the Court found that §1983 should be interpreted as received in 1874, rather than in whatever form it may have taken in 1871, after spirited disagreement among the Justices. See Maine v. Thiboutot, 448 U.S. 1, 11, 100 S. Ct. 2502, 2508, 65 L. Ed. 2d 555 (1980)(Powell, J., dissenting). This reinforces the bedrock principle that Supreme Court case law can only be overruled by the Supreme Court. See Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 1921, 104 L. Ed. 2d 526 (1989).

Finally, the two pronged analysis of qualified immunity claims is settled case law and does not violate Article III of the United States Constitution. Again, though an academic argument may be made

concerning whether the current interpretive framework employed by Courts to analyze qualified immunity results in advisory opinions or addressing contingent legal questions, the Supreme Court has supplied the framework at issue which leaves that framework settled law. Pearson v. Callahan, 555 U.S. 223,129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

2. The District Court did not err when it found that Gintz was entitled to Qualified Immunity

Not only is qualified immunity still the law in this Court, it is applicable to the claims made by the Plaintiffs and operates to provide immunity to Gintz as no case cited by Plaintiffs has facts sufficiently similar to the undisputed facts and circumstances of this case.

Recently, in Bailey v. Iles, 87 F.4d 275, 282 (5th Cir. 2023), this Court reversed the grant of qualified immunity and set out the well established contours of that defense:

> "The qualified immunity inquiry includes two parts": (1) "whether the officer's alleged conduct has violated a federal right"; and (2) "whether the right in question was 'clearly established' at the time of the alleged violation, such that the officer was on notice of the unlawfulness of his or her conduct." Cole v. Carson, 935 F.3d 444, 451 (5th Cir. 2019). An officer is entitled to qualified immunity "if there is no violation, or if the conduct did not violate law clearly established at the time." Id.

> For a right to be "clearly established," "[t]he 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, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). The right may be clearly established by the Supreme Court's precedent or our own. Shumpert v. City of Tupelo, 905 F.3d 310, 320 (5th Cir. 2018) "The central concept is that of 'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.' " Kinney v. Weaver, 367 F.3d 337, 350 (5th Cir. 2004)(en banc)(quoting Hope v. Pelzer, 536 U.S. 730, 740, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)).

Gintz did not violate the Fourth Amendment, either in the length of detention or in the display of his gun. Even if the Court strikes down qualified immunity as a defense, a finding that the Fourth Amendment was not violated would still result in a judgment of dismissal.

The undisputed facts and admissions of the Plaintiffs conclusively establish that Wesley knowingly violated La. R.S. 32:78 by driving the wrong way down a one-way street. ROA.615. Once Gintz observed that violation, he had both reasonable suspicion and probable cause to effect a traffic stop had he desired to do so. ROA.544. Further, Gintz had reasonable suspicion of a potential violation La. R.S. 14:402(E)(5) which states that, "it shall be unlawful. . . to introduce or attempt to introduce

into or upon the premises of any municipal or parish prison or jail. . . any narcotic or hypnotic or excitive drug." This reasonable belief was based upon Gintz's knowledge of similar problems at the DC. ROA.538. Wesley even admitted that driving through the DC parking lot at night was suspicious, and upon learning of the contraband issue at the facility, consented to a search of his truck. ROA.524. That suspicion provided adequate constitutional grounds to initiate an investigative stop of the Pigott vehicle (though again, Wesley stopped on his own). Gintz was also reasonably concerned with a possible escape(a potential violation of La. R.S. 14:110) which provided additional reasonable suspicion for a stop. ROA.543. Under the jurisprudence detailed above, Gintz had cause to stop and investigate Wesley for a reasonable amount of time based on his observation of Wesley's traffic violation. During that encounter he could also question Wesley about his other suspicions. Under these factual circumstances, none of the Plaintiffs' rights to be free from an unlawful detention were violated. As no violation occurred, Gintz is entitled to qualified immunity and summary judgment on the merits as to the detention claim. Further, even if Gintz mistakenly concluded there was reasonable suspicion or probable cause then he still would be entitled to

qualified immunity. Mendenhall v. Riser, 213 F.3d 226, 230 (5th Cir. 2000).

