

No. _____

In the Supreme Court of the United States

EDWARD WIERSZEWSKI,
Petitioner,

v.

ALAN THIBAUT,
Respondent.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit*

PETITION FOR A WRIT OF CERTIORARI

Michelle A. Thomas
Counsel of Record
THOMAS, DeGROOD
& WITENOFF, P.C.
400 Galleria Officentre
Suite 550
Southfield, MI 48034
(248) 353-4450
mthomas@thomasdegrood.com

Attorneys for Petitioner

QUESTIONS PRESENTED

ISSUE I:

DOES THE CIRCUIT COURT'S REFUSAL TO EXERCISE JURISDICTION DIRECTLY CONFLICT WITH SUPREME COURT PRECEDENT?

ISSUE II:

DOES THE CIRCUIT COURT'S APPARENT AFFIRMATION OF THE DISTRICT COURT'S DETERMINATION THAT QUESTIONS OF FACT PRECLUDE THE GRANT OF SUMMARY JUDGMENT DIRECTLY CONFLICT WITH SUPREME COURT PRECEDENT?

ISSUE III:

DOES THE CIRCUIT COURT'S APPARENT AFFIRMATION OF THE DISTRICT COURT'S DENIAL OF QUALIFIED IMMUNITY DIRECTLY CONFLICT WITH SUPREME COURT PRECEDENT REGARDING WHETHER A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT WAS VIOLATED?

PARTIES TO THE PROCEEDINGS

Petitioner, Edward Wierszewski, was the Defendant-Appellant in the Court of Appeals for the Sixth Circuit. Respondent, Alan Thibault was the Plaintiff-Appellee in the Court below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Edward Wierszewski discloses that Meadowbrook Insurance Group is a publicly held corporation and has a financial interest in the outcome of this case as the liability insurer for Wierszewski's employer, City of Grosse Pointe Farms.

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PETITION FOR A WRIT OF CERTIORARI

Pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rules 10 and 12, Petitioner Edward Wierszewski requests the Supreme Court to review and reverse the judgment of United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 2017 U.S. App. LEXIS 10568, 2017 FED App. 0323N (6th Cir.) (reproduced in Petitioner's Appendix ("Apx.") at 1-32), reh. and reh. en banc den. (7/13/17) (reproduced in Apx. at 68-69). The Opinion and Order of the District Court for the Eastern District of Michigan, initially reported at 2016 U.S. Dist. LEXIS 82191 (E.D. Mich. 6/24/16), and corrected at 2016 U.S. Dist. LEXIS 82195(E.D. Mich. 6/24/16), is reproduced at Apx. 33-67.

JURISDICTION

The Sixth Circuit's judgment was entered on June 9, 2017 (Apx. 1). On July 13, 2017, the Sixth Circuit entered an order denying a Petition for Rehearing and Rehearing *En Banc* filed on behalf of Edward Wierszewski ("Apx. 68-69). The Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amend. 4 states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amend. 14 states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State herein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1291 states:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 U.S.C.S. §§ 1292(c) and (d) and 1295].

42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

M.C.L. § 257.625 states in pertinent part:

(1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means any of the following:

(a) The person is under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a

combination of alcoholic liquor, a controlled substance, or other intoxicating substance.

(25) As used in this section:

(a) “Intoxicating substance” means any substance, preparation, or a combination of substances and preparations other than alcohol or a controlled substance, that is either of the following:

(i) Recognized as a drug in any of the following publications or their supplements:

(A) The official United States pharmacopoeia.

(B) The official homeopathic pharmacopoeia of the United States.

(C) The official national formulary.

(ii) A substance, other than food, taken into a person’s body, including, but not limited to, vapors or fumes, that is used in a manner or for a purpose for which it was not intended, and that may result in a condition of intoxication.

STATEMENT OF THE CASE

Petitioner Edward Wierszewski is a public safety officer with the Grosse Pointe Farms (“GPF”) Public Safety Dept. (“PSD”) (Apx. 1, 34, 72). At approximately 2:00 AM on December 5, 2014, Wierszewski and fellow officer Veronica Cashion were on patrol in separate squad cars when they noticed a semi tractor-trailer inexplicably hit and go up and over, a median in the middle of a main street (Apx. 2-3, 35, 75, 113-114).

When approaching the truck, Wierszewski detected two equipment-related violations of the Michigan Motor Vehicle Code (Apx. 3, 35, 88). Wierszewski initiated a traffic stop, with Cashion providing back-up (Apx. 3, 35, 75-76). The traffic stop was recorded by the dash camera of Wierszewski’s patrol car and body microphone (Apx. 3, 45, 73-74, 86-111).¹

Both officers observed that the driver’s window was down, despite cold temperatures, and that the radio volume was unusually high (Apx. 3, 36, 76, 114). Upon initial contact with the driver, Respondent Alan Thibault, the officers observed that Thibault appeared disorientated, was attempting to smoke an unlit cigarette, was speaking unusually slow, and, had a flushed red face (Apx. 3, 36, 76, 115).

Thibault explained that he had hit the median after becoming confused about how to access a delivery destination (Apx. 87). Thibault denied having any medical issues, being on medication, or consuming

¹ A DVD and transcription of the recording were filed with the District Court. The DVD has been authenticated as complete and accurate (Apx. 74-75, 114-115, 119-120, 125).

alcohol or drugs (Apx. 87-89, 98). When asked if he realized that his cigarette was not lit, Thibault replied, “No. It goes out a lot.” (Apx. 88).

Thibault was shaking and explained he was chilled despite just vacating a warm vehicle (Apx. 76-77, 88-89).

Wierszewski’s observations raised concerns regarding possible intoxication, so he requested and received consent to conduct a pat down and field sobriety tests (“FST’s”) (Apx. 77, 89-90). At the time, Wierszewski was a certified drug recognition expert and was trained and experienced in the administration of FST’s – including standard FST’s (“SFST’s”) approved and recommended by the National Highway Traffic Safety Administration (“NHTSA”) (Apx. 72, 78). The FST’s were recorded by the dash cam and observed by Cashion (Apx. 90-103, 114, 116). Cashion was also trained in the use and administration of FST’s and SFST’s (Apx. 72).

With respect to two of the FST’s administered, Thibault correctly chose the number between 19 and 21 and was able to touch of the tip of a thumb to the trip of each finger while counting (Apx. 77, 90, 91).

When requested to recite the alphabet from the letter D to the letter O, Thibault responded by stating, “D, A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V.– stopping at O.” (Apx. 77, 90). Both Wierszewski and Cashion concluded that Thibault’s peculiar response constituted evidence of possible intoxication (Apx. 77, 116).

Thibault completed a request to silently count for thirty seconds in only nineteen seconds (Apx. 78, 93-94).

Before administering three standard FST's developed by the NHTSA, Wierszewski inquired whether Thibault had any problems standing, sitting or walking to which Thibault responded in the negative (Apx. 78, 91).

Wierszewski administered the walk-and-turn test after providing verbal instructions and a physical demonstration (Apx. 91-92). Thibault acknowledged understanding the instructions and voiced no questions, concerns or objection (Apx. 92). Wierszewski and Cashion determined that Thibault exhibited multiple indicators/clues of intoxication, including: body rigidity; swaying and flailing his arms to maintain balance while being instructed; elevating and using his arms for balance while walking; and, stopping during the process (Apx. 78-81, 116). Two clues during performance of the walk-and-turn test constitute reliable evidence of intoxication (Apx. 82).

Wierszewski provided verbal instructions and a physical demonstration for the one-leg-stand test, which Thibault confirmed he understood and about which he voiced no questions, concerns or objections (Apx. 92). Thibault also acknowledged that Wierszewski performed the test without difficulty (Apx. 92-93). Thibault again exhibited multiple indicators of intoxication, specifically: failure to count as instructed; failure to maintain 6" foot elevation; inability to keep arms at side and use of arms for balance; swaying while balancing; and, hopping (Apx. 82, 116). Two clues are indicative of intoxication (Apx. 82).

During the HGN test, Thibault's eyes did not pursue smoothly and he had nystagmus at maximum deviation in both eyes, for a total of four clues suggestive of intoxication (Apx. 82-83, 94-95).

Wierszewski received permission to search the truck (Apx. 95). By this point, GPF Officer Thomas Dionne arrived at the scene and remained with Thibault (Apx. 120). Dionne was trained in the use and administration of FST's and SFST's (Apx. 72).

During the search, Cashion confirmed that: (1) Thibault had been hanging out the open window of his cab and had his radio "blasting"; (2) Thibault attempted to smoke an unlit cigarette; (3) Thibault's face had remained flushed and red; and, (4) Thibault's performance of the SFST's, especially the walk-and-turn, suggested intoxication (Apx. 95-97, 114). The search did not uncover evidence of alcohol or drugs (Apx. 36-37).

Wierszewski advised Thibault that the FST and SFST results were consistent with consumption of an intoxicant and that Wierszewski had ruled out alcohol consumption (Apx. 99). Wierszewski also recounted other factors, including attempts to extinguish an unlit cigarette which, combined with the test results, caused Wierszewski to suspect that Thibault was impaired by a non-alcohol intoxicant (Id.). Thibault denied taking any drugs but offered no explanation for the observed indicators of intoxication (Id.).

By then, Sgt. Krizmanich had arrived at the scene (Apx. 124-125). Krizmanich was trained in the use and administration of FST's and SFST's (Apx. 72). After conferring with Krizmanich, Dionne, and Cashion, all

of whom agreed that Thibault appeared intoxicated, Wierszewski reexamined Thibault's eyes for signs of stimulant use and administered a second walk-and-turn test (Apx. 100-102). Prior to the walk-and-turn test, Dionne asked Thibault to roll up his sleeves and inquired when Thibault had last used drugs (Apx. 102). Thibault admitted to previously using marijuana, but denied current drug use (Id.).

Wierszewski again verbally explained and physically demonstrated the walk-and-turn test and Thibault again confirmed he understood without voicing any questions, concerns, or objections (Apx. 103). All four officers observed Thibault substantially swaying from side to side, stepping off the line, lifting his legs off the ground, and considerably flailing his arms (Apx. 78-81, 116, 120, 125-126).

The professional judgment of all four officers at the scene: Thibault was possibly under the influence of an intoxicant other than alcohol and, if so, should not be allowed to continue to operate the truck on the public streets (Apx. 77, 83-84, 106, 116-117, 120-121, 125-126). Therefore, Wierszewski arrested Thibault for violating MCL § 257.625 (Apx. 4, 40, 83-84, 103).

At the station, Wierszewski completed a drug influence evaluation upon Thibault as witnessed by Cashion (Apx. 4, 83-84, 114). Wierszewski again administered the NHSTA SFST's, as witnessed by Cashion, during which Thibault continued to exhibit clues of impairment (Apx. 4, 84, 116-117). Wierszewski, Cashion, and Krizmanich all detected a white powder-like substance in Thibault's left nostril (Apx. 4, 84, 126). Wierszewski remained concerned that Thibault was possibly under the influence of a

central nervous system stimulant or depressant (Apx. 84). All activities occurring within the GPF booking room were captured visually and audibly by a mounted recorder (Apx. 77)².

Thibault consented to blood testing and the samples were sent to the Michigan State Police for analysis (Apx. 4-5, 40, 84). After his release, Thibault submitted to blood tests at his employer's medical facility, the results of which were negative for alcohol and certain – but not all – non-alcohol intoxicants, including marijuana, cocaine, amphetamines, opiates, and PCP (Apx. 5, 45).

The OWI charges against Thibault were dismissed, pending the results of the Michigan State Police Laboratory blood screen (Apx. 46). The laboratory subsequently reported that Thibault's blood was negative for certain limited class of drugs, specifically: amphetamines, barbiturates, benzodiazepines, cannabinoids, cocaine metabolites, meprobamates, methadone, opiates, tramadol and zolpidem (Apx. 5, 46).

Thibault instituted the instant action pursuant to 42 U.S.C. § 1983, alleging that Wierszewski engaged in an unlawful arrest and the malicious prosecution of Thibault in violation of rights secured by the Fourth and Fourteenth Amendments to the U.S. Constitution (Apx. 5).

² A copy of the DVD recording from the booking room was filed with the District Court. This DVD has also been authenticated as complete and accurate (Apx. 75, 115, 121-122, 126).

Wierszewski filed a Motion for Summary Judgment asserting that: (1) the false arrest claims and malicious prosecution claims fail on the merits because Wierszewski had probable cause; (2) the malicious prosecution claims fail on the merits because Wierszewski did not participate in Thibault's prosecution in a blameworthy way and Thibault did not suffer from a deprivation of liberty apart from the initial arrest; and, (3) Wierszewski was entitled to qualified immunity because it was objectively reasonable for Wierszewski to believe probable cause existed for Thibault's arrest (Apx. 5, 135-145, 164-168, 174-176).

At the Summary Judgment hearing, Plaintiff's counsel admitted that: (1) Thibault drove erratically; (2) the windows of Thibault's truck were down while he was driving; (3) Thibault never explained why he had an unlit cigarette in his mouth; (4) Thibault never stated that he had a speech impediment that would account for his slow speech; and, (5) Thibault denied having any medical conditions that would impact his ability to perform FST's/SFST's (Apx. 148-150, 153-154). Plaintiff's counsel asserted, for the first time, that Thibault did not attempt to extinguish an unlit cigarette and received permission to submit an affidavit to that effect (Apx. 150, 162).

Thibault's strategy for defeating summary judgment on the false arrest claims consisted of attacks upon: (1) Wierszewski's motives; (2) the accuracy and reliability of Wierszewski's administration and assessment of Thibault's performance of the FST's and SFST's; and, (3) Wierszewski's credibility in light of the negative blood test results (Apx. 150-161, 168-174). No

evidence was proffered contesting the affidavits of Officers Cashion, Dionne and Krizmanich.

Before taking the dispositive motion under advisement, the District Court confessed to unsuccessfully attempting to perform the NHTSA-approved FST's (Apx. 137, 157). The Court found the tests to be "troubling" and opined that they appeared designed to trap innocent motorists (Id.). However, the District Court also recognized that: (1) the dash cam video clearly depicts a "substantial" loss of balance during both walk-and-turn tests; (2) in addition to the results of the FST's/SFST's, there were other undisputed facts such as Thibault's erratic driving, flushed face, and use of an unlit cigarette, all of which could cause a reasonable police officer to suspect that Thibault was impaired; (3) Wierszewski faced a difficult situation; and, (4) it might have been irresponsible to have allowed Thibault to continue driving (Apx. 155-157, 177).

The District Court ultimately granted summary judgment on the malicious prosecution claims but denied summary judgment on the false arrest claims (Apx. 33-63). The Court determined that whether Wierszewski's probable cause determination was objectively reasonable was a question of fact for the jury, emphasizing that Wierszewski's credibility was undermined by: (1) perceived pauses in the tape where Thibault could have offered exculpatory explanations for his unusual behavior; (2) the lack of evidence of alcohol use, including negative breathalyzer results; (3) negative blood test screenings for alcohol and certain drugs; and, (4) expert criticism of Wierszewski's administration and analysis of SFST's (Apx. 34, 51-62).

The District Court failed to consider the undisputed facts that: (1) Wierszewski had ruled out alcohol as an intoxicant; (2) three other officers at the scene observed Thibault and had independently determined that there was probable cause for Thibault's arrest; and, (3) the negative blood test results were received subsequent to the arrest. The District Court also failed to address and resolve the potentially dispositive legal issue of whether, assuming unconstitutional conduct, Wierszewski violated clearly established law.

Wierszewski sought appellate reversal of the denial of summary judgment on qualified immunity grounds with respect to the false arrest claims.

On June 9, 2017, the Sixth Circuit issued a split opinion (Apx. 1-32). Citing *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995), the majority concluded the Court lacked jurisdiction, deferring to the District Court's determination that questions of fact exist as to whether probable cause existed for Thibault's arrest (Apx. 7-10, 30). The majority reached this determination after engaging in an analysis of the credibility of each party's proofs and concluding that, even if undisputed, Wierszewski's observations, alone, could not justify Thibault's arrest (Apx. 11-30). Like the District Court, the Circuit Court majority failed to consider undisputed evidence that: (1) three other trained and experience police officers were at the scene of Thibault's detention and arrest; and, (2) the three officers also observed Thibault's demeanor and sobriety test performances and independently determined that probable cause existed for an OWI arrest.

Also akin to the District Court, the Sixth Circuit majority failed/refused to resolve discrete and dispositive legal issues regarding: (1) the existence, substance and clarity of preexisting law; and, (2) whether, under the particular circumstances, it was objectively reasonable for Wierszewski to believe, even mistakenly, that probable cause existed for Thibault's arrest. Yet, the majority readily rejected arguments that Wierszewski was entitled to rely upon the sobriety test results as evidence of possible impairment by non-alcohol intoxicants, reasoning that Wierszewski's conduct compared unfavorably with prior cases involving blatant evidence of alcohol consumption (Apx. 13-17). The majority seemed to suggest that Wierszewski might have been operating under the false assumption that he had "free reign" to administer field sobriety tests to whomever he pleased and to arrest individuals who made the "slightest misstep while performing the tests." (Apx. 17).

Judge Sutton issued a dissenting opinion, reasoning that the appellate court was required to exercise jurisdiction over the legal issues presented (Apx. 31-32).

On July 13, 2017, the Sixth Circuit entered an Order Denying A Petition for Rehearing and Rehearing *En Banc* filed on behalf of Wierszewski, Judge Sutton dissenting (Apx. 68-69).

REASONS FOR GRANTING THE PETITION**ARGUMENT I:****THE CIRCUIT COURT'S REFUSAL TO EXERCISE JURISDICTION DIRECTLY CONFLICTS WITH SUPREME COURT PRECEDENT**

42 U.S.C. § 1983 confers a private federal right of action against any person who, acting under color of state law, deprives an individual of any right, privilege or immunity secured by the Constitution or federal laws. Qualified immunity shields governmental officials from the burdens of litigation and liability under § 1983 where officials reasonably believe that their actions were lawful. *Ziglar v. Abbasi*, 137 U.S. 1843, 1866-1867, 198 L. Ed. 2d 290 (2017); *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007, 198 L. Ed. 2d 625 (2017); *White v. Pauly*, 580 U.S. ___, 137 S. Ct. 548, 551-552, 196 L. Ed. 2d 463 (2017).

This Court mandates broad application of qualified immunity to avoid inhibiting governmental officials in the discharge of socially desirable duties. *Ziglar, supra*; *White, supra*; *Taylor v. Barkes*, 575 U.S. ___, 135 S. Ct. 2042, 2044, 192 L. Ed. 2d 78 (2015); *City & Cnty of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774, 191 L. Ed. 2d 856 (2015); *Carroll v. Carman*, 574 U.S. ___, 135 S. Ct. 348, 350-352, 190 L. Ed. 2d 311 (2014); *Stanton v. Sims*, 134 S. Ct. 3, 5, 187 L. Ed. 2d 341 (2013); *Reichle v. Howards*, 566 U.S. ___, 132 S. Ct. 2088, 2093, 182 L. Ed. 2d 985 (2012); *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1249, 182 L. Ed. 2d 47 (2012).

A qualified immunity defense requires resolution of whether: (1) the defendant's conduct violated a federal right or Constitutional guarantee; and (2) the right or guarantee, even if violated, was clearly established at the time of the misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009); *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001); *Behrens v. Pelletier*, 516 U.S. 229, 313, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). **Both inquiries must be addressed and qualified immunity must be conferred if either prong is resolved in favor of the government official.** *White*, 137 S. Ct. at 551; *Mullenix v. Luna*, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022-2023, 188 L. Ed. 2d 1056 (2014); *Pearson*, 555 U.S. at 236.

An order denying summary judgment on qualified immunity grounds is final for the purposes of 28 U.S.C. § 1291 because it conclusively determines government officials must bear the burdens of litigation and personal liability. *Ashcroft v. Iqbal*, 556 U.S. 662, 671-672, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Behrens*, 516 U.S. at 307.

Johnson v. Jones, 515 U.S. 304, 319-320, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995), decrees that circuit courts do not have appellate jurisdiction over the denial of summary judgment on qualified immunity grounds where the sole issue is whether the evidence supports a finding that an illegal act occurred as alleged. The issue in *Johnson*: whether the defendants were present at and participated in unconstitutional conduct. 515 U.S. at 307-308.

Since *Johnson*, the Supreme Court has clarified that, even where district courts determine that summary judgment is precluded by material facts regarding violation of a federal right or guarantee, circuit courts must exercise appellate review over separate legal issues regarding: whether the district court failed to properly assess the record; and whether the claimant's facts are blatantly contradicted by incontrovertible evidence. *Plumhoff*, 134 S. Ct. at 2019-2020, 188 L. Ed. 2d 1056 (2014); *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

Post *Johnson*, the Supreme Court has also reiterated that appellate jurisdiction must be exercised over purely legal issues focused upon: (1) disputes over the existence, substance and clarity of pre-existing law; (2) whether a government official's actions clearly violated federal statutory law or constitutional provisions; and, (3) whether the official acted in an objectively reasonable, even if mistaken, belief that the actions were legal. *Plumhoff*, 134 S. Ct. at 2019, 2022-2023; *Ortiz v. Jordan*, 562 U.S. 180, 190, 131 S. Ct. 884, 178 L. Ed. 2d 703 (2010); *Iqbal*, *supra*, citing *Mitchell v. Forsyth*, 472 U.S. 511, 526-528, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); *Behrens*, *supra*.

Circuit courts are expected to segregate reviewable legal issues from unreviewable factual ones in order to avoid the dismissal of an entire appeal for lack of jurisdiction. *Ortiz*, *supra*; *Behrens*, *supra*; *Johnson*, 515 U.S. at 319. And, the Supreme Court has reversed circuit courts which shirk the core appellate duty to decide legal issues presented by qualified immunity

defenses. *Behrens*, 516 U.S. at 312-314; *Mitchell*, 472 U.S. 530, 536.

In this case, the Sixth Circuit majority panel relied upon *Johnson, supra*, to justify *sua sponte* dismissal of Wierszewski's appeal for lack of jurisdiction. Yet, the facts in this case are nothing like those in *Johnson*; specifically, Wierszewski has never claimed that he was not present at or responsible for Thibault's arrest.

Even if the District Court correctly determined that material questions of fact exist with respect to Wierszewski's alleged violation of the Fourth Amendment, the Sixth Circuit was nonetheless obligated to exercise appellate review over discrete legal issues raised by Wierszewski regarding the District Court's improper assessment of: (1) the dash cam video; (2) the lack of evidence of alcohol use; (3) admissions on behalf of Thibault regarding his unusual behavior; (4) the uncontested affidavits of three other police officers at the scene of the arrest confirming the existence of probable cause; (5) the blood test results produced after the arrest; and, (6) expert opinions regarding the reasonableness of Wierszewski's probable cause determination. *Plumhoff, supra; Scott, supra; Ortiz, supra; Iqbal, supra; Behrens, supra; Johnson, supra.*

Wierszewski's qualified immunity defense also rested upon arguments that: (1) he did not violate Thibault's Fourth Amendment rights; (2) he did not violate clearly established law regarding the existence of probable cause for operating a vehicle while impaired by intoxicants other than alcohol; and, (3) he acted in an objectively reasonable, even if mistaken, belief that Thibault's arrest was legal. Hence, this

appeal presents purely legal issues that the Sixth Circuit was obliged to decide on the merits, regardless of the existence of underlying factual disputes with respect to Wierszewski's alleged constitutional violations. *Plumhoff*, 134 S. Ct. at 2019; *Ortiz, supra*; *Scott, supra*; *Iqbal, supra*; *Behrens, supra*; *Johnson, supra*.

