

RECOGNIZING AND PRESERVING CIVIL RIGHTS CLAIMS
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I. Primary Tool in Most Cases is 42 U.S.C. § 1983.

42 U.S.C. §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within its jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at Law, suit in equity, or other proper proceeding for redress.

This paper is focused on commonly-asserted claims under federal law, but state law claims can be important. Civil rights litigation is complex. This paper is not intended to cover all of the possible claims or all of the technicalities. The law in this area continues to develop.

II. Theories of Liability

“Terry” Stops. “[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.” *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). “While ‘reasonable suspicion’ is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop.” *Id.* (citing *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).

In the absence of reasonable suspicion justifying the stop, a person approached by an officer “need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.” *Florida v. Royer*, 460 U.S. 491, 497-98 (citing *Terry*, 392 U.S. at 32-33 (Harlan, J., concurring) and 34 (White, J., concurring)). An individual “may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does

not, without more, furnish those grounds.” *Id.* at 498 (citing *United States v. Mendenhall*, 446 U.S. 544, 556 (1980)).

The Court in *Terry* emphasized that “[t]he scope of the search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.” 392 U.S. at 19 (citations omitted). Thus, even when supported by reasonable suspicion, “an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” *Royer*, 460 U.S. at 500; *see also Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (even a seizure justified at inception “can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission”); *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (“In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the [suspect.]”); *Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984) (once purpose of stop is concluded, which may occur upon detainee’s refusal to answer questions, “he must be released”); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975) (officer may ask stopped individual to “explain suspicious circumstances, but any further detention or search must be based on consent or probable cause”).

Weapon Patdowns. Under *Terry* and its progeny a police officer also has a right to conduct a patdown search for weapons. This right is separate and distinct from the right to stop an individual. *See United States v. Bonds*, 829 F.2d 1072, 1074 (11th Cir. 1987).

A patdown for weapons must be “supported by a reasonable belief [the searched individual is] armed and presently dangerous.” *Id.* (quoting *Ybarra v. Illinois*, 444 U.S. 85, 93 (1980)). The officer must be “aware of specific facts which would warrant a reasonable person to believe he was in danger.” *Id.* (quoting *United States v. Tharpe*, 536 F.2d 1098, 1101 (5th Cir. 1976) (en banc)). “This standard requires an objectively reasonable fear based upon specific facts regarding specific individuals. A generalized suspicion or ‘hunch’ will not justify a frisk. It is this standard, consistent with that stated in *Ybarra*, that governs the legitimacy of a frisk as opposed to a stop.” *Id.* at 1074-75; *see also Terry*, 392 U.S. at 26 (“[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection

of the police officer, where he has reason to believe he is dealing with an armed and dangerous individual.”); *Bourgeois v. Peters*, 387 F.3d 1303, 1314 (11th Cir. 2004) (“*Terry* did away with the warrant and probable cause requirements for pat-down searches, but not an individualized suspicion requirement.”); *United States v. Rogers*, 131 Fed. Appx. 138, 139 (11th Cir. 2005) (suppressing evidence seized without reasonable suspicion when officer testified “he had no idea whether [bulge] was a gun or knife or posed any threat to him, but thought it was a ‘possibility’”).

Even if a patdown is justified under *Terry*, “a protective search – permitted without a warrant and on the basis of reasonable suspicion less than probable cause – must be strictly ‘limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.’” *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (citations omitted). “If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry*.” *Id.* (citing *Sibron v. New York*, 392 U.S. 40, 65-66 (1968)). Further, “[t]he search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault.” *Sibron*, 392 U.S. at 65; *see also United States v. Clay*, 483 F.3d 739, 743-44 (11th Cir. 2007) (officer may continue search beyond outer garments “when an officer feels a concealed object that he reasonably believes may be a weapon”).

