CASE NO. 18-1974

In The

United States Court of Appeals

For The Fourth Circuit

JULIAN RAY BETTON,

Plaintiff-Appellee,

v.

DAVID BELUE in his individual capacity,

Defendant-Appellant,

and,

BILL KNOWLES, in his individual capacity and official capacity; JIMMY RICHARDSON, II, in his individual capacity and official capacity; DEAN BISHIOP, in his individual capacity; CHAD GUESS, in his individual capacity; FRANK WADDELL, in his individual capacity; CHRIS DENNIS, in his individual capacity; and THE CITY OF MYRTLE BEACH,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, FLORENCE DIVISION

BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 18-1974 Caption: Julian Betton v. David Belue

Pursuant to FRAP 26.1 and Local Rule 26.1,

Julian Betton
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Narendra K. Ghosh Date: 8/27/2018

Counsel for: Julian Betton

CERTIFICATE OF SERVICE

****

I certify that on August 27, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Narendra K. Ghosh (signature) 8/27/2018 (date)

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INTRODUCTION

On April 16, 2015, ten agents of the 15th Circuit Drug Enforcement Unit ("DEU") bearing a standard knock-and-announce search warrant converged on the Myrtle Beach residence of plaintiff Julian Betton. Defendant David BeLue was the first agent to Betton's front door. BeLue did not knock or announce himself as an officer. Neither did the other DEU agents. Instead, BeLue held open the screen door so agent Chad Guess could smash the interior door with a battering ram, and BeLue and two other agents rushed into Betton's home with their semi-automatic rifles raised.

Betton was walking out of his bathroom when he heard his front door broken in. He did not know the armed men who broke in were police. They never identified themselves or gave any warnings or commands, and none were wearing uniforms. Startled by the break-in, Betton reached for a gun in his back waistband and held it by his side. He did not raise or point it at anyone. Within two or three seconds of breaking in, BeLue and the other agents fired 29 shots at Betton, hitting him nine times and paralyzing him for life.

BeLue violated the Constitution and South Carolina law when he (1) entered Betton's home without knocking, announcing his presence, and waiting a reasonable period of time; and (2) shot Betton even though Betton did not raise his

weapon and had no way of knowing the men were law enforcement officers. BeLue is liable for Betton's injuries. The District Court correctly denied BeLue's motion for summary judgment.

STATEMENT OF THE ISSUE

Did the District Court err in denying defendant BeLue's motion for summary judgment as to the issue of whether BeLue is entitled to qualified immunity on plaintiff's claim of excessive force?

STATEMENT OF THE FACTS

A. BeLue Joins the Myrtle Beach Police Department and the Drug Enforcement Unit.

In 2007, defendant David BeLue began his law enforcement career as a uniform patrol officer with the Myrtle Beach Police Department ("MBPD"). (JA 2308-09.) In 2010, BeLue requested assignment to the 15th Circuit Drug Enforcement Unit ("DEU"), a multi-jurisdictional task force, and MBPD granted the request. (JA 2310-13.)

DEU agents typically executed multiple residential search warrants per month. (JA 2299, 2449-50.) While BeLue and his fellow DEU agents almost never sought judicial authority to dispense with the knock-and-announce requirement, they almost always ignored the requirement in practice. Of the 120-

150 DEU residential search warrants BeLue helped execute, he could think of "maybe one or two" when DEU sought or obtained no-knock authority. (JA 2365.) Nevertheless, in DEU agent Mark McIntyre's experience, "DEU almost always forcibly entered without knocking and announcing, or simultaneously with announcing." (JA 2300.)

B. On April 16, 2015, BeLue and Other DEU Agents Break into Julian Betton's Home Without Knocking and Announcing and Fire 29 Bullets at Him.

1. BeLue Participates in DEU's Plan for the Betton Raid.

In early 2015, DEU Agent Chad Guess became the Case Agent for DEU's investigation into plaintiff Julian Betton. (JA 2422, 2425.) Under Guess's supervision, with funds provided by DEU, a confidential informant went to Betton's apartment at 602 Withers Swash Drive and purchased seven grams of marijuana from him on March 24, 2015, and eight grams on April 7, 2015, paying $100 each time. (JA 2543-48.)

Guess obtained a standard knock-and-announce search warrant for Betton's apartment. (JA 2524-29.) He also obtained arrest warrants and a criminal history for Betton. (JA 2423, 2530-42.)

On April 16, 2015, Guess assembled nearly a dozen DEU agents and MBPD officers, including BeLue, to participate in a pre-raid briefing. (JA 2427-28.)

Pursuant to the raid plan, at least four of the agents, including BeLue, would be armed with semi-automatic rifles. (JA 2428.)

Before the pre-raid briefing, BeLue knew nothing about Betton or the upcoming raid. (JA 2317.) At the briefing, BeLue reviewed the "Operational Plan," which included information that the informant had seen two firearms inside Betton's apartment and two security cameras at the front door. (JA 2322-23, 2476).[1] BeLue was told that Betton's criminal history – which showed he had not been charged for any offense in the preceding seven years and had never been convicted for the use of violence, (JA 2530-42) – included "a possible narcotics warrant out of, I believe it was Ohio, . . . [b]ut that it had not been confirmed." (JA 2318.) BeLue understood the search warrant required the agents to knock, announce, and wait a reasonable period before forcible entry. (JA 2319-21.)

During the briefing, Guess assigned himself to use the battering ram but no one else to any role other than the generic labels of "Entry" and "Perimeter." (JA 2299, 2334-35, 2424-26.) Instead, each DEU agent was expected to figure out his or her role upon arrival at the scene. (JA 2334-36, 2424-26.) BeLue was assigned to the "Entry" team. (JA 2324.) Consistent with DEU's common practice, no one was assigned to knock and announce. (JA 2299, 2426.) At the briefing, BeLue

[1] Betton obtained the security system and firearms after being assaulted in a violent home robbery in early 2014. (JA 2369-73.) He never fired the weapons. (JA 2384.)

raised no concern about the lack of no-knock authority in the search warrant or the lack of a knock-and-announce assignment. (JA 2320, 2328.)