Unless the Supreme Court intervenes, Wierszewski will be exposed to the substantial costs and other burdens of continued litigation as well as significant personal liability if a lay jury ultimately finds Wierszewski lacked arguable probable cause to arrest Thibault for driving while impaired. Such a result will inhibit police officers from fulfilling their duty to investigate and arrest drivers suspected of driving while impaired by intoxicants other than alcohol, especially in border-line cases, and even where the suspected intoxication is independently corroborated by other officers at the scene. Supreme Court action to avoid such an unjust and socially undesirable outcome is especially necessary given, as is addressed more thoroughly in Argument III, the currently undeveloped law in this area of law enforcement.

Petitioner Wierszewski requests the Supreme Court to summarily reverse and vacate the Sixth Circuit's dismissal of Wierszewski's appeal for lack of jurisdiction and remand this matter to the Sixth Circuit with instructions to consider the qualified immunity defenses on the merits. Alternatively, Petitioner requests the Court to grant his Petition for a Writ of Certiorari and to review the jurisdictional issue on the merits.

ARGUMENT II:**THE CIRCUIT COURT'S APPARENT AFFIRMATION OF THE DISTRICT COURT'S DETERMINATION THAT QUESTIONS OF FACT PRECLUDE THE GRANT OF SUMMARY JUDGMENT DIRECTLY CONFLICTS WITH SUPREME COURT PRECEDENT**

Should the Court reverse the Sixth Circuit's determination to dismiss Wierszewski's appeal for lack of jurisdiction, then Petitioner requests the Court to review and reverse the Sixth Circuit's apparent affirmation of the District Court's determination that questions of fact preclude the grant of summary judgment on the issue of whether the Fourth Amendment was violated. The District Court's denial of summary relief in this regard is directly contrary to Supreme Court precedent and there is no guarantee that, on remand, the Sixth Circuit will abide by such precedent absent specific directive by this Court.

The Fourth Amendment, as incorporated by the Fourteenth Amendment, prohibits warrantless arrests in the absence of probable cause. Whether probable cause exists depends on the totality of the particular circumstances in existence at the time of the arrest. *Kingsley v. Hendrichson*, 576 U.S. ___, 135 S. Ct. 2466, 192 L. Ed. 2d 416, 426 (2015); *Illinois v. Gates*, 462 U.S. 213, 232, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). Courts may not engage in an after-the-fact analysis of each individual factor. *Hernández, supra*; *White*, 137 S. Ct. at 550; *Kingsley, supra*; *Graham v. Connor*, 490 U.S. 386, 394, 104 L. Ed. 2d

443, 109 S. Ct. 1865 (1989); *Gates, supra*. Exculpatory information received or discovered after an arrest cannot defeat probable cause. *Hernández, supra*; *White, supra*; *Kingsley, supra*; *Graham, supra*; *Gates, supra*.

Additionally, challenged conduct may not be tested from the standpoint of legal scholars, from a judge's own experience or perspective, or with the benefit of hindsight. *U.S. v. Montoya De Hernandez*, 473 U.S. 531, 542, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985); *Gates*, 462 U.S. at 232; *U.S. v. Cortez*, 419 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). In *Montoya De Hernandez*, the Court explicitly cautioned against indulging in "unrealistic second-guessing", noting that "creative" judges "engaged in *post hoc* evaluations of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *Id.*, at 686-687.

Probable cause exists when reasonably reliable information suggests a fair probability of criminal activity – ironclad evidence of guilt is **not** required. *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003); *Texas v. Brown*, 460 U.S. 730, 732, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983); *Beck, supra*; *Baker v. McCollan*, 443 U.S. 137, 145-146, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979). The existence of probable cause does not depend upon the knowledge and experience of the arresting officer; other officers' observations can support probable cause judgments. *Brown*, 460 U.S. 730, 742-743. Unusual, bizarre, and even innocent behavior can support probable cause. *Gates*, 462 U.S. at 243, n. 13. Subsequent dismissals of

charges do not render actionable an officer's prior determination of probable cause. *Baker, supra*; *Michigan v. DeFillippo*, 443 U.S. 31, 36, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979).

Reasonableness – and not perfection – is the “ultimate touchstone” of the Fourth Amendment. *Heinen v. North Carolina*, 135 S. Ct. 530, 536, 190 L. Ed. 2d 475 (2014); *Brinegar v. U.S.*, 228 U.S. 160, 176, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949). The objective reasonableness of a particular arrest “requires careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” *Graham*, 490 U.S. at 396. See also: *Plumhoff*, 134 S. Ct. at 2020. Hence, police officers have leeway to make reasonable mistakes of fact and law while protecting their communities from suspected criminals. *Heinen, supra*; *Brinegar, supra*. Indeed, qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986), See also: *Ziglar*, 137 S. Ct. at 1867; *White*, 137 S. Ct. at 551; *Mullenix*, 136 S. Ct. at 308; *Taylor*, 135 S. Ct. at 2044; *Sheehan, supra*; *Carroll*, 135 S. Ct. at 350; *Stanton*, 134 S. Ct. at 5; *Messerschmidt, supra*.

Improper motives cannot transform objectively reasonable actions into Fourth Amendment violations. *Heinen*, 135 S. Ct. at 539; *Whren v. U.S.*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996); *Graham*, 490 U.S. at 397.

While a court resolving a request for summary judgment on qualified immunity grounds is required to view the factual evidence and all reasonable inferences

in a light most favorable to the opposing party, the court is not obligated to accept wholesale or grant deference to an opposing party's version of the facts if that version is so blatantly contradicted by the record that no reasonable jury could believe it. *Scott*, 550 U.S. at 378-381. *Scott* stands for the propositions that: where there is a complete and accurate video/audio recording of the entire incident giving rise to § 1983 claims, the courts must view the facts in the light depicted by the recording; witness accounts seeking to contradict such video recordings do not create triable factual issues for juries; and, once the court has determined the relevant set of facts and inferences supported by the record, the reasonableness of a defendant's actions is a question of law for the courts.

Moreover, as a general rule, conclusory allegations, speculation, unsubstantiated assertions, or a mere scintilla of evidence may not defeat summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1996); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

In this case, the lower courts disregarded clear Supreme Court precedent by concluding that questions of fact exist as to whether Wierszewski had probable cause for arresting Thibault for violating MCL § 257.625.

The Michigan Legislature enacted MCL § 257.625 in order to address the enormity of dangers posed by intoxicated drivers. *People v. Rogers*, 438 Mich. 602, 621, 475 N.W.2d 717 (1991); *People v. O'Neal*, 198 Mich. App. 118, 122, 497 N.W.2d 535 (1993). Probable cause for an arrest under § 625 exists where there is

reasonably trustworthy information suggesting that a person in physical control of a moving vehicle is under the influence or alcohol or other intoxicants which could render that person mentally and/or physically incapable of driving safely. See, i.e., *People v. Hamilton*, 465 Mich. 536, 533, 638 N.W.2d 92 (2002), *overruled on other grounds in Bright v. Littlefield*, 465 Mich. 770, 776, 641 N.W.2d 587 (2002); *People v. Berger*, 217 Mich. App. 213, 214-218, 551 N.W.2d 421 (1996).

Wierszewski predicated his probable cause determination upon: (1) his extensive prior training, experience, and certification as an expert in drug use recognition and the administration of SFST's; (2) his duty to protect Thibault and others from the dangers posed by driving while intoxicated; (3) Thibault's apparent inability to successfully perform six out of eight FST's; and, (4) other reliable indicators of non-alcohol intoxication, including, the time of day, erratic driving, driving with windows open in cold weather, driving with the radio turned up extremely loud, slow speech, red/flushed face, disorientation, restlessness, and, attempts to smoke and extinguish an unlit cigarette.

The District Court incorrectly concluded that, given the parties' different versions of certain facts and the attacks upon Wierszewski's actions by Thibault's expert witnesses, a jury must decide whether Wierszewski's account is credible and whether his probable cause determination was objectively reasonable. By apparently affirming the District Court, the Sixth Circuit majority directly contravened Supreme Court mandates by failing or refusing to

properly assess the incontrovertible record and to consider only legally relevant evidence.

Specifically, both lower courts refused to acknowledge admissions that: (1) Thibault drove erratically; the truck windows were down; (2) Thibault never explained why he had an unlit cigarette in his mouth; (3) Wierszewski was not told that Thibault had a speech impediment that would account for slow speech; and, (4) Thibault denied any medical conditions that would impact his ability to perform FST's.

The lower courts also failed/refused to consider the undisputed fact that Wierszewski's probable cause determination was predicated upon and fully corroborated by three other officers at the scene.

Additionally, the lower courts flouted this Court's mandates in *Scott, supra*, by refusing to view many of the allegedly disputed facts in the light of the incontrovertible evidence provided by the dash camera recording of Thibault's detention, testing, and arrest. Critically, the recording was authenticated as complete and accurate and there is no evidence to the contrary. More to the point, the recording vindicates Wierszewski's perceptions regarding the factors establishing probable cause.

The audio confirms that Wierszewski and Cashion observed that Thibault's face was flushed and red and that he was attempting to smoke an unlit cigarette.

The recording verifies that, as Thibault was exiting the cab, Wierszewski inquired whether Thibault "realize[d] that the cigarette was not even lit." Thibault's response: "No. It goes out a lot." A reasonable interpretation of this clear and discernible

response: Thibault did not realize that the cigarette was unlit.

The audio recording substantiates that Thibault did not object or seek clarification regarding performance of the alphabet recitation test and, thus, blatantly contradicts the expert opinion that Thibault did not understand and “passed” the alphabet test.

The dash cam recording also blatantly contradicts the lower courts’ conclusions that questions of fact exist as to whether Thibault passed the one-leg-stand test. Nitpicking regarding the quality or scope of the video notwithstanding, the recording proves that Thibault: (1) failed to count as instructed; (2) failed to maintain a 6” leg elevation; (3) failed to keep his arms at his side and used them for balance; and, (4) repeatedly swayed and hopped on his planted foot.

The dash cam recording is irrefutable evidence that Thibault failed to successfully perform two separate walk-and-turn tests. The recording documents substantial swaying and flailing of arms and legs - a fact the District and Circuit Courts readily recognized. The recording also captures Thibault’s express denial that physical problems would interfere with his performance of the SFST’s.

Moreover, the lower courts justified denial of qualified immunity upon negative indicia of alcohol consumption and blood test results negative for currently screen-able drugs. The absence of evidence of alcohol use is factually irrelevant because Wierszewski had ruled out alcohol as an intoxicant. The blood tests results were legally irrelevant because

they were received after Thibault's arrest. *Hernández, supra; White, supra; Kingsley, supra.*

Finally, the lower courts engaged in improper judicial oversight when evaluating the reasonableness of Wierszewski's probable cause determination.

In particular, the reasonableness of Wierszewski's reliance upon Thibault's perceived poor performance of the FST's and SFST's should not have been undermined by the District Court's personal experience with – and expressed doubts regarding the fairness of – such routine tests. *Montoya De Hernandez, supra; Gates, supra; Cortez, supra.*

The District Court and Sixth Circuit majority also indulged in impermissible *post hoc* evaluations of each individual factor relied upon by Wierszewski as supporting probable cause instead of reviewing the totality of the circumstances known to the officers at the time of the arrest. The lower courts were particularly preoccupied with the lack of readily detectable evidence of alcohol consumption – even though it is undisputed that Thibault was investigated and arrested for operating under the influence of non-alcohol intoxicants. And, both lower courts are guilty of unrealistic second-guessing reached with the benefit of hindsight afforded by the negative blood test results reached after Thibault's arrest.

The Sixth Circuit majority opinion separately crossed a bright line by suggesting that Wierszewski: (1) was motivated by a desire to railroad an innocent driver; and (2) made a hasty decision to arrest without any reliable evidence of intoxication. Wierszewski's alleged nefarious motivations are legally irrelevant.

Heinen, supra; Whren, supra; Graham, supra. The dash cam recording confirms that a highly professional Wierszewski engaged in a lengthy and painstaking investigation during which he acknowledged the exculpatory factors and wrestled with the determination of whether these factors “trumped” his duty to enforce MCL § 257.625.

Moreover, both lower courts violated Supreme Court precedent by refusing to accord Wierszewski any leeway to make mistakes of fact or law while attempting to protect his community from dangers posed by intoxicated drivers. *Sheehan, supra; al-Kidd, supra; Carroll, supra; Stanton, supra; Messerschmidt, supra.*

Markedly, neither lower court found – and there is no evidence – that Wierszewski’s professional judgment was either plainly incompetent or resulted from a knowing violation of the Fourth Amendment. The District Court even acknowledged that, under the particular circumstances, Wierszewski faced a difficult choice and that the failure to arrest Thibault could have been a dereliction of duty. If qualified immunity does not apply to Wierszewski’s decision to err on the side of protecting his community, then the doctrine truly has no application at all.

If the Supreme Court fails to intervene, the decisions of the courts below will inhibit police officers from fulfilling their duty to investigate and arrest drivers suspected of driving while impaired by intoxicants other than alcohol, especially in border-line cases, and even where the suspected intoxication is independently corroborated by other officers at the scene.

Therefore, if the Court reverses the Sixth Circuit's dismissal, for lack of jurisdiction, in lieu of remanding the matter with instructions to consider the qualified immunity defense on the merits, Wierszewski requests the Court to summarily reverse and vacate the Sixth Circuit's apparent affirmation of the District Court's determination that questions of fact exist on the issue of objectively reasonable probable cause, and remand with instructions that judgment be entered in favor of Defendant Wierszewski.

Alternatively, Petitioner requests the Court to reverse and vacate the Sixth Circuit's apparent affirmation of the District Court's denial of qualified immunity and remand with instructions to abide by Supreme Court precedent when deciding the issue of whether genuine issues of material fact exist as to whether Wierszewski violated the Fourth Amendment.

Alternatively, Wierszewski requests the Court to grant his Petition for a Writ of Certiorari to the Sixth Circuit and review all qualified immunity issues on the merits.

ARGUMENT III:**THE CIRCUIT COURT'S APPARENT AFFIRMATION OF THE DISTRICT COURT'S DENIAL OF QUALIFIED IMMUNITY DIRECTLY CONFLICTS WITH SUPREME COURT PRECEDENT REGARDING WHETHER A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT WAS VIOLATED**

Should the Supreme Court reverse the Sixth Circuit's dismissal for lack of jurisdiction, then Petitioner requests the Court to address the issue of whether, under the particular circumstances and in light of clearly established law, he should have reasonably expected that his conduct would give rise to personal liability. Not only was the denial of qualified immunity directly contrary to Supreme Court precedent, there is no guarantee that, on remand, the Sixth Circuit will abide by such precedent absent specific directive.

Whether a constitutional right is clearly established is a question of law for the courts. *Mullenix*, 136 S. Ct. at 307; *Ortiz v. Jordan*, 562 U.S.180, 188, 131 S. Ct. 884, 178 L. Ed. 2d 703 (2010); *Scott*, 550 U.S. at 381, n. 8; *Hunter v. Bryant*, 502 U.S. 224, 227-228, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991); *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Government officials are entitled to qualified immunity where § 1983 claimants fail to identify similar prior case law providing fair warning that particular conduct gives rise to personal liability. *Ziglar, supra*; *White*, 137 S. Ct. at 552.

A right or guarantee is clearly established if it would be clear to a reasonable officer that, in light of existing case law, his conduct was unlawful in the situation he confronted. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007, 198 L. Ed. 2d 625 (2017); *White*, 137 S. Ct. at 551-552; *Mullenix*, 136 S. Ct. at 308-309; *Plumhoff*, 134 S. Ct. at 2023; *Reichle*, 566 U.S. at 664. While notice need not take the form of a case squarely on point, existing precedent must place the legality issue “beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). See also: *Ziglar*, 137 S. Ct. at 1866-1867; *White*, 137 S. Ct. at 561; *Mullenix*, 136 S. Ct. at 309; *Taylor*, 135 S. Ct. at 2044. This “exacting standard ‘gives government officials breathing room to make reasonable but mistaken’ judgments”. *Sheehan*, 135 S. Ct. at 1774, quoting *al-Kidd*, 563 U.S. at 743. See also: *Carroll*, 135 S. Ct. at 350; *Stanton*, 134 S. Ct. at 5; *Messerschmidt*, 565 U.S. at 553.

Whether a right is clearly established depends on the exact conduct at issue - not as a broad general proposition. *Ziglar*, 137 S. Ct. at 1866; *White*, *supra*; *Mullenix*, *supra*; *Plumhoff*, 134 S. Ct. at 2022-2023; *al-Kidd*, 563 U.S. at 742. “Otherwise, [p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.” *White*, 137 S. Ct. at 552, quoting *Anderson*, 483 U.S. at 639. In *Ziglar*, the Court lately stressed that, in Fourth Amendment cases, “it may be difficult for an officer to know whether a search or seizure will be deemed reasonable given the precise situation encountered” and “[f]or this reason, ‘the dispositive question is whether the violative nature of *particular* conduct is

clearly established”’. *Id.*, 137 S. Ct. at 1866, quoting *Mullenix*, 136 S. Ct. at 308 and citing *Saucier*, 533 U.S. at 205. See also: *Sheehan*, 135 S. Ct. at 1775-1776 (“[q]ualified immunity is no immunity at all if ‘clearly established’ law can simply be defined as the right to be free from unreasonable searches and seizures.”); *al-Kidd*, 179 L. Ed. 2d at 1160; *Anderson*, 483 U.S. at 644.

Courts should hesitate to find violation of clearly established law when governmental officials faced new or unique situations. *White*, 137 S. Ct. at 553. The total absence or scarcity of cases featuring sufficiently similar fact patterns preponderates against the existence of controlling legal authority. *Taylor*, 135 S. Ct. at 2044; *Carroll*, 135 S. Ct. at 350; *Reichle*, 566 U.S. at 664-665; *al-Kidd*, 563 U.S. at 741.

In § 1983 cases asserting false arrest, questions of fact as to the existence of probable cause is not the test for qualified immunity. In recognition of the social value of qualified immunity and the fact that police officers are only human, Supreme Court precedent instructs that officers may not be held personally liable in cases where they reasonably, albeit incorrectly, conclude that probable cause is present. *Brousseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004); *Saucier*, 533 U.S. at 205; *Malley v. Briggs*, 475 U.S. 335, 341, 343, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986); *Anderson*, 483 U.S. at 641, 644.

In this case, neither lower court directly confronted and answered the potentially dispositive legal question of whether Wierszewski’s conduct violated clearly established law regarding probable cause for non-alcohol intoxication. At the outset, then, the lower courts ignored Supreme Court precedent mandating

that both prongs of the qualified immunity test be addressed. *White, supra; Mullenix, supra; Plumhoff, supra; Pearson, supra.*

Additionally, the lower courts primarily examined and relied upon prior cases involving drivers impaired by alcohol before concluding that a jury must decide whether Wierszewski's conduct was objectively reasonable.

Specifically, the lower courts broadly defined the constitutional guarantee at issue as the right to be free from arrest, without probable cause, for driving while impaired by intoxicants. The courts then tested Wierszewski's conduct against previous cases involving arrests for driving under the influence of alcohol. In so doing, the lower courts failed to abide by this Court's mandate to narrowly focus upon the exact conduct at issue when determining whether to accord qualified immunity. *Ziglar, supra; White, supra; Mullenix, supra; Plumhoff, supra; al-Kidd, supra; Sheehan, supra; Anderson, supra.*

The lower courts compounded their error by testing Wierszewski's conduct against non-comparable cases involving drivers impaired by alcohol. Again, it is undisputed that Wierszewski had ruled out alcohol as an intoxicant and, therefore, his probable cause determination would and should not have been impacted by the presence or absence of alcohol odors emanating from the detainee and the vehicle and/or negative breathalyzer results. The record further establishes that, unlike breathalyzer tests which provide immediate blood-alcohol measurements, current blood tests for non-alcohol intoxicants only screen for some, but not all, drugs, and, such test

results are not available until weeks after the initial draw.

In short, for the purposes of qualified immunity, cases involving impairment by alcohol cannot serve to establish controlling guidelines for police conduct where the suspected impairment involves non-alcohol intoxicants. *Ziglar, supra*; *White, supra*; *Mullenix, supra*; *Plumhoff, supra*; *al-Kidd, supra*; *Sheehan, supra*; *Anderson, supra*.

More to the point, at the time of Thibault's arrest in December 2014, there was a scarcity of cases featuring sufficiently similar fact patterns and giving fair warning that Wierszewski's conduct could give rise to personal liability. Indeed, no existing Michigan or U.S. Supreme Court case addressed the factors sufficient to establish probable cause for the purposes of § 1983 claims arising out of arrests for driving under the influence of non-alcohol intoxicants. The law was severely underdeveloped in the Sixth Circuit with only one, unpublished, appellate decision, *Meadows v. Thomas*, 117 Fed. Appx. 397 (2004), and one district court decision, *Wynn v. Morgan*, 861 F. Supp. 622 (E.D. Tenn. 1994). The law was evolving in other federal jurisdictions, with one unpublished circuit court decision, *Edney v. City of Colombia*, 1999 U.S. App. LEXIS 8625 (9th Cir. 1999), and two district court decisions, *Corcoran v. Higgin*, 2010 U.S. Dist. LEXIS 47284 (S. D. N. Y., 2010) and *Woodruff v. O'Kelly*, 2012 U.S. Dist. LEXIS 94402 (W.D. Ark., 2012).

Notably, however, every existing federal decision found the challenged probable cause determination to be objectively reasonable because the totality of the circumstances suggested a fair probability that the

detained driver was impaired by an intoxicating substance other than alcohol. *Meadows*, 117 Fed. Appx. at 402-403 (two officers observed reckless and erratic driving, red and glazed eyes, and unusual behavior); *Wynn*, 861 F. Supp. at 633 (reckless and erratic driving combined with judgment that driver failed walk and turn, HGN and one leg stand sobriety tests); *Corcoran*, 2010 U.S. App. LEXIS 47284 at *10-12 (two officers adjudged driver failed 3 of 4 FST's and subsequently received negative blood test results did not negate probable cause); *Edney*, 1999 U.S. App. LEXIS 8625 at *2-3 (erratic driving and blood shot eyes negative breathalyzer results irrelevant since officer ruled out alcohol as intoxicant); *Woodruff*, 2012 U.S. Dist. LEXIS 94402 at *4-7, 11-16 (officer at scene observed erratic driving and failed SFST's; 2nd officer, certified as drug expert independently concluded impairment associated with drug use; and, negative blood-alcohol test results irrelevant).

By 2014, only a handful of states had addressed the issue of probable cause in the context of arrests for apparent non-alcohol intoxication and none of these cases dealt with qualified immunity. *Dept. of Hwy. Safety & Motor Vehicles v. Rose*, 105 So.3d 22 (Fla. App. 2012); *Mathis v. Coats*, 24 So. 2d 1284 (Fla. App. 2010); *People v. Munsey*, 18 Cal. App. 3d 440 (1971); *Wilson v. Dir. of Revenue*, 35 S.W.3d 923 (Miss. App. 2001); *State v. Berger*, 683 N.W.2d 897 (N.D. S. Ct. 2004); *State v. Despain*, 173 P.3d 213 (Utah App. 2007). Yet, all the state courts agreed that, when there is no odor or other direct evidence of alcohol use, it is reasonable for officers to suspect intoxication by chemicals or drugs where they observe: reckless or dangerous operation of a motor vehicle; speech

impairments; lack of balance or dexterity; flushed face; physical shaking; glassy, watery or bloodshot eyes; and/or, poor performance of FST's. *Munsey*, 18 Cal. App. 3d at 446; *Berger*, 683 N.W. 2d at 902-903; *Despain*, 173 P. 3d at 216-217; *Wilson*, 35 S.W.3d at 926. The *Wilson* Court also held that probable cause for an arrest for driving while impaired by drugs is not negated by negative blood-alcohol test results. *Id.*

In sum, at the time of Thibault's arrest for driving while impaired by an intoxicant other than alcohol, there was a marked shortage of case law providing guidance in the precise situation confronted by Officer Wierszewski. This fact alone counsels against any determination that Wierszewski violated clearly established law. *White, supra; Taylor, supra; Carroll, supra; Reichle, supra; al-Kidd, supra.*

Even so, the unanimous consensus of the few courts addressing the issue supports the conclusion that Wierszewski's probable cause determination was objectively reasonable given that: (1) Wierszewski and Officer Cashion independently observed Thibault's erratic driving, flushed face, slow speech, and unusual behavior; (2) Wierszewski, Cashion, Dionne and Krizmanich observed Thibault's performance of SFST's with all four officers agreeing that there was clear indicia of intoxication; and, (3) Wierszewski, a certified drug recognition expert, ruled out alcohol as an intoxicant. The existing cases also indicate that Wierszewski's probable cause determination was not undermined or negated by the negative breathalyzer and blood-alcohol tests.

