EIGHTH CIRCUIT NO. 21-1365

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JAMES HARTMAN, *et al.*

PLAINTIFFS-APPELLANTS,

v.

DETECTIVE BEARY BOWLES,

DEFENDANT-APPELLEE.

Appeal from the United States District Court
for the Eastern District of Missouri
The Honorable Stephen R. Clark

APPELLANTS' BRIEF

Respectfully submitted,

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

The victim of a nighttime shooting called 911, stating that his assailant was a "Black male, hoodie." He promptly repeated that description twice: first at the scene near downtown St. Louis, and then at the hospital. Appellee Detective Beary Bowles filed warrant applications to search the homes of the Appellant Hartman brothers, and then filed probable causes statements causing their seizures for 21 months. Det. Bowles claimed probable cause because the Hartmans bought cigarettes at a nearby gas station minutes before the shooting, and drove a dark sedan similar to the shooter's. Det. Bowles omitted that the Hartmans are White.

The Hartmans assert the skin color omission negates probable cause. They sue Det. Bowles under §1983 for unreasonable searches and seizures, for unfair criminal procedure, and for state law malicious prosecution. The district court granted Bowles's motion to dismiss most of the case. This Court then issued *Bell v. Neukirch*, 979 F.3d 594 (8th Cir. 2020), which confirms there is no probable cause where expected characteristics differ significantly. The district court denied a motion to reconsider. As in *Bell*, this is an obvious case of no probable cause, and therefore Det. Bowles does not have qualified immunity.

Request for Oral Argument

Appellants request oral argument and seek 15 minutes. Appellants suggest oral argument will assist the Court in reviewing the case. 8th Cir. R. 28A(i).

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JURISDICTIONAL STATEMENT

On December 16, 2019 Appellants the Hartman brothers filed their First Amended Complaint, J.A. 6. The pleading asserted four federal civil rights claims, and a state law malicious prosecution claim. The district court had federal question jurisdiction over the federal claims under 42 U.S.C. §1331, with 42 U.S.C. §1983 being the statute at issue. The district court had discretionary jurisdiction over the supplemental state law claim under 28 U.S.C. §1367.

On December 30, 2019 Appellee Det. Bowles moved to dismiss, J.A. 46. On June 23, 2020 the district court dismissed most of the case except those claims arising months after the shooting when an exculpatory "NIBIN" firearms notice was issued, J.A. 86.

On November 13, 2020, Appellants filed a Motion to reconsider based on intervening authority *Bell v. Neukirch*, 979 F.3d 594 (8th Cir. 2020), J.A. 135. On December 8, 2020 the district court denied the motion, J.A. 170.

On January 25, 2021 Appellants dismissed their remaining claims by stipulation, J.A. 181. At that point all claims were adjudicated. On February 4, 2021, within the 30 days allowed by Fed. R. App. P. 4(a)(1)(a), Appellants timely filed their notice of appeal, J.A. 184.

This Court has jurisdiction herein pursuant to 28 U.S.C. §1291, which provides for jurisdiction in this Court over a final judgment from a district court.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Issue: **Whether there is obviously no probable cause for search and arrest warrants when the applicant omitted that the victim of a shooting thrice stated that his shooter was a "Black male, hoodie" but the subjects are White.**

Bell v. Neukirch, 979 F.3d 594 (8th Cir. 2020)

Z.J. by & through Jones v. Kansas City Bd. of Police Commissioners, 931 F.3d 672 (8th Cir. 2019)

United States v. Evans, 851 F.3d 830 (8th Cir. 2017)

Tillman v. Coley, 886 F.2d 317 (11th Cir. 1989)

STATEMENT OF THE CASE

Hours after the 2017 Super Bowl, someone shot a City of St. Louis fire captain seated in his car parked near downtown, First Amended Complaint (FAC) ¶1, J.A. 6. When he called 911, the captain described his shooter as "Black male, hoodie". He then did so twice again, once at the scene and once at the hospital, FAC 1, J.A. 6; FAC 27, J.A. 9.

Appellants are two brothers, James Corey Hartman and Ryan Hartman, who are White, FAC 70, J.A. 16. Appellee Det. Beary Bowles applied for search and seizure warrants for the brothers, but omitted the captain's statements and the Hartmans' skin color, FAC 1, J.A. 6.

Since this is an appeal of a motion to dismiss (or, more accurately, an appeal of a motion to reconsider a dismissal), the Hartmans obtain their facts in this brief from their operative pleading, J.A. 6.

Other than those noted exceptions, the following facts have been known to Det. Bowles at all relevant times, FAC 11-20, J.A. 8-9.

This case involves four separate groups of people.

The first group of people is made up of Appellants, brothers James Corey Hartman and Ryan Hartman, FAC 2, J.A. 6. They were on video at a gas station in the area of the shooting a few moments before the crime occurred, FAC 11-15,

J.A. 8. In that video Corey is calmly buying cigarettes. He is not wearing a hoodie, FAC 72, J.A. 16.

The second group of people consists of a young St. Louis fire captain and his lady friend, who were in the Captain's parked car in the 2500 block of South 7th Street, with Sidney Street to the south and Victor Street to the north, FAC 20, J.A. 9. At that location 7th Street is many lanes wide, and one can see the mammoth Anheuser-Busch brewery straight down the road, FAC 35, J.A. 12.

The third group of people consists of the true shooter and his driver. On a surveillance video from a business near the scene, their car is seen pulling up on eastbound Victor, west of 7th Street, half a block north of the crime scene, FAC 34, J.A. 10-12. A person gets out of the car, pauses and then walks south on 7th Street, FAC 34.h, J.A. 11. One minute and 34 seconds later this true shooter is seen running back to the vehicle and getting in the passenger seat, FAC 34.i, J.A. 11; FAC 34.k, J.A. 11, and then off the car goes, first in reverse westbound on Victor to 9th, and then north on 9th, all at a rapid rate, FAC 34.m, J.A. 11; FAC 34.o, J.A. 11. The Hartmans assertion that the person who emerged from the car parked on Victor and then returned to that car was the true shooter is an inference which would be made by any reasonable officer, FAC 41, J.A. 12. Det. Bowles has always believed this inference, FAC 42, J.A. 13. In fact, everyone involved has

always reasonably believed that person to be the true shooter. FAC 34.f, J.A. 11; FAC 34.h, J.A. 11; FAC 41, J.A. 11.

The time of the shooting may be established by a 911 call which occurred at 12:32:45 a.m. from a resident named Anthony Edwards, who reported shots fired, FAC 23 J.A. 9. Another citizen, Antonio Perry, residing on 9th street in the block between Victor and Barton, also called 911 to report that he had heard gun shots and seen a car engage in suspicious activity, FAC 43, J.A. 13.

The fourth and last group of people is made up of the 911 operator, other investigating officers, and, particularly, Det. Bowles.

