Case No. 23-30879

United States Court of Appeals
for the
Fifth Circuit

WESLEY PIGOTT, ON HIS OWN BEHALF
AND ON BEHALF OF HIS MINOR CHILD, K.P., AND 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, Alexandria Division

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Plaintiffs-Appellants ("the Pigotts") certify that the following listed persons and entities as described in the fourth sentence of 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:

1) **Plaintiffs-Appellants:**

   Wesley Pigott, on his own behalf and on behalf of his minor child K.P.; Mya Pigott

2) **Defendant-Appellee:**

   Paul Gintz

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INTRODUCTION

Defendant-Appellee mischaracterizes or omits disputed material facts, and ignores testimony confirming he used excessive force during an unreasonable, unlawfully extended seizure of the Pigott family. To this end, Defendant-Appellee Gintz ("Defendant" or "Gintz") advances four core arguments that fail under scrutiny:

First, Gintz erroneously argues that a traffic offense justified Plaintiffs' prolonged detention. But detention for a traffic offense may not continue beyond the time necessary to expeditiously investigate the infraction. That an arrest *could* have been effectuated is irrelevant to the length of detention when no additional reasonable suspicion developed during the course of the stop. Thus, Defendant's decision to hold the Pigotts at gunpoint rather than promptly investigating the traffic infraction unlawfully prolonged their seizure.

Second, Gintz incorrectly contends that the excessive force claim was properly dismissed. To supplement the district court's inaccurate assertion that third-party medical evidence is required for injury claims, Gintz defends the dismissal by referencing 17 "undisputed" facts in the record. But those facts—a number of which are *highly* disputed—fail to

fully capture the incident, including the testimony of Officer Lacaze, who later arrived on the scene. Lacaze's testimony supports the conclusion that Gintz's use of force was unreasonable. In a Hail Mary, Defendant relies without support on later-recorded video to infer facts that occurred before the video started in his favor. No case law permits this, least of all where Defendant is the movant at summary judgment.

Third, Gintz is wrong to assert that this Court cannot correct the misplacement of qualified immunity's burden on plaintiffs. Because the Supreme Court has not settled this question—over which the circuits split—this Court is free to correct its own jurisprudence in light of textual evidence that no immunity may be asserted against a Section 1983 claim.

Finally, Defendant's challenge to Warden Slayter's internal affairs report lacks merit. Warden Slayter's report falls squarely within Federal Rule of Evidence 803(8)(A)(iii)—the public records exception. These reports are *presumed* admissible unless the opposing party proves otherwise. Defendant makes no such showing here.

For these reasons and those in the Pigotts' opening brief, the unlawful seizure and excessive force claims should be remanded for jury adjudication.

I. Defendant Fails to Justify the District Court's Error That the Traffic Offense Justified the Length of the Seizure.

Defendant argues he lawfully seized the Pigotts because Mr. Pigott committed a traffic offense. Gintz Br. 26–30. The "tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop and attend to related safety concerns." *Rodriguez v. United States*, 575 U.S. 348, 354 (2015) (internal citations omitted); *Florida v. Royer*, 460 U.S. 491, 500 (1983). Such a seizure therefore becomes unlawful when prolonged beyond the time reasonable to issue a citation. *Rodriguez*, 575 U.S. at 350–51; *Graham v. Connor*, 490 U.S. 386, 396 (1989); *United States v. Jenson*, 462 F.3d 399, 404 (5th Cir. 2006) (detention runs afoul of Fourth Amendment when longer than necessary to effectuate the purpose of the stop).

Gintz attempts to obfuscate the "mission" of his seizure of the Pigotts. He argues that the traffic offense alone was sufficient, stating the Pigotts "repeatedly and erroneously" focus too much on Gintz's belief that they committed offenses at the facility. Gintz Br. 26. But he also claims that preventing more serious crimes, such as alleged escape attempts and throwing contraband over the facility fence, motivated the

seizure and justified its length and the force used. Gintz Br. 30. Neither imagined scenario is backed by reasonable suspicion, meaning the length of the seizure was premised on nothing more than a mere traffic violation. *Rodriguez*, 575 U.S. at 354 ("Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed."); *see* Opening Br. 40–43 (collecting cases).

A Fourth Amendment violation occurs where an officer fails, as Gintz did, to diligently pursue an investigation "that would quickly confirm or dispel the authorities' suspicion." *United States v. Place*, 462 U.S. 696, 702 (1983). Gintz concedes he could have easily questioned Mr. Pigott. Gintz Br. 25–26. He did not. *Id.* But Gintz instead escalated a minor traffic offense into a seriously dangerous situation, immediately drawing and aiming his gun after exiting his vehicle (without identifying himself as an officer), and frantically yelling that he would "blow [Mr. Pigott's] fucking head off." ROA.834, 837.