In conclusion, under the particular circumstances involving the more difficult assessment of possible impairment by non-alcohol intoxicants, Officer Wierszewski did not violate clearly established law. Therefore, the lower courts flouted Supreme Court precedent by refusing to order dismissal of Thibault's claims under the doctrine of qualified immunity. *Ziglar, supra; Mullenix, supra; Taylor, supra; Sheehan, supra; Carroll, supra; Stanton, supra; Messerschmidt, supra; al-Kidd, supra.*

Hence, if the Court reverses the Sixth Circuit's dismissal, for lack of jurisdiction, in lieu of remanding the matter with instructions to consider the qualified immunity defense on the merits, Petitioner Wierszewski requests the Court to summarily reverse and vacate the Sixth Circuit's apparent affirmation of the District Court's denial of summary judgment on grounds of qualified immunity and remand with instructions that judgment be entered in favor of Wierszewski.

Alternatively, Wierszewski requests the Court to reverse and vacate the Sixth Circuit's apparent affirmation of the District Court's denial of summary judgment on grounds of qualified immunity and remand with instructions to decide this issue in accordance with Supreme Court precedent.

Alternatively, Wierszewski requests the Court to grant his Petition for a Writ of Certiorari to the Sixth Circuit and review the qualified immunity issues on the merits.

CONCLUSION

For the reasons stated, Petitioner Wierszewski requests the Supreme Court to summarily reverse and vacate the Sixth Circuit's dismissal of Wierszewski's appeal for lack of jurisdiction.

If the Court reverses the Sixth Circuit's dismissal for lack of jurisdiction, in lieu of remanding the matter with instructions to consider the qualified immunity defense on the merits, Wierszewski requests the Court to also summarily reverse and vacate the Sixth Circuit's apparent affirmation of the District Court's denial of summary judgment on qualified immunity grounds and remand with instructions that judgment be entered in favor of Wierszewski. Alternatively, Wierszewski requests the Court to remand the matter to the Sixth Circuit with instructions to decide this issue in accordance with binding Supreme Court precedent.

Alternatively, Petitioner Wierszewski respectfully requests the Supreme Court to grant his Petition for a Writ of Certiorari to the Sixth Circuit and review all the qualified immunity issue on the merits.

Respectfully submitted,

Michelle A. Thomas
Counsel of Record
THOMAS, DeGROOD
& WITENOFF, P.C.
400 Galleria Officentre, Suite 550
Southfield, MI 48034
(248) 353-4450
mthomas@thomasdegrood.com

Attorneys for Petitioner

APPENDIX

APPENDIX

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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT
PUBLICATION

File Name: 17a0323n.06

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 16-2021

[Filed June 9, 2017]

ALAN THIBAUT,)
)
Plaintiff-Appellee,)
)
v.)
)
EDWARD WIERSZEWSKI,)
)
Defendant-Appellant.)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN

BEFORE: DAUGHTREY, SUTTON, and DONALD,
Circuit Judges.

MARTHA CRAIG DAUGHTREY, Circuit Judge.
Acting in his official capacity as a public safety officer
for the City of Grosse Pointe Farms (Michigan),
defendant Edward Wierszewski arrested plaintiff Alan

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Thibault for operating a motor vehicle while under the influence of alcohol or drugs. When results of breathalyzer and blood tests revealed that Thibault had neither alcohol nor illicit drugs in his system at the time of the arrest, city prosecutors dismissed the charges against Thibault, leading him to file suit against Wierszewski under 42 U.S.C. § 1983 for violating his Fourth and Fourteenth Amendment right to be free from arrest without probable cause. Wierszewski, raising an affirmative defense of qualified immunity, filed a motion for summary judgment in his favor. The district court denied that request, in pertinent part ruling that a jury resolving myriad factual disputes in plaintiff Thibault's favor could determine that defendant Wierszewski's conclusion that he had probable cause to make the arrest was not a reasonable one. Wierszewski now appeals, arguing that Thibault's inability to perform various field sobriety tests properly provided him with the probable cause necessary to justify the arrest. Given the disputes of fact surrounding the existence of probable cause to arrest, we find ourselves without jurisdiction to hear this appeal.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 2:00 a.m. on December 5, 2014, Alan Thibault, driving an 18-wheel, tractor-trailer rig, attempted to make a scheduled delivery of supplies to a Wendy's Restaurant on Mack Avenue in Grosse Pointe Farms, Michigan. Travelling north on Moross Road, Thibault noticed a break in the median separating the lanes of traffic on Moross, and, mistakenly believing that the break marked the intersection of Moross and Mack, began to execute a

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left turn with his vehicle. As he did so, he noticed that Mack Avenue actually was the next intersection up Moross and so attempted to turn the tractor-trailer back onto Moross to travel the rest of the short block. In doing so, however, the tires on the driver's side of the 48-foot trailer hit the curb on the median in front of him. Unfortunately for Thibault, as the trailer hit the curb, two public safety officers, Edward Wierszewski and Veronica Cashion, were travelling south on Moross in separate vehicles and observed what appeared to the officers to be reckless driving on the part of the rig's operator.

The two officers pulled behind Thibault, who immediately stopped his truck and activated its hazard lights. According to Wierszewski, upon parking behind the tractor trailer, he also "observed the trailer did not have a license lamp to illuminate the plate, and a trailer clearance light was not properly working." Armed with the evidence of those equipment violations, as well as the knowledge that Thibault had driven the rig in such a manner as to allow the trailer to travel onto the curb of the median, Wierszewski activated audio and video recording devices and approached Thibault to ask him for his license, his medical card, and his log book. When he reached the cab of the truck, the officer noted that Thibault had previously rolled down the window despite the chilly temperatures, that the truck's radio was blaring, that "[t]he driver had an unlit cigarette he was attempting to smoke," that the driver then attempted to extinguish the unlit cigarette, that the driver "appeared disoriented and spoke with slow speech," that the driver's face was "flushed and red," and that after exiting the cab, Thibault was

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shaking, even though the cab in which he had been sitting was heated.

Wierszewski did not see any alcoholic beverages or containers in the cab and did not detect an odor of alcohol; nevertheless, Wierszewski claimed that his earlier observations led him to conclude that Thibault had been operating the truck while under the influence of either alcohol or drugs. He thus instructed Thibault to perform various field sobriety tests, some of which Thibault performed without difficulty and others of which, according to Wierszewski and other officers who also arrived on the scene, Thibault struggled to complete as instructed.

Believing that the inability of Thibault to perform each of the field sobriety tests perfectly made it more probable than not that he was under the influence of some intoxicating substance, Wierszewski arrested Thibault for a violation of Michigan Compiled Law § 257.625 and directed that he be transported to the Grosse Pointe Farms station house. Once there, officers again subjected Thibault to additional field sobriety tests and to a breathalyzer test. Even though the breathalyzer test resulted in blood-alcohol-content reading of 0.000%, Thibault remained under arrest, and Wierszewski, Cashion, and Sergeant Holly Krizmanich later asserted that they observed a white powder-like substance in the plaintiff's left nostril. However, no attempt was made to obtain a sample of the alleged substance, to document its existence, or to have it tested.

More than three hours after Thibault first was taken to the police station, officers transported him to a local hospital where blood was drawn from the

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plaintiff in an effort to ascertain whether any non-alcoholic intoxicants were present in his bloodstream. Months later, the state police laboratory finally reported that the blood samples were free of any detectable amount of “amphetamines, barbiturates, benzodiazepines, cannabinoids, cocaine metabolites, meprobamate, methadone, opiates, tramadol, zolpidem or any other acidic, neutral or basic drugs.” Furthermore, immediately after being released on bail, Thibault contacted his employer and provided a urine specimen for additional testing. Results from that test were received a mere eight hours after the plaintiff’s arrest on December 5, 2014, and proved negative for the presence of marijuana, cocaine, amphetamines, opiates, and phencyclidine (PCP).

When all charges against him eventually were dismissed, Thibault filed suit against Wierszewski pursuant to the provisions of 42 U.S.C. § 1983, raising both a claim of malicious prosecution and a claim alleging that Wierszewski had arrested him without probable cause. Following a period of discovery, Wierszewski filed a motion for summary judgment, arguing that the doctrine of qualified immunity protected him from liability in this matter. The district court rejected that argument, however, concluding that “the circumstances surrounding the stop and arrest are riddled with important factual disputes.” Furthermore, the district court noted that even the “authenticated video and audio recording of Thibault’s detention and arrest” did not necessarily support the conclusion that Wierszewski was objectively reasonable in believing he had probable cause to arrest the plaintiff. According to the court’s written ruling, the ambiguous portions of the video, the deposition testimony of Thibault himself,

and the deposition testimony of Thibault's expert that some of the field sobriety tests were administered incorrectly "require that a jury make the ultimate determination as to whether Wierszewski lawfully arrested Thibault."

DISCUSSION

Probable-Cause Standard

The legal principle is well established that the Fourth and Fourteenth Amendments to the Constitution of the United States require probable cause to justify an arrest of an individual. *See, e.g., Crockett v. Cumberland Coll.*, 316 F.3d 571, 580 (6th Cir. 2003). "A police officer has probable cause for arrest if, at the time the officer makes the arrest, 'the facts and circumstances within [the officer's] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [plaintiff] had committed or was committing an offense.'" *Courtright v. City of Battle Creek*, 839 F.3d 513, 521 (6th Cir. 2016) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

Qualified-Immunity Defense

In the face of Thibault's claim that he was arrested without probable cause, Wierszewski sought to interpose the defense of qualified immunity. The court-created concept of qualified immunity shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Indeed, even in the absence of probable

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cause to arrest, “an officer is entitled to qualified immunity . . . if he or she could reasonably (even if erroneously) have believed that the arrest was lawful, in light of clearly established law and the information possessed at the time by the arresting agent.” *Green v. Throckmorton*, 681 F.3d 853, 865 (6th Cir. 2012) (citation and internal quotation marks omitted).

Jurisdiction to Entertain Appeal

In their appellate briefing, neither Wierszewski nor Thibault questions our authority to entertain this appeal. Nevertheless, we are “under an independent obligation to police [our] own jurisdiction, regardless of whether the parties challenged jurisdiction.” *United States v. Certain Land Situated in Detroit*, 361 F.3d 305, 307 (6th Cir. 2004) (internal quotation marks and citation omitted).

Congress has conferred authority upon the courts of appeals to review “*final decisions* of the district courts.” 28 U.S.C. § 1291 (emphasis added). Thus, as a general matter, a party may not appeal from a denial of a request for summary judgment, simply because such a denial is not a final order. *Black v. Dixie Consumer Prods. LLC*, 835 F.3d 579, 582 (6th Cir. 2016). Nevertheless, § 1291’s jurisdictional grant has been construed to include authority to review collateral orders that “finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). As this court has recognized:

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An order denying qualified immunity is a collateral order because it is conclusive, separable from the merits of the action and, as the purpose of qualified immunity is to provide officers with “*immunity from suit*” rather than a mere defense to liability,” is effectively unreviewable on appeal from a final judgment.

Brown v. Chapman, 814 F.3d 436, 443-44 (6th Cir. 2016) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526-29 (1985)).

Even though it might appear that we therefore have jurisdiction over Wierszewski’s appeal of the denial of his request for summary judgment based upon his claim of qualified immunity, the Supreme Court has made clear that our authority to review a district court’s denial of qualified immunity extends only to those appeals that turn “on an issue of law.” *Mitchell*, 472 U.S. at 530. Indeed, “a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court’s summary judgment order insofar as that order determines whether or not the pretrial record sets forth a ‘genuine’ issue of fact for trial.” *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995). We explained in *Thompson v. City of Lebanon*, 831 F.3d 366, 370 (6th Cir. 2016):

We may decide an appeal challenging the district court’s *legal* determination that the defendant’s actions violated a constitutional right or that the right was clearly established. We may also decide an appeal challenging a *legal* aspect of the district court’s factual determinations, such as whether the district court properly assessed the incontrovertible

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record evidence. And we may decide, as a *legal* question, an appeal challenging the district court's factual determination insofar as the challenge contests that determination as blatantly contradicted by the record, so that no reasonable jury could believe it.

We may not, however, decide an appeal challenging the district court's determination of evidence sufficiency, *i.e.*, which facts a party may, or may not, be able to prove at trial. Because such a challenge is purely fact-based, it does not present a legal question in the sense in which the term was used in *Mitchell*, and is therefore not an appealable final decision within the meaning of 28 U.S.C. § 1291. . . . We have also explained that the defendant-appellant may not challenge the inferences the district court draws from those facts, as that too is a prohibited fact-based appeal.

(Citations and internal quotation marks omitted.)

In this case, the district court concluded that the evidence before it was such that the legitimacy of the justification to arrest Thibault for driving under the influence of an intoxicant rested upon which version of contested facts a jury would credit. As the district court stated, "(1) there are important factual disputes concerning the basis for the arrest and (2) if a jury resolved those disputes in Thibault's favor, it could find that Wierszewski lacked a reasonable basis to believe that the arrest was lawful." Thus, unless Wierszewski can establish that there is no such material dispute of fact, this court is without jurisdiction over this matter at this time.

Wierszewski argues that the district court erred in denying him the protections of qualified immunity. In doing so, he concedes that “[i]n general, the existence of probable cause in a § 1983 action presents a jury question, unless there is only one reasonable determination possible.” *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995). However, he also notes that only a fair probability of criminal activity is required to satisfy the Constitution’s probable-cause requirement, *Kinlin v. Kline*, 749 F.3d 573, 578 (6th Cir. 2014), and that an ultimate dismissal of charges brought by an officer does not mean, in all cases, that probable cause for an arrest did not exist. *Id.* He points to certain of his personal observations of Thibault, to results of field sobriety tests, and to video of activities occurring shortly after the stop of Thibault’s truck and contends that those purportedly undisputed bits of evidence support his conclusion that he had probable cause to arrest Thibault. However, an examination of the record on appeal reveals exactly the type of factual disputes that should be resolved by a jury in the first instance.

Wierszewski’s Personal Observations of Thibault’s Person and Demeanor

What clearly is *not* in dispute in this case is the legitimacy of the initial stop by Wierszewski of Thibault’s truck. Even Thibault admits that the trailer portion of his rig hit the curb of a median on Moross Road. However, following that stop, Wierszewski claimed to have observed certain actions and conditions that led him to decide that Thibault should be arrested for driving under the influence of an intoxicant. Specifically, as noted previously, the officer reported that the window on the driver’s side of Thibault’s cab

was rolled down despite the chilly weather, that the radio in the truck was unusually loud, that Thibault was attempting to smoke an unlit cigarette, that Thibault then attempted to extinguish the cigarette that was unlit, that Thibault's face was red and flushed, that the driver appeared disoriented, and that Thibault began shaking upon exiting his vehicle.

Such observations could, in certain circumstances, be indicative of an intoxicated condition. On an attempted interlocutory appeal from a denial of qualified immunity, however, “the defendant must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to the plaintiff's case.” *Berryman v. Rieger*, 150 F.3d 561, 562 (6th Cir. 1998). In that posture, it is clear that any *undisputed* observations by Wierszewski cannot alone justify the subsequent arrest of Thibault. The plaintiff concedes that he had rolled down the window of his cab prior to the moment of the traffic stop, although he later explained during his deposition testimony that he had rolled the window down when he “made the stop to make the first initial left turn.” Clearly, Wierszewski was not in possession of such knowledge during his initial confrontation with Thibault, but he also never questioned Thibault about the reason for having the window down, and, clearly, simply travelling in a vehicle with a rolled-down window, even on a chilly night, is not an indication that the driver is intoxicated. Furthermore, Thibault maintained that his radio was “[n]ot that loud,” especially considering that the volume had to be raised in order to drown out the noise of the truck's engine.

Thibault also denied that he was attempting to smoke an unlit cigarette when he was stopped, or that he attempted to extinguish any such unlit cigarette. Instead, he told Wierszewski that the cigarette “goes out a lot,” explaining why it was not lit at that time, and later offered a sworn affidavit stating that “[a]t no point during [the] December 5, 2014[,] encounter with Officer Edward Wierszewski did [he] attempt to extinguish an unlit cigarette.” Additionally, the video of the traffic stop never shows Thibault attempting to extinguish any cigarette, lit or unlit.

Furthermore, Wierszewski himself, during his deposition, undercut the validity of his reliance on the “flushed, red” appearance of Thibault’s face as a sign of possible intoxication when, under questioning from Thibault’s counsel, Wierszewski admitted that “it was cold, very cold” that night and that low temperatures could explain the plaintiff’s flushed, red face. Similarly, the cold night could explain why Thibault, who was not wearing a sweater or jacket at the time, was shaking after being ordered out of the cab of his truck. Indeed, when Wierszewski asked Thibault why he was shaking so much, the plaintiff responded, “Because it’s chilly.” The video of the occurrences that took place after the stop confirm Thibault’s explanation as the other officers on the scene were clad in heavy police jackets, and some of those officers also were wearing winter stocking caps on their heads.

Finally, the video of the encounter clearly discredits Wierszewski’s assertion that Thibault appeared disoriented at the time of the arrest. Indeed, the defendant’s own recording of the events shows that Thibault walked steadily from his truck to the area

where the field sobriety tests were conducted, even though he was forced to traverse what appeared to be a sloped, grassy median. In fact, the video shows that Thibault walked as steadily and as rapidly over that distance as Wierszewski did. Moreover, at all times, Thibault's speech was clear and coherent, and he was able to understand all directions given him by Wierszewski. In short, none of the personal observations catalogued by Wierszewski can be considered undisputed evidence that Thibault was impaired in any way whatsoever.

Performance of Field Sobriety Tests

Wierszewski nevertheless rests his heaviest support for his decision to arrest the plaintiff on his assertion that Thibault failed to perform the field sobriety tests properly. In doing so, he cites in his appellate brief 17 decisions from various federal courts, all allegedly standing for the proposition that failure to perform field sobriety tests satisfactorily “constitutes reliable evidence upon which officers may premise probable cause determinations.” What Wierszewski fails to mention, however, is the salient fact that, in 16 of the 17 cited cases, additional evidence existed to bolster the presumption that less-than-satisfactory performance on field sobriety tests indeed was indicative of intoxication or impairment. *See Bradley v. Reno*, 632 F. App'x 807, 808-09 (6th Cir. 2015) (plaintiff's breath smelled of alcohol, his eyes were red and glassy, his speech was slurred, he admitted drinking a “couple” “small pitchers” of beer and a “couple” bottles of beer in the preceding two hours, and a breathalyzer test indicated a blood-alcohol level of .111%); *Jolley v. Harvell*, 254 F. App'x 483, 485 (6th Cir. 2007) (officer

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reported odor of marijuana in car and noted plaintiff's bloodshot eyes); *Wynn v. Morgan*, 861 F. Supp. 622, 626 (E.D. Tenn. 1994) (unusual behavior included plaintiff accelerating away from arresting officer after being stopped; after being stopped again, plaintiff screamed at officer and ran away from him as he attempted to handcuff her); *Burgett v. Sanborn*, No. 6:13-CV-1358-TC, 2015 WL 4644619, at *2 (D. Or. May 14, 2015) (officer noticed an odor of alcohol, and plaintiff admitted drinking a glass of whiskey and two glasses of wine a few hours earlier), *report and recommendation adopted by* 2015 WL 4644598 (D. Or. Aug. 4, 2015); *Ketchum v. Khan*, No. 10-14749, 2014 WL 3563437, at *1 (E.D. Mich. July 18, 2014) (officer smelled strong odor of intoxicants, and plaintiff admitted to consuming beer and ingesting Lorazepam); *Cameron v. City of Riverview*, No. 10-14098, 2011 WL 3511497, at *2 (E.D. Mich. July 26, 2011) (odor of intoxicants, plaintiff's speech was slurred, and plaintiff "admitted to consuming a couple of alcoholic beverages"), *report and recommendation adopted by*, 2011 WL 3511485 (E.D. Mich. Aug. 11, 2011); *Mott v. Davis*, No. 3:10-CV-270, 2011 WL 4729856, at *1 (E.D. Tenn. Oct. 5, 2011) (plaintiff's speech was slurred, one eye was bloodshot, and both eyes were "watery and glazed over"); *Freeland v. Simmons*, No. 4:09cv01384-WOB, 2012 WL 258105, at *2 (D. S.C. Jan. 27, 2012) (plaintiff seen at two bars, admitted that he had "had a few," officer detected a strong odor of alcohol and noted that plaintiff's eyes were red, glassy, and bloodshot); *Rutherford v. Cannon*, No. 8:09-2137-HMH-BHH, 2010 WL 3905386, at *2 (D. S.C. Sept. 2, 2010) (officer detected odor of alcohol and plaintiff admitted he had been drinking beer), *report and recommendation adopted by* 2010 WL 3834448 (D. S.C. Sept. 27, 2010);

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Shackleford v. Gutermuth, No. Civ.A. 301CV743S, 2005 WL 3050522, at *1 (W.D. Ky. Nov. 10, 2005) (plaintiff's eyes were dilated and not reactive to light); *Briggs v. Holsapple*, No. 08-6037-KI, 2009 WL 395134, at *1 (D. Or. Feb. 11, 2009) (officer smelled alcohol, plaintiff's eyes were watery and bloodshot, and plaintiff admitted he "had a couple of beers" earlier); *Wilson v. City of Coeur d'Alene*, No. 2:09-CV-00381-EJL, 2010 WL 4853341, at *1 (D. Idaho Nov. 19, 2010) (plaintiff stated he had come from a bar and had drunk "some beer," plaintiff's face was "very flushed and his eyes were red and glassy"); *Corcoran v. Higgins*, No. 08 Civ. 10734 (HB), 2010 WL 1957231, at *1 (S.D. N.Y. May 13, 2010) (plaintiff had glassy eyes, slurred speech, and impaired motor coordination); *People v. Cloutier*, No. 328255, 2016 WL 4947801, at *1 (Mich. Ct. App. Sept. 15, 2016) (officer smelled "heavy odor of intoxicants," defendant admitted drinking and had glassy, bloodshot eyes and slurred speech); *United States v. Gorder*, 726 F. Supp.2d 1307, 1309 (D. Utah 2010) (officer "noticed an alcoholic beverage odor," defendant had bloodshot eyes and slurred speech, and a "heavily intoxicated" passenger was in the vehicle); *United States v. Hernandez-Gomez*, No. 2:07-CR-0277-RLH-GWR, 2008 WL 1837255, at *2 (D. Nev. Apr. 22, 2008) (adopting in full the findings and recommendations of the magistrate judge that the arresting officer noticed the odor of alcohol, defendant's eyes were bloodshot, and defendant admitted to drinking "two or three beers").

The seventeenth cited case, *People v. Berger*, 551 N.W.2d 421 (Mich. Ct. App. 1996), does not indicate specifically that the arresting officer relied on other observations other than the field sobriety tests themselves in concluding that he possessed probable

cause to arrest the defendant. The *Berger*, decision, however, held only that the horizontal-gaze-nystagmus (HGN) test used by police officers as one tool to determine the intoxication of a motorist is admissible as evidence if the test is performed properly by an officer who is qualified to administer it. *Id.* at 423-24.