A police officer is only entitled to search in a person’s pockets if he reasonably believes the object he or she feels in the pocket is a weapon. *Id.* (officer’s search of pocket proper only because he believed “long, thin object in Clay’s pocket might be a screwdriver or something similar that could be used as a weapon”); *United States v. Teague*, 2010 WL 6529640 at *15 (N.D. Ga. Nov. 12, 2010) (“Holly’s entry in Defendant’s pants pocket and retrieval of the keys went beyond the scope of a *Terry* pat-down ‘for the discovery of weapons which might be used to harm the officer or others nearby’ and thus ran afoul of the Fourth Amendment”) (citations omitted) (citing cases).

It is insufficient for an officer to be unable to determine what the object is; the officer must affirmatively have a reasonable belief the object in the pocket is a weapon. *See Clay*, 483 F.3d at 743-44; *United States v. Owens*, 2008 WL 151978 at *5 (S.D. Fla. January 15, 2008) (citing *Clay* and holding that officer “exceeded the scope of a *Terry* protective search for weapons when he removed [a] bulge from the

defendant's pocket" when the officer "did not know what the bulge was" and "did not state he believed the bulge in the defendant's pocket was a weapon or contraband"); *Kapila v. Jenkins*, 2009 WL 1288233 at *5 (S.D. Fla. May 7, 2009) ("[e]ven contorting the facts to find an articulated, objective basis for the pat-down searches based on some general specter of violence, the constitutionally permissible scope was exceeded here. In his deposition, Young could not testify to any belief in danger of imminent harm when he frisked Garruto.").

Automobile Stops. Police officers may make a traffic stop of a vehicle whenever there is probable cause to believe a traffic violation has occurred. *Whren v. U.S.*, 517 U.S. 806 (1996). Police officers have the right to order both the driver and any passengers out of the vehicle.

False Arrest, including "Contempt of Cop" Cases and a Failure to Investigate. These claims turn upon the presence of probable cause, which in turn is dependent upon the substantive criminal law. In so-called "contempt of cop" cases, common false charges used by officers to justify their actions are obstructing governmental operations and disorderly conduct.

Verbal criticism and challenge directed at police officers is conduct ordinarily protected by the First Amendment. *City of Houston v. Hill*, 482 U.S. 451, 461 (1987); *Skop*, 485 F.3d at 1139 (citing *Hill*); *see also Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973) (overturning conviction under disorderly conduct statute where "petitioner was arrested and convicted merely because he verbally and negatively protested Officer Johnson's treatment of him"). Accordingly, the Alabama courts have made sure the disorderly conduct statute does not reach such conduct. *See Walker v. Briley*, 140 F. Supp. 2d 1249, 1258-59 (N.D. Ala. 2001) (stating that "the Alabama courts . . . [have], in order to avoid potential First Amendment infirmities, sharply and consistently limited what conduct and attendant circumstances are required for a violation of the disorderly conduct statute, especially where the defendant is addressing a police officer, and even more so where such exchange is not heard by other members of the public . . .") (citations omitted).

Probable cause to arrest exists when an arrest is objectively reasonable based on the totality of the circumstances. *Rankin v. Evans*, 133 F.3d 1425, 1435 (11th Cir. 1998). "This standard is met when 'the facts and circumstances within the officer's

knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.” *Id.* (quoting *Williamson v. Mills*, 65 F.3d 155, 158 (11th Cir. 1995)).

Law enforcement officers cannot ignore or disregard facts within their knowledge to create probable cause, *Kingsland v. City of Miami*, 382 F.3d 1220, 1228-31 (11th Cir. 2004)(stating, among other things, that “officers [are] not be permitted to turn a blind eye to exculpatory information that is available to them, and instead support their actions on selected facts they chose to focus upon”), and cannot refuse to investigate easily-verifiable claims of innocence, *Tillman v. Colely*, 886 F.2d 317, 321 (11th Cir. 1989) (sheriff could have easily had undercover officer go look at the Mary Tillman (age 41) he was about to get a warrant to arrest to see if she was the same Mary Tillman (age 24) who bought drugs from the officer); *Burdeshaw v. Snell*, 350 F. Supp. 2d 944, 950 (M.D. Ala. 2004) (no probable cause for arrest on controlled substance charges when officer refused to examine prescription pill bottles the plaintiff said were in his truck).