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Let us now return to the first, group, the Hartman brothers, and review their whereabouts that night in more detail. The day before the shooting was February 5, 2017, that year's Super Bowl Sunday, FAC 9, J.A. 7. Over the course of the earlier part of the evening, the Hartmans enjoyed St. Louis's nightlife. They first watched the game at DB's Bar at 1615 S. Broadway in South City, FAC 10, J.A. 8. They then went to a Phillips 66 gas station on 7th Street to buy cigarettes, arriving at approximately 12:23 a.m., FAC 11, J.A. 8. As shown on the gas station's video, Corey got out of his car appearing relaxed and calm, FAC 12, J.A. 8; FAC 15, J.A. 8. He then paid for the cigarettes with a credit card, FAC 13, J.A. 8. As is further shown on video, he then walked out of the station, opened the pack of cigarettes,

and got back in his car, FAC 14, J.A. 8. Corey was not wearing a hoodie, FAC 72, J.A. 16. Video from another gas station, taken two plus hours later, again shows neither Appellant wearing a hoodie, FAC 72, J.A. 16. Their car, however, is admittedly close in color to the true shooter's car, FAC 45-46, J.A. 13.

According to the City's "Real Crime Time" video system at 12:30:17 a.m. Corey drove his car out of the Phillips 66 gas station and went southbound on 7th Street, FAC 19, J.A. 9. The location where the fire captain parked his vehicle is 0.4 miles, or 6 blocks, south of the gas station, FAC 21, J.A. 9. There are no stop lights between the station and that location, FAC 21, J.A. 9. When Det. Bowles later interrogated the Hartman brothers a month after the shooting, they both said that after they left the gas station, they first went south on 7th Street, and then turned right and drove westbound Sidney, FAC 146, J.A. 27. (Sidney is one and one half blocks south of the site of the shooting.) They then drove three blocks west on Sidney to 11th Street where they parked, FAC 142-146. J.A. 27. At that location Ryan got out of the car and urinated, and then both brothers took cocaine, FAC 147, J.A. 27. They concluded the evening at a nightclub, the Pepper Lounge, FAC 148, J.A. 27 where they stayed for two hours, FAC 149, J.A. 27.

Let us now return to the shooting itself and what the captain said about it. At 12:34:46 a.m., three and half minutes after the Hartmans started driving south from the gas station, the captain called 911 and reported that he and his companion

had been shot, FAC 26, J.A. 9. The captain described his shooter as "Black male, hoodie," FAC 27, J.A. 9.

In response to the captain's 911 call, police officers and EMT personnel converged on the scene, FAC 52, J.A. 14. At 12:48:24 a.m., Officer Eric Paul reported a description of the suspect over the police radio network, FAC 54, J.A. 14. He described the shooter, on inference based on a statement from the fire captain, as a "Black male wearing a black hoodie," FAC 64, J.A. 15. Officer Paul confirmed this in his initial police report where he wrote that the fire captain had stated at the scene that the shooter was a "Black male wearing a black hoodie," FAC 54, J.A. 14. A minute and two seconds later, at 12:49:26 a.m., a dispatcher broadcast another description of the suspect as a: "Black male wearing a black hoodie running north with a gun," FAC 65, J.A. 15. The fire captain's lady friend, due to her medical situation, was incapable of making a statement, FAC 66, J.A. 15.

Officer Bradley Summers interviewed the fire captain at the hospital promptly after his admission, FAC 69, J.A. 15. Officer Summers later informed Officer Paul about the interview, FAC 69, J.A. 15. According to Officer Paul's report of the interview, the captain told Officer Summers that he had first observed the Black male "walk south on the adjacent sidewalk passing his location," FAC 69, J.A. 15. A brief time later, he observed the same Black male, "suspect #1",

standing near the front passenger's side display a handgun and fire several rounds into his vehicle, FAC 69, J.A. 15. "He then observed suspect #1 run north in the 2500 block of 7th Street on the sidewalk until out of sight," FAC 69, J.A. 15.

Detective Bowles identified Corey through the gas station credit card records, and through Corey's car ownership records, FAC 94, J.A. 19.

The Hartmans are White, FAC 70, J.A. 16. No reasonable officer would think the Hartmans have skin color anything other than White, FAC 71, J.A. 16.

Based on the three statements of the fire captain, first at the scene then at the hospital, no reasonable officer would conclude that a White person committed the shooting, FAC 73, J.A. 16.

At his deposition in the underlying criminal case against Hartmans for the shooting, Det. Bowles stated for the first time that the captain had said he was "not certain" about the shooter's skin color during his interview of the captain in the hospital a day after the shooting, FAC 77, J.A. 16. Det. Bowles testified that the captain believed the shooter was a Black male only because he had on baggy pants, which he believed to be a type of clothing worn by Black people, and because of his "body type." FAC 77, J.A. 16.

Notwithstanding his deposition testimony, however, Det. Bowles omitted from his police report these alleged hospital interview statements in which the captain doubted his prior certainty about the skin color of the shooter, FAC 79,

J.A. 17. In his deposition, Det. Bowles also generally discredited his own hospital interview with the captain in the hospital, observing the captain's statements were tainted because he was "sedated", FAC 82, J.A. 17.

The Hartmans' First Amended Complaint rejects Det. Bowles reliance on this alleged subsequent statement, FAC at 83, J.A. 17:

> Detective Bowles' allegation that the fire captain had only identified the shooter as Black by his clothing and Detective Bowles' allegation the fire captain was uncertain about the skin color of the shooter were fabrications and/or are not reliable and/or were so internally inconsistent as to be wholly not reliable, because the fire captain was certain at the scene and in the hospital immediately after the shooting about the skin color of the shooter, and no reasonable officer would have thought the fire captain's later statements were more reliable than his excited utterances at the scene, particularly if the fire captain was on medication at the time of at least some of the later statements.

The Hartmans' pleading further stated at FAC 93, J.A. 18, that:

> On inference, because the fire captain, as a fire captain, was a prominent member of the community, Detective Bowles felt pressure to identify a shooter.

The Hartmans' pleading further stated at FAC 95, J.A. 19:

> On inference, Detective Bowles decided to give up on finding the Black male who really did commit the crime and instead elected to just charge some persons who conveniently happened to be at a nearby gas station at generally the same time and who were driving a close in color sedan. Those persons were Plaintiffs.

Let us now turn to what Det. Bowles wrote in his warrant applications.

On March 2, 2017 Det. Bowles signed an affidavit in support of a search warrant for the apartment in the City of St. Louis where Corey was then living, FAC 122, J.A. 23.

> In para. 2 Detective Bowles wrote" "Victim [the fire captain] described a male running north from the crime scene wearing baggy clothes and grey (sic) hoodie." FAC 124.a, J.A. 24.

To state the obvious, Det. Bowles omitted from that statement (a) the skin color of the suspect as identified by the victim, and (b) the skin color of Corey.