In any event, it is clear that a defendant like Wierszewski, who is seeking to rely upon the results of field sobriety tests to establish probable cause for an arrest, must establish that the tests were administered properly and that the results of the tests clearly demonstrate the arrestee's intoxication or impairment. When, as in this case, the issue arises in the context of a defense motion for summary judgment, we must view that evidence in the light most favorable to the plaintiff, *see Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014), and determine whether countervailing evidence casts doubt on the arresting officer's determination. However, if one version of the relevant facts "is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). This result is especially true when a video, not alleged to have been altered in any way, depicts the actions at issue. *Id.* at 380-81.

Without question, the existence of probable cause to arrest an individual must be assessed "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 302 (6th Cir. 2005) (quoting *Klein v. Long*, 275 F.3d 544, 550 (6th Cir. 2001)). Moreover, reviewing courts must acknowledge

“the difficulty inherent in making on-the-fly determinations regarding possible driving impairments” [and must] “recognize the severity of drunk driving and ‘the potential consequences of an incorrect call.’” *Green*, 681 F.3d at 866 (citation omitted). “Yet officers do not have free rein to administer field sobriety tests to whomever they please and then to arrest that person for making the slightest misstep while performing the tests.” *Id.* at 866-67.

Prior to placing Thibault under arrest and transporting him to the Grosse Pointe Farms station house, Wierszewski forced the plaintiff to undergo eight field sobriety tests. Keeping in mind the principles set forth in *Green*, we examine those tests captured by Wierszewski’s own video camera and microphone to determine whether there exists a sufficient factual dispute over the legitimacy of the criteria upon which the arresting officer relied so as to justify submitting the matter to a jury for resolution.

1. Pick-a-Number Test

In the first field sobriety test given to Thibault, Wierszewski explained, “I’m going to give you a set of numbers. I want you to pick any number that falls between the set I give you. All right. Pick a number for me between – pick any number between 21 and 19.” In a clear voice, Thibault answered, “20.” Clearly, nothing about the plaintiff’s performance on the first field sobriety test justified Wierszewski concluding that he possessed probable cause to arrest Thibault.

2. Alphabet Test

For the second test, Wierszewski asked Thibault to “recite the alphabet starting with the letter D, David,

stopping at the letter O, as in ocean.” Again, clearly and without hesitation, the plaintiff responded, “D, A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V -- stopping at O.” The plaintiff’s expert, Marty Bugbee, who served for 22 years as a Michigan State Police trooper and who “instructed other officers and troopers on field sobriety testing and the arrest process for alcohol enforcement,” testified that, although Thibault technically did the test improperly, the results should not be interpreted as failing that particular task. According to Bugbee:

[O]ther observations . . . need to be taken into account. . . [H]e did [the test] with clear speech. He wasn’t confused. Although he did it wrong, he wasn’t necessarily confused. The letters were said in sequence or the letters were said in sequence. He maintained a steady position of balance throughout the test. I interpreted as though he was confused of what he was asked because it was never said, quote, without saying any other letters. He just said: Go from D to O. He didn’t say: Don’t say any other letters.

Thus, in regard to this second test, Thibault has created at least a genuine dispute concerning the plaintiff’s proficiency in completing the task.

3. Fingertip-Dexterity Test

Next, Wierszewski directed Thibault, “With your right hand, when I ask you to, you’re going to touch the tip of your thumb to the tip of each finger and count out loud, just like this. 1, 2, 3, 4; 4, 3, 2, 1. You do that three times.” Thibault completed that third test perfectly. Again, nothing in the plaintiff’s performance

of the fingertip-dexterity test justified Wierszewski in finding probable cause to arrest Thibault for being intoxicated.

4. First Walk-and-Turn Test

Wierszewski then directed Thibault to execute a walk-and-turn test, which “requires the subject to walk heel to toe along a straight line for nine paces, pivot, and then walk back heel to toe along the line for another nine paces.” *Pennsylvania v. Muniz*, 496 U.S. 582, 585 n.1 (1990). In addition, Wierszewski required Thibault to place his right foot in front of his left foot and stand in that heel-to-toe position while the officer explained and “demonstrated” the proper way to complete the exercise.¹ The video of the stop indicates that Thibault was forced to remain in that unnatural posture for 62 seconds before beginning the test. Despite that fact, despite still being outside in the December chill without a jacket or sweater, and despite having informed Wierszewski that he had “a balance

¹ Wierszewski testified in his deposition that he himself “performed this test” as an example for Thibault. However, the video shows that the officer did not stand in the heel-to-toe position for any significant period of time whatsoever before starting the test, much less for more than a minute while under suspicion of committing a serious traffic violation and without wearing an outer garment on a cold, December morning. Furthermore, Wierszewski did not complete the required nine paces before executing the pivot turn; instead his “performance” of the test involved walking three steps, stopping, giving further instructions, resetting himself, walking four more steps, pivoting, and walking only four more steps.

issue,”² Thibault was able to maintain his balance for the duration of the instruction period.

Furthermore, at three points while giving his instructions, Wierszewski directed Thibault to walk *eight* paces. Only later did the officer correct himself and explain that Thibault was to count *nine* paces forward and then back. Unquestionably, the video shows that Thibault was able to follow those varying instructions and complete the test, even though he did use his arms to balance himself on occasion and even though the flashing emergency lights on Wierszewski’s squad car were reflecting off the back of Thibault’s tractor-trailer as the plaintiff performed the exercise. Moreover, Wierszewski’s deposition testimony that Thibault “stopped the test while he was performing it” is contradicted by the video recording, which indicates no such hesitation.

Bugbee also offered his opinion that Thibault’s performance on the first walk-and-turn test would not justify a conclusion that probable cause existed to believe the plaintiff was impaired. According to Bugbee:

² Wierszewski denies that Thibault referenced any problems maintaining his balance. The fact that the plaintiff nevertheless insists that he did creates yet another genuine dispute of fact that this court is not in a position to resolve. Nor does the video or the transcript of the encounter clear up the disagreement. Although nowhere in the transcript of the field sobriety tests does Thibault’s reference to balance problems appear, a number of inaudible comments are made throughout the video and could support the plaintiff’s version of the events of the early morning hours of December 5, 2014.

[D]uring the instruction phase Mr. Thibault was very steady. He maintained the position that the officer asked him to while he was giving instructions. Okay. As he performed the test, though he did use his arm to balance, it didn't appear as though he stepped off the [imaginary] line.

He did the proper amount of steps, which indicated that he had understood the questions, recalled them correctly and executed it properly. He did a good turn without losing control there and walked back. So in all, the only thing I saw him do which may raise some suspicion was he raised his arms above six inches to maintain his balance.

Bugbee did concede that the walk-and-turn test ultimately was administered properly by Wierszewski. Nevertheless, the district court correctly concluded that a genuine dispute of fact exists regarding the propriety of relying on Wierszewski's interpretation of Thibault's performance on the first walk-and-turn test to establish probable cause to arrest the plaintiff for driving under the influence of an intoxicant. Calling into question the validity of Wierszewski's claim that Thibault "failed" the first walk-and-turn test were the facts that: (1) Wierszewski testified falsely that Thibault stopped the test; (2) Wierszewski's assertions that Thibault could not "even stand there" and could "barely do the walk and turn" were contradicted by the video evidence; (3) Wierszewski gave confusing, and somewhat contradictory, instructions on how to complete the test; and (4) Bugbee testified that

Thibault actually did perform the first test satisfactorily.

5. One-Leg-Stand Test

Wierszewski next directed Thibault to perform a one-leg-stand test, in which a person is required “to stand on one leg with the other leg extended in the air for 30 seconds, while counting aloud from 1 to 30.” *Muniz*, 496 U.S. at 585 n.1. Wierszewski claims that Thibault also exhibited “clues” of intoxication during that field sobriety test because the plaintiff “failed to count by ‘one thousand one, one thousand two, one thousand three,’ etc. Mr. Thibault could not maintain his elevated foot at a constant height, swayed while balancing, and used his arms to balance. He also hopped at [sic] one occasion.”

Again, the video and Bugbee’s expert testimony cast serious doubt on the validity of Wierszewski’s conclusion that Thibault failed this field sobriety test. Although it is true that Thibault did not count “one thousand one, one thousand two, one thousand three, etc.,” during the test, the plaintiff, prior to performing the test, stood erect without swaying at all, and during the test, held his leg out while counting from 1 to 35. Moreover, rather than allowing Thibault to keep his extended leg six inches off the ground as originally directed, Wierszewski twice directed the plaintiff to raise his leg even higher, until at one point, Thibault’s left leg was extended from his body at approximately a 45-degree angle. When evaluating the video of the one-leg-stand test, Bugbee concluded that Thibault indeed performed that field sobriety test satisfactorily: “He had slight raising of the arms for balance. Proper count. And the tempo was good. There was no slurred

speech as he was speaking and counting out. He had no loss of balance. He was able to complete the test without putting his foot to the ground.”

6. Modified Romberg Test

In the next field sobriety test, Wierszewski asked Thibault to close his eyes, tilt his head backward, and when he felt that 30 seconds had passed, bring his head forward and open his eyes. While performing that test, Thibault stood erect and still and neither swayed nor indicated any difficulty in maintaining his balance. Only 20 seconds after the start of the test, Thibault indicated that he believed that 30 seconds had elapsed. However, Thibault indicated that between 29 and 31 seconds had gone by because he had counted in his head “[j]ust one, two, three, four,” not “by thousands.” Nevertheless, even though Wierszewski subsequently informed Cashion that Thibault’s “30-second passage was 20 seconds,” under the circumstances, the mere ten-second discrepancy did not provide the officer the probable cause necessary to justify placing Thibault under arrest.

7. Horizontal-Gaze-Nystagmus Test (HGN Test)

The penultimate test Wierszewski had Thibault perform was the HGN test. As explained by the Supreme Court:

The “horizontal gaze nystagmus” test measures the extent to which a person’s eyes jerk as they follow an object moving from one side of the person’s field of vision to the other. The test is premised on the understanding that, whereas everyone’s eyes exhibit some jerking while

turning to the side, when the subject is intoxicated “the onset of the jerking occurs after fewer degrees of turning, and the jerking at more extreme angles becomes more distinct.”

Muniz, 496 U.S. at 585 n.1 (citation omitted).

Because Thibault was asked to stand with his back to the camera mounted on the dashboard of Wierszewski’s squad car during the HGN test, the video offers the viewer no indication of the results of the test.³ Wierszewski testified, however, that Thibault “had lack of smooth pursuit in both eyes and distinct nystagmus at maximum deviation of both eyes.”

Rather than accept blindly Wierszewski’s interpretations of the HGN test results, Bugbee raised concerns with Wierszewski’s administration of that test. In his deposition testimony, the plaintiff’s expert explained that “[i]t appeared that the HGN test, the horizontal gaze nystagmus, was conducted in conjunction with the lack of convergence test, which are two different tests. They were both mixed into one test.”

Even after conducting the seven field sobriety tests, Wierszewski apparently still was not convinced that he possessed the probable cause required to arrest Thibault for driving under the influence of an intoxicant. Therefore, he asked the plaintiff for

³ As part of the administration of the HGN test, Thibault was asked to follow the beam from Wierszewski’s penlight. At the same time, however, Thibault also was facing streetlights on Moross Road, was facing the back of his tractor-trailer with its blinking hazard lights, and had Officer Cashion walk into his field of vision.

permission to search the cab of the tractor-trailer, and after receiving that permission, placed Thibault in the squad car and enlisted Cashion to assist him in the search. During that attempt to uncover incriminating evidence, Wierszewski spent almost seven minutes in the cab, and Cashion searched for almost an additional minute after that. Even so, the officers were unable to uncover any evidence to establish probable cause to arrest Thibault, leading a clearly frustrated Wierszewski to make the following statements during his fruitless search:

I'm just wondering where it's at here. . . . He didn't have enough time to hide anything. It's got to be something in here. Nothing.

Come on. Find me something here. Come on. There's got to be something.

What is he on[?] I'm not happy. I want something. There's got to be something here that I'm missing. This shit again.

What am I missing[?] The one thing I didn't do, I didn't look up his nose to see if he snorted anything. Some stimulant. Got to be cuz everything sped up.

Oh, God, something is in here. I know it is.

8. Second Walk-and-Turn Test

Unable to discover physical evidence in the tractor-trailer that would provide probable cause to arrest Thibault for driving under the influence, Wierszewski brought the plaintiff back out from the squad car, checked the plaintiff's eyes a second time, and

questioned him again about any alcohol or drug use, going so far as to examine Thibault's hands and arms for needle marks. Finally, Wierszewski ordered Thibault to perform a second walk-and-turn test, first directing the plaintiff to stand with his right heel in front of his left toes for 45 seconds. Again, Thibault was able to maintain his balance during the instructional phase of the test, but clearly began to lose his balance as he started to walk with heel-to-toe steps. Before Thibault could take even the first nine steps, however, Wierszewski arrested him "for operating while intoxicated." Interestingly, Wierszewski then stated, "You can't even walk," but Thibault exhibited no difficulty in walking back to the squad car, even though his arms were cuffed behind his back at that time. Furthermore, Thibault continued to converse intelligibly and appropriately, both at the scene and later at the station house.

After viewing both the video of the stop and the field sobriety tests and the video of Thibault's interactions with law enforcement personnel at the station house, Bugbee testified during his deposition that "the amount of tests given and the repetitive tests was very excessive," so much so that Bugbee "was flabbergasted by how much [Wierszewski] was putting this person through to try to get a positive result." The plaintiff's expert continued, "So I think it was rather excessive and I think that Officer Wierszewski ignored the evidence that he collected all along the way to make his decision. It just appeared to be a results based investigation." Similarly, Thibault offered his opinion that Wierszewski was intent on arresting him regardless of the evidence of the plaintiff's innocence. For example, after Thibault voiced concern about how

inconsequential the blood-test results would be if, as claimed by Wierszewski, those results would not be available for two or three months, Wierszewski responded, “It doesn’t matter what the blood tests says. We’ll go off my report.”

Before this court, Wierszewski attempts to counteract those accusations and seeks to justify his decision to administer field sobriety tests by referencing his initial observations of Thibault. He then claims that, after the completion of those tests, he possessed probable cause to arrest Thibault for driving under the influence based upon his interpretation of the results of the tests he directed the plaintiff to perform. Unfortunately for Wierszewski, the video of the traffic stop and the field sobriety tests, Thibault’s testimony, and the testimony of Thibault’s expert create genuine disputes of material fact that call into question both the validity of Wierszewski’s conclusions, his credibility, and the legitimacy of his decision to arrest Thibault.

Because this case has come before us in the posture of an appeal from the denial of summary judgment, we may exercise jurisdiction over the matter only to the extent that Wierszewski is willing to accept the plaintiff’s view of any disputed facts and those facts established by uncontroverted video evidence. Viewed in that light, the following facts were available to inform Wierszewski’s decisions:

-- some of the tires of Thibault’s tractor-trailer came into contact with the curb of a median on Moross Street;

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-- the driver's side window of Thibault's vehicle had been rolled down;

-- the truck's radio was playing loudly enough to be heard over engine noise but was not unduly loud;

-- Wierszewski neither saw nor smelled any evidence of any intoxicant in Thibault's vehicle or on the plaintiff's person;

-- Thibault denied that he had consumed any alcoholic beverages or ingested any drugs in the hours prior to beginning his route;

-- Thibault knowingly had an unlit cigarette in his mouth at the time of the traffic stop;

-- Thibault did not attempt to extinguish the unlit cigarette;

-- the night was chilly, causing Thibault to shiver upon exiting his vehicle and resulting in a red, flushed appearance;

-- Thibault spoke in a somewhat slow, yet normal and coherent fashion;

-- upon exiting his truck, Thibault did not appear disoriented and was not unsteady in his gait;

-- Thibault performed the pick-a-number and the fingertip-dexterity tests perfectly;

-- Wierszewski either did not give clear instructions for or did not administer properly the alphabet test, the first walk-and-turn test,

the one-leg-stand test, the Modified Romberg test, and the HGN test;

-- Thibault performed satisfactorily on the alphabet test, the Modified Romberg test, the walk-and-turn test, and the one-leg-stand test; and

-- momentary losses of balance while performing the walk-and-turn tests and the one-leg-stand test can be explained by the plaintiff's problems with balancing that were mentioned to Wierszewski prior to the performance of those tests.

Clearly, it was not illegal for Thibault to operate a tractor-trailer with the window down while listening to the radio and holding an unlit cigarette in his mouth. Thus, a reasonable jury could determine that Wierszewski was not justified in forcing the plaintiff to perform numerous field sobriety tests simply because of the relatively minor traffic violation committed on a nearly empty street at 2:00 in the morning. Even after the tests were administered, a jury could conclude, after watching the video and hearing the testimony of the plaintiff and the plaintiff's expert, that the tests were not administered properly and that Thibault nevertheless completed the tests satisfactorily.

It is true that no video evidence or deposition testimony specifically contradicts Wierszewski's explanation of Thibault's performance on the HGN test. However, as we held in *Green*, "What matters here [is] that a subsequent test for drugs and alcohol showed that the driver was in fact sober. That evidence alone is sufficient to cast doubt on the truthfulness of [the

arresting officer's] testimony regarding [the plaintiff's] pupils." *Green*, 681 F.3d at 863.

In short, viewing the evidence in the record in the light most favorable to the plaintiff—as we must—it becomes clear that the facts underlying Wierszewski's determination that he had probable cause to arrest Thibault are in dispute. Moreover, those disputes are neither minor nor immaterial. Consequently, the district court properly denied summary judgment to Wierszewski on his asserted claim of qualified immunity.

CONCLUSION

Supreme Court and Sixth Circuit precedents dictate that when a district court denies summary judgment because of the existence of genuine factual disputes, we have no jurisdiction over an appeal of that denial. In this case, the district court identified just such factual disputes regarding the reasonableness of Wierszewski's determination that probable cause to arrest Thibault existed. Because the record before us supports the district court's conclusion, we must **DISMISS** this appeal for lack of jurisdiction and **REMAND** the matter to the district court for further proceedings.

SUTTON, Circuit Judge, dissenting. As I read *Johnson*, as our court's cases read *Johnson*, and as the Supreme Court itself has read *Johnson*, it deprives us of jurisdiction over an appeal from denial of qualified immunity only when the defendant's argument boils down to an attack on the plaintiff's evidence-supported version of the facts. See *Leary v. Livingston Cty.*, 528 F.3d 438, 441 (6th Cir. 2008). But when a defendant challenges the reasonableness of *inferences* the district court drew from the plaintiff's account of the facts, we must hear the appeal. See *Scott v. Harris*, 550 U.S. 372, 380–81 (2007). That's especially true when an inference implicates a mixed question of law and fact, as it typically will in a qualified immunity case.

Today's case illustrates the problems with a broad reading of *Johnson*. Like the defendant in *Scott*, Wierszewski argues that the district court drew an untenable inference from the video evidence: that Thibault's performance on the sobriety tests showed he was not driving while intoxicated. According to Wierszewski, that untenable inference gave rise to an untenable legal conclusion: that Wierszewski was not entitled to qualified immunity because he unreasonably concluded he had probable cause to arrest Thibault. On Wierszewski's view, the undisputed facts in the case—most notably, Thibault's difficulty maintaining his balance during several of the tests—establish that he had a reasonable basis for the arrest even if we resolve all other factual disputes in Thibault's favor. The Supreme Court recently made clear that deciding legal claims of this sort is “a core responsibility of appellate courts” that *Johnson* does not limit. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2019 (2014). Yet today the court finds itself without jurisdiction, and thereby

strips Wierszewski of immunity from suit (and his right to an interlocutory appeal, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)) without considering his legal argument on the merits.

For these reasons, I respectfully dissent.

APPENDIX B

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**Case No. 15-cv-11358
Hon. Matthew F. Leitman**

[Filed June 24, 2016]

ALAN THIBAUT,)
)
 Plaintiff,)
)
 v.)
)
 EDWARD WIERSZEWSKI,)
)
 Defendant.)

AMENDED OPINION AND ORDER
(1) GRANTING IN PART AND DENYING IN
PART DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT (ECF #12) AND
(2) DENYING DEFENDANT'S MOTION TO
EXCLUDE EXPERT TESTIMONY (ECF #13)¹

¹ This Amended Opinion and Order amends only a single sentence in the second paragraph of the Court's original Opinion and Order (ECF #28).

On December 5, 2014, Defendant Edward Wierszewski (“Wierszewski”), a public safety officer with the City of Grosse Pointe Farms, arrested Plaintiff Alan Thibault (“Thibault”) for operating a motor vehicle while under the influence of drugs. Blood tests later revealed that Thibault did not have any medications or controlled substances in his system, and a prosecutor dismissed the criminal citation that Wierszewski had issued to Thibault. In this action, Thibault alleges that Wierszewski violated the Fourth Amendment by arresting him without probable cause and by maliciously prosecuting him.

Wierszewski now moves for summary judgment on his qualified immunity defense (the “Summary Judgment Motion”). (See ECF #12.) Wierszewski argues that he is entitled to such immunity because he reasonably believed that Thibault had been driving while under the influence of drugs and was thus subject to a lawful arrest and prosecution. Wierszewski would be correct *if* the facts were as he describes them. But many of the key facts here are hotly disputed. And if a jury resolved those disputes in Thibault’s favor, it could find that Wierszewski’s conclusion that he had probable cause to believe that Thibault was under the influence of drugs was not a reasonable one. Accordingly, Wierszewski is not entitled to summary judgment on his qualified immunity defense to Thibault’s unlawful arrest claim.

However, Wierszewski is entitled to summary judgment on Thibault’s malicious prosecution claim. That claim fails as a matter of law because Thibault has failed to present any evidence that he suffered a deprivation of liberty apart from his initial arrest.

In a second motion, Wierszewski seeks to exclude the testimony of Thibault's retained expert witness Marty Bugbee ("Bugbee") (the "Motion to Exclude"). (See ECF #13.) As explained below, the Court concludes that exclusion is not warranted.

Accordingly, the Court **GRANTS IN PART AND DENIES IN PART** the Summary Judgment Motion and **DENIES** the Motion to Exclude.

I

A

On December 5, 2014, Wierszewski was on patrol in the early morning hours when he "observed the front tire . . . of [a] semi tractor-trailer hit, go up and over and bounce off [a] median [on Moross Road], while it was being operated in a straight line on [a] stretch of straight roadway." (Wierszewski Aff. at ¶ 17, ECF #12-2 at 6, Pg. ID 113.) Wierszewski believed that the driving he observed was "erratic," and he thereafter began to follow the truck in his squad car. (*Id.*) While following the truck, he noticed that it had at least two equipment violations. (*See id.*) Wierszewski then initiated a traffic stop.

Thibault was driving the semi-truck. He had been on his way to make a delivery to a local Wendy's when he came into contact with the median. (*See* Thibault Dep. at 67, ECF #12-7 at 19, Pg. ID 242.) Thibault explained to Wierszewski that he had gotten lost, was "trying to make [a] turn," saw a "split" in the roadway, and "jerked over a little bit" into the curb and median in order to avoid encountering oncoming traffic. (Traffic Stop Tr. at 3, ECF #12-5 at 4, Pg. ID 189.)

Wierszewski claims that as he observed Thibault, he noticed a number of unusual circumstances that led him to suspect that Thibault may have been under the influence of alcohol or drugs. For example, Wierszewski says that Thibault's window had been rolled down even though it was a cold morning, that Thibault's car stereo was "extremely loud," that Thibault was "smoking/puffing on an unlit cigarette," and that Thibault's "face was flushed and red." (Wierszewski Aff. at ¶ 19, ECF #12-2 at 7-8, Pg. ID 114-15.) Wierszewski also says that Thibault "appeared disoriented and spoke with slow speech."² (*Id.* at ¶ 19, ECF #12-2 at 8, Pg. ID 115.) Wierszewski adds that as Thibault exited his truck, Thibault "tried to extinguish" the unlit cigarette. (*Id.*; *see also* Police Report, ECF #12-2 at 28, Pg. ID 135.) Finally, Wierszewski says that Thibault "was shaking, in spite of the fact that he had just exited a warm semi-tractor cab." (*See* Wierszewski Aff. at ¶ 20, ECF #12-2 at 8, Pg. ID 115.)