Any suggestion that the Fourth Amendment analysis changes because an arrest for a violation of La. R.S. 32:78 is not allowed (which Gintz does not concede) is directly rebutted by the Supreme Court's decision in Virginia v. Moore, 553 U.S. 164, 170, 128 S. Ct. 1598, 1604, 170 L. Ed. 2d 559 (2008). There the Supreme Court found that even where a state statute does not allow an arrest to be made for violation of that statute, an arrest based on probable cause for violation of that statute does not violate the Fourth Amendment. That rule was applied in a similar situation in Adams v. City of Shreveport, 269 F. Supp. 3d 743, 756 (W.D. La. 2017) where the plaintiff's argument that a false arrest had occurred in part because the city ordinance at issue (concerning "sagging") did not allow for an arrest was rejected. Accordingly, because Wesley violated La. R.S. 32:78 and could have been taken into custody, a few minutes of detention did not violate his Fourth Amendment rights.

Though the qualified immunity analysis is satisfied once it is shown that the Plaintiffs cannot meet their burden of showing that Gintz's conduct violated their constitutional rights, Gintz is further entitled to qualified immunity because the Plaintiffs cannot show that their right to

be free from a 10-12 minute detention was clearly established at the time of the incident. See Terry and its progeny including U.S. v. Pack, 612 F.3d 341, described above.

D. WARDEN SLAYTER'S REPORT

Plaintiffs argue that Warden Slayter's opinion, found in his report, that Gintz violated the Sheriff's policy shows liability but did not take his deposition and accordingly have not laid a foundation for the admissibility of said report. Further, the report, itself, is hearsay and because there is no testimony or evidence that places Slayter at the scene it can only include hearsay within hearsay. Fed. R. Evid. 801. Plaintiffs could have made various legal arguments to lay a foundation for admissibility but never did so. Courts in this Circuit have held that similar reports, with significantly more foundation, are inadmissible.

In Gerhart v. Rankin County, No. 3:11-CV-586-HTW-LRA, 2018 WL 4689126, at *1 (S.D. Miss. Sept. 29, 2018) the district court held that an internal affairs report was hearsay and further found that it did not fall within the public records exception to the hearsay rule:

> The report falls outside of Fed. R. Evid. 803(8)(A)(iii) Sgt. Bennett's report does not elaborate upon several important features that might alleviate this court's concern about

> trustworthiness: although Sgt. Bennett states that he spoke to four of the officers from the team of surveillance officers, Sgt. Bennett fails to indicate what each individual officer told Sgt. Bennett; whether Sgt. Bennett discounted the testimony of one or more of the officers is unknown; and there is no indication that the Pearl Police Department adopted Sgt. Bennett's statement. The Plaintiffs may call all four persons involved in this report at the jury trial to testify about the matters contained therein, but the report itself may not be admitted under the public record exception to the hearsay rule. (Citations omitted.)
> Id., at *7.

Similarly, in Randle v. Tregre, 147 F. Supp. 3d 581, 587 (E.D. La. 2015), aff'd, 670 F. App'x 285 (5th Cir. 2016), the district court excluded internal affairs reports finding that those reports were hearsay and did not fall under any hearsay exception.

Both Randle, and Huval v. The Louisiana State University Police Department, No. CV 16-00553-BAJ-RLB, 2018 WL 3199460 (M.D.La. June 29, 2018) looked to the following factors to determine the admissibility of the reports:

1) The timeliness of the investigation;

2) The special skill or expertise of the official;

3) Whether a hearing was held and at what level; and,

4) Possible motivational problems.

Based upon the face of Slayter's report, the following is found:

1) The report is dated 4/23/2020, a week after the incident;

2) There is no information on the special skill or expertise of Slayter;

3) There was no testimony or even statements from Gintz or anyone else;

4) No indication from the report that a hearing was held; and,

5) There is no testimony or evidence about possible motivational problems.

The report does not indicate that Slayter was aware that Wesley had committed a traffic offense. Also, there is no mention in the report that Gintz was dealing with five individuals during the incident. Instead, it only mentions one person. Furthermore, it does not provide the factual basis for Slayter's opinions, other than a brief reference to Gintz's report. There is no mention that Slayter reviewed the video of the incident , that he spoke with Gintz, or that he listened to the radio traffic. Slayter's opinions do not reflect any evaluation of Gintz's actions based upon the Fourth Amendment. This lack of a foundation shows that the Plaintiffs cannot establish the trustworthiness (reliability) of the report; thus, the report and any testimony or evidence about the report and discipline are

inadmissible.[8]

E. VIOLATION OF POLICY

Plaintiffs argue that Gintz's actions, which they claim violated RPSO policy, support their civil rights claims. However, it is well settled that a failure to follow official policy, by itself, shows, at most, negligence and cannot show a violation of the Constitution. Mason v. Lafayette City-Parish Council, 806 F.3d 268 (5th Cir. 2015).