United States v. Pack is distinguishable because Gintz did not diligently pursue a means of investigating the traffic violation. 612 F.3d 341, 361 (5th Cir.), *opinion modified on denial of reh'g*, 622 F.3d 383 (5th Cir. 2010). Defendant's attempt to justify "the 10-12 minute detention"

here by nodding to the 35-minute stop in *Pack* accordingly falls flat. Gintz Br. 30. *Pack* involved a known "drug trafficking corridor," visible signs of distress by the car's occupants, and conflicting stories between the driver and passenger. *See Pack*, 612 F.3d at 345. The scenario here differs as the Pigotts displayed no suspicious behavior during the stop.

"If the officer develops reasonable suspicion of additional criminal activity *during* his investigation of the circumstances that originally caused the stop, he may further detain its occupants for a reasonable time while appropriately attempting to dispel this reasonable suspicion." *Pack*, 612 F.3d at 350 (emphasis added). Gintz developed no such suspicion of additional criminal activity upon his forcible seizure of the Pigotts. The record shows that the Pigotts were compliant, non-threatening, and did not attempt to flee. ROA.1150. Gintz himself concedes that he was "subsequently able to see that the people in the bed were juveniles and unlikely escapees." Gintz Br. 7. There were no reports of escapees from the facility that night. And no one saw anyone throw contraband over the fence. ROA.1147.

Pack does not excuse seizing the Pigotts beyond the time needed to issue a traffic citation. Their prolonged detention was unconstitutional.

II. Defendant's Arguments Do Not Save the District Court's Errors of Ignoring Material Fact Disputes and Misapplying Case Law in Dismissing the Pigotts' Excessive Force Claims.

According to Defendant, the district court correctly dismissed the excessive force claims for one or more of the following five reasons:

A. Mr. Pigott committed a traffic violation entitling Gintz to qualified immunity. Gintz Br. 45–46;

B. Seventeen (17) undisputed facts show that Gintz's "use of force was not clearly excessive to the need of the situation and was not objectively unreasonable." Gintz Br. 33–35;

C. Body-worn camera footage "shows that a portion of the events described by K.P. did not occur" and "proves that whatever may have occurred before Lacaze arrived did not cause Wesley, K.P. and Mya any injury." Gintz Br. 30, 31;

D. None of the Pigotts' injuries can be corroborated with documentary evidence in accordance with *Martin* and *Strickland*. Gintz Br. 32–33;

E. Relying on prior instances of contraband being thrown over the fence is sufficient to prompt use of a gun on suspect who committed a traffic violation. Gintz Br. 31, 35, 36.

Each of these arguments either relies on disputed or ignored material facts or involves a misapplication of circuit precedent.

A. The Minor Traffic Offense Was Not Proportional to the Level of Force Gintz Used During the Seizure.

Defendant argues that Mr. Pigott's commission of a traffic offense entitled Gintz to qualified immunity on the excessive force claims. Gintz

Br. 45–46. But the minor traffic violation militates in the Pigotts' favor—as the severity of the crime was not proportional to the force Gintz used. *Graham v. Connor*, 490 U.S. 386, 396 (1989); *see also generally* Opening Br. 39–44.

In using force against a suspect, an officer "must assess not only the need for force, but also 'the relationship between the need and the amount of force used.'" *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (quoting *Gomez v. Chandler,* 163 F.3d 921, 923 (5th Cir. 1999)). This Court previously denied qualified immunity to officers who used force when the crime at issue was a traffic offense. *See Deville*, 567 F.3d; *see also Aguilar v. Robertson*, 512 Fed.Appx. 444 (5th Cir. 2013); *Hanks v. Rogers*, 853 F.3d 738 (5th Cir. 2017).

In *Deville*, this Court denied qualified immunity to an off-duty officer who, smelling of alcohol, smashed the driver's window and roughly extracted her during a stop for minor speeding, all while her grandchild sat in the backseat terrified. 567 F.3d at 169. This Court found the force was not justified because "the need for force [was] substantially lower than if [the driver] had been suspected of a serious crime." *Id.* at 167.

Here, an inebriated Gintz violently used force against a father in front of his terrified children after a minor traffic offense. Just as in *Deville*, a reasonable jury could conclude that Gintz executed an unlawful seizure by "engag[ing] in very little, if any, negotiation with [Mr. Pigott]—and find that [Gintz] instead quickly resorted to [excessive force]." *Id.* at 168.

Aguilar v. Robertson is also on point. 512 Fed.Appx. 444 (5th Cir. 2013). There, this Court affirmed the denial of qualified immunity on summary judgment for an excessive force claim brought against an officer who tackled a motorcyclist and brandished his gun at him during a routine traffic stop. *Id.* at 450. The *Aguilar* Court held that a jury could conclude that the officer used a disproportionate amount of force in response to a speeding infraction committed by a non-threatening motorcyclist who did not attempt to flee. *Id.* at 446–50. Similarly, here, a traffic infraction was the only justification for stopping the Pigotts—who neither appeared threatening nor attempted to flee—waiving a gun at them, and pressing the barrel of that gun into the back of Mr. Pigott's head. ROA.1150, 838.