A full custodial arrest for a minor traffic offense is not actionable. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

Arrest Warrants. Officials may be liable for obtaining an arrest warrant by presenting material false information or omitting material exculpatory facts when the warrant would not have been issued if the truth had been presented. *See Malley v. Briggs*, 475 U.S. 335 (1986). Also, even if a warrant application is not deceptive, if it is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,” an officer may be liable. *See Messerschmidt v. Millender*, 132 S. Ct. 1235, 1245 (2012) (quoting *Malley*, 475 U.S. at 344-45).

Warrantless Home / Property Searches. A warrantless entry into a home generally requires probable cause and an exigent circumstance. Exigent circumstances include “hot pursuit of a subject, risk of removal or destruction of evidence, and danger to the arresting officers or the public.” *U.S. v. Edmondson*, 791 F.2d 1512, 1515 (11th Cir. 1986); *but see Ryburn v. Huff*, 132 S.Ct. 987 (2012) (officers may enter home even without probable cause to protect officer safety). Police officers, however, may not rely on an exigency they create by “engaging . . . in conduct that

violates the Fourth Amendment.” *Kentucky v. King*, 131 S.Ct. 1849, 1858 (2011).

The Supreme Court has held using a trained police dog to explore the area around a home in hopes of discovering incriminating evidence violates the Fourth Amendment if it is not supported by probable cause and a search warrant. *See Florida v. Jardines*, 133 S. Ct. 1409, 1415-16 (2013).

Knock and Announce. Generally, the Fourth Amendment requires officers to knock and announce their identity before entering a home. *Wilson v. Arkansas*, 514 U.S. 927 (1995).

Search Warrants. See arrest warrant discussion above for general principles. Probable cause to search a residence requires there to be a nexus between the residence and criminal activity. *United States v. Bradley*, 644 F.3d 1213, 1263 (11th Cir. 2011). Items to be seized must be described with particularity. *Groh v. Ramirez*, 540 U.S. 551 (2004). Searches pursuant to valid warrants may also be challenged as unreasonable in their execution.

Excessive Force (Fourth Amendment). The Fourth Amendment requires that the force used by a police officer be reasonably proportionate to the need for that force, which is measured by the severity of the crime, the danger to the officer, and the risk of flight.” *Lee v. Ferraro*, 284 F.3d 1188, 1199 (11th Cir. 2002) (citing *Graham v. Conner*, 409 U.S. 386 (1989)). When force is “unnecessary and disproportionate” it constitutes excessive force in violation of the Fourth Amendment. *Id.* at 1198. If the arrest is valid, courts will tolerate some force, even force that may seem unnecessary, in the making of the arrest. Moreover, reasonable force does not become actionable merely because it causes significant injury. Claims may be made based on lethal (i.e., gun) and less-than-lethal (strikes, takedowns, pepper spray, and tasers) uses of force.

Excessive Force Against Prisoners (Eighth Amendment). The core inquiry in an Eighth Amendment excessive force case is whether the use of force was applied in a good faith effort to maintain or restore discipline or whether it was applied maliciously or sadistically for the purpose of causing harm. *See Whitley v. Albers*, 475 U.S. 312, 320-21 (1984). If an action taken by an official “‘unnecessar[ily] and wanton[ly] inflicted pain,’” it is a “clear violation of the Eighth Amendment.” *Hope*

v. Pelzer, 536 U.S. 730, 741 (2002). The factors to be considered include: (1) the need for force; (2) the relationship between the need for force and the amount of force used; (3) the threat reasonably perceived; (4) efforts made to temper the severity of a forceful response; and (5) the extent of the injury. *Id.* at 321. While the Eighth Amendment accords substantial deference to public officials, they are not insulated from actions taken “in bad faith and for no legitimate purpose.” *Whitley*, 475 U.S. at 322.