The ensuing SWAT raid turned up illegal drugs, but nothing relevant to the shooting, FAC 126, J.A. 25; FAC 131, J.A. 25.

On March 2, 2017 Det. Bowles signed an affidavit in support of search warrant for the Hartmans' parents' home in St. Louis County, where Ryan was then living, FAC 127, J.A. 25.

That affidavit was in all relevant aspects the same as the one for Corey's apartment, with the same omissions regarding skin color, FAC 128, J.A. 25.

The ensuing SWAT raid produced nothing relevant to the shooting, FAC 134, J.A. 25.

On March 4, 2017 in support of the filing of an information charging Corey with the shooting, City of St. Louis Circuit Court, 22nd Judicial Circuit, no. 1722-CR01003, and making application for Corey's arrest, Det. Bowles signed a probable cause statement against Corey, FAC 135. J.A. 26.

The document states that Det. Bowles has "probable cause to believe that James [Corey] Hartman, a White Male, DOB; 5/231/93 Age, 23, committed one or more criminal offense(s)", FAC 136, J.A. 26:

Count 1: Assault 1st Degree or Attempt

Count 2: Armed Criminal Action

Count 3: Assault 1st Degree or Attempt

Count 4: Armed Criminal Action

As "the facts supporting this belief" Detective Bowles' paragraph states, FAC 137, J.A. 26:

> I was assigned as the lead Detective in the follow up investigation of a shooting that occurred on February 6, 2017, in the area of 2500 S. 7th Street here in the City of St. Louis. During my investigation, I learned that the victims I.S. and L.S. were in a vehicle parked at 2500 S. 7th St. While the victims were in the vehicle, a blue Infinity approached the approximate location of the victims. As the Infinity approached, the driver of the Infinity turned the lights off and continued to approach the approximate location of the victims' vehicle. The passenger of the Infinity then exited the car, approached the victims' car and shot multiple times into the vehicle. I.S. was shot multiple times. L.S. was also shot multiple times. Both victims sustained serious injuries and were taken to the hospital for treatment. Cellular phone records, bank records, and multiple surveillance videos were obtained that identify the defendant as the passenger and his brother, James [Corey] Hartman, as the driver.

As the Court can see, Det. Bowles grounds his probable cause in the color of the car, but Det. Bowles omits the skin color of the shooter and of Corey.

Similarly, on March 4, 2017 in support of the filing of an information charging Ryan with the shooting, Case no. 1722-CR01002, and making an application for his arrest, Det. Bowles signed a Probable Cause Statement against Ryan, FAC 138, J.A. 26. The Probable Cause Statements for Corey and Ryan differ only in their last few phrases and the differences are insignificant, FAC 139, J.A. 26.

On March 4, 2017, each brother was arrested, FAC 143, J.A. 27. Judges of the City Circuit Court set the bond for each at $750,000, FAC 154, J.A. 28. Neither could make bond and so they remained in jail, FAC 155, J.A. 28.

The Circuit Attorney then presented the cases against the Hartmans to the grand jury, FAC 156, J.A. 28. On inference, Detective Bowles testified at the grand jury, FAC 157, J.A. 28. On inference, Det. Bowles purposefully omitted from his testimony both the material facts of skin color which exonerate Corey and Ryan, and his own failure to follow adequate and reasonable police procedures, FAC 158, J.A. 28. On inference, if the grand jury had known of those material facts, and Det. Bowles' failure to follow adequate and reasonable police procedures, then the grand jury would not have indicted the Hartmans, FAC 159, J.A. 28. On May 24, 2017 the grand jury did indict the Hartmans, FAC 160, J.A. 28.

The Hartmans remained in the City of St. Louis Justice Center on Tucker Boulevard for almost five months, from March 3 until July 27, 2017, FAC 161, J.A. 28. At that time a City of St. Louis Circuit Court judge reduced their bond, FAC 161, J.A. 28. The Hartmans then posted their bond, but remained on house arrest in their parents' home for another approximately 16 months, FAC 163, J.A. 28.

In October 2017, while the Hartmans were under house arrest, Det. Bowles received a "NIBIN" firearms notice from the crime lab that the gun used in the fire captain shooting had been used in another, wholly separate shooting, FAC 110-112, J.A. 21. "NIBIN" refers to the City's forensics procedure of matching shell casings to detect if the same firearm is used in different crimes, FAC 112, J.A. 21. The Hartmans asserted that Det. Bowles caused their continued unreasonable seizure by failing to investigate the "NIBIN" notice, FAC 113-116, J.A. 21. (That allegation turned out to be weak, as will be discussed briefly below).

In March 2019, shortly before trial, Det. Bowles enhanced the video footage of the actual shooter's car, and discovered that the make of the shooter's car and its license plate differed from the Corey's car. That fact further exonerated the Hartmans, FAC 170, J.A. 29. On March 21, 2019 the Circuit Attorney entered *nolle prosequi* on the criminal charges against the Hartmans, FAC 176, J.A. 29.

The Hartmans then filed this civil rights suit in state court against Det. Bowles. He removed the case to federal court, J.A. 2. On December 16, 2019 the Hartmans filed the current operative pleading, their First Amended Complaint, J.A. 6. In that pleading, they made the following claims:

Count I: Unreasonable Searches under the Fourth Amendment

Count II: Unreasonable Seizures of their Persons under the Fourth Amendment

Count III: Continued Seizures after Obtaining Exonerating Information under the Fourth Amendment (related to the same gun being used in a later crime while the Hartmans were on house arrest), an issue referred to in the litigation as the "NIBIN" firearms notice

Count IV: Unfair criminal proceedings under the Fourth Amendment

Count IV: Malicious Prosecution under Missouri State Law.

J.A. 33-44.

On December 30, 2019 Det. Bowles moved to dismiss the case, J.A. 46. On June 23, 2020 the Court granted his motion in part, as to those claims related to the searches and initials seizures, J.A. 86, leaving alive only those claims related to Det. Bowles receiving the "NIBIN" firearms notice, but failing to notify the Circuit Attorney that the same gun had been used in a different crime, J.A. 86.

The parties were underway with written discovery on the "NIBIN" issue when on October 28, 2020 this court issued *Bell v. Neukirch*, 979 F.3d 594, 601 (8th Cir. 2020). (The discovery process was by then indicating that liability against Det. Bowles may not lie for the NIBIN claim, due to vagaries of the City of St. Louis law enforcement procedures).

Bell confirms and clarifies the definition of an "obvious" case: that is, when an arrestee's characteristics differ substantially from what reasonably would be expected from the suspect, and confirms that in that circumstance there is no probable cause. On November 13, 2020, citing *Bell*, the Hartmans filed a Motion to reconsider the dismissal of their claims before the "NIBIN" notice, J.A. 135. The district court denied that Motion on December 8, 2020, J.A. 170.