In *Hanks v. Rogers*, this Court reversed a decision to grant an officer summary judgment on excessive force claims when the officer abruptly resorted to physical violence with a driver who posed no immediate threat or flight risk over a minor traffic violation. 853 F.3d 738, 747 (5th Cir. 2017). While the driver had his hands surrendered to his back and spoke to the officer, the officer suddenly ceased verbal communication, rushed, and administered blows to the driver. *Id.* at 742–43. The *Hanks* court held that "a reasonable officer on the scene would have known that suddenly resorting to physical force . . . would be clearly excessive and clearly unreasonable." *Id.* at 745. The same logic applies in this case.

Thus, the district court's ruling dismissing the Pigotts' excessive force claims was inappropriate and should be reversed.

1. Lacaze's Actions Are Relevant in Determining Whether Gintz's Actions Were Reasonable.

In an attempt to cure the district court's error in concluding that Gintz's "use of his weapon was reasonable to protect his own safety." ROA.1330, Gintz argues that Lacaze's actions—ignored by the district court—have no bearing on the excessive force analysis. Gintz Br. 35–36. This is not so.

Lacaze arrived in his marked police vehicle with his emergency lights flashing, conducted a pat-down on Mr. Pigott, asked for his license, checked the license, and searched the truck. ROA.945, 956–57. These actions show that a reasonable officer would not have immediately threatened lethal force, as Defendant did. Indeed, officers' conduct can be compared against one another when determining whether their actions were reasonable under the circumstances. *See Aguilar*, 512 Fed.Appx. at 450 (court granted qualified immunity to officer who hit motorist on the shoulder but denied immunity to different officer who tackled motorist).

Gintz argues that Lacaze's behavior is irrelevant because Lacaze arrived later. Gintz Br. 35–36. But by immediately drawing his weapon and pointing it at the Pigotts, by failing to identify himself as law enforcement, and by shouting threats, Gintz *created* a chaotic scene wholly inconducive to investigating whatever alleged suspicions he had about Plaintiffs' supposed activities. ROA.1069, 1072. *See Deville*, 567 F.3d 167. The contrast with Lacaze's actions underscores that Gintz's use of force was excessive.

2. Pointing Firearms at Compliant Children Is Unreasonable.

Defendant asserts that pointing his weapon at children was lawful because youth "can be dangerous and were a potential risk of harm to [him]." Gintz Br. 37. But Defendant cites no case law to support this contention, nor any evidence of dangerousness on the part of the youth here.

In fact, Defendant admits he had ample opportunity to observe *these* minors while pursuing them for several miles, including at a stop light. ROA.1147. He thus knew they were children and had no reason to suspect they were dangerous. Crucially, "there is a robust consensus that pointing a gun at compliant children is objectively unreasonable." *Flores v. Rivas*, EP-18-CV-297-KC, 2020 WL 563799, at *9 (W.D. Tex. Jan. 31, 2020). As this Court has made clear, pointing weapons at "unarmed, confused, and only mildly disruptive suspect[s]" violates the law. *Castro v. Kory*, No. 23-50268, 2024 WL 1580175, at *4 (5th Cir. Apr. 11, 2024).

3. Pointing a Gun at Mr. Pigott's Head Constituted Excessive Force.

Defendant unconvincingly points to *Elphage v. Gautreaux* as support that the force he used was not excessive. 969 F. Supp.2d. 493 (M.D. La. 2013); Gintz Br. 37–38. In *Elphage*, the court held that officers'

pointing of a shotgun at a suspect in a reported shooting was not excessive force. *Elphage*, 969 F. Supp.2d. at 509. But here Defendant engaged in a miles-long pursuit with no reports of any criminal activity, much less any reported violence.

The facts here are more akin to *Castro v. Kory*, 23-50268, 2024 WL 1580175. In *Castro*, the officer parked his unmarked truck behind a man who was taking a nap in his car, then ran the man's plates and called for backup. *Id.* at *1. Confused and startled out of sleep by uniformed officers' calls to exit the truck, the man refused and called 911. *Id.* The plainclothes officer approached from the passenger door and pointed an AR-15 at the man's head. *Id*. This Court held that the force used by the police, "*particularly pointing a gun at his head*," was clearly disproportionate to the man's level of resistance. *Id.* at *4 (emphasis added).