BeLue and other members of the assigned entry team for the Betton raid were not wearing law enforcement uniforms or any readily visible insignia indicating they were law enforcement officers. (JA 2481, 2601.) They instead wore a mix of face masks, long-sleeved t-shirts, short-sleeved knit shirts, backwards baseball caps, khakis, and blue jeans. (JA 2470-72, 2481, 2601.)

Chuck Drago, plaintiff's police practices expert, observed that the entry team agents "were not wearing uniforms," and instead "dressed in various types of clothing with little to no similarity to each other." (JA 2600.) He stated: "I was a police officer for 35 years and served as a SWAT member, a plain clothes tactical member and as the supervisor of two narcotics units, and I would not have immediately recognized these officers as police officers." (JA 2602.) He concluded that the agents "were not immediately recognizable as police officers either individually or collectively." (JA 2600)

2. Without Knocking, Announcing, or Waiting, BeLue and Other DEU Agents Break into Betton's Home.

At approximately 2:50 p.m. on April 16, 2015, four vehicles filled with DEU agents and non-DEU MBPD officers converged on the two-story, four-unit

apartment building at 602 Withers Swash Drive. (JA 2392.) Betton's apartment was on the lower right side. (JA 2475.) The vehicles' sirens were not activated. (JA 1396-97.)

BeLue was the first to arrive, driving a white, unmarked SUV directly onto the front yard. (JA 2297, 2299-2300, 2336-37, 2481.) Betton's neighbor Santos Garcia was standing next to his moped by the front porch. (JA 2297, 2481.) As other vehicles arrived, BeLue got out of his SUV, pointed his semi-automatic rifle at Garcia's face, and ordered him to the ground. (JA 2297, 2481.) Garcia immediately complied. (JA 2297, 2481.)

BeLue continued to lead agents Guess, Jason Brummett, Chris Dennis, and Frank Waddell up to Betton's front door. (JA 2337-48.) Guess carried the battering ram, while the rest had semi-automatic rifles. (JA 2481, 2800.) BeLue ran onto the porch and arrived first at the door. (JA 2481, 2799-2800.) He did not knock. (JA 2481, 2800.) Instead, he opened the screen door without hesitation while Dennis and Brummett flanked the door with their assault rifles drawn. (JA 2481, 2800.) After opening the screen door, BeLue did not knock on the interior door. (JA 2481, 2800.) He did not try to open the interior door, which was unlocked. (JA 2330-31, 2374, 2481, 2800.) Instead, BeLue held the screen door open as Guess ran onto the porch with a battering ram, clearing the way for Guess

to ram in the front door. (JA 2297, 2481, 2800.) Guess was followed by Waddell, who wore a mask and whose assault rifle was also drawn. (JA 2481.) Neither BeLue nor any other agent announced their presence before breaking in Betton's door. (JA 2297.)

Security cameras on Betton's porch captured video of the officers' entry. (JA 2481, 2555.)[2] From the moment BeLue first stepped out of his unmarked SUV until Guess smashed in Betton's door, only 11 seconds passed. (JA 2481.) During that period, no one knocked or announced. (JA 2414-15, 2430, 2481, 2800.) From the moment BeLue first stepped on the front porch until Guess smashed in Betton's door, only five seconds elapsed. (JA 2481.)

3. BeLue and Two Other DEU Agents Shoot Betton Immediately After Entering His Home.

Immediately after Guess broke in Betton's front door, Dennis, Waddell, and BeLue entered Betton's living room with their semi-automatic rifles raised in front of their chests. (JA 1355-56, 2331.) Betton was leaving his bathroom. (JA 2376.) Startled by the break-in, and having been assaulted in a violent home robbery a year earlier, Betton reached for a gun in his back waistband. (JA 2376, 2378-79.)

[2] The cameras did not record any of the events that took place inside Betton's home. (JA 2481, 2555, 2815.)

He held the gun by his right side. (JA 1998-99.) He did not raise or point the gun at anyone. (JA 2376-77.) He did not fire the gun. (JA 2377.)

At that point, the DEU agents had not identified themselves as law enforcement officers or issued Betton any commands. (JA 2377.) The only thing Betton heard before being shot was the sound of his front door being broken down. (JA 2375.) If Betton had known the men were police, he would have voluntarily submitted to their authority and fully complied with any commands. (JA 2296.)

Instead of saying anything, BeLue and the other agents opened fire. (JA 1998-99.) No more than two or three seconds passed from the moment Guess broke down the door until the agents began firing. (JA 2297, 2300, 2332, 2432.) BeLue recalled that Betton appeared to be hit, dropped his weapon, took a couple steps backwards, and fell into the hallway. (JA 2363-64.)

DEU agents fired 29 bullets at Betton. (JA 2563.) BeLue fired nine of those shots. (JA 2563.) Betton was hit nine times. (JA 2296.) The crime scene investigation conducted by the South Carolina Law Enforcement Division ("SLED") revealed multiple bullet holes throughout Betton's apartment, including several close to the floor where Betton fell. (JA 2688-89, 2696-97.)

The raid left Betton in a medically induced coma for six weeks. (JA 2296.) He was required to undergo multiple surgeries. (JA 2296.) He has incurred more

than $3,000,000 in medical expenses. (JA 2296.) He is permanently paralyzed from the waist down, lives with constant pain, and requires daily attendant care. (JA 2296.) Betton is expected to incur $6.8 million to $13.2 million in future medical expenses due to his injuries. (JA 2630.)

In their search of Betton's apartment, officers collected a small quantity of marijuana. (JA 2548.) They found no other drugs. (JA 2548.)