On January 25, 2021 the Hartmans by stipulation dismissed with prejudice their "NIBIN" claims. J.A. 181. At that point the district court had adjudicated all claims.

On February 4, 2021 the Hartmans timely filed their notice of appeal, J.A. 184.

SUMMARY OF ARGUMENT

A St. Louis fire captain and his lady friend were shot as they sat inside his parked car near downtown just after midnight the day after the 2017 Super Bowl. Surveillance video from a nearby business shows the shooter, but the video is not clear enough to identify his detailed physical characteristics.

The captain called 911. He identified the shooter as a "Black male, hoodie." Soon thereafter St. Louis police swarmed the area, and the police radio broadcast an instruction for officers to look for a "Black male, hoodie." That description came from the captain at the scene. Soon afterward, at the hospital, the captain again identified the shooter as a "Black male, hoodie" to an interviewing officer.

Minutes before the shooting, Appellants James Corey Hartman and his brother Ryan stopped to buy cigarettes at a gas station six blocks or 0.4 miles away. Corey is seen on video calmly going to and from his car, and then driving south toward where the shooting occurred. Appellee Detective Beary Bowles later identified the Hartmans from their license plate and credit card receipts.

Det. Bowles was in charge of the investigation. He signed search warrant applications leading to a search of the brothers' homes, and later filed probable causes statements leading to their arrests and seizures. Det. Bowles omitted the captain's three statements about the Black skin color of his shooter, and that the Hartmans are White.

The Hartmans faced criminal charges. They spent five months in jail, and then they spent another 15 months on house arrest at their parents' home. The St. Louis Circuit Attorney finally dismissed the charges. Appellants then filed this 42 U.S.C. §1983 civil rights suit alleging unreasonable searches and seizures, unfair criminal proceedings, and a state law claim for malicious prosecution. The gravamen of their theory is that Det. Bowles felt intense pressure to solve the crime because of the captain's prominence in the community.

Det. Bowles moved to dismiss, which the district court granted in part, leaving only those claims related to the use of the shooter's gun in a later crime, for which Det. Bowles received a "NIBIN" firearms notice but failed to report it to the Circuit Attorney.

This Court then issued *Bell v. Neukirch*, 979 F.3d 594 (8th Cir. October 28, 2020), which confirms and clarifies existing law that where a suspect and an arrestee have substantially different characteristics, then there is obviously no probable cause.

The Hartmans moved the district court to reconsider, which the court denied. The Hartmans then dismissed with prejudice their remaining claims, and filed this appeal.

The *Bell* court denied qualified immunity based on obviousness of the misidentification. The *Bell* plaintiff was arrested without a warrant despite (1)

being a different height from the suspect, (2) walking a mile away just seven minutes later, but neither sweating nor breathing heavily, and (3) wearing different clothes, sock and shoes than the suspect.

The critical paragraph in *Bell* states:

> Law enforcement officers are afforded "substantial latitude in interpreting and drawing inferences from factual circumstances." *Kuehl v. Burtis*, 173 F.3d 646, 650 (8th Cir. 1999). However, "such latitude is not without limits." *Id.* "First, because the *totality* of circumstances determines the existence of probable cause, ...[a]n officer contemplating an arrest is not free to disregard plainly exculpatory evidence, even if substantial inculpatory evidence (standing by itself) suggests that probable cause exists." *Id.* Under the Fourth Amendment, we must "analyze the weight of all the evidence—not merely the sufficiency of the incriminating evidence—in determining whether [an officer] had probable cause to arrest [an individual]." *Id.*
>
> (emphasis in original)

The Hartmans suggest that omitted facts of skin color alone are obvious proof of exoneration, and thus dispositive under *Bell* as to both probable cause and qualified immunity.

The Hartmans ask this court to exercise *de novo* review, reverse the district court, reinstate their claims, and remand for further proceedings.

ARGUMENT

Issue: **Whether there is obviously no probable cause for search and arrest warrants when the applicant omitted that the victim of a shooting thrice stated that his shooter was a "Black male, hoodie" but the subjects are White.**

Standard of Review

The Hartmans believe the standard of review in this case is *de novo*. They filed their civil rights suit asserting that their homes were unreasonably searched and their persons unreasonably seized under the Fourth Amendment, that they were subjected to unfair criminal proceedings under the Fourth Amendment, and that they were maliciously prosecuted under state law for a crime they did not commit. The gravamen of their allegations is the omitted but exculpatory fact that the victim thrice stated near the time of the crime that the shooter was Black, but the Hartmans are White. Det. Bowles filed a motion to dismiss, which the district court granted in part, leaving only those claims related to a later time period after Det. Bowles received notice that the same gun was used in a wholly separate, later crime. The court's Memorandum and Order was not in the form of a judgment, and thus was interlocutory in nature. Written discovery ensued on the remaining claims.

This Court then released *Bell v. Neukirch*, 979 F.3d 594, 601 (8th Cir. 2020) which clarifies and confirms existing law in the Hartmans' favor because it holds—citing numerous cases both as to probable cause, and to lack of qualified immunity—that when the suspect and the arrestee have substantially different characteristics, then there is no probable cause and it is an obvious case.

The Hartmans filed a motion to reconsider, which the district court denied. The parties voluntarily stipulated to a dismissal with prejudice of the Hartmans' remaining claims. The Hartmans then filed this appeal of both the original order of dismissal, and the denial of the motion to reconsider.

The court accepts the allegations in the pleading as true, *Rivera v. Bank of Am., N.A.*, No. 19-2868, 2021 WL 1323785, at *3 (8th Cir. Apr. 9, 2021). This appeal is therefore over an issue of law, that is, application of precedent to pleaded facts. *See Former Emps. of Sonoco Prod. Co. v. Cho*, 372 F.3d 1291, 1295 (Fed. Cir. 2004) ("where the facts are undisputed, all that remains is a legal question, even if that legal question requires the application of the appropriate standard to the facts of a particular case.").

The standard of review for a motion to dismiss is well established:

> We review *de novo* the grant of a motion to dismiss. We accept 'as true the complaint's factual allegations and grant[ ] all reasonable inferences to the non-moving party.' " *Rivera v. Bank of Am., N.A.*, No. 19-2868, 2021 WL 1323785, at *3 (8th Cir. Apr. 9, 2021), citing to *Park Irmat Drug Corp. v. Express Scripts Holding Co.*, 911 F.3d 505, 515 (8th Cir. 2018) (alteration in original) (citations omitted).

There is considerable discussion in the case law about whether a motion to reconsider of an interlocutory order should be analyzed under Fed. R. Civ. P. 54(b) or Fed. R. Civ. P. 60(b).