Wierszewski repeatedly asked Thibault if he (Thibault) had consumed any alcohol or drugs that would affect his ability to drive, and Thibault continually denied doing so. (*See* Traffic Stop Tr. at 3-5, 15-16, ECF #12-5 at 4-6, 16-17, Pg. ID 189-91, 201-02.) Wierszewski did not believe Thibault's denials and told Thibault that he must be "on something." (*Id.* at 15-16, ECF #12-5 at 16-17, Pg. ID 201-02.) Wierszewski also searched the cab of Thibault's truck for signs of drugs

² While Wierszewski says that Thibault's "slow" speech caused him to suspect that Thibault was intoxicated, Wierszewski acknowledges that Thibault did not have "slurred" speech. (Wierszewski Dep. at 22, ECF #12-3 at 9, Pg. ID 156.)

or alcohol, but Wierszewski found nothing. (*See id.* at 12-13, ECF #12-5 at 13-14, Pg. ID 198-99.)

In order to further assess Thibault's condition, Wierszewski administered a series of field sobriety tests. Wierszewski says that he is certified in these tests and that he administered the tests in a manner that was consistent with his training. (*See, e.g.*, Wierszewski Dep. at 26-27, ECF #12-3 at 10, Pg. ID 157; *see also* Certifications, ECF #12-8.) Three of the tests that Wierszewski administered – the “Walk and Turn Test,” the “One-Leg Stand Test,” and the Horizontal Gaze Nystagmus Test (the “HGN Test”) – are “recommended” and “validated tests recognized by the [National Highway Traffic Safety Administration (the “NHTSA”)].” (Wierszewski Aff. at ¶ 25, ECF #12-2 at 9, Pg. ID 116.)

Wierszewski acknowledges that Thibault successfully completed two of the field sobriety tests without exhibiting signs of impairment. More specifically, Thibault completed (1) a test in which Wierszewski asked him to pick a number between 19 and 21 (the “Pick a Number Test”) and (2) a test in which Thibault had to touch the tips of each of his fingers on his right hand with his thumb while counting out loud forwards and backwards (the “Finger Dexterity Test”). (*Id.* at ¶ 23, ECF #12-2 at 8-9, Pg. ID 115-16.)

However, Wierszewski says that Thibault exhibited multiple signs of intoxication during the other five tests, including the three NHTSA-recognized tests. In the first of these tests, Wierszewski asked Thibault to recite the alphabet starting with the letter “d” and ending with the letter “o” (the “Alphabet Test”). (*See id.*

at ¶ 23, ECF #12-2 at 9, Pg. ID 116.) Wierszewski says Thibault started at “d” but then went back to “a” and recited the alphabet “past the letter o” where he was instructed to stop. (*Id.*)

In the second test, Wierszewski asked Thibault to close his eyes and re-open his eyes when he believed that thirty seconds had elapsed (the “30 Second Test”). Wierszewski says that Thibault did not complete this test properly because Thibault “counted the passage of 30 seconds in his mind as 19 seconds.” (*Id.*)

The third test that Wierszewski administered was the “Walk and Turn Test.” Wierszewski says this test has two phases, an “instruction” phase and a “walking” phase. (*Id.* at ¶ 26, ECF #12-2 at 9, Pg. ID 116.) According to Wierszewski, in the “instruction” phase, a person must “stand heel-to-toe with [his] arms at [his] sides, listening to and remembering the instructions.” (*Id.* at ¶ 26, ECF #12-2 at 10, Pg. ID 117.) Wierszewski says in the “walking” phase, a person must take nine “heel-to-toe steps on an imaginary straight line, turn around keeping the front or lead foot on the line and to turn by taking a series of small steps with the other foot, and return nine (9) heel-to-toe steps down the line, counting each step out loud.” (*Id.* at ¶ 28, ECF #12-2 at 10, Pg. ID 117.) In addition, the person must “keep his arms at his sides at all times” and “not stop walking until the test was completed.” (*Id.*) Wierszewski says that Thibault exhibited multiple “clues” of intoxication during this test, including “extreme body rigidity,” “sway[ing],” stopping, and “attempt[ing] to maintain his balance using his arms. (*Id.* at ¶ 32, ECF #12-2 at 12, Pg. ID 119.)

The fourth test that Wierszewski administered was the “One-Leg Stand Test.” During this test, Wierszewski instructed Thibault to “raise either leg approximately six inches off the ground with that leg held straight out with the other leg straight as well.” (*Id.* at ¶ 34, ECF #12-2 at 13, Pg. ID 120.) Wierszewski also directed Thibault to “look at [his] elevated foot during the test” and count out loud until told to stop. (*Id.*) Wierszewski says that Thibault exhibited multiple clues of intoxication during this test. (*See id.*) Specifically, Wierszewski says Thibault “did not count as instructed . . . could not maintain his elevated foot at a consistent height, swayed while balancing, and used his arms to balance.” (*Id.* at ¶ 36, ECF #12-2 at 13-14, Pg. ID 120-21.) Wierszewski says Thibault also “hopped [on] one occasion.” (*Id.*)

The final test that Wierszewski administered was the HGN Test. (*See id.* at ¶ 37, ECF #12-2 at 14, Pg. ID 121.) During this test, Wierszewski asked Thibault to focus on a stimulus (in this case, a blue light) that Wierszewski moved from side to side in front of Thibault’s face. (*See id.*) Wierszewski says that during this test, Thibault “demonstrated a lack of smooth pursuit” in both eyes and the presence of “nystagmus.” (*Id.* at ¶ 38, ECF #12-2 at 15, Pg. ID 122.) Wierszewski insists that these were additional “clues” that Thibault was intoxicated. (*See id.*)

After Wierszewski completed the HGN Test, he asked Thibault to perform the Walk and Turn Test for a second time. (*See id.* at ¶ 33, ECF #12-2 at 12, Pg. ID 119.) During this second Walk and Turn Test, Wierszewski says he again observed numerous “clues” of intoxication, including Thibault using “his arms in

an effort to maintain his balance on multiple occasions.” (*Id.*)

Wierszewski says that based on his interactions with, and observations of, Thibault, as well as the “clues” of intoxication Thibault exhibited during the field sobriety tests, he (Wierszewski) concluded that there was “probable cause [] to arrest [Thibault] for impaired operation of a motor vehicle.” (*Id.* at ¶ 42, ECF #12-2 at 16, Pg. ID 123.) He then arrested Thibault for that crime.

Wierszewski then transported Thibault to the police station for processing. When Thibault arrived at the station, he took a breathalyzer test. That test registered no presence of alcohol. (*See* Wierszewski Dep. at 46, ECF #12-3 at 15, Pg. ID 162.) Thibault also agreed to permit the police to test his blood, and Wierszewski accompanied Thibault to Cottage Hospital where Thibault’s blood was drawn. (*See* Wierszewski Aff. at ¶ 41, ECF #12-2 at 16, Pg. ID 123.) The blood was sent to the State Police lab for testing, and the results of the tests were not immediately available. Nonetheless, Wierszewski issued Thibault citation for operating a motor vehicle while impaired. (*See* Citation, ECF #12-13 at 6, Pg. ID 292.)

<p style="text-align: center;"><u>OBSERVATION WIERSEWSKI CLAIMS TO HAVE MADE IN SUPPORT OF HIS CONCLUSION THAT THIBAUT WAS IMPAIRED</u></p>	<p style="text-align: center;"><u>CONTRARY/ COMPETING EVIDENCE IN THE RECORD</u></p>
<p>Radio volume was</p>	<p>• Thibault testified that</p>

<p>unusually high</p>	<p>the radio was “not that loud.” (Thibault Dep. at 75, ECF #12-7 at 21, Pg. ID 244.)</p>
<p>Thibault attempted to extinguish an unlit cigarette that was in his mouth</p>	<ul style="list-style-type: none"> • Thibault denies that he “attempt[ed] to extinguish an unlit cigarette.” (Thibault Aff. at ¶ 2, ECF #27 at 1, Pg. ID 741.)
<p>Thibault was flushed and red in the face and shaking when he got out of his car</p>	<ul style="list-style-type: none"> • Thibault explained that he was shaking because he was not wearing a coat and “[t] was cold out. It was really extremely cold outside.” (Thibault Dep. at 87-88, ECF #12-7 at 24, Pg. ID 247.) • Moreover, Thibault told Wierszewski that the reason he was shaking was because he was cold. (<i>See id.</i>; <i>see also</i> Stop Tr. at 4, ECF #12-5 at 5, Pg. ID 190.) • W i e r s z e w s k i acknowledged that it was “very cold” at the time of the stop and

	<p>that the cold “could” explain Thibault’s flushed face. (Wierszewski Dep. at 23, ECF #12-3 at 9, Pg. ID 156.)</p>
<p>Thibault appeared “disoriented” and spoke with “slow” speech</p>	<p>• The video and audio recording of the stop do not reveal any obviously slow speech nor other clear signs of disorientation. (<i>See</i> Recording, Exhibit 1 to ECF #12-2.)³</p>
<p>Thibault lost his balance momentarily during the Walk and Turn and One-Leg Stand Tests</p>	<p>• The video reveals that Thibault was able to walk steadily over uneven terrain as he traveled from cab of his truck to the front of Wierszewski’s vehicle. (<i>See id.</i>)</p>

Moreover, other evidence in the record undermines the reliability of (1) the field sobriety tests administered by Wierszewski and (2) Wierszewski’s interpretation of Thibault’s performance on those tests. For instance, Thibault’s proffered expert witness,

³ The recording was filed in the traditional manner as Exhibit 1 to Wierszewski’s Affidavit. The affidavit can be found in the record at ECF #12-2, and the page in the record that corresponds to the recording is Pg. ID 129.

former Michigan State Trooper Marty Bugbee, opined, based upon his review of a video recording of the stop, that Wierszewski did not properly administer four of the field sobriety tests.⁴

Bugbee testified that when Wierszewski administered the 30 Second Test, Wierszewski erroneously asked Thibault to count the passage of time silently, in his head. (*See* Bugbee Dep. at 66, ECF #13-3 at 19, Pg. ID 448.) Bugbee further testified that Wierszewski gave confusing instructions during the Alphabet Test. (*See id.* at 65, ECF #13-3 at 19, Pg. ID 448.) Bugbee also testified that Wierszewski improperly combined the HGN Test with another eye test known as the Lack of Convergence test. Bugbee explained that when these tests are combined, they fatigue the eyes and lead to false positives and inaccurate results. (*See id.* at 68, ECF #13-3 at Pg. ID 448.) Finally, Bugbee opined that when Wierszewski administered the One-Leg Stand Test, Wierszewski erred by repeatedly asking Thibault to lift his leg higher and higher and by failing to observe Thibault throughout the entire test. (*See id.* at 60-61, ECF #13-3 at 17-18, Pg. ID 446-47.)

In addition, Bugbee testified that Thibault “passed” the Alphabet Test and the One-Leg Stand Test. Bugbee explained that “although [Thiabault] did the [Alphabet Test] improperly, he did it with clear speech. He wasn’t confused. Although he did it wrong . . . [t]he letters were said in sequence. . . . He maintained a steady

⁴ Wierszewski challenges the admissibility of Bugbee’s testimony in the Motion to Exclude. But for the reasons stated below, the Court denies that motion.

position of balance throughout the test.” (*Id.* at 65, ECF #13-3 at 19, Pg. ID 448.) Bugbee said that in light of these facts, he would not have interpreted Thibault’s performance as a “failed test.” (*Id.*) Bugbee further disputed Wierszewski’s interpretation of Thibault’s performance on the One-Leg Stand Test. Bugbee testified that during that test, Thibault followed instructions without confusion and without difficulty, spoke with “no slurred speech as he was speaking and counting,” and “complete[d] the test without putting his foot to the ground.” (*Id.* at 61, ECF #13-3 at 18, Pg. ID 447.)

Finally, Thibault offered testimony that explained his difficulty keeping his balance at certain points during the field sobriety tests. He explained that he has had a longstanding problem with his balance (going back to the beginning of his time in the armed forces) and that this problem hindered his ability to complete successfully the Walk and Turn Test and the One-Leg Stand Test. (*See* Thibault Dep. at 86, 109-110, ECF #12-7 at 24, 30, Pg. ID 247, 253.) Thibault also testified that he told Wierszewski during the traffic stop that he had problems with his balance. (*See id.*)⁵

⁵ The transcript of the traffic stop in the record does not contain any evidence that confirms Thibault’s testimony that he informed Wierszewski that he had a problem with his balance. However, there are numerous parts of the transcript in which Thibault’s responses are transcribed as “inaudible.” (*See, e.g.*, Stop Tr. at 2, 11, 15, 16, 21, ECF #12-5 at 3, 12, 16, Pg. ID 188, 197 201, 202, 207.)

C

At the beginning of the traffic stop, Wierszewski activated a video and audio recording system that was equipped in his squad car. The system continued to record until the end of the stop. Much of the interaction between Wierszewski and Thibault is captured on that video and audio recording. (*See* Recording, filed in the traditional manner as Exhibit 1 to ECF #12-2.) But material portions of the stop cannot be seen or heard on the recording. For example, the initial interaction between Wierszewski and Thibault – during which, according to Wierszewski, Thibault attempted to extinguish an unlit cigarette – cannot be seen on the video. Likewise, the video of the Walk and Turn Test does not depict Thibault’s feet or the “line” he was supposed to walk, nor does it show how Thibault’s eyes reacted during the HGN Test. Moreover, at several points on the recording, it is impossible to hear Thibault’s response to Wierszewski’s questions. Because the recording does not capture all of the relevant aspects of the entire encounter between Thibault and Wierszewski, it does not provide a conclusive picture of precisely what occurred.

D

After Thibault was formally charged with driving while impaired, he posted a \$500 bond and was released from custody. Immediately upon his release, Thibault reported to his employer and underwent drug and alcohol testing from his employer’s drug testing facility. Those tests came back negative for alcohol, marijuana, cocaine, amphetamines, opiates, and PCP. (*See* ECF #12-13 at 34-35, Pg. ID 320-21.)

On December 19, 2014, the police received the first set of results from the blood tests they had administered to Thibault. (*See* ECF #12-11.) Those results confirmed that Thibault did not have any alcohol in his system on the night he was arrested. (*See id.*) The prosecutor then entered into a stipulated order dismissing the driving while impaired charge without prejudice. (*See* ECF #12-13 at 18, Pg. ID 304.) Following the dismissal of the charge, the police received a second set of results from the testing of Thibault's blood. Those results came back negative for the presence of other drugs, including amphetamines, opiates, cocaine, and barbiturates. (*See* ECF #12-12.)

On April 14, 2015, Thibault filed this action against Wierszewski under 42 U.S.C. § 1983. (*See* Compl., ECF #1.) He alleges that Wierszewski violated his Fourth Amendment rights in two respects: by arresting him without probable cause and by maliciously prosecuting him. (*See id.*) Wierszewski has asserted, among other defenses, the defense of qualified immunity.

Wierszewski filed the Summary Judgment Motion and the Motion to Exclude on March 29, 2016. (*See* ECF ## 12, 13.) The Court held a hearing on both motions on June 6, 2016.

III

Wierszewski argues that he is entitled to summary judgment on his qualified immunity defense. The summary judgment standard and its application in the qualified immunity context are well-established.

A movant is entitled to summary judgment when it “shows that there is no genuine dispute as to any material fact” *SEC v. Sierra Brokerage Servs.*,

Inc., 712 F.3d 321, 326-27 (6th Cir. 2013) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)) (quotations omitted). When reviewing the record, “the court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor.” *Id.* “The mere existence of a scintilla of evidence in support of the [non-moving party’s] position will be insufficient; there must be evidence on which the jury could reasonably find for [that party].” *Anderson*, 477 U.S. at 252. Summary judgment is not appropriate when “the evidence presents a sufficient disagreement to require submission to a jury.” *Id.* at 251-252. Indeed, “[c]redibility determinations, the weighing of the evidence, and the drafting of legitimate inferences from the facts are jury functions, not those of a judge” *Id.* at 255.

Qualified immunity “protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.” *Green v. Throckmorton*, 681 F.3d 853, 864 (6th Cir. 2012) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). “Once raised, it is the plaintiff’s burden to show that the defendant[] [is] not entitled to qualified immunity.” *Kinlin v. Kline*, 749 F.3d 573, 577 (6th Cir. 2014).

The Sixth Circuit “has generally used a two-step [qualified immunity] analysis: (1) viewing the facts in the light most favorable to the plaintiff, [the court] determines whether the allegations give rise to a constitutional violation; and (2) [the court] assesses whether the right was clearly established at the time

of the incident.” *Id.* (internal punctuation omitted). “[U]nder either prong [of this inquiry], courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment.” *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014). Indeed, in *Tolan*, the Supreme Court vacated a grant of summary judgment on a qualified immunity defense because, among other things, the lower court “credited the evidence of the party seeking summary judgment and failed to properly acknowledge key evidence offered by the party opposing that motion.” *Id.* at 1867–68. The Supreme Court explained that “[b]y weighing the evidence and reaching factual inferences contrary to [the non-moving party’s] competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.” *Id.* at 1867. Simply put, “where the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability.” *Green*, 681 F.3d at 864.

IV

A

“An officer has probable cause [to arrest] when the facts and circumstances known to the officer warrant a prudent man in believing that an offense has been committed.” *Miller v. Sanilac County*, 606 F.3d 240, 248 (6th Cir. 2010) (quoting *Henry v. United States*, 361 U.S. 98, 102 (1959)). “In general, the existence of probable cause in a § 1983 action presents a jury question, unless there is only one reasonable determination possible.” *Green*, 681 F.3d at 865 (quoting *Parsons v. City of Pontiac*, 533 F.3d 492, 501

(6th Cir. 2008). “But a lack of probable cause is not necessarily fatal to an officer’s defense against civil liability for false arrest. Rather, an officer is entitled to qualified immunity under § 1983 if he or she could reasonably (even if erroneously) have believed the arrest was lawful, in light of clearly established law and the information possessed at the time.” *Id.* (internal quotation marks omitted). Here, Wierszewski is not entitled to summary judgment on his qualified immunity defense to Thibault’s arrest-without-probable-cause claim because (1) there are important factual disputes concerning the basis for the arrest and (2) if a jury resolved those disputes in Thibault’s favor, it could find that Wierszewski lacked a reasonable basis to believe that the arrest was lawful.

B

The conflicting evidence concerning what occurred in connection with the stop and arrest is set forth above. When the conflicts are resolved in Thibault’s favor and when the evidence is otherwise viewed in the light most favorable to Thibault, the facts are as follows:

- Wierszewski stopped Thibault after the front tire of Thibault’s semi tractor-trailer came into contact with a curb and median;
- Thibault’s window was rolled down even though the weather was very cold;
- Thibault informed Wierszewski that he had not been drinking and had not taken any other drugs or substances;

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- Wierszewski did not detect any odor of intoxicants from Thibault or his truck;
- Wierszewski did not find any drugs or intoxicants during a search of Thibault's truck;
- Thibault's radio was on, but the volume of the music was not unusually loud;
- Thibault had an unlit cigarette in his mouth;⁶
- Thibault never attempted to extinguish the unlit cigarette;
- Thibault was shaking and had a flushed face when he stepped out of his truck. However, he was not wearing a sweater or jacket, and it was a very cold morning;
- Wierszewski administered seven different field sobriety tests;
- Thibault successfully completed the Pick a Number Test and the Finger Dexterity Test;
- Wierszewski did not properly administer four of the other five tests (the Alphabet Test, the 30 Second Test, the HGN Test, and the One-Leg Stand Test);
- There is no evidence in the record, other than Wierszewski's own testimony, that Thibault

⁶ When Wierszewski asked Thibault about the unlit cigarette during the traffic stop, Thibault explained that it "goes out a lot." (Stop Tr. at 3-4, ECF #12-5 at 4-5, Pg. ID 189-90.) In addition, Thibault says he told Wierszewski that he knew the cigarette was not lit. (Thibault Dep. at 112, ECF #12-7 at 30, Pg. ID 253.)

exhibited “clues” of intoxication during the HGN Test;

- Although Thibault exhibited some possible “clues” of intoxication during the Alphabet Test, the One-Leg Stand Test, and the Walk and Turn Test, he ultimately passed each of those tests;
- Thibault experienced a momentary, noticeable loss of balance during the Walk and Turn Test and the One-Leg Stand Test. However, Thibault has had a longtime problem with balance, and he informed Wierszewski of this problem before taking the field sobriety tests;
- At certain points during the stop, Thibault was able to walk over uneven terrain without difficulty and without losing his balance; and
- Thibault did not speak in an unusually slow manner nor in a manner that suggested that he was disoriented.

The Sixth Circuit held on a similar set of facts in *Green, supra*, that an arresting officer was not entitled to summary judgment on his qualified immunity defense. The plaintiff in *Green* had traveled all day from her hometown in South Carolina to a fairground in an unfamiliar area of Ohio. *See Green*, 681 F.3d at 856. At approximately 10:30 in the evening, the plaintiff drove to Walmart to purchase groceries. As she returned to the fairgrounds, the roads “were wet from a recent rain [making] visibility somewhat worse than normal.” *Id.* In order to see better, the plaintiff turned on her high beam lights. However, the plaintiff failed to switch to her low beam lights when she encountered oncoming traffic. Her failure to do so

violated Ohio law. A police officer driving in the opposite direction witnessed the plaintiff's failure to dim her lights, turned around, and began following her. He then saw the plaintiff "briefly cross[] over a shoulder lane marker." *Id.* The officer thereafter commenced a traffic stop.

After the officer approached the plaintiff's car, the officer asked why the plaintiff had "brighted" and "blinded" him with her high beams. *Id.* at 857. The plaintiff apologized and told the officer that she used the beams because it was dark, there were no street lights like there were in her hometown, and she was trying to drive carefully. *See id.* As the officer spoke with the plaintiff, he "momentarily pointed his flashlight inside [the plaintiff's] vehicle" and "noticed that [the plaintiff's] pupils were constricted." *Id.* He regarded that constriction as "abnormal." *Id.*

The plaintiff then tried to exit her car in order to retrieve her driver's license from her trunk. *See id.* When she did so, she "either forgot to completely remove her seatbelt or became entangled in it." *Id.* At that point, the officer "commented that [the plaintiff] might want to take her seatbelt off" when attempting to exit the vehicle. *Id.* (internal punctuation omitted). The plaintiff was then able "to remove her seatbelt quickly and easily," and she exited her vehicle. *Id.*

The officer then asked the plaintiff if she had anything to drink or had taken any drugs or medications that evening. *See id.* The plaintiff said she had not. *See id.* In addition, the officer "did not see or smell alcohol or drugs at any time during the stop," and he did not "notice anything suspicious" upon a preliminary search of the plaintiff's car. *Id.*

The officer nonetheless chose to administer several field sobriety tests. He first attempted to conduct the HGN Test using his pen as a stimulus. *See id.* at 858. According to the officer, he tried to administer this test two times but was unable to complete the test because the plaintiff could not follow the tip of his pen as he moved it back and forth. *See id.* The officer then asked the plaintiff again if she had taken any drugs or medications. *See id.* The plaintiff said she had only been drinking water. *See id.* The officer did not believe her and insisted that “[y]ou’ve taken something else. I mean, you’re, you’re just completely dazed off there for a second.” *Id.* The officer then tried to administer the HGN Test a third time, and he concluded that plaintiff again failed to follow the pen with her eyes. *See id.*

The officer then asked the plaintiff to “recite the alphabet, beginning with the letter L and ending with the letter S.” *Id.* He also asked her to “count backward from 57 to 42.” *Id.* The plaintiff was able to complete the Alphabet Test “without difficulty,” but she “hesitated slightly between a few of the numbers” during the counting test. *Id.* The officer also “noticed that she talked slowly and that there was a slight slur to her words.” *Id.* However, the sound recording on the video of the stop did “not indicate that [the plaintiff’s] speech was either unusually slow or slurred.” *Id.*

Next, the officer administered the One-Leg Stand Test. *See id.* During the test, the plaintiff “struggled to maintain her balance . . . but [she] did not sway badly.” *Id.* In addition, “[h]er foot appear[ed] to touch the ground on multiple occasions, and she skipped the number 19 while counting.” *Id.*

Finally, the officer administered the Walk and Turn Test. *See id.* During this test, the plaintiff “swayed very slightly as she walked, used her arms for balance, and turned right instead of left.” *Id.* at 859.