Here, Gintz pulled up behind Mr. Pigott's truck in an unmarked vehicle. ROA.1149. Gintz startled the Pigotts by brandishing a gun at them and sticking it at the back of Mr. Pigott's head. ROA.838–39, 861–62, 882. Furthermore, Gintz did not make any inquiries of Mr. Pigott before pointing the gun at him. ROA.834.

Defendant also attempts to point to *Campbell v. Sturdivant* to justify his conduct. 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). In *Campbell*, the court held that an officer brandishing a firearm was not excessive force because a reasonable officer could have inferred a physical threat from the plaintiff's behavior (driving while intoxicated). *Id.* at *6.

Here, no evidence suggests that Mr. Pigott did anything other than commit a minor traffic infraction. ROA.836, 913. Gintz himself testified that Mr. Pigott did not drive erratically. ROA.912. Defendant followed the Pigotts for seven to eight miles, when Mr. Pigott exited his vehicle and then immediately obeyed all of Defendant's verbal commands. ROA.843, 881. The Pigotts posed no threat. Once again, Defendant's case law is inapt.

B. The 17 "Undisputed" Facts Relied upon by the Trial Court to which Defendant Points Are Not Faithful to the Record Evidence or Excessive Force Case Law.

Omissions of material fact and the failure to recognize disputed issues of material fact are grounds for reversing a grant of qualified immunity. *Tolan v. Cotton*, 572 U.S. 650, 659 (2014) (reversing grant of

qualified immunity on summary judgment because lower court "failed properly to acknowledge key evidence offered by the party opposing that motion."). Such omissions and failures occurred here, where Defendant mischaracterizes the record as to certain facts. Gintz Br. 34–35. Specifically, of the 17 facts Defendant identifies, six are materially disputed:

Disputed Fact	**Defendant's Claim (Gintz Br. 34–35)**	**Plaintiffs' Claim**
3	"There was no reason for the pickup to drive through the parking lot."	Mr. Pigott drove through the parking lot to show his daughter Mya where he worked. ROA.834.
9	"Gintz followed the suspicious truck and reported its travel path . . . ."	Plaintiffs dispute the characterization of the truck as suspicious.
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 parking 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."	Defendant simultaneously drew his weapon, brandished it, and cursed at the Pigotts when he gave these orders. ROA.834, 837, 861, 863, 881, 882.

Disputed Fact	Defendant's Claim (Gintz Br. 34–35)	Plaintiffs' Claim
14	"Gintz did not know how many occupants were in the cab of the truck."	But for his own chaotic, irresponsible actions, Gintz would have been able to ascertain how many people were in the cab of the truck. ROA.837.

Plaintiffs dispute Gintz's characterization of Mr. Pigott's behavior as "suspicious" in facts 9–12. This dispute is material because a reasonable jury could find that Mr. Pigott's truck was not suspicious, and that by following and holding the Pigotts at gunpoint, Gintz did not behave as a reasonable officer would under the circumstances.

Gintz states that Mr. Pigott admitted he acted suspiciously and then consented to a search. Gintz Br. 46. But Gintz's characterization of that "admission" is disputed. ROA.813. Gintz and Deputy Lacaze repeatedly told Mr. Pigott that they had been having problems with contraband at the facility and scolded him for acquiescing to his daughter's request to see the jail, to which Mr. Pigott *then* responded (with the threat of arrest looming—and moments after Defendant had pointed a gun to the back of his head) that he understood how it could

have looked suspicious. ROA. 836–37; *see also* Lacaze Body Camera Footage (ROA.36) at 02:17–03:44.

Plaintiffs also dispute Gintz's claims that the gun was pointed at the ground and not at Mr. Pigott's head and that the only possible effect of alcohol that Mr. Pigott observed was Gintz's shaking hands. Gintz Br. 30, 51. The district court erroneously overlooked these credibility and fact disputes. There is testimony that Gintz's gun touched the back of Mr. Pigott's head and that Mr. Pigott smelled alcohol on Gintz's breath. ROA.1073, 1075, 1078.

These disputes and omissions are essential to the analysis of whether Gintz used excessive force, and they are solely within the purview of the jury to evaluate—not the district judge. *Schulz v. Pennsylvania R.R. Co.*, 350 U.S. 523, 525 (1956) (". . . [t]he jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact."). "In qualified immunity cases, the plaintiff must show that there is a genuine dispute of material fact and that a jury could return a verdict entitling the plaintiff to relief." *Edwards v. Oliver*, 31 F.4th 925, 929 (5th Cir. 2022); *Joseph on behalf of Estate of Joseph v. Bartlett*, 981 F.3d 319, 324 (5th Cir. 2020) ("We expect those charged with

executing and enforcing our laws to take measured actions that ascend in severity only as circumstances require. A disproportionate response is unreasonable.").

It is premature at this stage to find that the material and omitted facts in dispute show that the force Gintz used against the Pigotts was proportional to the circumstances. Viewed in the light most favorable to the nonmovant, the facts establish that Gintz used excessive force.