C. BeLue Makes Multiple False Statements About the Betton Raid.

In the hours following the Betton raid, SLED began to investigate whether the DEU agents who shot Betton had committed a crime. (JA 2451.) Agents BeLue, Guess, Dennis, and Waddell, and Deputy Commander Bishop all provided written statements to SLED the day after the shooting. (JA 2355.) Each said the agents knocked, announced, and waited at Betton's door before forcing entry. (JA 692, 2484, 2521, 2551, 2557.) In his statement, BeLue mentioned no exigent circumstance that would have justified a no-knock entry. (JA 2520-22.) BeLue, Dennis, and Waddell all told SLED that Betton shot at them first, prompting them to return fire. (JA 694, 2484, 2521.)

A month later, on May 15, 2015, during an internal MBPD investigation interview, BeLue repeated his statement that the agents knocked, announced, and waited at Betton's door before forcing entry. (JA 2356-62.) BeLue again did not

mention any exigent circumstance justifying the entry. BeLue also stated he "distinctly remembered" Betton firing one round at the agents but "couldn't tell" if Betton "fired more or not." (JA 2361.)

After BeLue made his statements to SLED and MBPD about the entry, review of the video footage from Betton's front porch revealed the agents had not told the truth: there was no knock-and-announce or waiting. (JA 2414-15, 2430, 2481). The agents' statements that Betton shot at them were also false: the SLED investigation and firearms analysis revealed that Betton did not fire his gun. (JA 2563-64.)

Neither BeLue nor any of the other agents were disciplined by DEU for their conduct during the Betton raid or for their false statements afterward. (JA 2447-48.) DEU Commander Knowles testified that in his view, the officers who executed the Betton raid "didn't do anything wrong." (JA 2447-48.)

After the SLED investigation proved that their initial statements about Betton firing his gun were false, BeLue, Dennis, and Waddell continued to claim that Betton pointed and presented his gun at them; based on those claims, DEU filed criminal charges against Betton for felonious "pointing or presenting a weapon" at them. (JA 2433-34.) When defendant Jimmy Richardson, the 15th Circuit Solicitor, recused his office from prosecuting Betton, (JA 2459-61), the

South Carolina Attorney General's Office took over the case and dismissed the pointing and presenting charges. (JA 2296.)

D. The District Court Denies BeLue's Motion for Summary Judgment.

On November 17, 2015, plaintiff filed his initial complaint against defendants BeLue, Dennis, Waddell, Guess, Bishop, Knowles, and Richardson, alleging claims under 42 U.S.C. § 1983 and South Carolina law. (JA 35-68.) On May 24, 2017, plaintiff filed an amended complaint, adding the City of Myrtle Beach as a defendant under § 1983. (JA 77-121.) Plaintiff's claims against BeLue include unlawful entry in violation of the Fourth Amendment; excessive force in violation of the Fourth Amendment; and assault, battery, and trespass under South Carolina law. (JA 100-01, 109-12.)[3]

On January 5, 2018, defendant City of Myrtle Beach moved for summary judgment, contending that plaintiff could not show that his injuries were caused by action on the part of Myrtle Beach pursuant to official municipal policy. (JA 23, 2898.) On February 15, 2018, defendant BeLue moved for summary judgment. (JA 131-2258.) BeLue contended that he had not committed any constitutional violations and was entitled to qualified immunity for the § 1983 claims. (JA 137-

[3] On March 27, 2018, defendants Knowles, Richardson, Bishop, Guess, Waddell, and Dennis were terminated as parties by stipulation of dismissal with prejudice. (JA 30.)

56.) For the state law claims, BeLue contended he was immune from liability under the South Carolina Tort Claims Act. (JA 157-60.)

On May 21, 2018, Magistrate Judge Kaymani D. West issued a Report and Recommendation, recommending that the City's motion for summary judgment be denied and that BeLue's motion for summary judgment be denied in part and granted in part. (JA 2795-2840.) With regard to the City, the Magistrate Judge concluded that a jury could find that DEU had a widespread and persistent practice of executing search warrants without knocking and announcing and waiting a reasonable time before entering a private residence, that the City and MBPD Chief Gall had actual or constructive knowledge of the practice, and that the practice resulted in the unconstitutional entry into Betton's apartment. (JA 2824-38.)

With regard to the unlawful entry claim against BeLue, the Magistrate Judge closely reviewed the video from Betton's porch and found that no officers knocked or announced before entering. (JA 2799-2800, 2802, 2809-10.) The Magistrate Judge concluded that a jury could find that BeLue's failure to knock and announce was unconstitutional, that he was a direct participant in the unlawful entry of Betton's home, and that no exigent circumstances justified the entry. (JA 2804-12.)

With regard to the excessive force claim against BeLue, the Magistrate Judge recognized that there were disputed facts about whether Betton was pointing

a gun at BeLue before BeLue shot him. (JA 2815.) Viewing the record in the light most favorable to plaintiff, she stated, "the facts show that as [Betton] left his bathroom and entered the hallway, he heard no announcements or warnings but instead heard a crash through his door, saw moving shadows, and was startled by the commotion. He reached for his gun and held it by his right side, at which point the officers opened fire." (JA 2815.) The Magistrate Judge concluded that a jury could find BeLue used excessive force in shooting Betton because there was evidence Betton did not pose a threat to BeLue and his fellow officers when they entered his home and that Betton was not actively resisting arrest. (JA 2814-15.)[4]

The Magistrate Judge concluded that BeLue was not entitled to qualified immunity on either the unlawful entry or excessive force claims. (JA 2815-21.) For the excessive force claim, the Magistrate Judge concluded that under Fourth Circuit precedent, it was "clearly established that an individual is entitled to be free from the use of excessive force if the person is on his property or in his residence, is in possession of a gun that he is not pointing at police officers, and is not given a warning or command to drop the gun before he is shot." (JA 2821.)

[4] The Magistrate Judge did not address plaintiff's alternative argument that BeLue used excessive force against Betton by continuing to fire his weapon after Betton was incapacitated. (JA 2289-91.)