F. ALCOHOL

The Plaintiffs assert that Wesley smelled alcohol on Gintz's breath which Gintz denies. Plaintiffs go further and claim that Gintz was inebriated at the time of the incident. However, this is not supported by Wesley's own deposition testimony. To wit: Wesley testified that the only possible effects of alcohol that he observed, the shaking of Gintz's hand, could also have been readily explained by the stress of the incident. ROA.1075. Finally, the BWC video does not support the argument that Gintz was inebriated. That video does not show any swaying, unsteadiness

[8] Slayter's report is also inadmissible as a Subsequent Remedial Measure because the report is also a measure directed to Gintz that, had it been in place before, would have made the incident less likely to occur. Fed. R. Evid. 407.

of gait, slurring or confusion. Accordingly, this baseless accusation can be ignored.

G. PLAINTIFFS' CASES

In Flores v. Rivas, No. EP-18-CV-297-KC, 2020 WL 563799 (W.D. Tex, Jan. 31, 2020), cited by Plaintiffs, the district court denied a 12(b)(6) motion to dismiss, based on qualified immunity, to an officer that threatened a group of children with a loaded gun. The district court ruled that the minors adequately pleaded, that the officer's use of force–pointing and threatening them directly with a firearm while yelling instructions–was unreasonable under the circumstances and denied qualified immunity. After the district court could find no controlling jurisprudence in this Circuit, it looked beyond to other Circuits to find the consensus required by the qualified immunity analysis. That analysis was flawed. Morrow v. Meachum, 917 F.3d 870, 879-880 (5th Cir. 2019) was used to justify looking outside the Circuit. That case found six other Circuits insufficient to establish a sufficient "out of circuit consensus". Nevertheless, the district court in Flores, overreached, finding that seven other Circuits would suffice. The cases used to reach consensus–for example a SWAT team member pointing a loaded rifle at the head of a

prostrate adult and accidentally killing him (Stamps v. Framingham, 813 F.3d 27, 32 (1st Cir. 2016)) or an officer training his pistol on an infant during a warrantless search (Motley v. Parks, 432 F.3d 1072, 1077 (9th Cir. 2005), overruled by United States v. King, 687 F.3d 1189 (9th Cir. 2012))–are dissimilar enough to run afoul of the Supreme Court's mandate that lower courts are "not to define clearly established law at a high level of generality." Ashcroft v. al-Kidd, 563 U.S. 731, 742, 131 S. Ct. 2074, 2084, 179 L. Ed. 2d 1149 (2011). Reaching to other Circuits for such generality should not be repeated here.

Hodge v. Layrisson, No. CIV. A. 97-555, 1998 WL 564263,(E.D. La. Sept. 1, 1998) is factually distinguishable. There, the alleged excessive force occurred during a search of an officer's home pursuant to a presumptively valid warrant by DEA agents. The plaintiff alleged that the agents entered her home without announcing their presence, ordered her to lay on the floor, handcuffed her, then one agent "in a 'cold and calculating manner' . . . placed a loaded gun to her face and demanded her duty weapon." Id. at *6. That court found that the agent pointed his gun in the plaintiff's face, while she was incapacitated and unarmed for an unspecified duration. Id. Here, the duration of the gun point as to Mya

and K.P. was about a second based on K.P.'s testimony. ROA.687. Further distinguishing Hodge, the search or detention here was reasonable and justified because Wesley had committed a traffic offense and because the detention was valid under Terry. These differences prevent Hodge from providing the clearly established law necessary to overcome qualified immunity.

In Manis v. Cohen, No. CIV.A.3:00CV1955-P, 2001 WL 1524434 (N.D. Tex., Nov. 28, 2001) the district court rejected a defendant's motion for summary judgment on grounds of qualified immunity when it found a disputed issue of material fact concerning whether an officer had pointed his gun at the plaintiff's face. Pertinent, and distinguishable factually, the plaintiff in Manis was able to show sufficient injury as his alleged mental distress was severe enough to cause him to lose his job. Id. at *7. Here, the Plaintiffs offer nothing beyond their own testimony to suggest that their emotional distress rises to the level of compensability.