Fed.R.Civ.P. 54(b) states in relevant part:

> any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities

In *Zurich Am. Ins. Co. v. U.S. Eng'g Co.*, No. 10-00656-CV-W-GAF, 2012 WL 13028219, at *2 (W.D. Mo. May 30, 2012) the court analyzed a Motion to reconsider under 54(b) stating that the rule "'governs reconsideration of orders that do not constitute final judgments in a case.'" *Westinghouse Elec. Co. v. United States*, No. 4:03CV861 CDP, 2009 WL 881605, at *4 (E.D. Mo. Mar. 30, 2009). The court then stated that under Rule 54(b) a motion to reconsider could be granted for among other reasons, "a controlling change in the law occurred." *Id.* (quoting *Jones v. Casey's Gen. Stores*, 55 F. Supp. 2d 848, 854 (S.D. Iowa 2008).

Strongly in favor of analysis under this Fed.R.Civ.P. 54(b) is *Julianello v. K-V Pharm. Co.*, 791 F.3d 915, 923, n. 3 (8th Cir. 2015), where the court said:

> K–V argues that the district court could have considered the motion under Federal Rule of Civil Procedure 60(b) rather than under Federal Rule of Civil Procedure 54(b). We disagree. Rule 54(b) allows a district court to revise a decision that adjudicates, but does not enter final judgment on, fewer than all claims in an action with multiple claims. Fed.R.Civ.P. 54(b) ("[A]ny order or other decision, however

> designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."). The district court concluded that because it had not yet entered final judgment on any of plaintiffs' claims when the plaintiffs filed the motion for reconsideration, Rule 54(b) is the appropriate rule under which to consider the motion. We agree. *See Auto Servs. Co., Inc. v. KPMG, LLP*, 537 F.3d 853, 856 (8th Cir.2008) (noting that district court must direct entry of judgment for purposes of a final judgment when issuing an order dismissing fewer than all of the claims). The district court did not enter final judgment until after denying the motion for reconsideration.

Nevertheless, Fed. R. Civ. P. 60(b) states:

> Judgment on Multiple Claims or Involving Multiple Parties.
>
> When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, *any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities*.
>
> (emphasis added)

In *Loy v. BMW of N. Am., LLC*, No. 4:19-CV-00184 JAR, 2020 WL 5095372, at *3–4 (E.D. Mo. Aug. 28, 2020) the court stated regarding a motion to reconsider in relevant part:

> By its terms, only Rule 60(b) encompasses a motion filed in response to an order. *See Broadway v. Norris*, 193 F.3d 987, 989 (8th Cir. 1999). For this reason, the Court will construe BMW's motion [to

> reconsider] as a Rule 60(b) motion, which permits relief from an order due to, among other things, mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence; fraud, misrepresentation, or misconduct by an opposing party; or any other reason that justifies relief. Fed. R. Civ. P. 60(b); see also *Elder–Keep v. Aksamit*, 460 F.3d 979, 984 (8th Cir. 2006) ("[W]e have determined that motions for reconsideration are 'nothing more than Rule 60(b) motions when directed at non-final orders.' ").
>
> Relief under "Rule 60(b) is an "extraordinary remedy" that is "justified only under 'exceptional circumstances.' " *Prudential Ins. Co. of Am. v. Natl. Park Med. Ctr., Inc.*, 413 F.3d 897, 903 (8th Cir. 2005) (quoting *Watkins v. Lundell*, 169 F.3d 540, 544 (8th Cir.1999)). Further, "[r]elief is available under Rule 60(b)(6) only where exceptional circumstances have denied the moving party a full and fair opportunity to litigate his claim and have prevented the moving party from receiving adequate redress." *Harley v. Zoesch*, 413 F.3d 866, 871 (8th Cir. 2005). The Rule 60(b)(6) catch-all provision is not a vehicle for setting forth arguments that were made or could have been made earlier in the proceedings. See *Broadway*, 193 F.3d at 989-90.

The Hartmans are not certain which of the two rules applies, and they stated as much to the district court in their Reply, J.A. 163. The Hartmans note, however, that this Court has taken the position that Rule 60(b)(6) is the correct Rule for consideration of a motion to reconsider. *Broadway*, 193 F.3d at 989. Where the motion was brought only because *Bell*, as an intervening authority, clarified the law, Appellants are not using the Rule as "a vehicle for setting forth arguments that were made or could have been made earlier in the proceedings."

But regardless of which Rule applies, there is still the separate issue of whether review should be under a *de novo* standard or some other standard.

Appellants believe the answer lies in the long-standing principle that issues of law are reviewed *de novo*, just the same as the standard of review for the underlying motion to dismiss. *Krakowski v. Allied Pilots Ass'n*, 973 F.3d 833, 836 (8th Cir. 2020).

The Hartmans conclude that the standard of review in this matter is *de novo*.

Introduction

A City of St. Louis fire captain and his lady friend were in a car parked on 7th Street south of downtown, FAC 20, J.A. 9. Video shows a person emerging from a car half a block to the north, walking in their direction, and then running back to the car and driving off, FAC 34, J.A. 10-12. Based on the timing and the nature of the events on the video, everyone involved reasonably believes that person to be the true shooter, FAC 41-42, J.A. 12-13.

The captain called 911, describing his assailant as a "Black male, hoodie," FAC 26-27, J.A. 9. Officers arriving at the scene repeated the description "Black male, hoodie" on their radios, FAC 54, J.A. 14, because the captain told them so, FAC 55, J.A. 16. Shortly afterward, at the hospital, the captain, for a third time, gave the same description to an interviewing officer, FAC 69, J.A. 15.

Det. Bowles testified in his deposition in the underlying criminal case that the captain, while sedated, stated to him a day later that he was not sure of his assailant's skin color, but assumed it because the assailant wore baggy pants, FAC

77, J.A. 16. Det. Bowles omitted that fact from his written reports, FAC 79, J.A. 17, and further stated that he discounted the captain's later statement because of the sedation, FAC 82, J.A. 17.

The captain's initial excited utterances, combined with his statement at the hospital immediately after the shooting, should have been credited as truthful by Det. Bowles, FAC 83, J.A. 17—or at least should not have been omitted by him. Further, the Hartmans make the reasonable assertion in their pleading that Det. Bowles is correct that the captain's later doubt was tainted by the sedation medication, FAC 83, J.A. 17.

Since this case involves a motion to dismiss (and a motion to reconsider that dismissal), this Court should credit the Hartmans' pleading as to the captain's statements to be true, *Rivera v. Bank of Am., N.A.*, No. 19-2868, 2021 WL 1323785, at *3 (8th Cir. Apr. 9, 2021). The Hartmans suggest that Det. Bowles' omission of the fire captain's initial three statements that the shooter was Black meets the plausibility standard for that to be a true fact under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

Det. Bowles was under intense pressure to arrest a suspect because the victim, as a fire captain, was a prominent person, FAC 93, J.A. 18; FAC 95, J.A.