Finally, the Magistrate Judge concluded that BeLue did not have immunity for the state law claims because assault, battery, and trespass are intentional torts. (JA 2822-24.) Accordingly, the Magistrate Judge recommended that BeLue's motion for summary judgment be denied with regard the unlawful entry, excessive force, and state law claims. (JA 2838.)[5]

On June 14, 2018, defendants BeLue and the City each filed objections to the Magistrate Judge's report. (JA 32, 2851-61.) On August 7, 2018, the District Court issued an order rejecting all of the defendants' objections. (JA 2896-2907.) The District Court accepted all of the Magistrate Judge's findings and recommendations. (JA 2902.) The District Court fully agreed with the Magistrate Judge's conclusions regarding BeLue's defense of qualified immunity. (JA 2903.) Accordingly, the District Court denied the City's motion for summary judgment and denied BeLue's motion for summary judgment with regard to the unlawful entry, excessive force, and state law claims. (JA 2906.)

On August 20, 2018, defendant BeLue filed notice of appeal from the decision of the District Court. (JA 2908.) BeLue's appeal is limited to the issue of qualified immunity for plaintiff's claim of excessive force. (Def.'s Br. at 2.)

[5] The Magistrate Judge recommended granting BeLue summary judgment on plaintiff's § 1983 claim for excessive force based on the decision to use SWAT-like tactics and dynamic forcible entry. (JA 2821-22.) Plaintiff did not object to this recommendation. (JA 2903.)

SUMMARY OF ARGUMENT

The District Court correctly denied BeLue summary judgment on plaintiff's excessive force claim. Crediting plaintiff's evidence, the record shows that BeLue and his fellow DEU agents rammed down Betton's front door without knocking, announcing, or waiting. They then entered Betton's living room with their semi-automatic rifles raised. They were not wearing uniforms. Walking out of his bathroom, Betton reacted to the break-in by reaching for a gun in his back waistband and holding it by his side. Betton did not raise or point his gun at the officers. Betton did not know the intruders were law enforcement officers. BeLue and the other agents did not identify themselves or give Betton any warnings or commands. Instead, they immediately opened fire, shooting 29 times and hitting Betton with nine bullets.

Under the Constitution, police officers cannot forcibly enter a home without identifying themselves, and then immediately attempt to kill a resident who responded to the home invasion by holding a firearm by his side. This Court has held that an individual is entitled to be free from the use of deadly force if the person is on his property or in his residence, is in possession of a gun that he is not pointing at police officers, and is not given a warning or command to drop the gun

before he is shot. Under this clearly established precedent, BeLue used excessive force in shooting Betton and is not entitled to qualified immunity.

A jury could also conclude that the amount of force ultimately used against Betton was unreasonable. BeLue and his fellow agents fired 29 times at Betton, and a jury could find that they continued to fire their weapons even after Betton was incapacitated. BeLue could therefore be liable for using excessive force even if his initial decision to fire his weapon was justified.

STANDARD OF REVIEW

This Court "'review[s] *de novo* a district court's denial of summary judgment and qualified immunity, construing all facts in the light most favorable to the nonmovant.'" *Pegg v. Herrnberger*, 845 F.3d 112, 117 (4th Cir. 2017) (quoting *Orem v. Rephann*, 523 F.3d 442, 445 (4th Cir. 2008)). In an interlocutory qualified immunity appeal, the Court only has jurisdiction over the question of whether there was a violation "'of clearly established law accepting the facts as the district court viewed them.'" *Id.* (quoting *Winfield v. Bass*, 106 F.3d 525, 530 (4th Cir. 1997). Therefore, the Court "accept[s] the facts as the district court articulated them when it determined whether summary judgment was appropriate, and then . . . determine[s] 'whether, based on those facts, a reasonable person in the [officer's] position could have believed that he or she was acting in conformity with clearly

established law at the time.'" *Id.* (quoting *Gray-Hopkins v. Prince George's Cty.*, 309 F.3d 224, 229 (4th Cir. 2002)).

ARGUMENT

I. The District Court Correctly Denied Summary Judgment on Plaintiff's Claim for Excessive Force.

"Qualified immunity protects officials 'who commit constitutional violations but who, in light of clearly established law, could reasonably believe that their actions were lawful." *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 537-38 (4th Cir. 2017) (quoting *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (en banc)). When deciding issues of qualified immunity, the Court "engage[s] in a two-step inquiry, asking 'whether a constitutional violation occurred' and 'whether the right violated was clearly established' at the time of the official's conduct." *Id.* at 538 (quoting *Melgar v. Greene*, 593 F.3d 348, 353 (4th Cir. 2010)). In this case, BeLue's decision to shoot Betton constituted excessive force and violated Betton's clearly established rights.

A. BeLue's Decision to Shoot Betton Constituted Excessive Force.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons ... against unreasonable ... seizures." U.S. Const. Amend. IV. "The Fourth Amendment prohibition on unreasonable seizures bars police officers from

using excessive force to seize a free citizen." *Jones v. Buchanan*, 325 F.3d 520, 527 (4th Cir.2003). "A court determines whether an officer has used excessive force to effect a seizure based on a standard of 'objective reasonableness.'" *Id.*

To determine if the amount of force used in effecting an arrest is reasonable, courts consider the severity of the crime at issue; whether the suspect poses an immediate safety threat to officers or others; and whether he is actively resisting arrest or attempting to evade arrest by flight. *See Graham v. Connor*, 490 U.S. 386, 396 (1989); *Jones*, 325 F.3d at 527. "The extent of the plaintiff's injury is also a relevant consideration." *Jones*, 325 F.3d at 527. Courts assess the reasonableness of an officer's use of force based on the information available to the officer "'immediately prior to and at the very moment they fired the . . . shots.'" *Hensley v. Price*, 876 F.3d 573, 582 (4th Cir. 2017) (quoting *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991)).