In Falcon v. Holley, 480 Fed. Appx. 325 (5th Cir. 2012), this Court reversed a summary judgment based upon qualified immunity after finding that the district court improperly credited the defendant's version of the events over the plaintiff's. The plaintiff testified that excessive force

was used upon him without provocation or resistance causing an on-going back injury. Falcon is distinguishable because no medication was prescribed here and the district court did not improperly credit Gintz's testimony over the Plaintiffs'.

In Benoit v. Bordelon, 596 Fed. Appx. 264 (5th Cir. 2015), the plaintiff tried his case to the district court, and testified that a defendant grabbed him by the collar, threw him to the floor, put his knee to his lower back, pulled back his head and choked him allegedly causing back pain. His testimony was corroborated by another inmate who testified that the plaintiff convulsed and blacked out. The defendant argued that the force was necessary to overcome the plaintiff's resistance. Both defendants testified that the plaintiff appeared to have a seizure but both considered it to be fake. On that record this Court affirmed judgment in favor of the plaintiff. Defendant acknowledges that the Benoit plaintiff did not provide medical records of his throat injury. However, the defendants used a "tactical jaw restraint" to subdue the plaintiff, which corroborated that force was used upon plaintiff consistent with his injuries. The plaintiff also submitted a post incident grievance report which documented his claim that he had been spitting up blood and that his throat was sore and

bruised. Administrative comments on the plaintiff's medical grievance form corroborated that the plaintiff suffered a lumbar strain from the use of force. These Plaintiffs did not produce any such corroborating documents, much less contemporaneous documents, to substantiate their claims, as was done in Benoit, rendering that case unpersuasive for Plaintiffs' claims that they suffered any constitutionally impermissible use of force.

In Durant v. Brooks, 826 F. Appx. 331 (5th Cir. 2020), this Court held that issues of disputed fact precluded summary judgment. There the law enforcement defendants denied the use of any force, while the plaintiff and a witness testified that force was used on the plaintiff after he had been handcuffed, subdued and placed in the back seat of a police car. Denial of the motion for summary judgment was affirmed based upon this dispute of fact. Durant does not stand for the proposition that the brief display of a gun is excessive force under the Fourth Amendment.

Plaintiffs also cite Checki v. Webb, 785 F.2d 534, 538 (5th Cir. 1996), because it discusses a hypothetical situation and states:

> It cannot reasonably be argued that no serious physical danger confronts civilians who are forced to travel at speeds over 100 mph in their attempt to flee a terrorizing police officer.

> Furthermore, there is no valid reason for insisting on physical injury before a section 1983 claim can be stated in this context. 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.

There the central claim arose from a high speed pursuit that covered twenty miles at 100 mph. It was also alleged that the defendant struck the plaintiff in the face with his gun, causing severe facial injuries. The plaintiff also claimed that his arm was broken during the resulting traffic stop. On appeal, the plaintiff's injuries were not at issue, but rather venue and potential tolling of the plaintiff's claim were considered, rendering Checki inapposite.

In Sam v. Richard, 887 F.3d 710 (5th Cir. 2018), the plaintiff testified that an officer ran after him, and when the officer caught up with him, he was laying on the ground with his hands on his head. The plaintiff testified that the officer then kneed him in the hip and pushed him against a patrol car, during the course of an arrest. This Court held that this use of physical force raised a question of fact precluding summary judgment. Sam, accordingly provides no guidance concerning whether brandishing a gun constitutes excessive force or what constitutes *de*

minimis injury.

Miller v. Salvaggio, No. SA-20-CV-00642-JKP, 2021 WL 3474006 (W.D. Tex. Aug. 6, 2021), concerned a Rule12(b)(6) motion which was granted as to excessive force claims. The plaintiffs alleged that a search warrant for their home was based upon an affidavit containing false statements and material omissions, and that they were subjected to a retaliatory arrest and prosecution due to their exercise of their First Amendment rights. They also asserted malicious prosecution and unlawful entry claims. Though the district court allowed those claims to move forward the claims of excessive force were dismissed, with the Court finding that allegations that the defendants held them all at gun point for the duration of the unlawful search were insufficient to establish a claim for excessive force.