19. Det. Bowles therefore tried to pin the crime on the Hartmans without probable cause, with the slim justification that the two brothers were in the same urban area in a similarly colored sedan, while omitting that they have skin color different than that of the shooter.

The Court may also take judicial notice that downtown St. Louis is a crowded urban area, and Super Bowl Sunday 2017 was a major national event that packed bars and restaurants. Thus, the Hartmans' mere proximity to the crime is insufficient as an inculpatory fact. *Cf. United States v. Shavers,* 524 F.2d 1094, 1095-96 (8th Cir. 1975) (vague descriptions that many people in an area could match do not provide probable cause for a warrantless arrest).

Let us examine the details of what Det. Bowles knew about Corey and Ryan's possible involvement in the shooting. Moments before the shooting Corey and Ryan went at a gas station six blocks, or 0.4 miles, north of the shooting, FAC 11-15, J.A. 8. The gas station video shows Corey getting out of the driver's side of his car, and going into the gas station store, FAC 11-15, J.A. 8. The video shows him coming out of the store shortly afterward, opening a pack of cigarettes, and calmly getting back in his car, FAC 14, J.A. 8. He is obviously a White person, FAC 71, 72, J.A. 16, and not wearing a hoodie, FAC 72, J.A. 16. (In another gas station video taken two plus hours later, it is again obvious that both Hartmans are White and are not wearing hoodies, FAC 72, J.A. 16.)

In October 2017, while the Hartmans were under house arrest, the gun used in the shooting was used in a wholly separate shooting in north St. Louis, FAC 110-112, J.A. 21. Forensic analysis of shell casings confirmed it was the same gun, FAC 112, J.A. 21. The crime lab then generated a "NIBIN" forensic firearms notification to Det. Bowles, FAC 113-116, J.A. 21, who the Hartmans alleged he unconstitutionally failed to investigate, FAC 116, J.A. 21. (Although outside the record here, discovery on that issue later turned out to be in Det. Bowles' favor.)

In March 2019, shortly before the Hartmans' criminal trial setting, Det. Bowles enhanced the video footage of the actual shooter's car and compared it to other video footage, FAC 170, J.A. 29. At that point he apparently determined that the make of the car and the license plate further exonerated the Hartmans, and he thus reached a final (and correct) conclusion that the Hartmans were not involved in the shooting, FAC 170, J.A. 29.

The Circuit Attorney then promptly dropped the charges, FAC 176, J.A. 29. In the meantime, however, the two brothers had served five months in the City Justice Center and approximately 16 months on house arrest, FAC 181-182, J.A. 30.

Suit, Motion to Dismiss, Motion to Reconsider

The Hartmans filed suit[1] under 42 U.S.C. §1983 for unlawful searches and seizures under the Fourth Amendment, unfair criminal proceedings under the Fourth Amendment, and for malicious prosecution under state law, J.A. 2. Some of the claims related only to the time period after the "NIBIN" firearms notice, when Det. Bowles learned of an additional exculpatory fact, namely that the same gun was used in a different crime, FAC 112-113, J.A. 21.

Det. Bowles filed a motion to dismiss, J.A. 46 which the district court granted for all but claims except for those arising after the "NIBIN" notice, J.A. 86. The parties then began discovery.

During discovery, this Court released *Bell v. Neukirch*, 979 F.3d 594, 601 (8th Cir. October 28, 2020), rehearing denied December 11, 2020. *Bell* confirms and clarifies that "[w]here a seized person's characteristics differ substantially from what reasonably would be expected from the suspect, an officer does not have probable cause for an arrest." *Id.*

Relying on its existing precedent, the Court held that *Bell* fell into the "same category" of previous cases where the arrestee had differing characteristics from

[1] The Hartmans amended their pleading as of right under Fed. R. Civ. P. 15(a)(1)(B) to reflect an intervening decision by this Court that pre-trial detainee §1983 claims for reckless investigation and/or unfair criminal proceedings are to be analyzed under the Fourth Amendment, and not the Fourteenth. *Johnson v. McCarver*, 942 F.3d 405, 410- 411 (8th Cir. 2019). Thus the only operative pleading here is the First Amended Complaint.

the suspect. *Bell* at 605 (quoting *Kuehl v. Burtis*, 173 F.3d 646, 650 (8th Cir. 1999)). *Bell* also held that the right not to be seized but upon probable cause was defined at the required level of specificity under the Fourth Amendment, and that—citing longstanding precedent from this Court and other circuits, discussed below—it was clearly established that an officer must not disregard plainly exculpatory evidence, even if substantial inculpatory evidence suggests that probable cause exists.

Misidentification cases will seldom have the exact same specific facts, because everyone has unique physical characteristics. While probable cause may be lacking in one case because of a suspect's height being exculpatory, another case may find exculpatory characteristics in tattoos, age, or clothing. *Bell* at 604 (collecting cases). Thus the qualified immunity analysis turns on the *obviousness* of the exculpatory characteristic, and not one particular expected characteristic. While *Bell* denied qualified immunity because it was an "obvious case of insufficient probable cause," *id.* at 608, that "obviousness" is novel only on its particularized facts, and not on the required level of specificity for the probable cause analysis. That is, "obviousness" was already clearly established before *Bell* issued, and before Det. Bowles' omissions in this case.

Within a few weeks of the release of *Bell*, the Hartmans moved the district court to reconsider its partial dismissal, J.A. 135. The district court denied the

motion, J.A. 170. The parties then stipulated to a voluntary dismissal with prejudice of the Hartmans' remaining claims that sounded after the "NIBIN" firearms notice, J.A. 181, which discovery was already materially weakening. That adjudicated all claims before the district court, and made this appeal ripe.

The Hartmans assert that under existing case law Det. Bowles' omissions negated probable cause, that he lacks qualified immunity, and that *Bell* clarifies and confirms this obvious, plainly incompetent (or knowing, *Ivey v. Audrain Cty., Mo.*, 968 F.3d 845, 850 (8th Cir. 2020)) constitutional violation.

The Hartmans note that they are appealing both the district court's denial of their motion to reconsider (based on *Bell*) as well as the district court's initial dismissal. They argue that *Bell* sufficiently clarified and confirmed the law of probable cause to assert the district court erred as to the exculpatory facts of the skin color characteristic in their fact pattern.

Bell

The events of *Bell* occurred on June 8, 2016, approximately six months before this case's events.

In *Bell* a citizen reported three male juveniles playing with guns around a juvenile female. Officers came to the scene. One juvenile ran off. Seven minutes later, and a mile away, an officer saw Tyree Bell walking calmly along a street. Mr. Bell was five inches taller than the description of the running suspect, he had

on different clothes, socks and shoes, and he was not sweating or breathing heavily. Mr. Bell served three weeks in jail before charges were dropped. He sued, alleging no arguable probable cause for his arrest. This Court reversed the district court's grant of summary judgment in favor of the defendant officers.