"[T]he mere possession of a firearm by a suspect is not enough to permit the use of deadly force." *Cooper v. Sheehan*, 735 F.3d 153, 159 (4th Cir. 2013). For example, in *Cooper*, two police officers responded to a 911 call about an altercation on the plaintiff's property. *Id.* at 155. The officers arrived at the plaintiff's mobile home in their police cars, though neither officer had activated his blue lights or siren. *Id.* The officers parked at the edge of the plaintiff's property

and approached the mobile home on foot. *Id.* They heard a heated argument inside and one officer heard screaming. *Id.* To alert the occupants of the officers' presence, one officer tapped on the window with his flashlight, but neither officer announced his presence or identified himself as a deputy sheriff. *Id.*

In response to the sound at his window, the plaintiff called out for anyone in the yard to identify himself, but no one responded. *Id.* The plaintiff then decided to go outside to investigate, retrieving the shotgun he kept by the door. *Id.* With the butt of the gun in his right hand and its muzzle pointed toward the ground, the plaintiff opened the door and took two or three steps on to his porch. *Id.* The officers were close to the porch when the plaintiff emerged with his shotgun. *Id.* at 155-56. "Reacting to the sight of [the plaintiff] and his shotgun, the Officers drew their service weapons and commenced firing without warning." *Id.* at 156. The officers fired eleven to fourteen times and hit the plaintiff five or six times. *Id.* The plaintiff never fired his weapon. *Id.* at 156 n.4.

This Court held that a jury could conclude this was an unjustified use of deadly force, reasoning that "an officer does not possess the unfettered authority to shoot a member of the public simply because that person is carrying a weapon." *Id.* at 159. "Instead, deadly force may only be used by a police officer when, based on a reasonable assessment, the officer or another person is threatened with the

weapon." *Id.* The Court concluded that the officers did not have probable cause to feel threatened by the plaintiff because the plaintiff was standing at the threshold of his home, holding his gun with its muzzle pointed down, and had not made any threats or disobeyed any commands. *Id.* The officers' shooting thus constituted excessive force. *Id.*

The Court emphasized the fact that the officers never identified themselves. *Id.* If the officers had identified themselves to the plaintiff, "they might have been safe in the assumption that a man who greets law enforcement with a firearm is likely to pose a deadly threat." *Id.* However, because the officers did not identify themselves, the plaintiff's "perfectly reasonable" rationale for bearing a firearm while investigating a disturbance on his own property "should have been apparent to the Officers at the time of the shooting." *Id.* at 160.

Similarly, in *Hensley v. Price*, police responded to reports of a domestic disturbance. 876 F.3d at 578. Upon arrival, they saw the plaintiff struggle with his daughters on his front porch and strike his minor daughter with a handgun. *Id.* The plaintiff then stepped off the porch and began walking directly toward the officers, still carrying the gun. *Id.* The officers "never ordered him to stop, to drop the gun or issued any type of warning." *Id.* They just opened fire. *Id.*

This Court held that the evidence supported the plaintiff's claim for excessive force. It noted the plaintiff "never raised the gun to the officers," and that the officers failed to "warn him—or to order him to drop the gun—before employing deadly force[.]" *Id.* at 584. Because the plaintiff "never raised the gun, never threatened the Deputies, and never received a warning command," the officers were not entitled to summary judgment on the plaintiff's excessive force claim. *Id.* at 586.

And in *Pena v. Porter*, 316 Fed. Appx. 303 (4th Cir. 2009) (unpublished), officers searching for a fugitive came to the plaintiff's door late at night but did not identify themselves. *Id.* at 307. The plaintiff awoke to the sound of his dogs barking and, with no knowledge that the police were outside, opened his door while holding a rifle pointed toward the ground. *Id.* This Court concluded that, under the circumstances, the plaintiff had a "perfectly reasonable" rationale for holding the rifle, which "should have been apparent to [the officers] at the time of the shooting." *Id.* at 312. For purposes of summary judgment, this Court concluded that the plaintiff's rights had been violated because "[a]bsent any additional factors which would give the [officers] probable cause to fear for their safety or the safety of others, the mere presence of a weapon is not sufficient to justify the use of deadly force." *Id.*

In this case, viewing the evidence in the light most favorable to plaintiff, the record shows that BeLue and his fellow DEU agents rammed down Betton's front door without knocking, announcing, or waiting. (JA 2297, 2414-15, 2430, 2481.) They then entered Betton's living room with their semi-automatic rifles raised. (JA 1355-56, 2331.) They were not wearing uniforms, had no visible insignia indicating they were law enforcement officers, and did not identify themselves as law enforcement officers. (JA 2296, 2481, 2600-02, 2815.) Walking out of his bathroom, Betton reacted to the break-in by reaching for a gun in his back waistband and holding it by his side. (JA 1998-99, 2815.) Betton did not raise or point his gun at the men, who he did not know were law enforcement officers. (JA 2296, 2376-77.) BeLue and the other agents did not give Betton any warnings or commands. (JA 2377.) Instead, they immediately opened fire, shooting 29 times and hitting Betton with nine bullets. (JA 2296, 2563.)

Cooper and *Hensley* are directly on point. When he was shot, Betton was standing in his own home, holding a gun by his side that was not pointed at anyone, and had not received any warnings or disobeyed any commands. Armed men had broken down his front door, one of them wearing a mask. Betton had no way to know they were law enforcement officers as they had not identified themselves and were not wearing uniforms. Under those circumstances, the fact

that Betton was holding a firearm by his side was not sufficient to permit BeLue to try to kill him. *See Cooper*, 735 F.3d at 159; *Hensley*, 876 F.3d at 586.

As in *Cooper*, it is highly significant that BeLue and the other agents had not identified themselves. Betton's "perfectly reasonable" response of holding his firearm because several unidentified, armed men broke down his front door should have been apparent. *See Cooper*, 735 F.3d at 160. Because "[s]elf-defense is a basic right," *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767, 130 S. Ct. 3020, 3036, 177 L. Ed. 2d 894 (2010), an objective officer would see Betton holding a gun as a reasonable means of self-defense in one's home, not resistance to a lawful arrest. *See Cooper*, 735 F.3d at 160; *Doornbos v. City of Chicago*, 868 F.3d 572, 585 (7th Cir. 2017) ("[M]any civilians who would peaceably comply with a police officer's order will understandably be ready to resist or flee when accosted . . . by an unidentified person who is not in a police officer's uniform.").