In Smith vs. Heap, 31 F. 4th 905 (5th Cir. 2022), a motion to dismiss was denied by the district court, but was reversed by this Court. There the constable for Waller County was stopped in Harris County by deputies of the Harris County constable. The stop was made in response to a 911 call from a motorist that a vehicle had pulled up alongside his car while driving down the highway, flashed "police lights" and after the 911 caller

slowed down the driver of that vehicle pointed a gun at him while yelling. In response to the call, two deputies located the constable and executed a textbook "felony stop." After reviewing the allegations made in the complaint, this Court affirmed the dismissal of the Fourth Amendment unreasonable seizure claim, as well as the use of force claims finding that alleged psychological injuries were improperly pleaded and, "that the police used objectively reasonable force. '[O]bjectively reasonable force will result in *de minimis* injuries only,' and *de minimis* injuries cannot sustain an excessive-force claim. Alexander v. City of Round Rock, 854 F.3d 298, 309 (5th Cir. 2017) (quotation omitted)." Id. at 912. The use of force, amounting to handcuffing the plaintiff for two minutes after a stop based on reports of a suspect pointing a gun, was found to be reasonable. Id. Though the facts of the complaint in Smith are distinguishable from the facts present herein, it stands for the proposition that pointing a gun during a "routine police procedure" can be classified as a *de minimis* injury.

No reported or unreported Fifth Circuit case holds that the display of a gun for approximately three to four minutes, under the circumstances here, was violative of anyone's rights. Certainly, there is no jurisprudence

from this Court or the Supreme Court that would put a reasonable deputy, with the facts and circumstances known to Gintz, on notice that a display of a gun was unconstitutional.

H. SEVERITY OF PLAINTIFFS' INJURY

It is acknowledged that the Plaintiffs testified about their feelings arising from the incident involving Gintz and offered several, anecdotal, descriptions of the impact of the events upon their psyche. But no one missed any work or school or suffered any delay in their life goals and there is no evidence of contemporaneous reporting on the issues. Certainly, Mya points to stress that she claims was related to the incident. However, she testified that she successfully completed all of the steps necessary to enlist in the Air Force. Further, when given a chance to relate her experiences to a professional during the course of her processing into the Air Force, she did not do so. Similarly, Mya testified that she required a service dog and suffered from elevated blood pressure, but no evidence was introduced to support these claims, not even a photograph of the dog.

Though K.P. and his father testified that K.P.'s grades plummeted after the incident, despite K.P. being a straight A student prior, they

produced no school records to substantiate that claim. Once again, the Plaintiffs had an opportunity to produce contemporaneous evidence of their injuries but did not do so. K.P. also makes the claim that his lifelong dream of becoming a game warden has been destroyed because of his experience. During the course of his deposition, he was questioned on his plan to be a game warden. He testified that he did not know the process for an interview, the training required or length of time he would have to spend to become a game warden. He speculated that he had to go to college to be a Texas game warden, but he had no knowledge as to whether a Louisiana game warden needed a college degree. He also did not know what kind of physical training might be required or whether he would have passed any of those requirements. He also did not know whether there was a psychological or psychiatric evaluation required and did not know whether he would pass that, either. ROA.1108-9.

Finally, Plaintiffs argue that "Mr. Pigott could not afford healthcare for himself or his children". ROA.1023. However, Wesley testified that he never priced healthcare, never attempted to secure healthcare and made no attempt to seek healthcare through any state agency or healthcare provider. In other words, Wesley did nothing to secure healthcare for his

children, a failure that cannot support the injury claims. ROA.1078.

VI. CONCLUSION

For the reasons detailed herein, the district court's ruling granting summary judgment to Gintz should be affirmed.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of April, 2024, I electronically filed the foregoing DEFENDANT - APPELLEE'S BRIEF ON BEHALF OF PAUL GINTZ with the Clerk of Court by using the CM/ECF system which will send notice of electronic filing to the following:

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I further certify that I have forwarded the foregoing document via facsimile and/or first-class mail to the following non-CM/ECF participants: NONE

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Counsel also certifies that on this 22nd day of April, 2024, the foregoing instrument was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that:

1) required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and

2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1.

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CERTIFICATE OF COMPLIANCE

With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains [12,997] words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfectX7 in Century Schoolbook font 14-point type face.

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