Excessive Force Against Pretrial Detainees (Fourteenth Amendment). The Supreme Court recently clarified that excessive force claims brought by pretrial detainees are governed by an objective standard and not the higher Eighth Amendment standard. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015).

Deliberate Indifference to Serious Medical Needs (Fourteenth and Eighth Amendments). An Eighth Amendment claim for deliberate indifference to a prisoner’s medical needs has three elements: (1) an objectively serious medical need, (2) deliberate indifference to that need, and (3) causation. *Danley v. Allen*, 540 F.3d 1298, 1309 (11th Cir. 2008). At least two tests have been established for determining whether a medical need is serious: 1) “whether a delay in treating the need worsens it,” *id.* at 1310, and 2) whether the need is one that has been diagnosed by a physician or is so obvious even a lay person would recognize the need for medical attention, *id.* at 1310-11. The deliberate indifference element has three components: “(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence.” *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999).

Fourteenth Amendment deliberate indifference claims by pretrial detainees have generally been evaluated by the same standard as prisoner claims, but courts are reconsidering the standard in light of *Kingsley*.

Deliberate Indifference to Risk of Harm from Inmate Violence (Fourteenth and Eighth Amendments). “A prison official’s “deliberate indifference” to a substantial risk of serious harm to an inmate violates the Eighth Amendment.” *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). “[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.” *Id.* at 833 (quotations and citations omitted). “It is not, however, every injury suffered by one inmate at the

hands of another that translates into a constitutional liability for prison officials responsible for the victim's safety.” *Id.* at 834. Prison or jail officials must have been subjectively aware of a substantial risk of serious harm to an inmate. *Id.* At 834-38. These cases turn on whether the information officials possessed regarding the threat to the inmate was specific enough. Facts that would support such a claim include being threatened, a fear of the attacker, and requesting protective custody. *See Rodriguez v. Sec’y for Dep’t of Corr.*, 508 F.3d 611, 621 (11th Cir. 2007).

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Malicious Prosecution. In the Eleventh Circuit, to establish a malicious prosecution claim under § 1983, a plaintiff must prove (1) the elements of the common law tort of malicious prosecution, and (2) a violation of his or her Fourth Amendment right to be free from unreasonable seizures. *Kingsland v. City of Miami*, 382 F.3d 1220, 1234 (11th Cir. 2004); *Wood v. Kesler*, 323 F.3d 872, 881 (11th Cir.2003), *cert. denied*, 540 U.S. 879 (2003). The common law claim requires proof the defendant instigated against the plaintiff, without probable cause and with malice, a prior judicial proceeding, that the prior proceeding ended in favor of the plaintiff, and that the plaintiff suffered damages. Causation is generally established by showing police officials deceived the prosecutor by fabricating evidence or by withholding exculpatory evidence. Whether there is a Fourth Amendment violation depends upon whether the plaintiff remained in jail or was subject to more restrictive conditions (i.e., cannot leave the state) than the normal conditions of a pretrial release on bond. *Kingsland*, 382 F.3d at 1236.

Retaliatory Prosecution. A malicious prosecution implemented in retaliation for a person exercising their First Amendment rights (i.e., filing a sworn claim). A lack of probable cause is required.

Denial of Liberty without Due Process (Criminal Procedure). A denial of liberty without due process may give rise to civil liability for a variety of misconduct, including fabricating and falsifying evidence, suppressing exculpatory evidence, and obtaining unreliable eye witness identifications.