In his brief, BeLue contends that *Cooper* is distinguishable because the plaintiff in that case was standing on his porch and was not moving. (Def.'s Br. at 7.) But the plaintiff in *Cooper* was inside his home when the officers first arrived on the scene and, in response to their presence outside, walked onto his porch with a shotgun. The officers did not see the plaintiff until he walked outside. They "react[ed] to the sight of [the plaintiff] and his shotgun . . . and commenced firing

without warning." *Cooper*, 735 F.3d at 156. The plaintiff was shot within a few seconds of walking onto his porch. *Cooper v. Brunswick Cty. Sheriff's Dep't*, 896 F. Supp. 2d 432, 438 (E.D.N.C. 2012) (describing plaintiff's testimony in detail).

BeLue also repeatedly mischaracterizes Betton's last act before being shot as reaching for his gun. (Def.'s Br. at 7, 15.) However, the Magistrate Judge's articulation of the facts, which the District Court adopted, is that Betton "reached for his gun and held it by his right side, at which point the officers opened fire." (R&R p. 21)[6] This Court's legal analysis must be based on the trial court's description of the facts. *See Pegg v. Herrnberger*, 845 F.3d 112, 117 (4th Cir. 2017) ("we accept the facts as the district court articulated them").[7]

Like the plaintiff in *Cooper*, Betton reacted to the unknown presence on his property by retrieving a gun and holding it pointed down. Like the plaintiff in *Cooper*, Betton did not raise or point the gun at the officers, did not receive any warnings, and did not disobey any commands. Like the plaintiff in *Cooper*, it should have been apparent that Betton did not know he was confronting law enforcement officers. And like the plaintiff in *Cooper*, Betton was shot by officers

[6] The Magistrate Judge's finding was plainly supported by Betton's deposition testimony. (JA 1998-99.)

[7] Even if Betton was reaching for his gun when he was shot, that would not change the analysis. An individual who has not yet taken hold of his weapon is even less threatening than an individual holding his weapon down by his side.

within seconds because the officers chose to fire immediately, instead of identifying themselves or warning Betton first. Because Betton was not posing a threat to the DEU agents, BeLue's decision to shoot Betton violated the Fourth Amendment. *See Cooper*, 735 F.3d at 159; *Hensley*, 876 F.3d at 586.

BeLue relies on several Fourth Circuit cases that are inapposite: *Anderson v. Russell*, 247 F.3d 125 (4th Cir. 2001); *Sigman v. Town of Chapel Hill*, 161 F.3d 782 (4th Cir. 1998); *Elliott v. Leavitt*, 99 F.3d 640 (4th Cir. 1996); and *Slattery v. Rizzo*, 939 F.2d 213 (4th Cir. 1991). In *Hensley*, this Court explained why these cases are inapplicable. *Hensley*, 876 F.3d at 585-86.

In *Anderson*, this Court concluded that a police officer was justified in using deadly force when a subdued suspect repeatedly lowered his hands toward what the officer perceived to be a gun, in violation of the officer's verbal commands. *Anderson*, 247 F.3d at 128-29, 130-32. Even though the suspect was merely trying to turn off his Walkman, the Court observed that "[a]ny reasonable officer in [the officer's] position would have imminently feared for his safety and the safety of others." *Id.* at 131. Likewise, in *Slattery*, this Court concluded that a police officer was justified in using deadly force when a suspect in the passenger seat of a stopped car repeatedly lowered his hands toward an object out of the officer's view, in violation of the officer's commands. *Slattery*, 939 F.2d at 214-17.

Although the object turned out to be a beer bottle, this Court held that "a reasonable officer [nevertheless] could have had probable cause to believe that [the plaintiff] posed a deadly threat." *Id.* at 216-17.

"In both cases, once the officer issued a verbal command, the character of the situation transformed." *Hensley*, 876 F.3d at 585. "If an officer directs a suspect to stop, to show his hands or the like, the suspect's continued movement likely will raise in the officer's mind objectively grave and serious suspicions about the suspect's intention." *Id.* In this case, as in *Cooper* and *Hensley*, the agents gave Betton no command to stop, drop his gun, or raise his hands. The agents thus had no basis to find Betton posed a threat.

In *Sigman*, this Court held that a police officer was justified in using deadly force against a suspect who, despite the surrounding police officers' commands to stop, advanced on him with a knife. *Sigman*, 161 F.3d at 787. Before the shooting, the suspect had threatened to kill himself, his girlfriend, and the officer. *Id.* at 784-85, 787. And the suspect had swung a knife at the officer through an open window in his home. *Id.* Betton, in sharp contrast, did not make any threats or attack the agents who shot him.

And in *Elliott*, officers shot a suspect who, while handcuffed in a police car, pointed a handgun at officers and ignored the officers' order to drop the weapon.

Id. at 642-43. This is a very different case. As this Court recognized in *Hensley*, *Elliott* simply does not apply to cases where officers shoot a suspect, like Betton, who "never pointed [a] gun at [an officer] nor received a command to stop or drop the gun." *Hensley*, 876 F.3d at 586.