After these tests were complete, the officer once more attempted to administer the HGN Test. *See id.* When he again determined that the plaintiff could not follow his pen with her eyes, he arrested her for “driving under the influence of alcohol or drugs.” *Id.* Following her arrest, officers searched her car and found no evidence of drugs or alcohol. *See id.*

The plaintiff was then transported to the police station and charged with operating a motor vehicle while under the influence of drugs or alcohol. She was held in custody for two days while she attempted to make bail. *See id.*

During her time in custody, the plaintiff provided a urine sample to be tested for alcohol and drugs. “When [the plaintiff’s] urine test later came back negative for both alcohol and drugs, all charges against her were dismissed.” *Id.*

Following the dismissal of the charges against her, the plaintiff sued the officer under 42 U.S.C. § 1983 for, among other things, arresting her without probable cause. *See id.* The officer moved for summary judgment on the basis of qualified immunity. “The district court, after concluding that no constitutional violations had occurred, granted summary judgment in favor of [the defendant officer].” *Id.* The Sixth Circuit reversed.

The Sixth Circuit first refused to treat as undisputed the officer’s testimony that the plaintiff’s “pupils were constricted and that this feature

suggested possible impairment.” *Id.* at 862. The court noted that the video of the stop “provide[d] no evidence to support [the officer’s] claim that [the plaintiff’s] pupils were constricted at the time of the stop,” and it stressed that the negative result of the urine test “alone is sufficient to cast doubt on the truthfulness of [the officer’s] testimony regarding [the plaintiff’s] pupils.” *Id.* at 862-63. The court added that under these circumstances, it was unwilling to “take” the officer’s testimony about the plaintiff’s pupils “on faith,” and it declined to “penalize [the plaintiff] for failing to produce any evidence directly rebutting [the officer’s] stated observation” concerning her pupils because she could not “speak to the appearance of her [own] pupils.” *Id.*

The Sixth Circuit then stressed that a reasonable juror could conclude that the plaintiff was neither confused nor disoriented on the video of the stop:

A reasonable jury could find, for example, that [the plaintiff] acted rationally throughout the stop, that her relatively minor traffic violations were not indicative of impairment, and that [the officer’s] fabricated the alleged constriction of [the plaintiff’s] pupils to create an after-the-fact justification for the detention.

Id. at 864.

Finally, after reviewing the video recording of the stop, the court was “convinced that [the plaintiff’s] performance on the [field sobriety] tests was sufficiently ambiguous to submit the probable-cause question to the jury.” *Id.* at 865. As the court explained:

[The plaintiff] completed several of the tests without any apparent difficulty and others with only minor mistakes. And the video does not show whether she could follow the pen with her eyes when [the defendant] tried to administer the HGN test. Because reasonable jurors could interpret the video evidence differently, we conclude that the district court erred in deciding as a matter of law that [the defendant] had probable cause to arrest [the plaintiff]. We further conclude that the question of qualified immunity turns on disputed facts – namely, on [the plaintiff's] ambiguous performance on the field sobriety tests and whether [the defendant] was being truthful when he claimed that [the plaintiff] could not follow the pen – and thus the jury, not the judge must determine liability.

Id. at 865-66 (internal quotation marks omitted).

While the facts in *Green* are not identical to those here, there are a number of significant similarities between the two cases. In both cases, (1) the plaintiffs drove in an irregular manner; (2) the officers did not see or smell alcohol during the stop; (3) the drivers denied ingesting drugs or drinking alcohol; (4) the officers found no evidence of drugs or alcohol in the drivers' vehicles; (5) the recordings of the stops did not plainly support the officers' claims that the drivers were disoriented or spoke with irregular speech;⁷ and

⁷ Wierszewski's claim that he suspected Thibault was impaired because Thibault spoke too *slowly* is in some tension with Wierszewski's later-expressed view that Thibault was under the influence of an impairing substance that "sped up" Thibault's

(6) while the video recordings of the field sobriety tests depicted some conduct by the drivers that could arguably be consistent with impairment, reasonable jurors in both cases could interpret the videos “differently,” *Green*, 681 F.3d at 866 – *i.e.*, as not depicting the obvious signs of impairment claimed by the arresting officers. Finally, just as the urine test results in *Green* raised doubts about the credibility of the officer’s testimony concerning the plaintiff’s pupils, the blood test results here cast doubt on Wierszewski’s claim that Thibault’s eyes did not “smoothly pursue” the blue light that Wierszewski used to administer the HGN Test (which was not captured on the video).

And in at least two important respects, Thibault’s position here is much stronger than that of the plaintiff in *Green*. First, Thibault has presented expert witnesses testimony – missing in *Green* – that creates doubt as to whether the arresting officer properly administered many of the field sobriety tests that led to his arrest. Second, the Sixth Circuit in *Green* refused to consider the plaintiff’s explanations for the shortcomings in her field sobriety test performance – *i.e.*, that she was tired from driving all day, was overweight, and was distracted by passing traffic and the officer’s radio – because she did not offer the explanations to the officer at the time of the tests. *See Green*, 681 F.3d at 865. Here, however, Thibault testified that he *did* tell Wierszewski about his long-standing balance problems. (*See Thibault Dep.* at 86,

cognition and processing. (Stop Tr. at 12, ECF #12-5 at 13, Pg. ID 198.) A fact-finder could reasonably conclude that this tension undermines the credibility of Wierszewski’s claimed observations and descriptions of Thibault.

109-110, ECF #12-7 at 24, 30, Pg. ID 247, 253.) Given the Sixth Circuit's holding in *Green* that a jury in that case could have found that the officer made an unreasonable decision to arrest, this Court must conclude that a jury here could likewise deem objectively unreasonable Wierszewski's determination that he had probable cause to arrest Thibault. Accordingly, Wierszewski is not entitled to summary judgment on his qualified immunity defense to Thibault's arrest-without-probable-cause claim.

C

Wierszewski resists this conclusion on four primary grounds, but none carry the day. First, in both his motion papers and at oral argument, Wierszewski repeatedly argued that the evidence of probable cause was "undisputed and indisputable." (Wierszewski Mot. Summ. J. at 20-21, ECF #12 at 30-31, Pg. ID 98-99.) For instance, Wierszewski stressed that "the totality of the circumstances surrounding [Thibault's] arrest . . . are conclusively established by: [Wierszewski's own] sworn deposition and [Wierszewski's] affidavit[s] . . . official certification of [his] expertise in the administration of [field sobriety tests] and drug detection; the sworn affidavits of [other police officers on the scene that night]," and the video of the arrest. (*Id.* at 20, ECF #12 at 30, Pg. ID 98; emphasis in original.)

However, as detailed above, the circumstances surrounding the stop and arrest are riddled with important factual disputes. Indeed, the list of evidence identified by Wierszewski is notable for what it fails to mention: Thibault's deposition testimony and version of events and the portions of the video that support

Thibault's version of events. Wierszewski also ignores Bugbee's expert testimony that Wierszewski improperly administered many of the field sobriety tests and reached the wrong conclusions when interpreting Thibault's performance on those tests. Wierszewski's failure to accept as true the facts favorable to Thibault is directly contrary to the Supreme Court's instructions in *Tolan* and inconsistent with the Sixth Circuit's guidance in *Green*.

Second, Wierszewski argues that the "authenticated video and audio recording of Thibault's detention and arrest" leads to "the unavoidable conclusion that Officer Wierszewski made an objectively reasonable judgment call that there was probable cause to believe that Thibault was driving under the influence of intoxicants." (Wierszewski Mot. Summ. J. at 20-21, ECF #12 at 30-31, Pg. ID 98-99; emphasis in original.) But, as described above, the video in this case is ambiguous in many of the same ways that the video in *Green* was ambiguous, and portions of the video – *i.e.*, Thibault's steady walk from his truck to the front of Wierszewski's squad car over uneven ground and the audio of his speech as he spoke with Wierszewski – affirmatively support Thibault's insistence that he did not appear impaired. In addition, as further described above, the video recording does not capture the entire encounter between Wierszewski and Thibault, nor does the video capture (1) Thibault's feet during at least some of the field sobriety tests that involve his use of his feet or (2) his eyes during the HGN Test. This is simply not a case like *Scott v. Harris*, 550 U.S. 372 (2007), in which a complete and unambiguous video recording "blatantly contradict[ed]" one party's version

of events and was thus sufficient to resolve a qualified immunity defense as a matter of law.

Third, Wierszewski cites a long line of cases for the proposition that “[t]he results of standard or accepted field sobriety tests may provide reliable evidence of probable cause for an arrest for driving under the influence of intoxicants.” (Wierszewski Mot. Summ. J. at 19, ECF #12 at 29, Pg. ID 97.) But, as described above, there is evidence in this record that Wierszewski erroneously administered and interpreted the tests. This evidence, if accepted by a jury, would materially undermine the reliability of the test results that Wierszewski seeks to rely upon. Moreover, in all but one of the cases cited by Wierszewski, (1) the plaintiff admitted to taking intoxicants and/or (2) the officer smelled intoxicants coming from the vehicle, and neither of those circumstances exist here.⁸

⁸ See *Bradley v. Reno*, 632 Fed. App’x 807, 808 (6th Cir. 2015) (the plaintiff’s “breath smelled of alcohol” and when asked, the plaintiff “admitted that he had consumed a ‘couple’ ‘small pitchers’ of beer”); *Jolley v. Harvell*, 254 Fed. App’x 483, 484 (6th Cir. 2007) (officer asked plaintiff “to step outside to the rear of the car after allegedly smelling marijuana”); *Ketchum v. Kahn*, No. 10-14749, 2014 WL 35633437, at *1 (E.D. Mich. July 18, 2014) (officer “smelled a strong odor of intoxicants, and [the plaintiff] acknowledged that he had consumed a beer and was taking Lorazepam”); *Cameron v. Riverview*, No. 10-14098, 2011 WL 3511497, at *2 (E.D. Mich. July 26, 2011) (officers testified “they could smell the odor of intoxicants” and plaintiff “admitted to consuming a couple of alcoholic beverages”); *Freeland v. Simmons*, 2012 WL 258105, at *2 (D.S.C. Jan. 27, 2012) (officer testified that “he detected a strong odor of alcohol on [plaintiff’s] breath” and plaintiff “admitted that he had ‘had a few’”); *Rutherford v. Cannon*, 2010 WL 3475283, at *2 (D.S.C. Sept. 2, 2010) (officer “testified that he detected an odor of alcohol coming from plaintiff’s car”);

Fourth, Wierszewski argues that the Court should disregard Bugbee's testimony that Wierszewski improperly administered the field sobriety tests because Bugbee testified that Wierszewski administered the tests properly. This argument fails to account for the totality of Bugbee's testimony. As Wierszewski accurately notes, at one point during his deposition, Bugbee did testify that Wierszewski properly administered the Walk and Turn Test and the One-Leg Stand Test. (See, e.g., Bugbee Dep. at 51, 59, ECF #13-13 at 15, 17 Pg. ID 444, 446.) However, at other points, Bugbee did criticize Wierszewski's administration of the One-Leg Stand Test. Bugbee opined that during that test Wierszewski improperly "stopped observing [] Thibault" and kept asking Thibault to lift his leg higher into "a difficult position for [] Thibault to maintain his balance." (*Id.* at 60-61, ECF #13-3 at 17-18, Pg. ID 446-47.) In addition, as

Shackelford v. Gutermuth, 2005 WL 3050522, at *1 (W.D. Ky. Nov. 10, 2005) (plaintiff admitted to have taken an unidentified medication "which she did not normally use"); *United States v. Gorder*, 726 F. Supp. 2d 1307, 1309 (D. Utah 2010) (officer testified he "noticed an alcoholic beverage odor"); *United States v. Hernandez-Gomez*, 2008 WL 1837255, at *2 (D. Nev. Apr. 22, 2008) (officer testified "he observed an odor of alcohol emanating from the defendant" and defendant admitted to drinking "two or three beers"). And the only case cited by Wierszewski in which the officer did not smell intoxicants and the plaintiff did not admit to consuming an intoxicant – *Mott v. Davis*, 2011 WL 4729856 (E.D. Tenn. Oct. 5, 2011) – is also distinguishable. In *Mott*, the plaintiff had "bloodshot" and "glazed-over eyes" and slurred his speech, important factors that did not exist here. *Id.* at *8. Moreover, *Mott* is an unpublished decision from another jurisdiction, and it was decided *before* the Sixth Circuit's published, binding decision in *Green*.

detailed above, Bugbee also criticized Wierszewski's administration of several *other* tests, including the Alphabet Test and the HGN Test, one of the three recognized NHTSA field sobriety tests. Bugbee's testimony, when viewed in Thibault's favor, as it must be at this stage, creates a factual dispute as to whether Wierszewski properly administered the field sobriety tests.⁹

Finally, while the Court rejects Wierszewski's argument that he is entitled to judgment as a matter of law, the Court does appreciate "the difficulty inherent in making on-the-fly determinations regarding possible driving impairments, just as [it] recognize[s] the severity of drunk driving and the potential consequences of an incorrect call had [Thibault] ultimately proven to be impaired." *Green*, 681 F.3d at 866. But the many factual disputes on this record require that a jury make the ultimate determination as to whether Wierszewski lawfully arrested Thibault.

V

Wierszewski is entitled to summary judgment on Thibault's malicious prosecution claim. In order to prevail on that claim, Thibault would have to prove, among other things, that he suffered a "deprivation of liberty," as understood in Fourth Amendment jurisprudence, apart from the initial seizure. *Sykes v. Anderson*, 625 F.3d 294, 308-10 (6th Cir. 2010). He has failed to present any evidence of such a deprivation. In

⁹ Wierszewski is certainly free to impeach Bugbee at trial with those portions of Bugbee's deposition testimony that arguably confirm that Wierszewski administered the tests properly.

fact, in his response to the Summary Judgment Motion, Thibault argues that “it is clear that [Wierszewski] acted maliciously *by arresting* [Thibault] without any shred of probable cause.” (Thibault Resp. Br. at 9, ECF #15 at 16, Pg. ID 481; emphasis added.) But, as noted above, to succeed on a malicious prosecution claim, Thibault had to identify evidence that he was deprived of liberty *apart from* his arrest.

At the hearing before the Court, Thibault argued that he was deprived of liberty when he was charged with a crime and forced to hire a lawyer. He cited no authority for that proposition, and the Court declines accept this unsupported argument. Thibault also contended at the hearing that he was deprived of liberty by bond conditions imposed upon his initial release from custody. But he failed to identify any evidence of those conditions in the record. Finally, Thibault argued at the hearing that his arrest deprived him of liberty by leading to his suspension from work. Again, however, Thibault has not provided any authority to support his argument that the actions of a private employer may amount to a deprivation of liberty for purposes of a malicious prosecution claim. Therefore, Wierszewski is entitled to summary judgment on Thibault’s malicious prosecution claim.¹⁰

¹⁰ In addition, Wierszewski presented testimony at his deposition that he had “no interaction” and “never spoke with” the prosecutor in charge of Thibault’s criminal case. (Wierszewski Dep. at 46, ECF #12-3 at 15, Pg. ID 162.) Thibault has not identified any evidence in the record that contradicts Wierszewski’s un rebutted testimony that he did not participate in Thibault’s prosecution. This is yet another reason Wierszewski is entitled to summary judgment on Thibault’s malicious prosecution claim. *See, e.g.*,

VI

In the Motion to Exclude, Wierszewski asks the Court to preclude Thibault's proffered expert witness, Marty Bugbee, from testifying at trial. (*See* ECF #13.) As noted above, Thibault intends to offer testimony from Bugbee that Wierszewski erroneously administered the field sobriety tests and wrongly interpreted the results of those tests. Wierszewski argues that the Court should exclude this expert testimony because: (1) Bugbee is "not qualified to render expert testimony in this matter" (*id.* at 12, ECF #13 at 20, Pg. ID 408); and (2) Bugbee's opinions as to whether or not Thibault's performance on the field sobriety tests demonstrated probable cause for Thibault's arrest are irrelevant and invade the province of the jury. (*See id.* at 3-10, ECF #13 at 11-18, Pg. ID 399-406.) The Court disagrees.

First, Bugbee is qualified to present the expert testimony described above. Bugbee was a Michigan State Police Trooper for more than twenty years (from 1989 to 2011) and was certified as a "standard sobriety field test expert." (Bugbee Dep. at 5-6, ECF #13-3 at 4, Pg. ID 433.) In addition, Bugbee "instructed other officers and troopers on field sobriety testing and the arrest process for alcohol enforcement" (*id.* at 6, ECF #13-3 at 4, Pg. ID 433) and was personally involved in

Skousen v. Brighton High School, 305 F.3d 520, 529 (6th Cir. 2002) (granting state trooper summary judgment on malicious prosecution claim where plaintiff "offered no evidence . . . supporting her claim that [the trooper] caused her to be prosecuted" or that the trooper "had anything to do with [her] prosecution . . . after he submitted his report to the prosecutor's office.").

stopping motorists and administering field sobriety tests while he worked as a police officer. (*Id.* at 11, ECF #13-3 at 5, Pg. ID 434). Based on these credentials, Bugbee is qualified to testify as an expert in this action. *See, e.g., United States v. Winkle*, 477 F.3d 407, 415-16 (6th Cir. 2007) (holding that witness was qualified to present expert testimony based his years of work experience, background in the relevant industry, and training). Wierszewski has not cited any cases in which any court has deemed unqualified a proposed expert on field sobriety tests with Bugbee's background, training, and experience. Under these circumstances, "[a]ny weaknesses in [Bugbee's] qualifications would [] go to the weight rather than the admissibility of his opinion testimony." *United States v. Nixon*, 694 F.3d 623, 630 (6th Cir. 2012).

Second, Bugbee's testimony as to how field sobriety tests are administered and how officers should interpret a driver's performance on those tests would be helpful to a jury. Members of the jury are unlikely be familiar with the procedures for administering field sobriety tests nor with the standards officers use when determining whether the tests provide "clues" that a driver may be intoxicated. Indeed, Wierszewski, himself, stresses that he was able to detect "clues" of Thibault's intoxication during the field sobriety tests precisely because he had "extensive prior training, experience, and certification as an expert in the administration" of field sobriety tests. (Wierszewski Mot. Summ. J. at 21, ECF #12 at 31, Pg. ID 99.) Thus, it is entirely appropriate for Bugbee to offer expert testimony with respect to the administration of field sobriety tests and how officers "grade" those tests.

While the Court will permit Bugbee to testify with respect to the issues described above, it will not permit him to opine as to whether Wierszewski had probable cause to arrest Thibault. Such testimony would be improper because “the existence of probable cause is a question of law that is not properly the subject of expert testimony.” *Rizzo v. Edison, Inc.*, 172 Fed. App’x 391, 394 (2d Cir. 2006); *see also DeMerrell v. City of Cheboygan*, 206 Fed. App’x 418, 427 (6th Cir. 2006) (holding that expert testimony on whether there was probable cause to believe that a suspect posed a significant threat of harm was inadmissible because it “expresses a legal conclusion”).

CONCLUSION

For the reasons stated above, **IT IS HEREBY ORDERED** that Wierszewski’s Summary Judgment Motion (ECF #12) is **GRANTED IN PART AND DENIED IN PART**. Thibault is entitled to a jury trial on his arrest-without-probable-cause claim; his malicious prosecution claim is **DISMISSED**.

IT IS FURTHER ORDERED that the Motion to Exclude (ECF #13) is **DENIED**.

s/Matthew F. Leitman
MATTHEW F. LEITMAN
UNITED STATES DISTRICT JUDGE

Dated: June 24, 2016

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on June 24, 2016, by electronic means and/or ordinary mail.

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s/Holly A. Monda
Case Manager
(313) 234-5113

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 16-2021

[Filed July 13, 2017]

ALAN THIBAUT,)
)
Plaintiff-Appellee,)
)
v.)
)
EDWARD WIERSZEWSKI,)
)
Defendant-Appellant.)

O R D E R

BEFORE: DAUGHTREY, SUTTON, and DONALD,
Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

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Therefore, the petition is denied. Judge Sutton would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX D

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**Case No. 2:15-cv-11358
Hon. Matthew F. Leitman**

[Filed March 29, 2016]

ALAN THIBAUT,)
)
 Plaintiff,)
)
 -vs-)
)
 EDWARD WIERSZEWSKI,)
 individually and in his official)
 capacity as a Public Safety Officer,)
)
 Defendant.)
)

* * *

**MOTION FOR SUMMARY JUDGMENT ON
BEHALF OF DEFENDANT EDWARD
WIERSZEWSKI**

* * *

EXHIBIT A

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**Case No. 2:15-cv-11358
Hon. Matthew F. Leitman**

[Dated March 25, 2016]

ALAN THIBAUT,)
)
 Plaintiff,)
)
 -vs-)
)
 EDWARD WIERSZEWSKI,)
 individually and in his official)
 capacity as a Public Safety Officer,)
)
 Defendant.)
)

ARI KRESCH (P29593)	GEORGE M. DeGROOD,
SOLOMON RADNER	III (P33724)
(P73653)	Attorney for City of
Attorney for Plaintiff	Defendant
26700 Lahser Road,	400 Galleria Officentre,
Suite 400	Suite 550
Southfield, MI 48033	Southfield, MI 48034
(248) 291-9712	(248) 353-4450
<u>sradner@1800LawFirm.</u>	<u>gdegrood@thomasdegrood</u>
<u>com</u>	<u>.com</u>

AFFIDAVIT OF EDWARD WIERSZEWSKI

STATE OF MICHIGAN)
)ss.
COUNTY OF WAYNE)

I, Edward Wierszewski, after first being duly sworn, deposes and states as follows:

1. That I am over the age of twenty-one (21) and make this affidavit upon my own personal knowledge of all of the facts expressed and explained herein.

2. That I was hired by the City of Grosse Pointe Farms Department of Public Safety on December 18, 2001 as a Public Safety Officer, and have remained employed in that capacity continuously since then.

3. That on December 4, 2014 and December 5, 2014 I was a Public Safety Officer for the City of Grosse Pointe Farms Department of Public Safety and was both trained in the use of and administration of Field Sobriety Tests and Standard Field Sobriety Tests. I was also certified as a Drug Recognition Expert. Standard Field Sobriety Tests have been deemed validated indicators of impairment based on National Highway Traffic Safety Administration (NHTSA) research.

4. That I know that the officers who were also present at the scene of the December 5, 2014 stop of Alan Thibault, same being Sgt. Krizmanich, Public Safety Officer Cashion and Public Safety Officer Dionne, were also trained in the use of and administration of Field Sobriety Tests and Standard Field Sobriety Tests.

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5. That on December 4, 2014 I worked the night shift as a public safety officer for the City of Grosse Pointe Farms Department of Public Safety starting at 11:00 p.m. on December 4, 2014 and ending at 7:00 a.m. on December 5, 2014, unless my responsibilities required overtime.

6. That on December 4, 2014 I was assigned Unit (squad car) No. 33 which I operated and used throughout my shift and throughout my patrol duties within the City of Grosse Pointe Farms.

7. That on December 4, 2014, and at all times relevant to my encounter with Mr. Alan Thibault, Unit No. 33 was equipped with a dash-mounted video camera (dash cam) and additionally, I wore a body microphone on my person, and the dash cam recorded statements transmitted over same.