III. Basic Rules in § 1983 Litigation

Government Officials Have Qualified Immunity. A government employee is only liable under § 1983 if his or her conduct violated clearly established law of which a reasonable person would have known. The law can be clearly established not only by cases that are factually close to the one at hand but also by broader legal principles. *U.S. v. Lanier*, 520 U.S. 259, 271-72 (1997) (citations omitted); *see also Hope v. Pelzer*, 536 U.S. 730 (law was clearly established even though no case had held being handcuffed to a hitching post for hours without water or bathroom breaks violated the Eighth Amendment); *Childs v. Dekalb County, Georgia*, 286 Fed. Appx. 687, 695 (11th Cir. 2008) (the requirements of *Terry v. Ohio* for investigatory stops can provide a “general constitutional rule [that] applies ‘with obvious clarity’ to [police officers].”); *Keating v. City of Miami*, 598 F.3d 753, 766-67 (11th Cir. 2010) (finding law clearly established despite “novel facts” and absence of factually-similar Eleventh Circuit precedent based on “a broader, clearly established principle . . . that peaceful demonstrators have a First Amendment right to engage in expressive activities”).

Employees of prison and jail contractors are not entitled to assert a qualified immunity defense. *See Richardson v. McKnight*, 521 U.S. 399, 401 (1997) (prison guards).

Qualified Immunity Generally Protects Officials Who Have an Arguable Basis for Their Actions. *See, e.g., Kingsland v. City of Miami*, 382 F.3d 1220, 1232 (11th Cir. 2004) (an officer is not entitled to qualified immunity if he or she lacks arguable probable cause to arrest).

An Official’s Subjective Intent Is Frequently Irrelevant. Because inquiries under the Fourth Amendment are objective ones, what the officers subjectively believe is irrelevant. *See Skop v. City of Atlanta*, 485 F.3d 1130, 1141 n.3 (11th Cir. 2007) (“This is not to say that [the officer’s] subjective state of mind is relevant to the issue of probable cause or arguable probable cause; it is not. Instead, whether [the officer] thought Skop heard the order is relevant because it goes to our hypothetical officer’s objective understanding of the circumstances. Thus, if [the officer] knew that Skop did not or could not hear the order, our arguable probable cause yardstick—a reasonable officer “possessing the same knowledge” as Brown—would also have

known that Skop did not hear the order.”)(citations omitted). Thus, an arresting officer claiming arguable probable cause for an arrest is not limited to the offenses actually charged. *Grider v. City of Auburn*, 618 F.3d 1240, 1257 (11th Cir. 2010).

Individuals May Be Liable for Failing to Intervene. Officers who have an opportunity to prevent excessive force by another officer can be liable for not intervening. *Hadley v. Guitierrez*, 526 F.3d 1324, 1330-31 (11th Cir. 2008). Liability for failure to intervene to stop a false arrest is more limited. *See Brown v. City of Huntsville*, 608 F.3d 724, 737 (11th Cir. 2010) (distinguishing officers who participate in an arrest from those who are merely present with the arresting officers at the scene and limiting liability of the merely present to persons who are “part of the chain of command authorizing the arrest action”).

There Is No Vicarious Liability. Municipalities (and counties) are liable under section 1983 only for customs or policies that are the moving force behind constitutional violations. *See Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690 (1978). There is no respondeat superior liability.

Liability may arise from a single incident, and there is no requirement that a plaintiff prove a long-standing practice.

“[M]unicipal liability may be based upon (1) an action taken or policy made by an official responsible for making final policy in that area of the city’s business; or (2) a practice or custom that is so pervasive, as to be the functional equivalent of a policy adopted by the final policymaker.” *Church v. City of Huntsville*, 30 F.3d 1332, 1343 (11th Cir. 1994). “State and local positive law determine whether a particular official has final policymaker authority for § 1983 purposes.” *Cooper v. Dillon*, 403 F.3d 1208, 1222 (11th Cir. 2005) (finding the police chief’s actions subjected defendant city to municipal liability because a city ordinance gave the chief powers pursuant to a delegation of municipal power in the Florida Constitution and there were other state statutes indicating that police chiefs in the state have final policymaking authority in their respective municipalities for law enforcement matters).