Finally, BeLue cites *Salazar-Limon v. City of Houston*, 826 F.3d 272 (5th Cir. 2016) *cert. denied*, 137 S. Ct. 1277 (2017). In *Salazar-Limon*, the plaintiff had been drinking and was driving a truck on the freeway with three passengers. *Id.* at 275. An officer observed the plaintiff speeding and weaving between lanes, so conducted a traffic stop. *Id.* After getting the plaintiff's license, the officer asked the plaintiff to exit his vehicle, and the two men walked to the area between the truck and the officer's patrol car. *Id.* The officer tried to handcuff the plaintiff, the plaintiff resisted, and a brief struggle ensued. *Id.* After the struggle, the plaintiff pulled away from the officer and started to walk away. *Id.* The officer pulled out his handgun and ordered the plaintiff to stop. *Id.* The plaintiff did not comply with the officer's order. *Id.* Instead, the officer saw the plaintiff turn and reach toward his waistband, consistent with reaching for a weapon. *Id.* The officer then fired a single shot at the plaintiff. *Id.* Based on the totality of the circumstances – including the plaintiff's intoxication, his resisting arrest, his struggle with the officer, his disregard of the officer's order, and his sudden reaching for his

waistband – the Fifth Circuit found the officer's use of force was not excessive. *Id.* at 279.[8]

This is a far different case. Here, Betton had not had any prior interactions with the DEU agents, did not know the agents were police when they entered his home, did not resist arrest, did not fight with the officers, received no warnings, and had not disobeyed any commands. BeLue and his fellow agents had no objective reason to believe Betton knew they were officers or that Betton would not have voluntarily complied with their commands. Betton merely possessed a gun on his own property, like the plaintiffs in *Cooper* and *Hensley*. Because a jury could conclude Betton was shot despite having "never raised the gun, never threatened the [officers], and never received a warning command," BeLue is not entitled to summary judgment. *Hensley*, 876 F.3d at 586.

B. BeLue Is Not Entitled to Qualified Immunity for the Excessive Force Claim.

The second step of the qualified immunity analysis is whether BeLue "violated a constitutional right that was clearly established at the time the conduct occurred." *Wilson v. Prince George's Cty., Maryland*, 893 F.3d 213, 221 (4th Cir.

[8] Two Justices dissented from the denial of certiorari because they believed there was a disputed question of fact whether the plaintiff turned and reached for his waistband. *Salazar-Limon*, 137 S. Ct. at 1280-83 (Sotomayor, J., dissenting).

2018). "A right is 'clearly established' if it would be clear to a reasonable officer that the alleged conduct is unlawful." *Id.* (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

"A right need not be recognized by a court in a specific factual context before such right may be considered 'clearly established' for purposes of qualified immunity." *Id.* (citing *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)). "In other words, defendants 'can still be on notice that their conduct violates established law even in novel factual circumstances,' so long as the law provided 'fair warning' that their conduct was unconstitutional." *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538 (4th Cir. 2017) (quoting *Hope*, 536 U.S. at 741, 122 S.Ct. 2508). However, "courts are 'not to define clearly established law at a high level of generality,' and . . . 'specificity is especially important in the Fourth Amendment context." *Wilson*, 893 F.3d at 221 (quoting *Kisela v. Hughes*, 138 S.Ct. 1148, 1152, 200 L.Ed.2d 449 (2018)).

Defined at the proper level of specificity, this Court should determine that it was clearly established law in April 2015 that an officer shooting an individual was an unconstitutional use of excessive force when: (1) the individual was suspected of non-violent offenses, such as selling 7 or 8 grams of marijuana; (2) the officer had intruded on the individual's private property without identifying himself as an

officer; (3) the individual had no way of knowing the intruder was a law enforcement officer; (4) the individual was holding a gun by his side; (5) the individual did not raise the gun or point it at anyone; (6) the officer did not give any commands or provide any warning; and (7) the individual did not make any threats or disobey any commands. *See Wilson*, 893 F.3d at 222.

Cooper v. Sheehan, 735 F.3d 153, 159 (4th Cir. 2013), is directly on point and would have made clear to a reasonable officer in 2015 that shooting an individual in this situation was unlawful. In *Cooper*, the officers were responding to a 911 call about a domestic altercation, the officers approached the plaintiff's home without identifying themselves, the plaintiff reasonably had no way of knowing officers were present, the plaintiff was holding his gun pointed down and never raised it, and the officers never gave any commands or warnings before opening fire within seconds of seeing the plaintiff. *Id.* at 155-56. In 2013, this Court held that the shooting was excessive force, and that the law had been clearly established regarding that fact at the time of the 2007 shooting. *Id.* at 159; *see also Pena v. Porter*, 316 Fed. Appx. 303, 312 (4th Cir. 2009) (unpublished) (finding it clearly established in 2004 that officers could not shoot a suspect who came out of his home with a gun when the officers had not identified themselves or given any warnings before shooting).

To the extent there was any ambiguity as to the state of the law before 2013, *Cooper* is directly analogous to the instant case and undeniably placed BeLue on notice that his decision to shoot Betton was unconstitutional. *See* Section I.A, *supra*; *Wilson*, 893 F.3d at 221-22.

In his brief, BeLue mischaracterizes relevant facts in several respects. (Def.'s Br. at 12.) First, according to the facts articulated by the Magistrate Judge and adopted by the District Court, Betton was shot when he was holding his gun by his side, not when he was reaching for it. (R&R 21); *see* Section I.A, *supra*. The plaintiff in *Cooper* was similarly holding his gun when he was shot.

Second, BeLue did not know that Betton was a "fugitive from Ohio." Rather, BeLue was told of "a possible narcotics warrant out of, I believe it was Ohio," "[b]ut that it had not been confirmed." (JA 2318.) Third, Betton was only suspected of selling 7 and 8 grams of marijuana for $100 on two occasions; he was not a major drug trafficker. (JA 2543-48.)

Someone suspected of selling tiny amounts of marijuana, who might or might not have a narcotics warrant outstanding, and who has no history of violence, cannot be presumed so violent that officers have a license to shoot him when he is not threatening anyone. *See Pena*, 316 Fed. Appx. at 311 and n.7

(holding officers could not believe occupant was a violent criminal where his prior offenses were all minor and nonviolent).