8. That on December 4, 2014 and December 5, 2014, the dash cam of Unit No. 33 operated continuously from the time said vehicle left the Grosse Pointe Farms Department of Public Safety recording everything within the field of view of said dash cam as well as recording the audio transmitted over my microphone, which could not be turned off or disabled.

9. That upon my return to the Grosse Pointe Farms Department of Public Safety at the end of my shift, the recorded audio and video data was automatically downloaded from Unit No. 33 to the audio/video server where it remained for thirty (30) days unless "tagged" for a longer period of retention.

10. That on December 5, 2014 the dash cam of Unit No. 33 captured the audio and video of my stop,

detention, testing, search of the semi tractor and arrest of Alan Thibault.

11. That on December 5, 2014 the Grosse Pointe Farms Booking Room that was used by me during the completion of the Drug Influence Evaluation (post-arrest) and booking of Mr. Alan Thibault was equipped with a permanently mounted video camera recording system capable of recording video and audio within the Booking Room and said data was then downloaded to the audio/video server. Like the dash cam of Unit No. 33, this equipment could not be turned off or disabled by me or any of the three officers.

12. That there is no way that I can/could manipulate, delete, or modify in any manner whatsoever the audio/video data recorded of Mr. Alan Thibault's December 5, 2014 stop, detention, testing, search of the tractor, arrest or booking activities recorded at the scene of the stop by Unit No. 33's dash cam or recorded within the Booking Room by the permanently mounted audio/video camera.

13. That I have reviewed the audio and video recording of the December 5, 2014 stop, detention, testing, search of the tractor and arrest of Alan Thibault as downloaded on a DVD (**Ex 1**) and have identified the individuals visually depicted and/or audibly recorded on this DVD as including Mr. Alan Thibault, myself, as well as Grosse Pointe Farms Department of Public Safety Sgt. Holly Krizmanich, Public Safety Officer Veronica Cashion, and Public Safety Officer Thom Dionne.

14. That the audio and video recordings of the December 5, 2014 stop, detention, testing, search of the

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tractor and arrest of Alan Thibault as downloaded on the DVD (**Ex 1**) is a true and accurate depiction of the events depicted on same.

15. That I have reviewed the audio and video recording of the December 5, 2014 activities that took place at the City of Grosse Pointe Farms Department of Public Safety station, including the testing and booking of Alan Thibault, as downloaded onto a DVD and captured by the permanently mounted video/audio recording camera in the booking room (**Ex 2**), and have identified the individuals visually depicted and/or audibly recorded on this DVD as including Alan Thibault, myself, Grosse Pointe Farms Department of Public Safety Sgt. Krizmanich, Public Safety Officer Veronica Cashion and Public Safety Officer Thom Dionne.

16. That the audio and video recordings of the December 5, 2014 testing and booking of Alan Thibault as downloaded onto a DVD as described above is a true and accurate depiction of the events depicted in same.

17. That on December 5, 2014 I observed the erratic operation of a semi tractor-trailer on Moross near the intersection of Moross and Mack Avenue. I observed the front tire on the driver's side of the semi tractor hit, go up and over and bounce off the median, while it was being operated in a straight line on this stretch of straight roadway. I also observed two (2) equipment violations in violation of the Michigan Motor Vehicle Code, same being an inoperable top clearance lamp on the top of the front of the trailer and the lack of an operational license plate lamp on the rear of the trailer. I therefore commenced a traffic stop whereupon I learned the identity of the driver, Mr. Alan Thibault. I

personally participated in the stop, detention and testing of Mr. Thibault on December 5, 2014 as well as the search of the semi tractor. I also arrested Mr. Thibault and participated in those activities conducted at the Grosse Pointe Farms Department of Public Safety station following his arrest.

18. That attached hereto as **Exhibit 3** is a copy of the Case Report prepared on December 5, 2014 with Case Report No. 140005021-001, sixteen (16) pages in length. Included in **Exhibit 3** are the Case Report Administrative Details; my Narrative; my Drug Influence Evaluation (completed post-arrest); my Drug Influence Narrative (completed post-arrest); Alcohol and Drug Determination Sheet (Blood Sample Information Sheet); Breath, Blood, Urine Test Report; Chemical Test Rights Form; State of Michigan Commercial Law Citation Ticket No. 14GF01772; Arrest and Booking Record; and, State of Michigan Department of State Police Laboratory Report (completed on December 19, 2014).

19. That my initial contact with Mr. Thibault, before I asked him to exit the tractor cab, revealed a rolled down window, a stereo radio being operated extremely loud (it was necessary for me to request that he turn it off), Mr. Thibault smoking/puffing on an unlit cigarette (he subsequently attempted to extinguish same), that his face was flushed and red, and he appeared disoriented and spoke with slow speech.

20. That when I asked Mr. Thibault to exit the semi tractor cab, when he stood upon the ground he was shaking, in spite of the fact that he had just exited a

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warm semi tractor cab (**Ex 1**, at approximately 01:51:16).

21. That for the reasons set forth in the two above paragraphs together with the information contained within my Narrative within **Exhibit 3** and my deposition testimony, I had probable cause to have Mr. Thibault undergo Field Sobriety Tests and Standard Field Sobriety Tests in that he appeared under the influence of either intoxicants or controlled substances.

22. That prior to performing the Field Sobriety Testing, I was assured by Mr. Thibault that he knew the alphabet “A” through “Z” (**Ex 1**, at approximately 01:51:41 and at approximately 01:52:19).

23. That I requested Mr. Thibault complete the following Field Sobriety Tests and these were my observations:

- A. Picking a number between “21” and 19” (**Ex 1**, at approximately 01:52:27). Mr. Thibault properly selected the number “20;”
- B. Recitation of the alphabet starting with “D” (David) and stopping at “O” (Ocean) (**Ex 1**, at approximately 01:52:41). Mr. Thibault started with “D” then stated “A,” “B,” “C” ... and continued his recitation of the alphabet past the letter “O;”
- C. Finger dexterity: instructed to complete three times on right hand (**Ex 1**, at approximately 01:53:02). Mr. Thibault successfully completed this test;

D. Modified Romberg: Mr. Thibault counted the passage of 30 seconds in his mind as 19 seconds (**Ex 1**, at approximately 01:57:19 to 01:57:38).

24. That prior to administering the Standard Field Sobriety Tests, I was assured by Mr. Thibault that he had no problems standing, sitting or walking (**Ex 1**, at approximately 01:53:22).

25. That the Standardized Field Sobriety Test that I administered to Mr. Thibault are the recommended battery of standardized, validated tests recognized by the NHTSA, following research as reliably providing “clues” to be used in determining a subject’s impairment due to alcohol or drugs. The three (3) Standard Field Sobriety Tests composing the battery are the Walk-and-Turn, the Horizontal Gaze Nystagmus, and the One-Leg Stand. All three of these Standard Field Sobriety Tests were given to Mr. Thibault.

26. That the Walk-and-Turn test is divided into two (2) phases, an instruction phase and a walking phase. The instruction phase requires a subject to stand heel-to-toe with their arms at their sides, listening to and remembering the instructions. The walking phase requires balancing, walking heel-to-toe, and turning with a return heel-to-toe walk.

27. That the instruction phase required Mr. Thibault to stand heel-to-toe with the right foot ahead of his left foot with the heel of his right foot against the toe of his left foot, keeping his arms at his sides, with myself demonstrating said stance. Mr. Thibault was

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required to maintain this stance until he was instructed to begin the walking phase.

28. That the walking phase required Mr. Thibault to take nine (9) heel-to-toe steps on an imaginary straight line, turn around keeping the front or lead foot on the line and to turn by taking a series of small steps with the other foot, and to return nine (9) heel-to-toe steps down the line, counting each step out loud. Mr. Thibault was instructed, as required, to keep his arms at his sides at all times, not to stop walking until the test was completed, and asked if he understood the instructions before he began the walking phase, to which he responded that he did.

29. That there are eight (8) “clues” I was instructed to watch for during both the instruction and walking phases of the Walk-and-Turn standardized test. Those clues are as follows:

- A. The subject cannot keep balance while listening to the instructions (subject fails to maintain the heel-to-toe position throughout the instructions and/or the subject sways or uses the arms to balance but maintains the heel-to-toe position;
- B. Starts too soon, before the instructions are finished;
- C. Stops while walking;
- D. Does not touch heel-to-toe;
- E. Steps off line;

- F. Uses arms to balance (subject raises one or both arms more than six inches from the sides in order to maintain balance);
- G. Improper turn;
- H. Incorrect number of steps.

30. That if a subject exhibits two (2) or more “clues” on the Walk-and-Turn test or fails to complete it, research has demonstrated the subject to be impaired by intoxicants or controlled substances.

31. That I administered the Walk-and-Turn Standard Field Sobriety Test to Mr. Thibault on two (2) occasions during the December 5, 2014 stop. The first Walk-and-Turn test commences on **Exhibit 1** at approximately 01:53:24 and ends at approximately 01:55:04. The second Walk-and-Turn Standard Field Sobriety Test commences on **Exhibit 1** at approximately 02:14:14 and ends at approximately 02:15:18.

32. That Mr. Thibault demonstrated extreme body rigidity throughout both the instructional and walking phases of the first Walk-and-Turn test with rigid movement. During the instructional phase, Mr. Thibault swayed and attempted to maintain his balance using his arms. During the walking phase, Mr. Thibault on multiple occasions used his arms to maintain balance. He also stopped on at least two (2) occasions while walking. As such, Mr. Thibault demonstrated at least four (4) “clues” during his first Walk-and-Turn test.

33. That during both the instructional and walking phases of the second Walk -and-Turn test, Mr. Thibault

demonstrated extremely rigid muscle tone and rigid movement. Throughout the instructional phase, Mr. Thibault utilized his arms in an effort to maintain his balance on multiple occasions when he began to sway. During the walking phase, Mr. Thibault used his arms to balance (raising one or both arms more than six inches from the sides in order to maintain balance) on multiple occasions. Mr. Thibault also stopped while walking and also stepped off the line with his left foot entirely off the line and off to his left side. As such, Mr. Thibault demonstrated four (4) “clues” during his attempt to perform this test.

34. That the second Standardized Field Sobriety Test I administered to Mr. Thibault was the One-Leg Stand test. It too is broken into two phases, an instructional phase and a balancing phase. During the instructional phase, the subject is instructed to stand with his feet together and arms down at his sides. The subject is instructed to remain in that position and not to begin the balancing phase until instructed to do so. During the instructional phase, the subject is told they will have to raise either leg approximately six inches off the ground with that leg held straight out with the other leg held straight as well. The subject is instructed that they must maintain this foot elevation throughout the test and that they must look at their elevated foot during the test. The subject is also told that they will have to count out loud in the following manner: “one thousand one, one thousand two, one thousand three” and so on until told to stop. The subject is asked if they understand the instructions before they are told to commence the balancing phase. There are four (4) “clues” the examiner looks for including the subject putting the foot down, using arms to balance, sways

while balancing, and hopping. Research has demonstrated that if an individual shows two (2) or more clues or fails to complete the One-Leg Stand, there is a good chance that they are impaired.

35. That the One-Leg Standard standardized test begins at **Exhibit 1** at approximately 01:55:03 and ends at approximately 01:56:34.

36. That during the balance phase of the One-Leg Stand test, Mr. Thibault did not count as instructed, in that he failed to count by “one thousand one, one thousand two, one thousand three,” etc. Mr. Thibault could not maintain his elevated foot at a constant height, swayed while balancing, and used his arms to balance. He also hopped at one occasion. As such, Mr. Thibault exhibited at least four (4) “clues” throughout this test.

37. That the last test of the Standard Field Sobriety battery of tests I administered to Mr. Thibault was the Horizontal Gaze Nystagmus (HGN). Horizontal Gaze Nystagmus is the involuntary jerking of the eyes as they gaze toward the side. During the HGN test, the subject is asked to focus on a stimulus, and, in Mr. Thibault’s case, he was asked to focus upon a blue light. The stimulus is then moved from side to side. When the subject’s eyes are following the smoothly moving stimulus (light), they should not jerk or bounce. If the eyes jerk or bounce as they follow the smoothly moving stimulus (light), the subject is said to have a Lack of Smooth Pursuit (LSP). Another component of this test seeks to identify the presence or lack of Distinct and Sustained Nystagmus at Maximum Deviation. At the extreme lateral gaze, known as the end point or maximum deviation, the Nystagmus is

Distinct and Sustained when the stimulus is held for a minimum of four (4) seconds. If the subject eye in the Maximum Deviation demonstrates Nystagmus while being held in this position, the subject is demonstrating Distinct and Sustained Nystagmus. The examiner looks for Nystagmus clues in each eye. A total of two (2) “clues” for each eye are available when the HGN and Distinct and Sustained Nystagmus at Maximum Deviation tests are administered.

38. That the HGN test I administered to Mr. Thibault commences at **Exhibit 1** at approximately 01:57:55 and ends at approximately 01:59:28. Mr. Thibault demonstrated Lack of Smooth Pursuit in the left eye, Nystagmus at Maximum Deviation in the left eye, Lack of Smooth Pursuit in the right eye, and Nystagmus at Maximum Deviation in the right eye. As such, a total of four clues was demonstrated by Mr. Thibault throughout this test. (I also performed a vertical nystagmus examination and no nystagmus was demonstrated.)

39. That I arrested Mr. Thibault during the second Walk-and-Turn Standard Field Sobriety Test in that I had the necessary elements present to arrest an individual for DWI (Driving While Impaired) in that I had observed the improper operation of a vehicle by Mr. Thibault; Mr. Thibault was in control of the vehicle at the time of the traffic stop; that it was a vehicle he was in; and, that he showed impairment on the Field Sobriety Testing and Standard Field Sobriety Testing.

40. That at City of Grosse Pointe Farms Department of Public Safety station, I completed a Drug Influence Evaluation upon Mr. Thibault and also completed a Drug Influence Narrative following my

Drug Influence Evaluation. During the Drug Influence Evaluation, I repeated the HGN Standard Field Sobriety Test, the Walk-and-Turn Standard Field Sobriety Test, and the One-Leg Stand Standard Field Sobriety Test (both left and right leg), as well as several other tests used to determine impairment. The results of those tests are contained within **Exhibit 3** in the Drug Influence Evaluation and Drug Influence Narrative, and, in short, Mr. Thibault continued to demonstrate those “clues” that would substantiate impairment. During the Drug Influence Evaluation, I discovered a white powder-like substance in Mr. Thibault’s left nostril.

41. That I requested Mr. Thibault consent to providing blood samples for alcohol and drug analysis by the Michigan State Police Laboratory and, after reading Mr. Thibault his Chemical Test Rights, I accompanied him to Cottage Hospital where the medical staff drew the appropriate blood samples that were sealed and forwarded to the Michigan State Police Laboratory under chain of custody procedures.

42. That, based upon my training and experience as well as my observation of the erratic driving of the semi tractor-trailer by Mr. Thibault, together with my interview of him at the scene of the stop coupled with his performance of the Field Sobriety Tests and Standard Field Sobriety Tests, probable cause existed to arrest him for impaired operation of a motor vehicle.

43. That following my Drug Influence Evaluation on December 5, 2014, and based upon my training and certification, in my opinion Mr. Thibault was under the influence of a CNS depressant and/or CNS stimulant and was not able to operate a vehicle safely.

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Further affiant saith not.

/s/Edward Wierszewski
EDWARD WIERSZEWSKI

Subscribed and sworn to before me
this 25 day of March, 2016.

/s/Kristen Bigham
Notary Public
County of Wayne, State of MI
My Commission Expires: 9-24-2022

KRISTEN BIGHAM Notary Public, State of Michigan County of Wayne My Commission Expires Sep. 24, 2022 Acting in the County of Wayne
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EXHIBIT D

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

Case No. 2:15-cv-11358

ALAN THIBAUT,)
)
Plaintiff,)
)
vs.)
)
EDWARD WIERSZEWSKI,)
individually and in his official)
capacity as a Public Safety Officer,)
)
Defendant.)
_____)

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UNIDENTIFIED SPEAKER: All right. 53. How about that 50.

OFFICER WIERSZEWSKI: 33 to 30. Traffic Moross and Mack.

UNIDENTIFIED SPEAKER: 30.

OFFICER WIERSZEWSKI: Readable plate. Oklahoma 828. One George Adam. 828 1GA.

CDL. Logbook. Medical card.

MR. THIBAUT: (Inaudible.)

OFFICER WIERSZEWSKI: Okay. Annual inspection as well.

MR. THIBAUT: Do you know where the Wendy's is here?

OFFICER WIERSZEWSKI: Yes. Right down the road here.

MR. THIBAUT: Can you tell me how far?

OFFICER WIERSZEWSKI: About maybe a block right there.

Do you have any kind of medical issue?

MR. THIBAUT: No.

OFFICER WIERSZEWSKI: What time did you start driving today?

MR. THIBAUT: I started driving about (inaudible.)

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OFFICER WIERSZEWSKI: You take any medications at all?

MR. THIBAUT: No.

OFFICER WIERSZEWSKI: What was up back here? You bounced off the curb.

MR. THIBAUT: I was looking for Wendy's. It says it's over there. I was trying to make the turn and then I saw the split. Then I saw the turn at Mack Avenue. I remember the address was on Mack Avenue. I jerked over a little bit and I felt so bad. And I saw traffic. I didn't want to go into the oncoming traffic.

OFFICER WIERSZEWSKI: Okay. A couple other things. You don't have any license plate light on the plate. You have your clearance light out on the top of the trailer.

You still over on Bentley?

MR. THIBAUT: Yes, in Monroe.

OFFICER WIERSZEWSKI: Okay. Step out for a minute.

Have you had anything to drink tonight?

MR. THIBAUT: No.

OFFICER WIERSZEWSKI: Okay. You realize that cigarette is not even lit, right?

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MR. THIBAUT: No. It goes out a lot.

OFFICER WIERSZEWSKI: Just do me a favor. Just stand right here. Okay?

MR. THIBAUT: Okay.

OFFICER WIERSZEWSKI: Sir, I just want to do a couple tests, all right?

MR. THIBAUT: Yes.

OFFICER WIERSZEWSKI: Do me a favor. Put your hands up in front of you. Just stand right here for me. Okay.

Why are you shaking so much?

MR. THIBAUT: Because it's chilly.

OFFICER WIERSZEWSKI: Is it just chilly?

MR. THIBAUT: Yes.

OFFICER WIERSZEWSKI: But you're in a truck. You're in a vehicle with heat, right?

MR. THIBAUT: Yes. I just stepped out.

OFFICER WIERSZEWSKI: Put your arms this way.

Are you taking any drugs today?

MR. THIBAUT: No.

OFFICER WIERSZEWSKI: Have you taken

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any kind of prescribed pills or any medication at all?

MR. THIBAUT: No.

OFFICER WIERSZEWSKI: What level education do you have?

MR. THIBAUT: I have some college. Army.

OFFICER WIERSZEWSKI: Do you know your alphabet A through Z?

MR. THIBAUT: Yes.

OFFICER WIERSZEWSKI: I'll tell you what. Why don't we walk back to the front of my vehicle. Okay. Stand by the vehicle. Right here. All the way back. Do me a favor. Put your hands up on the car. This is for your safety as well as mine. Do you have anything on you that is going to poke me or stab me?

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MR. THIBAUT: No.

OFFICER WIERSZEWSKI: Anything that is going to hurt me?

MR. THIBAUT: No.

OFFICER WIERSZEWSKI: Okay. So you know your alphabet from A through Z?

MR. THIBAUT: Yes.

OFFICER WIERSZEWSKI: Turn around.

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Face your truck. What I want you to do, I'm going to give you a set of numbers. I want you to pick any number that falls between the set I give you. All right. Pick a number for me between -- pick any number between 21 and 19.

MR. THIBAUT: 20.

OFFICER WIERSZEWSKI: Then just recite the alphabet starting with the letter D, David, stopping at the letter O, as in ocean.

MR. THIBAUT: D, A, B, C, D, E, F, G, H, I, J, K L, M, N, O, P Q, R, S, T, U, V -- stopping at O.

OFFICER WIERSZEWSKI: What I want you to do -- watch me. With my right hand, okay. With your right hand, when I ask you to, you're going to touch the tip of your thumb to the tip of each finger and count out loud, just like this. 1, 2, 3, 4; 4, 3, 2, 1. You do that three times. Okay.

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MR. THIBAUT: 1, 2, 3, 4; 4, 3, 2, 1. 1, 2, 3, 4; 4, 3, 2, 1. 1, 2, 3, 4; 4, 3, 2, 1.

OFFICER WIERSZEWSKI: Do you have any problems standing or sitting or walking?

MR. THIBAUT: (Nods head no.)

OFFICER WIERSZEWSKI: What I want you

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to do is imagine there's a straight line here in front of us.

MR. THIBAUT: Okay.

OFFICER WIERSZEWSKI: Put your right foot directly in front of your left foot, touching heel to toe. I want you to stay like that, arms relaxed at your side. I want you to stay like that until I'm done explaining the test.

When I ask you to, you're going to walk eight steps, heel to toe forward. You're going to turn. I'll show you how to turn. You're going to walk back eight steps, heel to toe. From your position this is what it's going to be. Count your steps out loud. Arms are down at your side. Eyes are focused on your forward toe. Counting out loud, one, two, three and so on, until you get up to number eight. I'm sorry. Until you get to the ninth step. Nine steps forward. Okay. Nine steps forward. Nine steps back.

When you get to the ninth step this is going to be your turn. Pay attention. If this is step six, seven, eight, nine, whatever foot is forward on your ninth step, keep that foot planted. With your other foot make

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a series of small steps, turning yourself around. Walk back the way you

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started, nine steps, heel/toe, one, two, three, four, all the way until you get to number nine. Once you begin the test do no stop the test for any reason.

Do you understand?

MR. THIBAUT: Yes.

OFFICER WIERSZEWSKI: Okay. Whenever you're ready to begin, go ahead.

MR. THIBAUT: One, two, three, four, five, six, seven, eight, nine. One, two, three, four, five, six, seven, eight, nine.

OFFICER WIERSZEWSKI: Turn around. Face me. What I want you to do is arms down at your side. Feet together just like this. Okay. What I want you to do when I ask you to, you're going to pick and chose whatever foot you want. Doesn't matter. Whichever foot feels most comfortable.

Whatever foot you choose, you are going to lift it up, elevate your foot six inches from the ground, arms are going to be down at your side. Eyes going to be focused on that foot. You're going to count out loud like this: 1001, 1002, 1003, 1004, and so on until I ask you to stop.

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MR. THIBAUT: Okay.

OFFICER WIERSZEWSKI: Do you understand that as I explained the test?

MR. THIBAUT: Yes.

OFFICER WIERSZEWSKI: Stand by for one second. You saw how I did it right here, correct?

MR. THIBAUT: Yes.

OFFICER WIERSZEWSKI: I didn't have any problems. So I'm going to have you stand right there. Okay. And go ahead and pick your foot up and begin.

MR. THIBAUT: One, two --

OFFICER WIERSZEWSKI: Got to get your foot up higher.

MR. THIBAUT: Three, four, five, six, seven, eight, nine --

OFFICER WIERSZEWSKI: Got to get your foot up higher. Straight out.

MR. THIBAUT: 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35.

OFFICER WIERSZEWSKI: Go ahead and put your foot down. What I want you to do, stand right here. Put your arms down at your side. What

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I want you to do, when I ask you to, you're going to tilt your head back. You're going to close your eyes. In your mind you're going to count the passage of 30 seconds. When you believe 30 seconds has passed you're going to

bring your head forward, open your eyes and tell me to stop.

Do you understand?

MR. THIBAUT: Count to 30 and --

OFFICER WIERSZEWSKI: In your mind when you believe 30 seconds has passed, you just open your eyes. So when I tell you to you're going to tilt your head back. You're going to close your eyes. You're going to begin counting. So when you think 30 seconds has stopped open your eyes and tell me to stop. So I'll know 30 seconds has passed. Okay. So I'll tell you when to start. You're going to tell me when to stop. Go ahead. Tilt your head back. Close your eyes and begin.