C. Defendant Cannot Rely on the Body-Worn Camera Footage That Was Recorded After Key Disputed Events to Flip the Summary Judgment Standard on Its Head.

Defendant also argues that the body-worn camera "shows that a portion of the events described by K.P. did not occur" and "proves that whatever may have occurred before Lacaze arrived did not cause Wesley, K.P. and Mya any injury." Gintz Br. 30, 31. Defendant does not cite to any support for the proposition that body-worn camera footage allows for the inference of facts from before the footage begins. Moreover, at summary judgment facts must be viewed in the light most favorable to the nonmoving party—the Pigotts. *Byrd v. Cornelius*, 52 F.4th 265, 271 (5th Cir. 2022); *Tolan*, 572 U.S. at 655–56.

In *Byrd v. Cornelius*, this Court affirmed a district court's denial of qualified immunity, finding a dispute of material fact regarding the events surrounding the plaintiff's arrest. 52 F.4th at 268. There, at the summary judgment phase, defendant-officers provided a short security video, but this Court held that because the video did not show what happened during the arrest or the events after the plaintiff was restrained, it did not clarify the factual dispute. *Id*. at 269, 271.

Here, Lacaze's body-worn camera footage does not clarify several factual disputes, as the footage was taken well *after* the parties' initial interaction. Defendant claims the body camera shows that the Pigotts did not appear to be distressed, but no video could fully capture the Pigotts' distress and fear. For example, K.P. begged Gintz not to shoot his father, and Mya was so scared by Gintz's actions that she initially thought he was an armed robber. ROA.884, 1098.

Against this backdrop, it is improper for Gintz to attempt to infer facts in his own favor contrary to case law and the Federal Rules of Civil Procedure. Fed. R. Civ. P. 56; *Flores v. Rivas*, EP-18-CV-297-KC, 2020 WL 563799, at *2 (W.D. Tex. Jan. 31, 2020) (The court "must accept all well-pleaded facts as true, draw all inferences in favor of the nonmoving

party, and view all facts and inferences in the light most favorable to the nonmoving party."). Such inferences are the province of the trier of fact and cannot be rendered on summary judgment. *Schulz*, 350 U.S. at 525; *Scott v. Harris*, 550 U.S. 372, 380 (2007) ("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'"). Any determination to the contrary is unsupported at law.

D. Defendant's Reliance on *Martin* and *Strickland* to Discredit Plaintiffs' Injuries Is Inapt.

Defendant additionally relies on inapt case law to discredit Plaintiffs' injuries. Gintz Br. 32–33. Defendant first cites *Martin*, wherein a district court found that plaintiffs failed to provide "any competent admissible evidence" of psychological injury. *Martin v. City of Alexandria Municipality Police Dep't*, No. CIV A 03-1282, 2005 WL 4909292, at *12 (W.D. La. Sept. 16, 2005), *aff'd sub nom. Martin v. City of Alexandria*, 191 F. App'x 272 (5th Cir. 2006). But there, the plaintiffs did not provide any admissible evidence of psychological injury *whatsoever*. *Id.* In *Martin*, the plaintiffs relied on exhibits that were either inadmissible hearsay or irrelevant. *Id.* at *5. Here, Plaintiffs have provided admissible evidence as to their own injuries, including

deposition testimony about Mr. Pigott's paranoia and Mya's need for a service dog. ROA.842–43. Defendant's reliance on *Martin* therefore fails.

Defendant next turns to *Strickland v. City of Crenshaw, Miss.*, for support, asserting that, because the Pigotts do not have third-party medical testimony or evidence, they cannot show sufficient injury to support an excessive force claim. Gintz Br. 32–33. This is not the law. In *Strickland*, the court held that a plaintiff lacked any admissible evidence supporting his assertions of psychological harm when police justifiably entered his home. *Strickland v. City of Crenshaw, Miss.*, 114 F. Supp. 3d 400, 416 (N.D. Miss. 2016). The deposition testimony failed to demonstrate that the defendants' actions were objectively unreasonable, and there was no testimony from the minor plaintiffs themselves as to what they saw and how it affected them. *Id.*

Here, the force unleashed on the Pigotts was not proportional to the need. *See supra* at Part II(A). Defendant pointed his firearm at the Pigotts without any reasonable suspicion of criminal activity or risk to his safety, and Mr. Pigott's seizure was not backed by a warrant as in *Strickland*. Moreover, all three Plaintiffs have testified regarding their psychological injuries. Mr. Pigott stated that he has developed paranoia

around law enforcement. ROA.842. Mya stated she had nightmares, and for at least a year she could not sleep alone, with her father getting her a service dog to help her cope. ROA.842–43, 865, 1100. K.P. suffered nightmares because of the incident, became depressed, gave up his dream of becoming a game warden due to a newfound fear of police, and saw his once-excellent grades plummet. ROA.842, 885, 1108, 1207.