The only qualification that the Supreme Court has placed on the type of decision upon which “an unconstitutional governmental policy could be inferred,” *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988), is that the decision must

represent “a deliberate choice to follow a course of action . . . made from among various alternatives,” *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). If such a decision is made by an official who has the authority to establish final policy in the particular subject area, then the decision will give rise to municipal liability, *id.* at 483-84, even if the decision is “tailored to a particular situation and [is] not intended to control decisions in later situations,” *id.* at 481.

Thus, for example, the county prosecutor’s instructions to the deputy sheriffs in *Pembaur* to “go in and get” employees presumed to be inside a locked business premises, without a search warrant, *id.* at 472-73, were held to be acts of the county, because the county prosecutor had authority to establish final county policy regarding law enforcement practices, *id.* at 484-85. Similarly, in *Cooper*, the Eleventh Circuit found a police chief had final policymaking authority in law enforcement matters and held his one-time decision to enforce an unconstitutional Florida statute against a newspaper publisher was adoption of “policy” that caused a deprivation of the publisher’s First Amendment rights sufficient to render the municipality liable under § 1983. 403 F.3d at 1222.

Monell liability can be established by proof of a policy that is unconstitutional on its face, like the policy permitting the shooting of fleeing felons ruled unconstitutional in *Tennessee v. Garner*, 471 U.S. 1 (1985). Even though the City of Memphis’ policy was based on a state statute, the city was found liable for its incorporation of that state law into its policies. *See Garner v. Memphis Police Dept.*, 8 F.3d 358 (6th Cir. 1993).

Monell liability can also arise from implicit policies or customs created when policymaking officials acquiesce in previous unconstitutional conduct by governmental employees or refuse to investigate complaints of constitutional violations. *See, e.g., Vineyard v. County of Murray*, 990 F.2d 1207, 1212 (11th Cir. 1993) (considering practice of not investigating excessive force complaints as evidence of custom or policy); *Hunter v. County Of Sacramento*, 652 F.3d 1225, 1236 (9th Cir. 2011) (“We hold that the District Court prejudicially erred in refusing to instruct the jury that, for purposes of proving a *Monell* claim, a custom or practice can be supported by evidence of repeated constitutional violations which went uninvestigated and for which the errant municipal officers went unpunished. We therefore vacate the judgment and remand for a new trial.”); *Leach v. Sheriff of Shelby*

County, 891 F.2d 1241, 1247 (6th Cir. 1989) (“Under the principles articulated in *Monell*, Leach must demonstrate that his maltreatment was the result of a policy or custom of the governmental entity. The policy involved here is one of deliberate indifference to the medical needs of paraplegic and physically incapacitated prisoners in the Shelby County Jail. The manifestation of this policy here has two aspects: first, the Sheriff failed to supervise his employees adequately when he knew or should have known of the danger that inmates such as Leach were likely to receive inadequate care and second, the Sheriff failed to investigate this incident and punish those responsible, in effect ratifying their actions.”); *Brown v. City of Margate*, 842 F. Supp. 515, 518 (S.D. Fla. 1993) (“[A] smaller number of incidents where the investigation and resulting disciplinary actions were inadequate may be more indicative of a pattern than a larger number of incidents where the department fully and satisfactorily addressed the matter and responded appropriately. . . . While the six incidents of alleged excessive use of force in *Carter [v. District of Columbia]* may not have been statistically significant in Washington, D.C., three such incidents may be sufficient to establish a pattern in Margate.”), *aff’d*, 56 F.3d 1390 (11th Cir. 1995).

More than negligence is required. Officials must be at least deliberately indifferent.

A governmental entity may be liable even though the individuals committing the constitutional violations have qualified immunity.

When a governmental entity contracts with a private company (i.e., jail medical contractor), the entity may still be liable for the company’s unconstitutional policies. *See Robinson v. Integrative Detention Health Services*, 2014 WL 1314947 at *9 (M.D. Ga. March 28, 2014) (holding, where there was no reporting to the sheriff regarding the quality of inmate medical care, that the actions of the medical contractor created policy for the sheriff, as the contractor’s actions were not subject to meaningful administrative review).