BeLue also includes a string citation to a series of recent Supreme Court decisions reversing denials of qualified immunity. All are plainly inapposite. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1153, 200 L. Ed. 2d 449 (2018) (per curiam) (officer shoots suspect whose erratic behavior prompted a 911 call, who was approaching a nearby bystander with a knife, and who disobeyed two commands to drop the knife); *White v. Pauly*, 137 S. Ct. 548, 550, 196 L. Ed. 2d 463 (2017) (per curiam) (officer shoots suspect after hearing an individual say "we have guns," hearing two shotgun blasts, and seeing the suspect point a handgun at him); *Mullenix v. Luna*, 136 S. Ct. 305, 309, 193 L. Ed. 2d 255 (2015) (per curiam) (officer shoots suspect after he engaged in high-speed vehicular flight, twice threatened to shoot officers, and was about to encounter an additional officer in the road); *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1777, 191 L. Ed. 2d 856 (2015) (officer opened door and deployed non-deadly force after emotionally disturbed suspect grabbed a knife, moved towards officers, yelled "I am going to kill you," and closed door); *Plumhoff v. Rickard*, 572 U.S. 765, 776, 134 S. Ct. 2012, 2021, 188 L. Ed. 2d 1056 (2014) (officers used deadly force after a five-minute, 100-mile-per-hour vehicle chase resulted in a suspect colliding with

a police cruiser and continuing to attempt maneuver and accelerate while pressed against the cruiser). If anything, the starkly contrasting facts in these cases demonstrate how straightforward the excessive force violation is here.[9]

In *Cooper*, the shooting occurred in 2007, and this Court held that "the contours of the constitutional right at issue—that is, the right to be free from deadly force when posing no threat—were clearly established at the time the Officers shot Cooper." *Id.* at 160. The right was even more clearly established when BeLue shot Betton in 2015. Just as the plaintiff in *Cooper* posed no threat to the officers and was not resisting arrest, Betton did not pose any threat to BeLue and was not resisting arrest. Accordingly, BeLue's defense of qualified immunity should be rejected.

[9] The majority of the opinions cited by BeLue address the contours of rights far removed from the excessive force claim at issue in this appeal, and therefore have no bearing on this case. *See D.C. v. Wesby*, 138 S. Ct. 577, 591, 199 L. Ed. 2d 453 (2018) (per curiam) (probable cause to arrest); *Carroll v. Carman*, 135 S. Ct. 348, 349, 190 L. Ed. 2d 311 (2014) (per curiam) (knock and talk doctrine); *Wood v. Moss*, 572 U.S. 744, 759, 134 S. Ct. 2056, 2068, 188 L. Ed. 2d 1039 (2014) (First Amendment rights of protesters); *Stanton v. Sims*, 571 U.S. 3, 6, 134 S. Ct. 3, 5, 187 L. Ed. 2d 341 (2013) (hot pursuit); *Reichle v. Howards*, 566 U.S. 658, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012) (First Amendment retaliatory arrest); *Ryburn v. Huff*, 565 U.S. 469, 474, 132 S. Ct. 987, 990, 181 L. Ed. 2d 966 (2012) (warrantless home entry).

C. The Amount of Force Used by BeLue Constituted Excessive Force.

A jury could also conclude that the amount of force ultimately used against Betton was unreasonable. Although this issue was not discussed in the District Court's opinions, it was fully briefed and provides additional grounds for denying BeLue's request for qualified immunity. (JA 152-52, 2289-91.)

"[F]orce justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated." *Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005). Officers can be liable for using excessive force when they continue firing their weapons after "the threat to their safety was eliminated." *Id.* "It is just common sense that continuing to shoot someone who is already incapacitated is not justified under these circumstances." *Brockington v. Boykins*, 637 F.3d 503, 508 (4th Cir. 2011).

The number of shots fired is relevant to whether an officer used excessive force. When officers fire a high number of shots, that fact could lead a reasonable juror to find the officers engaged in gratuitous violence exceeding any reasonable measure of necessary force. *Id.* For example, in *Brockington*, this Court contemplated that "thirty-three shots would be unjustified, as would twenty-nine, or even nineteen," and ultimately held that "six is too many." *Id.* at 508. The Court denied qualified immunity, concluding the right had been clearly established

by *Waterman*. *Id.; see also Margeson v. White Cty.*, 579 Fed. App'x 466, 472 (6th Cir. 2014) (unpublished) (holding a jury could "conclude that shooting at a man 43 times" including multiple shots "after he had fallen to the ground" was unreasonably excessive force).

In this case, a jury could conclude that officers continued to fire their weapons even after Betton was incapacitated. BeLue stated that after the officers opened fire, Betton appeared to be hit, dropped his gun, took a couple steps backwards, and fell into the hallway. (JA 2363-64.) The DEU agents ultimately chose to pull their triggers 29 separate times, firing 29 shots at Betton and hitting him nine times. (JA 2296, 2563.) Bullet holes were found throughout Betton's apartment, including several close to the floor where he fell to the ground. (JA 2688-89, 2696-97.)

A jury could draw the unremarkable inference that Betton was incapacitated and did not remain standing or able to present any threat throughout the entire hail of 29 bullets. It could easily find that the officers' fusillade continued after Betton dropped his gun and fell to the ground. A jury could therefore conclude the officers continued shooting Betton even after he was incapacitated, and it was unreasonable to use further deadly force. *See Brockington*, 637 F.3d at 507-08 (holding that although the initial use of deadly force was reasonable, there was no

indication that continued use of force was necessary after the plaintiff had been shot, was on the ground, and wounded). BeLue could therefore be liable for using excessive force even if his decision to pull the trigger the first or the second time, or even the third or fourth time, was justified.

Accordingly, defendant's motion for summary judgment was correctly denied with regard to plaintiff's excessive force claim.

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that the Court affirm the District Court's order denying BeLue's motion for summary judgment on plaintiff's claim for excessive force.

Respectfully submitted, this the 7th day of January, 2019.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains ***8,332*** 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in fourteen-point Times New Roman font.

This the 7th day of January, 2019.

/s/ Narendra K. Ghosh
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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of Appellee was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to James R. Battle, II, and Sandra J. Senn, Attorneys for Defendant-Appellant.

The undersigned further certifies that the required number of bound copies of the foregoing Brief of Appellee will be timely served via UPS Ground Transportation to the Clerk of this Court.

This the 7th day of January, 2019.

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