It is well-settled that a party may prove injury through testimony alone. *See Durant v. Brooks,* 826 F. App'x 331, 336 (5th Cir. 2020); *see also Benoit v. Bordelon*, 596 F. App'x 264, 269 (5th Cir. 2015) (plaintiff's testimony alone sufficient to establish injury). And, where the use of force was objectively unreasonable, "even relatively insignificant injuries and purely psychological injuries will prove cognizable." *Durant*, 826 F. App'x at 336; *Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir. 1999); *Thomas v. Tewis*, 22-30662, 2024 WL 841229 at *1 (5th Cir. Feb. 28, 2024). Defendant's reliance on *Strickland* fails, as Plaintiffs have provided evidence of more than *de minimis* injury. *Thomas,* 2024 WL 841229, at *1; *see* Opening Br. 58–61.

The law credits Plaintiffs' testimony as to injury because there is no evidence in the record that makes their claims untenable. *Thomas,*

2024 WL 841229, at *1; *see* Opening Br. 58–61. For these reasons, Defendant's arguments fail.

E. No Reasonable Suspicion Attaches to Gintz's Unsupported Conclusion That the Pigotts Threw Contraband Over the Fence.

Defendant argues that his belief that the Pigotts threw contraband over the fence justified his actions throughout the evening. Gintz Br. 30, 46. But hunches alone do not justify an officer's actions. *United States v. Michelletti*, 13 F.3d 838, 840 (5th Cir. 1994) (en banc) ("The Fourth Amendment requires only some minimum level of objective justification for the officers' actions—but more than a hunch—measured in light of the totality of the circumstances."). "Under Terry, if a law enforcement officer can point to specific and articulable facts that lead him to reasonably suspect that a particular person is committing, or is about to commit, a crime, the officer may briefly detain—that is, seize—the person to investigate." *United States v. Hill*, 752 F.3d 1029, 1033 (5th Cir. 2014) (citation omitted). "The officer must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity."

Illinois v. Wardlow, 528 U.S. 119, 123–24 (2000) (citation omitted); *see also* Opening Br. 40–43 (collecting cases).

No facts support any reasonable suspicion that the Pigotts brought contraband to the facility. Gintz merely guessed that they had, based on nothing but previous issues not involving the Pigotts. Gintz Br. 9. No one, including Gintz, saw the Pigotts throw contraband over the fence. ROA.1147. Gintz did not see the Pigotts speed off or start driving erratically when spotted by officers. ROA.1147. His beliefs were unsupported by articulable and particular facts, rendering unsubstantiated any notion of reasonable suspicion concerning an alleged escape from the facility or the throwing of contraband by the Pigotts over the fence.

In sum, the force used by Gintz against the Pigotts during the traffic stop was unconstitutional.

III. This Court Can Decide that Qualified Immunity's Flawed Foundation Militates in Favor of Placing the Burden of the Immunity Defense on the Defendant.

Defendant makes much of Judge Willet's concurring opinion in *Rogers v. Jarrett*, in which he writes that the Court's granting of qualified immunity was "compelled by our controlling precedent." 63 F.4th 971,

979 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 193 (2023). But that precedent rests on a revision that misstates the law, because the compilation of the Revised Statutes of 1974 did not have authority to amend the law of 1871. *Id.* at 980 (Willet, J., concurring).

A. Defendant's Qualified Immunity Arguments Ignore Section 1983's Legislative History and the Purpose of the Revised Statutes.

Defendant points to *Maine v. Thiboutot*, where the Supreme Court considered an 1874 change to Section 1983 and concluded that "§1983 should be interpreted as received in 1874[.]" Gintz Br. 43. But the Court in *Maine* did not confront a situation where the statute as written is irreconcilable with the legislative history. *Maine v. Thiboutot*, 448 U.S. 1 (1980). The petitioner in *Maine* argued that the phrase "and laws," added to Section 1983 in 1874 did not create a cause of action under Section 1983 to vindicate rights secured by the Social Security Act, but rather only for those laws that sound in civil rights or equal protection. *Id.* at 4.

While the Supreme Court rejected the petitioner's argument because "the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act," the Court evaluated legislative history to assess Congress' intent and found

that "the legislative history does not demonstrate that the plain language was not intended." *Id.* at 7–8. The Court affirmed the broad definition of the "and laws" language, stating that it was the role of Congress to act if Congress wished to change the law. *Id.* Thus, in *Maine*, the Court did not disturb an 1874 addition to Section 1983 because it found there was *no legislative history that supported doing so*.