Inadequate hiring procedures and a failure to train are available theories but very difficult to prove.

Supervisory Officials Are Liable When There Is a Causal Connection Between Their Actions and the Constitutional Violation. *See Cottone v. Jenne*,

326 F.2d 1352, 1360 (11th Cir. 2003). The causal link can be established by proof of (1) a failure to respond to a widespread pattern of abuse; (2) a custom or policy implemented by the official that resulted in deliberate indifference; or (3) the supervisor directed his subordinates to act unlawfully or knew the subordinates would act unlawfully but failed to stop them. *Id.*

Private Parties Who Act in Concert with State Actors Are Potentially Liable.

The Eleventh Amendment Bars Suits for Damages Against a State or State Agency.

Perjury and Unconstitutional Judicial and Prosecutorial Acts During the Criminal Case Are Protected by Absolute Immunity. *See Rehberg v. Paulk*, 132 S.Ct. 1497 (2012).

Generally Speaking, There Is No § 1983 Cause of Action for Negligence.

No Sworn Claim Is Required.

Cases May Be Brought in State or Federal Court, Though Cases in State Court Are Removable.

Section 1983 Does Not Apply to Federal Law Enforcement Officials. Constitutional violations by federal LEOs may be brought under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), but attorney's fees are not recoverable.

IV. Considerations Related to the Underlying Criminal Case

A Criminal Conviction May Bar the Lawsuit. A plaintiff cannot pursue a claim that is contrary to a criminal conviction without first having the criminal conviction overturned. *Heck v. Humphrey* 512 U.S. 477, 486-87 (1994). Excessive force claims generally are not barred by resisting arrest convictions. *See Hadley v. Guitierrez*, 526 F.3d 1324, 1331 (11th Cir. 2008); *Nelson v. Jashurek*, 109 F.3d 142 (3d Cir. 1997).

A Sweet Plea Deal May Bar the Lawsuit. A plaintiff may not be able to establish the favorable termination element of a malicious prosecution claim if there is compromise. *See Uboh v. Reno*, 141 F.3d 1000, 1005 (11th Cir. 1993) (finding unilateral decision of prosecutor, in absence of evidence of compromise, to be sufficient to show favorable termination and noting that courts have generally found the entry of a nolle prosequi sufficient to satisfy this element).

Even if the Criminal Case is Ongoing, the Lawsuit (Except for Malicious Prosecution Claims) Must Be Filed Within Two Years of the Arrest.

Prosecutors May Delay and/or Seek Release-Dismissal Agreements When Police Officers Violate Constitutional Rights. These agreements may be enforceable and, even if subject to challenge, a significant deterrent to a lawyer looking at filing a civil rights lawsuit.

Clients with Pending Criminal Charges Should Be Advised of Their Right to File a Notice of Claim and Their Right to File Suit (and the Pros and Cons of Doing Each). If a lawsuit is filed, the district court has the discretion to stay the case pending the outcome of the criminal case. *See Wallace v. Kato*, 549 U.S. 384, 393-94 (2007).

Document the Client's Injuries. Good photographs will matter, possibly in the criminal case and most definitely in the civil case.

Have the Client Seek Medical Treatment. Consider encouraging the client to seek medical treatment *even if the injuries appear likely to heal on their own*, particularly if the client suffered any kind of head trauma. The CT scan used to see if there is any serious head trauma, which will likely be negative, can later be used to identify areas of bruising consistent with your client's testimony regarding, for example, having his head slammed against a wall. Documentation of the injuries by medical personnel can add credibility to your client's case. Having heard too many tales of emergency room personnel hostility toward persons reporting an assault by law enforcement, I suggest telling the client to advise the health care provider that he is a victim of assault but refuse to identify the perpetrator.

Transcripts from Municipal Court Trials Can Make a Case. Police officers

are rarely well prepared before testifying in municipal court.