The opening paragraph of *Bell* states at 599:

> Bell and the suspect shared only generic characteristics in common: Black, juvenile, and male. Bell, however, had several characteristics distinct from the suspect: he was taller than the suspect; had distinguishable hair from the suspect; and wore shorts, shoes, and socks that differed from those donned by the suspect.
>
> …
>
> We conclude, however, that the evidence, viewed in the light most favorable to Bell, would support a finding that the arresting officers violated Bell's clearly established right to be free from an unreasonable seizure without probable cause under the circumstances.

Let us compare our facts. The calmness factor is the same, although Corey's calmness is before the shooting and Bell's shortly after the incident. The clothes factor is arguable at best. In *Bell* in a decision for the subject to have been the person who fled he would have had to have changed clothes while fleeing. At 606 the court gave that theory no credence at all. In our case, while Corey was undisputedly not wearing a hoodie minutes before the shooting, admittedly he could in theory have put on a hoodie in the short time frame between leaving the gas station and the shooting. Further, his brother Ryan could have had put on a hoodie while waiting for his brother to buy the cigarettes, as Ryan was seated in

the passenger seat, is not seen on the gas station video. Also, the true shooter emerged from the passenger side of the other car, whereas Corey was the driver of his car.

The Hartmans note that in its Order denying the motion to reconsider, the district court focused on the possibility that Corey might have put on a hoodie, J.A. 179. The Hartmans respectfully suggest, however, that it is not clothing which is relevant, but it is the exculpatory evidence of skin color. The Hartmans focused on that issue in their memorandum in support of their motion to reconsider, J.A. 149.

The *Bell* court focused on the suspect's "reasonably … expected" characteristics. In our case the shooter was Black and the Hartmans are White. Skin color is an immutable physical characteristic. No reasonable officer would believe a White person was the suspect when twice at the scene and a third time promptly afterward at the hospital the victim stated his assailant was Black. Thus, just as in *Bell*, "the evidence, viewed in the light most favorable to [Appellants], would support a finding that the arresting officers violated [Appellants'] clearly established right to be free from an unreasonable seizure without probable cause under the circumstances."

The *Bell* court looked at several factors: height, clothing, shoes, and no heavy breathing or sweating in light of what would have had to have been a seven-minute mile. The Hartmans suggest, by contrast, that in their case that one

characteristic is sufficiently exculpatory to be dispositive of probable cause: skin color.

By omitting the skin color issue from his warrant applications, Det. Bowles swore to materially inaccurate or incomplete affidavits. *Franks v. Delaware*, 438 U.S. 154, 171 (1978). In *Bell* the officer arrested without a warrant. Here the officer obtained search warrants and then arrest warrants for the searches of the Hartmans' homes and arrests of their persons, respectfully. In *Z.J. by & through Jones v. Kansas City Bd. of Police Commissioners*, 931 F.3d 672, 686 (8th Cir. 2019) the court said regarding *Franks*:

> The U.S. Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and requires that warrants shall be supported by probable cause. U.S. Const. amend. IV. "A warrant based upon an affidavit containing 'deliberate falsehood' or 'reckless disregard for the truth' " — including, as alleged here, material omissions of fact — "violates the Fourth Amendment." *Bagby v. Brondhaver*, 98 F.3d 1096, 1098 (8th Cir. 1996) (quoting *Franks v. Delaware*, 438 U.S. 154, 171 (1978)); *see also Morris v. Lanpher*, 563 F.3d 399, 402–04 (8th Cir. 2009) (analyzing a *Franks* claim involving alleged falsehoods and omissions).
>
> To prove a *Franks* violation based on the omission of material from a search warrant application, a plaintiff must show "1) that facts were omitted with the intent to make, or in reckless disregard of whether they thereby make, the affidavit misleading, and 2) that the affidavit, if supplemented by the omitted information, could not support a finding of probable cause." *Williams v. City of Alexander*, 772 F.3d 1307, 1312 (8th Cir. 2014) (quoting *United States v. Box*, 193 F.3d 1032, 1035 (8th Cir. 1999)). "Probable cause to issue a search warrant exists if, in light of the totality of the circumstances, there is 'a fair probability that contraband or evidence of a crime will be found in a

> particular place.' " *United States v. Shockley*, 816 F.3d 1058, 1061 (8th Cir. 2016) (quoting *United States v. Donnell*, 726 F.3d 1054, 1056 (8th Cir. 2013)).

Discovery is not far enough along in this case to have revealed what Det. Bowles stated to the grand jury, (and the Hartmans understand that whether that testimony is ever discovered will likely be subject to dispute), but his warrant applications, quoted at length in the Statement of the Case section above, firmly prove that Det. Bowles omitted the skin color issue from those documents. The Hartmans allegation that Det. Bowles testified to the grand jury consistently with his affidavits is reasonable. FAC 158, 160, J.A. 28, which Appellants respectfully suggest this Court should take as true. Det. Bowles' grand jury testimony was misleading, and if the skin color issue had been included there would have been no probable cause, and likely no indictment.

Let us now address the totality of the circumstances in more detail. In *Bell* at 603–604 this Court said:

> Law enforcement officers are afforded "substantial latitude in interpreting and drawing inferences from factual circumstances." *Kuehl v. Burtis*, 173 F.3d 646, 650 (8th Cir. 1999). However, "such latitude is not without limits." *Id.* "First, because the *totality* of circumstances determines the existence of probable cause, ...[a]n officer contemplating an arrest is not free to disregard plainly exculpatory evidence, even if substantial inculpatory evidence (standing by itself) suggests that probable cause exists." *Id.* Under the Fourth Amendment, we must "analyze the weight of all the evidence—not merely the sufficiency of the incriminating evidence—in determining whether [an officer] had probable cause to arrest [an individual]." *Id.*

(emphasis in original)

Here the central issue of the totality of the circumstances is that the Hartmans are White, and the victim thrice stated his assailant was Black. The hoodie, the similarity of the cars (before video enhancement), and the alleged baggy pants comment do not change the sufficiency of the skin color omission. Under a totality analysis, there may be a genuine dispute of material facts as to these issues, *Bell* at 606, but the issue presented here is not whether these other issues are sufficiently inculpatory as to create probable cause, but rather whether the skin color omission is sufficiently exculpatory to eliminate probable cause.

At 604 the *Bell* court said:

> Bell's appearance and that of the suspect differ markedly…
>
> …
>
> Where a seized person's characteristics differ this substantially from what reasonably would be expected from the suspect, an officer does not have probable cause for an arrest.