Rather than casting doubt on Plaintiff's argument, *Maine* affirms that the Court will look to the legislative intent of Congress when interpreting Section 1983—and the clear legislative intent of the Reconstruction Congress was to ensure that common law defenses had no place in Section 1983 claims. As discussed at length in Dr. Reinert's article, *Qualified Immunity's Flawed Foundation*, the legislative history was not silent on the issue of whether common law defenses were applicable. Alexander Reinert*, Qualified Immunity's Flawed Foundation,* 111 Calif. L. Rev. 201 (2023). The comparison to *Maine* is accordingly inapposite.

Separately, Defendant argues that *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968), provides limited value to this Court because the direct repeal language was not addressed. This is not so. The Revised

Statutes created an official compilation of federal laws because no official source stating what the law was existed. *See* Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 Minn. L. Rev. 1008, 1008–09 (1938). Congress attempted to do this first via a commission, but its revisions inadvertently changed law. *Id.* at 1013. Congress therefore instructed a lawyer to do his own analysis of proposed revisions, removing anything that substantively changed the law but keeping "mere changes of phraseology not affecting the meaning of the law." 2 Cong. Rec. 646-8 (1874). Any changes made were understood to condense the law, *not* alter its meaning. 2 Cong. Rec. 4220 (1874). Omissions were used to "to strike out the obsolete parts and to condense and consolidate." 2 Cong. Rec. 129 (1873).

Because the Revised Statutes did *not* change the law, the omission of the Notwithstanding Clause in 1874 did not change Congress' abrogation of common law immunities in Section 1983. *See United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) (when Congress decides to "revis[e] and consolidat[e] the laws," it does not change the effect of the law unless Congress explicitly says so). Hence, the Court in *Jones* recognized that Section 1982's Notwithstanding Clause was designed to "emphasiz[e] the

supremacy of the 1866 statute over inconsistent state or local laws," and that its deletion in the Revised Statutes merely removed superfluous language. *Jones*, 392 U.S. at 422 n.29. *Jones* demonstrates that the omission of the 1871 explicit language precluding common law doctrines did not change the meaning of the law.

B. Because Defendant's Arguments Have No Merit, the Burden of the Qualified Immunity Defense Is at Issue and Should Be Revisited by this Court.

While total abandonment of qualified immunity may require Supreme Court action, it is well within this Court's authority to revisit on whom the burden of the defense is placed—a burden that is subject to a circuit split unresolved by the Supreme Court. *See* Matthew Ackerman, *Reflections on a Qualified (Immunity) Circuit Split*, Ackerman & Ackerman (Mar. 17, 2022), https://ackerman-ackerman.com/reflections-on-a-qualified-immunity-circuit-split/ (citing and collecting cases).

The need for revision is urgent. As this Court has acknowledged, law enforcement invokes qualified immunity "under absurd circumstances." *Hughes v. Garcia*, No. 22-20621, 2024 WL 1952868, at *1 (5th Cir. May 3, 2024). One way to end this is by placing the burden on the party asserting it—not the plaintiff.

Burden-shifting to the plaintiff is premised on qualified immunity being a defense to Section 1983 claims; but the original statutory text unequivocally shows the opposite to be true. There is growing sentiment among jurists that qualified immunity has no basis in Section 1983 or the common law. *See Zadeh v. Robinson*, 928 F.3d 457, 480–81 (5th Cir. 2019) (Willet, J., concurring) (footnotes omitted); *see also Ziglar v. Abbasi*, 582 U.S. 120, 157 (2017) (Thomas, J., concurring) (courts applying the doctrine are not "engaged in 'interpret[ing] the intent of Congress in enacting'" Section 1983, and further "th[is] sort of 'freewheeling policy choice'" is antithetical to the judicial role).

IV. Gintz Violating RPSO Policy Is Part of the Objectively Reasonable Analysis for Qualified Immunity.

Defendant cites to *Mason v. Lafayette City-Parish Council,* arguing that his failure to follow RPSO policy shows negligence at most and cannot show a violation of the Constitution. 806 F.3d 268 (5th Cir. 2015); Gintz Br. 51. Plaintiffs, however, are not asserting that a policy violation alone demonstrates violation of a constitutional right. Rather, violation of departmental policy goes to the heart of whether actions were objectively reasonable. An officer failing to "follow departmental policy makes his actions more questionable, because it is questionable whether

it is objectively reasonable to violate such a departmental rule." *Rice v. ReliaStar Life Ins. Co.*, 770 F.3d 1122, 1133 (5th Cir. 2014).