Pursue Discovery in the Criminal Case. A civil rights lawyer needs to know what lies the bad guys are telling in order to evaluate the case. It is a lot easier for a civil rights lawyer to decide to take the case if the lawyer knows the police are not only lying but lying badly. Without the reports and any audio or video, when the victorious criminal defendant arrives in the civil rights lawyer's office, the case may be turned down – not because there is no case (or not a good enough case) but because the civil rights lawyer does not know enough to risk the attorney's limited time and money on the client's case. Heck, the civil rights lawyer may not even be able to identify everyone who needs to be sued.

Decisions Regarding Whether and How to Make Noise About Police Misconduct Are Difficult. Certainly, accountability is hard to find in many internal affairs departments. Some IA departments function more to prepare for the lawsuit than anything else. Yet filing an IA complaint may nevertheless be a good idea. It may cause evidence to be preserved. It may be the basis for a spoliation argument in the civil case if evidence is not preserved. It may force officers at the scene of the incident who did not file reports to put their version of events in writing (without opposing counsel's assistance).

Moreover, the nearly-inevitable approval of the officer's unconstitutional conduct at the conclusion of the IA complaint process may also provide support for a *Monell* (governmental liability) claim against the officer's employer or help lay the groundwork for one in a future case. The approval of an officer's unconstitutional conduct is strong evidence the officer's actions reflect the governmental entity's policies or customs, though ordinarily *Monell* claims require a pattern of constitutional violations.

Of course, there are risks to putting folks on notice you are planning to sue in any form. Being noisy about police misconduct may cause prosecutors to take a hard line. While prosecutors should not be in the business of protecting law enforcement from accountability in civil cases, the reality is that they often are. So, going to IA or the media, filing a sworn claim, or sending preservation letters may make sense only in the best of cases, when there is little doubt the prosecution will fold or lose at trial.

Delay Is Often the Client's Enemy. It is one thing for a civil rights plaintiff to lose claims as part of a negotiated plea deal. It is wholly another, and all too frequent, for civil rights claims to be lost, either as a matter of law or as a practical matter, not in trade, but due to the passage of time.

Prosecutors are not usually in a hurry to go to trial in bad cases. Good civil cases are lost, however, because no one thinks about the civil case until the bogus charges are finally dismissed, right before or after the statute of limitations has run. Statutes of limitation, except for malicious prosecution claims, do not wait for dismissal or acquittal.

V. Obstacles Beyond the Criminal Case

Prison Litigation Reform Act. The PLRA limits attorney's fees and damages and generally applies if suit is filed while the plaintiff is incarcerated, regardless of nature of claims. The PLRA requires inmates to exhaust their administrative remedies before filing suit. Jailed clients must exhaust the appropriate administrative remedy (grievance system, disciplinary appeal, or whatever) and need to do it according to the rules, including time limits. If they blow the time limit, they should try to file an out-of-time grievance (which most grievance systems allow in theory for good cause). If something prevents them from using the grievance system or other remedy (e.g., they are in the hospital during the relevant time period), they should try to use it as soon as the obstruction is removed. They should follow the process to the final appeal no matter what happens in the process or what any staff person tells them. Also, if they are getting out of jail (as opposed to being convicted and going to state prison), they would be wise to wait until they are out to file suit, unless that would create a statute of limitations problem.

Pleading Some Level of Factual Detail Is Required. While the Eleventh Circuit no longer applies a heightened pleading standard to claims brought pursuant to § 1983, *Randall v. Scott*, 610 F.3d 701, 709-10 (11th Cir. 2010), a plaintiff is still required to provide some detail for a complaint to pass muster under the plausibility standard that now governs pleading in federal court. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

A Stay of Discovery While the District Court Ponders the Defendant's

Motion to Dismiss Is Likely.

Lawsuits May Need to Be Filed Well Prior to the Two-year Statute of Limitations Because All Defendants Cannot Be Identified Before Filing Suit.
This is particularly true in jail cases.

Individual Defendants May Seek Interlocutory Appellate Review of an Unfavorable Lower Court Ruling on Qualified Immunity.

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