This Court held that *Bell* fell into the "same category" of previous cases where the arrestee had differing characteristics from the suspect as to scars and tattoos, a "discrepancy of a generation" in age, and different color clothing on a fleeing suspect. *Bell* at 604, discussing each of *United States v. Evans*, 851 F.3d 830 (8th Cir. 2017) (lack of abdominal scar and neck and hand tattoos on rape arrestee); *Tillman v. Coley*, 886 F.2d 317, 318, 321 (11th Cir. 1989) (suspect was about 24 years of age, but arrestee was 41, despite near-identical name); *Sharp v.*

County of Orange, 871 F.3d 901, 910 (9th Cir. 2017) (different color shir and pants). Those cases apply equally here.

Det. Bowles violated Corey and Ryan's constitutional right to be free of unreasonable searches of their homes and unreasonable seizures of their persons.

Qualified Immunity

The qualified immunity analysis is well known, as stated in *Bell* at 606-607:

> Having determined that Officers Munyan and Neukirch violated Bell's constitutional rights by arresting him without probable cause, we must next determine whether "the unlawfulness of their conduct was clearly established at the time." *District of Columbia v. Wesby*, —— U.S. ——, 138 S. Ct. 577, 589 (2018) (quotation omitted). If their unlawful conduct was clearly established, then they are not entitled to qualified immunity. *See id*.
>
> "Clearly established means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable officer would understand what he is doing is unlawful." *Id.* (quotations omitted); *see also Kisela v. Hughes*, —— U.S. ——, 138 S. Ct. 1148, 1153 (2018) ("An officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.' " (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014))). For a right to be clearly established, "existing law must have placed the constitutionality of the officer's conduct beyond debate." *Wesby*, 138 S. Ct. at 589 (quotation omitted). The "legal principle must have a sufficiently clear foundation in then-existing precedent." *Id.* "The rule must be settled law, which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority." *Id.* (cleaned up). Then-existing "precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that every reasonable official would know." *Id.* at 590 (cleaned up).

> For a right to be clearly established, it is not required that there be "a case directly on point." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). An officer may have fair notice based on the fact his conduct is obviously unlawful, even in the absence of a case addressing the particular violation. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *see also Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) ("Of course, in an obvious case, [the Fourth Amendment reasonableness standard articulated at a high level of generality] can 'clearly establish' the answer, even without a body of relevant case law."); *Rokusek v. Jansen*, 899 F.3d 544, 548 (8th Cir. 2018).

In *Z.J. by & through Jones v. Kansas City Bd. of Police Commissioners*, 931 F.3d 672, 685 (8th Cir. 2019) the Court repeated the final paragraph above.

In *Bell* the Court wrote at 608 about those facts: "It is an obvious case of insufficient probable cause." In his concurring opinion Judge Colloton fleshed this out:

> When an arrestee argues on a given set of facts that no reasonable officer could have believed that there was probable cause to arrest, the argument brings up for our consideration whether the officer's seizure was objectively legally reasonable. That question includes whether the existing constitutional rules apply with obvious clarity to the specific conduct in question. Sometimes a plaintiff can prevail by arguing from general constitutional standards that a right is clearly established on a given set of facts. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam). Bell argued that "fourteen obvious evidentiary reasons should have negated probable cause," asserted that the right in question was clearly established, maintained that it was not objectively reasonable on these facts for officers to conclude that there was probable cause, and employed a rhetorical question—"If all this was objectively reasonable, what would be unreasonable?"—to say, in effect, "it's obvious." We should not parse Supreme Court opinions as though they were statutes, *see Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979); nor should we read them as though they implemented a code-pleading regime for qualified immunity cases.

Bell held that the right not to be seized but upon probable cause was defined at the required level of specificity under the Fourth Amendment. Although *Bell* concerns a warrantless arrest under arguable probable cause, the probable cause analysis is not more generous to an officer for a warrant application. *Dowell v. Lincoln Cty., Mo.*, 762 F.3d 770, 777 (8th Cir. 2014). *Bell* clarifies and confirms the already-clearly established general proposition that a seizure (in that case, a warrantless arrest) must be supported by probable cause. *Habiger v. City of Fargo*, 80 F.3d 289, 295 (8th Cir. 1996). *Bell*'s qualified immunity analysis is further supported by longstanding doctrine that an officer must not disregard plainly exculpatory evidence, even if substantial inculpatory evidence suggests that probable cause exists. *Kuehl v. Burtis*, 173 F.3d 646, 650 (8th Cir. 1999). Officers also have a duty to conduct a reasonably thorough investigation before arresting a suspect. *Id*. Qualified immunity is further unavailable when a videotape viewed personally by the officers showed that no crime occurred by the arrestee. *Id.* at 650 (citing *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1259-60 (10th Cir. 1998)).

As stated above, it would be unworkable for the qualified immunity analysis to turn on the similarity of discrete physical characteristics. The issue, rather, is the obviousness.

The obviousness of the exculpatory fact of skin color in the Hartmans' case is as obvious if not more obvious than exculpatory facts of height, lack of sweating

and heavy breathing, and clothes and shoes in *Bell*. Thus, Det. Bowles lacks qualified immunity in this obvious case.

CONCLUSION AND PRAYER

WHEREFORE, Appellants Corey and Ryan Hartman pray the Court to reverse the district court and order the following counts complaint reinstated for further proceedings:

Count I: Unreasonable searches under the Fourth Amendment

Count II: Unreasonable seizures under the Fourth Amendment

Count IV: Unfair criminal proceedings under the Fourth Amendment

Count V: Malicious Prosecution under Missouri State Law.

Appellants further pray for costs, statutory attorney's fees under 42 U.S.C. 1988 and for such other orders as the court believes to be just, meet and reasonable.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, TYPE STYLE REQUIREMENTS, AND E-MAIL REQUIREMENTS

Undersigned counsel hereby certifies as follows:

1. Volume Limitation. This brief complies with F.R.A.P. 32(a)(7)(B)(i) because the number of words in the brief, excluding the Cover Page, Summary of Case and Request for Oral Argument, Table of Contents, Table of Authorities, and Certificates is less than 13,000 words, that it is, the brief's word count, after proper exclusions is 9701.

2. Typeface Requirements and Typestyle Requirements. This brief complies with F.R.A.P. 32(a)(5) and 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 2007, and the typestyle is 14 point, Times New Roman.

3. Emails. The emails for this brief (a) to the Court, and (b) to opposing counsel, comply with 8th Cir. R. 28A(h) because they have been scanned for viruses and are virus free. Further, the emails comply with 8th Cir. R. 28A(h)(3) because they were created by printing to PDF from the original word processing file.

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on April 30, 2021 (and under F.R.A.P. 25 and 8th Cir. R. 25A(d)), at the time Appellees are filing this Brief with this Court, Appellee is also serving this Brief on Appellant by the CM/ECF system, and, after the review process described in 8th Cir. R. 28A(a), counsel will timey deliver to opposing counsel named below (a) a revised brief (if required), (b) a paper copy of the final version of the brief, and (c) an e-mail version in Microsoft Word. Opposing counsel is:

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