V. Defendant's Challenge to Warden Slayter's Report Lacks Merit.

Defendant argues that Warden Slayter's report is inadmissible summary judgment evidence. Gintz Br. 48–50. But the report falls squarely within the public records hearsay exception of Federal Rule of Evidence 803(8). Rule 803(8)(A)(iii) creates a hearsay exception for "[a] record or statement of a public office if it sets out . . . in a civil case. . . factual findings from a legally authorized investigation," unless the party opposing admissibility shows "the source of information or other circumstances indicate a lack of trustworthiness." Fed. R. Evid. 803(8)(A)(iii). Rule 803(A) *presumes* that an investigator's findings are admissible unless the opposing party proves that the report is not trustworthy. *See Moss v. Ole S. Real Estate, Inc.*, 933 F.2d 1300, 1305 (5th Cir. 1991); *Mason v. Faul*, CV 12-2939, 2018 WL 1097092, at *2 (W.D. La. Feb. 28, 2018). "The Rule 803 trustworthiness requirement . . . means that the trial court is to determine primarily whether the report was compiled or prepared in a way that indicates that its conclusions can be relied upon ('reliability')." *Moss*, 933 F.2d at 1307. Because Gintz has

failed to demonstrate that Warden Slayter's report was compiled or prepared in an unreliable way, it is admissible evidence on summary judgment. *Id.*

In *Faul*, the district court considered four factors in concluding that an internal affairs report was admissible at trial: (1) timeliness; (2) the skill or experience of the official who drafted the report; (3) whether a hearing was held about the incident; and (4) whether the report was plagued by motivational problems or bias. *Faul*, 2018 WL 1097092 at *2. As to the first factor, Defendant argues that the "report is dated 4/23/2020, a week after the incident." Gintz Br. 50. In *Faul*, the district court found that, where an investigation and report were completed 2 months after the incident, the report was timely. *Faul*, 2018 WL 1097092 at *2. Thus, Warden Slayter's report dated six days after the incident was timely.

Regarding the second factor, Defendant argues, "there is no information on the special skill or expertise of Slayter." Gintz Br. 50. But in *Faul* the court presumed that the investigator had the requisite expertise without requiring any qualifications. *Faul*, 2018 WL 1097092 at *2. Slayter, Gintz's supervisor and the Warden at the Rapides Parish

Sheriff's Office, is presumed to be qualified to issue the report. He is responsible for the officers at the jail, and would therefore be the expert on proper policies and procedures. He indicated in his report that he previously directed all employees not to use their personally owned vehicles to pursue persons off the facility premises. ROA.990. The second factor is therefore met.

As to the third factor, there was no hearing held. Gintz Br. 50. But *Faul* does not require that *all* factors be met; the lack of a hearing does not itself render Warden Slayter's report unreliable, especially since the report satisfies the remaining three factors easily. *Faul*, 2018 WL 1097092 at *4.

Finally, Defendant concedes "[t]here is no testimony or evidence about possible motivational problems." Gintz Br. 50. The fourth factor is therefore satisfied, and Warden Slayter's report is admissible. *Faul*, 2018 WL 1097092 at *4.

Additionally, Defendant's argument that the report is hearsay and does not fall under any exception relies on distinguishable law. *Randle* is distinguishable because that court found the report inadmissible under Rule 403 because its probative value was substantially outweighed by the

danger of unfair prejudice. *Randle v. Tregre,* 147 F. Supp. 3d 581 (E.D. La. 2015), *aff'd*, 670 F. App'x 285 (5th Cir. 2016). That report contained a volume of witness statements and the investigator's summary of those statements, which the court found to be hearsay within hearsay. *Id.* at 597. No such statements exist in the Slayter report, which finds Gintz acted inappropriately. ROA.990.

Courts have a longstanding tradition of admitting internal affairs investigation reports and files under the public records exception. Fed. R. Evid. 803(8)(A)(iii); *Mapp v. Mobley,* 2013 WL 5350629, at *1 (S.D.Ga. Sept. 23, 2013) (report falls under public records exception); *Murphy v. Metropolitan Transp. Auth.,* 2009 WL 1044604, at *2 (S.D.N.Y. Apr. 14, 2009) (file not hearsay under 803(8)); *Escobar v. City of Houston,* 2007 WL 2900581, at *13 (S.D.Tex. Sept. 29, 2007) (file falls under 803(8)(A) and (B); report falls under 803(8)(C)); *Owens v. City of Philadelphia,* 6 F.Supp.2d 373, 377 n.3 (E.D.Pa.1998) (report containing witness accounts admissible under Rule 803(8)(C) as "factual" support for conclusion in investigator's report); *Puglise v. Cobb County, Ga.,* 4 F.Supp.2d 1172, 1177–78 (N.D.Ga.1998) (report could be considered on summary judgment). Warden Slayter's report is no different. Gintz

therefore has not overcome his burden in rebutting its presumption of admissibility.

CONCLUSION

This Court should reverse the judgment of the district court.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B)(ii) of the Federal Rules of Appellate Procedure because it contains 6,498 words, excluding the parts of the brief exempted by Rule 32(f).

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