MR. THIBAUT: 30 seconds.

OFFICER WIERSZEWSKI: Okay. How many seconds was that do you think?

MR. THIBAUT: Either 29 or 31.

OFFICER WIERSZEWSKI: How do you get to that?

MR. THIBAUT: I counted in my head.

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OFFICER WIERSZEWSKI: Did you count one or by thousands or how did you count?

MR. THIBAUT: Just one, two, three, four.

OFFICER WIERSZEWSKI: Okay. Are you able to cross your eyes?

MR. THIBAUT: Yes.

OFFICER WIERSZEWSKI: Okay. What I want you to do, see that light right there?

MR. THIBAUT: Yes.

OFFICER WIERSZEWSKI: I want you to watch with this light. All I want you to do is follow this light around. All right. I'm going to bring it down to the bridge of your nose but I'm not going to touch your nose. Okay. Keep your eyes on it.

Is there anything in the vehicle I need to know about?

MR. THIBAUT: No.

OFFICER WIERSZEWSKI: Okay. There's no weapons, drugs, grenades, bombs, rocket launchers, marijuana? So you have no problem if I look through the vehicle then?

MR. THIBAUT: No. (Inaudible.)

OFFICER WIERSZEWSKI: I'll tell you

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what. Why don't you have a seat back here. Stay in the warm. Why don't you step back here.

MR. THIBAUT: Is it possible I can call my dispatcher.

OFFICER WIERSZEWSKI: In a couple seconds here. Okay. Just have a seat right there.

OFFICER CASHION: When I drove by he was hanging out of the window. (Inaudible.)

OFFICER WIERSZEWSKI: He's got the radio blasting. He's smoking a cigarette. It's not even lit.

OFFICER CASHION: Right.

OFFICER WIERSZEWSKI: I'm just wondering where it's at here. His 30 second passage was 20 seconds. So he sped up on that. He didn't have enough time. He just put his four ways on. He didn't have enough time to hide anything. It's got to be something in here. Nothing.

Is that normal. Gum?

OFFICER CASHION: Gum.

OFFICER WIERSZEWSKI: I never seen it like that.

OFFICER CASHION: No.

OFFICER WIERSZEWSKI: I mean

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definitely by looking at him I could tell something is not right. I mean he couldn't even stand there.

OFFICER CASHION: He was like hanging out of the window.

OFFICER WIERSZEWSKI: Yes. Come on. Find me something here. Come on. There's got to be something.

OFFICER CASHION: This side clear.

OFFICER WIERSZEWSKI: What is he on. I'm not happy. I want, I want something. There's got to be something here that I'm missing. This shit again.

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OFFICER CASHION: Did you look in this toolbox too?

OFFICER WIERSZEWSKI: What's that?

OFFICER CASHION: Did you look in the toolbox?

OFFICER WIERSZEWSKI: No, I did not.

OFFICER CASHION: Where's he even coming from.

OFFICER WIERSZEWSKI: (Inaudible.) For what it is -- (inaudible.) There's no way he should be walking the way he was, that bad. You know, those tests weren't very good I don't think. What do you think?

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OFFICER CASHION: Uh-uh.

OFFICER WIERSZEWSKI: Why don't you try one more time, if you would. Then I'm going to go run him and see what's going on here. What am I missing. The one thing I didn't do, I didn't look up his nose to see if he snorted anything. Some stimulant. Got to be cuz everything sped up. Let's see here. I mean even the fact that he's smoking a cigarette that is not even lit. That's very strange.

OFFICER CASHION: Right.

OFFICER WIERSZEWSKI: Oh, God, something is in here. I know it is. (Inaudible.)

What was your first name again?

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MR. THIBAUT: Alan.

OFFICER WIERSZEWSKI: When did you start driving today?

MR. THIBAUT: I started driving an hour late because -- (inaudible.)

OFFICER WIERSZEWSKI: You have only been driving for -- what time do you think it is right now, roughly?

MR. THIBAUT: Two o'clock.

OFFICER WIERSZEWSKI: All right. So you have only been driving for a couple hours.

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MR. THIBAUT: (Inaudible.)

OFFICER WIERSZEWSKI: What's that?

MR. THIBAUT: (Inaudible.)

OFFICER WIERSZEWSKI: What did you take today?

MR. THIBAUT: I took the -- (inaudible.)

OFFICER WIERSZEWSKI: No. I'm saying what did you take? What are you on right now?

MR. THIBAUT: I'm on nothing, sir.

OFFICER WIERSZEWSKI: Well, I'm going to disagree with that.

MR. THIBAUT: Okay. (Inaudible.)

OFFICER WIERSZEWSKI: Well, the tests that I gave you, you failed those tests. All right. So it's an indication that you have taken something that you shouldn't have taken today. So I'm going to have a dog come out and see if there's anything in the car. And I'm taking you in for operating while under the influence.

MR. THIBAUT: My girlfriend -- (inaudible.)

OFFICER WIERSZEWSKI: What's that?

MR. THIBAUT: Is there anything I can do -- (inaudible.)

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OFFICER WIERSZEWSKI: That's what I'm telling you. With those tests I gave you, okay, you haven't drank but you're on something. You have taken something today, whether it's prescribed or not prescribed. You've taken something.

MR. THIBAUT: (Inaudible.)

OFFICER WIERSZEWSKI: Well, it's not common for somebody to be smoking on a non lit cigarette, hanging out the window, hitting a curb and unable to do these simple tests that I just gave you. So with all that together, something is going on. If you don't want to be honest with me then I just have to take the other route, so.

MR. THIBAUT: (Inaudible.)

OFFICER WIERSZEWSKI: Did you take any over the counter prescriptions today?

Sit tight for a minute.

OFFICER DIONNE: What did you think?

OFFICER WIERSZEWSKI: He hit the curb. He can't do sobriety tests. He doesn't have HGN. His 30 second count is done in 20 seconds. He can barely do the walk and turn. He's --

SERGEANT KRIZMANICH: (Inaudible.)

OFFICER WIERSZEWSKI: I'm pretty sure it's drugs. He's telling me he's not on anything.

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I can't find anything in the car. But he's, honestly, he's got an operating while impaired back in '06.

You look at him. He hits the curb here. I pull up to him. Veronica looks. He's hanging out the window. I go up there. I'm talking to him. His face is all flushed. He's smoking a cigarette that is not lit. The radio is pounding loud. Something is not right.

SERGEANT KRIZMANICH: Yes. (Inaudible.)

OFFICER WIERSZEWSKI: I'd give him a PBT but I know it's not alcohol. It's something else.

SERGEANT KRIZMANICH: Yeah. (Inaudible.)

OFFICER WIERSZEWSKI: I seem to get there and be nothing.

OFFICER DIONNE: What are your options?

OFFICER WIERSZEWSKI: There are no options.

OFFICER DIONNE: Tell him: Hey, you look like you're sick. We're going to take your truck for safekeeping and give you a ride home.

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What do you do?

OFFICER WIERSZEWSKI: I don't know. He said he's in the army too. So I don't know if he took all these drugs tests there. If you talk to him, something is not right. Veronica seems to -- (inaudible.)

SERGEANT KRIZMANICH: Yeah.

OFFICER WIERSZEWSKI: Something doesn't look right with the sobriety tests. Yeah.

OFFICER DIONNE: He's flush. I don't know what he's flush about.

OFFICER WIERSZEWSKI: Yes. He was all red in the face. I'm going to pull him back out and do his pupils. Why don't you guys see what you think when I'm talking to him?

SERGEANT KRIZMANICH: Is he diabetic?

OFFICER WIERSZEWSKI: No. He said no. I'll doublecheck. If you're diabetic you shouldn't be showing these signs.

(Inaudible conversation.)

OFFICER WIERSZEWSKI: I might.

OFFICER DIONNE: Do you want me to go back and get one of those?

OFFICER WIERSZEWSKI: No, that's all right.

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OFFICER DIONNE: Do you have a PBT?

OFFICER WIERSZEWSKI: Why don't you come out real quick. Let's go through one more test here. I want to check your eyes. Right in front of the car.

OFFICER DIONNE: (Inaudible.) What's your MOS?

MR. THIBAUT: Cooking. I really apologize. (Inaudible.) So I really apologize for that.

OFFICER WIERSZEWSKI: I don't think it's that. I think there's something else going on.

OFFICER DIONNE: Pull up your sleeves. You doing anything you shouldn't be doing, man?

MR. THIBAUT: No.

OFFICER DIONNE: Nothing strange?

MR. THIBAUT: I don't do anything like that.

OFFICER DIONNE: When is the last time you did drugs?

MR. THIBAUT: 15 years ago.

OFFICER DIONNE: What was your drug of choice?

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MR. THIBAUT: Weed.

OFFICER WIERSZEWSKI: Face this way. Just look straight ahead. Okay. Go ahead and pull your sleeves down.

Put your hands out. Put them straight out in front of you. Hold them like that. Flip them over. One more time I want to see you walk and turn one more time. Okay.

What I want you to do is put your right foot in front of your left. Just like this. I want you to stand like that. Now what I want you to do when I ask you to, give me nine steps heel/toe forward. You're going to turn around, walk back nine steps heel/toe.

So from that starting position when I tell you it's going to look like this: One, two, three. And so on until you get to number nine. When you get to number nine, whatever foot is forward, seven, eight, nine. Keep that foot planted.

Other foot, make a series of small steps. Turn yourself around. Walk back the way you started, nine steps heel/toe, one, two, three so on until you stop, until you get back to where you're at. Once you begin the test don't stop the

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test for any reason.

Do you understand that test? Whenever you're ready, begin.

MR. THIBAUT: One, two, three, four--

OFFICER WIERSZEWSKI: Put your hands behind your back. You're under arrest for operating while intoxicated. You can't even walk. Okay?

MR. THIBAUT: (Inaudible.)

OFFICER WIERSZEWSKI: We're just going to take you back in there and get some things going here.

MR. THIBAUT: What are you going to do with my truck?

OFFICER WIERSZEWSKI: Well, we'll figure that out here in a minute, okay. Just bear with me.

SERGEANT KRIZMANICH: Who do you deliver for?

MR. THIBAUT: Sigma. Wendy's.

(Inaudible conversation.)

Can someone call my boss? I have to call my boss.

OFFICER WIERSZEWSKI: Let's go back

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to the back of the vehicle here. Watch your head right here. Go in the back seat.

OFFICER DIONNE: Yeah, there is something going on there.

SERGEANT KRIZMANICH: Yeah. Before he even did the sobriety. Right.

OFFICER WIERSZEWSKI: Yes. (Inaudible.)

OFFICER DIONNE: Want me to run him down to Cottage?

OFFICER WIERSZEWSKI: No. I got to do the whole DRE.

OFFICER DIONNE: I got one in the car if you want to read it. Oh, you want to do it on camera.

OFFICER WIERSZEWSKI: I got to do the whole DRE on him. It's not alcohol so.

SERGEANT KRIZMANICH: Yeah. The 1-800 number.

(Inaudible conversation amongst Officers.)

OFFICER WIERSZEWSKI: I'll just call this one. Could be. No, it's it. See if he's got dispatch in there.

34 to T2. Can you see if he's got a

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number for dispatch. (Inaudible.) Yeah, he's on something. Yeah.

SERGEANT KRIZMANICH: You got his phone?

OFFICER WIERSZEWSKI: Yeah, I got his phone.

SERGEANT KRIZMANICH: Sigma. Jeff, manager.

OFFICER WIERSZEWSKI: Jeff. Plant manager.

SERGEANT KRIZMANICH: Got it?

OFFICER WIERSZEWSKI: Yes. What's his name?

SERGEANT KRIZMANICH: His name is Alan.

OFFICER WIERSZEWSKI: Is this Jeff? Jeff, this is Officer Wierszewski. Grosse Pointe Farms Police Department. I have one of your drivers here, Alan.

What's the last name?

SERGEANT KRIZMANICH: Thibault.

OFFICER WIERSZEWSKI: Thibault. He's in custody. He's going to be arrested. I'm going to give you guys the option of having a driver come out here and get this tractor-trailer or do you

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guys not have anybody?

Where are you based out of? Okay. Yeah.

They're all the way down in Ohio.

SERGEANT KRIZMANICH: Ohio?

OFFICER WIERSZEWSKI: Yeah.

SERGEANT KRIZMANICH: Does he have any ideas?

OFFICER WIERSZEWSKI: What's that?

SERGEANT KRIZMANICH: Does he have any ideas?

OFFICER WIERSZEWSKI: 45 minutes to an hour.

SERGEANT KRIZMANICH: Are you a driver at all?

OFFICER WIERSZEWSKI: No. No.

SERGEANT KRIZMANICH: Shoot.

OFFICER WIERSZEWSKI: I actually can't give you the reason for it. He can call you later but --.

SERGEANT KRIZMANICH: We can put cones out.

OFFICER WIERSZEWSKI: Yes, the equipment is fine. The equipment is fine. Let me try to call you back here. I'm going to talk to

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the supervisor and see what we can come up with as far as the vehicle. I'll let you know. Okay. Bye.

SERGEANT KRIZMANICH: He's got those like orange triangles.

OFFICER WIERSZEWSKI: Yeah, they got them right here.

SERGEANT KRIZMANICH: That's another option. They can get out within the hour.

OFFICER WIERSZEWSKI: He says 45 minutes to an hour. But, now we're leaving the truck here unsecured so we have to keep somebody here.

SERGEANT KRIZMANICH: Can't we secure it though? What if he's broken down. It's no different than someone breaking down.

OFFICER WIERSZEWSKI: I mean I got a key.

SERGEANT KRIZMANICH: There's just no way. You might be able to get away with it. I guess the key gives you permission.

OFFICER WIERSZEWSKI: Let me call him because it's not his truck. You know what. No. I'm not driving this. It's an automatic.

SERGEANT KRIZMANICH: Oh.

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OFFICER WIERSZEWSKI: If you back up I can get it in there. If we back those cars up I can get it into the Wendy's lot there. I think I can do that. I mean I'll call him and ask him.

SERGEANT KRIZMANICH: (Inaudible.)

OFFICER WIERSZEWSKI: I don't think that would be a problem.

SERGEANT KRIZMANICH: (Inaudible). Sounds like a plan.

OFFICER WIERSZEWSKI: Jeff, it's Officer Wierszewski again. We're stuck on a main road. That's the problem. We would have to have a car tied up. This is an automatic. It looks like it's automatic. I can -- you know, we're only about 60-foot. If I back it up I can put it into a parking lot. If I can get your okay to operate it back to it. Then you guys can come get it instead of impounding it. Does that work?

Okay. Yes. It's only about 60-foot. We're just going to block the road off. I'll back it up and pull it right into this parking lot right here. I'll just leave it right at the edge. We'll lock it up. If you could start making your way out here to come get this thing.

It's at Mack and Moross. It's going

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to be -- yes, Mack and Moross, Grosse Pointe Farms. So you're going to take probably -- take 94 and just get off at Moross. You're going to head eastbound. And -- yep,

M-o-r-o-s-s. And you're going to go down probably about three miles.

Once you come to -- you will see the big intersection. There's a BP Gas Station. It will be across from the BP Gas Station. You will see it sitting in the parking lot. It will be just off to your right hand side as you're coming. As soon as you cross Mack, slow down. Just look to your right. It will be sitting in that alley right there. It's an alleyway to the parking lot, so.

Well -- you know what. How about -- perfect. What I'll do is I'll leave the key. You know what, I'll take the key with me. When you get down here I'm going to give you a number. Call the number and I'll bring the key out to you. So do you have a pen. Okay. It's: 313-885-2100. That's the department. Just let them know that you're here and we'll get somebody out here to get you the key. Okay. Okay.

Yeah. If you're -- which way are you going to take? Are you going to take 75? Yes, 75 to 94 east. Yep. Okay. If you have any

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questions, just call that number if you have any questions. Okay. All right. Bye.

SERGEANT KRIZMANICH: (Inaudible.)

OFFICER WIERSZEWSKI: There's no mention of our whatchamacallit.

SERGEANT KRIZMANICH: Truck.

OFFICER WIERSZEWSKI: Yeah. I'm backing it straight up and just turning right in there. Well, no.

I'm just saying as long as you guys block this road off so nobody comes through I don't see a problem with it.

SERGEANT KRIZMANICH: He's going to call the station.

OFFICER WIERSZEWSKI: He's going to call the station, yes. If I start this and it doesn't feel right I'm not going to do it, so.

SERGEANT KRIZMANICH: We'll back it up.

(Inaudible.)

OFFICER WIERSZEWSKI: 33 to 34. Am I clear to back up?

SERGEANT KRIZMANICH: Affirm. You backing up?

OFFICER WIERSZEWSKI: I'm thinking of pulling it in.

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(Inaudible.)

SERGEANT KRIZMANICH: 33, you're all clear. You done backing in?

OFFICER WIERSZEWSKI: I'm thinking of pulling it in. Yeah. I better go back a little more. I don't know if I'm going to make it.

SERGEANT KRIZMANICH: Add that to your list of things you have driven.

OFFICER WIERSZEWSKI: I know. I didn't want to have to --

(End of Recording.)

* * *

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CERTIFICATE OF NOTARY PUBLIC

State of Michigan)
) SS.
County of Oakland)

I, the undersigned, do hereby certify that the recording that was given to me was accurately transcribed to the best of my ability.

I do further certify that I am not connected by blood or marriage with any of the parties; their attorneys or agents; that I am not an employee of either of them; and that I am not interested, directly or indirectly, in the matter in controversy.

In witness whereof, I have hereunto set my hand.

/s/Nikki Hatz Sinta

Nikki Hatz Sinta, CSR-2377
Certified Shorthand Reporter
Notary Public, Oakland County
My Commission Expires: 12-09-19

EXHIBIT E

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**Case No. 2:15-cv-11358
Hon. Matthew F. Leitman**

[Dated March 24, 2016]

ALAN THIBAUT,)
)
 Plaintiff,)
)
 -vs-)
)
 EDWARD WIERSZEWSKI,)
 individually and in his official)
 capacity as a Public Safety Officer,)
)
 Defendant.)
)

ARI KRESCH (P29593)	GEORGE M. DeGROOD,
SOLOMON RADNER	III (P33724)
(P73653)	Attorney for City of
Attorney for Plaintiff	Defendant
26700 Lahser Road,	400 Galleria Officentre,
Suite 400	Suite 550
Southfield, MI 48033	Southfield, MI 48034
(248) 291-9712	(248) 353-4450
<u>sradner@1800LawFirm.</u>	<u>gdegrood@thomasdegrood</u>
<u>com</u>	<u>.com</u>

AFFIDAVIT OF VERONICA CASHION

STATE OF MICHIGAN)
)ss.
COUNTY OF WAYNE)

I, Veronica Cashion, after first being duly sworn, deposes and states as follows:

1. That I am over the age of twenty-one (21) and make this affidavit upon my own personal knowledge of all of the facts expressed and explained herein.

2. That I was hired by the City of Grosse Pointe Farms Department of Public Safety on October 3, 2012 as a Public Safety Officer, and have remained employed with the City of Grosse Pointe Farms Department of Public Safety continuously since then.

3. That on December 4, 2014 and December 5, 2014 I was a Public Safety Officer for the City of Grosse Pointe Farms Department of Public Safety.

4. That on December 4, 2014 I worked the night shift as a Public Safety Officer for the City of Grosse Pointe Farms Department of Public Safety starting at 11:00 p.m. on December 4, 2014 and ending at approximately 7:00 a.m. on December 5, 2014.

5. That on December 4, 2014 I was assigned Unit (squad car) No. 34 which I operated and used throughout my shift to complete my responsibilities throughout my shift.

6. That on December 5, 2014 I observed the careless operation of a semi tractor-trailer by a subject (determined later to be Alan Thibault) prior to its traffic stop. Specifically, I witnessed the driver's side of

the tractor bounce up and over the curb of the median separating the two directions of travel on Moross, near the intersection of Moross and Mack Avenue in Grosse Pointe Farms. The roadway is straight at this location. Additionally, as I passed the above-described semi tractor, I observed the driver's window down with the driver leaning out of the window. I felt this was unusual under the circumstances. I also personally observed the entire stop, detention, testing and arrest of Mr. Alan Thibault with the exception of the time when Mr. Thibault was in Unit No. 33 with Public Safety Officer Wierszewski or when he was alone in Unit No. 33. I also personally participated in the search of the semi tractor at the scene of the stop.

7. That I also observed and participated in the testing performed upon Mr. Alan Thibault on December 5, 2014 at the City of Grosse Pointe Farms Department of Public Safety station and did participate in Mr. Thibault's booking process at the City of Grosse Pointe Farms Department of Public Safety station.

8. That I have reviewed the audio and video recording of the December 5, 2014 stop, detention, testing, search of the tractor and arrest of Alan Thibault as downloaded on a DVD (copy attached to the Affidavit of Edward Wierszewski as Ex 1), and have identified the individuals visually depicted and/or audibly recorded on this recording as including Mr. Alan Thibault, myself, Public Safety Officer Edward Wierszewski, Public Safety Officer Thom Dionne, and Sgt. Holly Krizmanich. The DVD attached as Exhibit 1 captures the activities completed at the location of the stop.

9. That the audio and video recordings of the December 5, 2014 stop, detention, testing, search of the tractor and arrest of Alan Thibault as downloaded on the DVD (copy attached to the Affidavit of Edward Wierszewski as Ex 1) is a true and accurate depiction of the events that I observed and/or participated in with respect to the stop, detention, testing, search of the tractor and arrest of Alan Thibault at the scene of the stop.

10. That I have reviewed the audio and video recording of the December 5, 2014 activities that took place at the City of Grosse Pointe Farms Department of Public Safety station, including the testing and booking of Alan Thibault, as downloaded onto a DVD and captured by the permanently mounted video/audio recording camera in the booking room (attached to Affidavit of Edward Wierszewski as Ex 2), and have identified the individuals visually depicted and/or audibly recorded on this recording as including Alan Thibault, myself, Public Safety Officer Edward Wierszewski, Public Safety Officer Thom Dionne, and Sgt. Holly Krizmanich.

11. That the audio and video recordings of the December 5, 2014 testing and booking of Alan Thibault as downloaded onto a DVD as described above is a true and accurate depiction of the events depicted thereon with respect to the observations and participation I had with respect to the events captured on said DVD.

12. That throughout the stop, detention, testing, and arrest of Mr. Alan Thibault, Mr. Thibault's face was and remained flushed and red.

13. That I did observe all of the Field Sobriety Tests and Standard Field Sobriety Tests administered to Mr. Alan Thibault from the time he exited the tractor of his semi tractor-trailer until the time of his arrest, including the picking of a number between 19 and 20 (Field Sobriety Test); reciting the alphabet starting at the letter "D" and ending with the letter "O" (Field Sobriety Test); thumb tip and finger tip dexterity test (Field Sobriety Test); a horizontal gaze nystagmus test (Standard Field Sobriety Test); two (2) Walk and Turn tests (Standard Field Sobriety Test); and, a one-leg stand test (Standard Field Sobriety Test).

14. That I observed sufficient "clues" from both Mr. Alan Thibault's attempts to comply with the Field Sobriety Tests and Standard Field Sobriety Tests administered as set forth above, prior to his arrest, such that I concluded sufficient probable cause existed for his arrest for operation of a motor vehicle while impaired by a controlled substance or other intoxicating substance. Those "clues" included Mr. Thibault's improper recitation of the alphabet as instructed; his inability to maintain balance while listening to the instructions for the Walk and Turn testing, stepping off line during the Walk and Turn testing, use of his arms to maintain balance during the Walk and Turn testing, and rigid body/muscle tone while performing the Walk and Turn test; his inability to avoid swaying while attempting to balance during the one-leg stand testing, his use of arms for balance during the one-leg stand testing, and his inability to maintain his raised foot at a constant elevation during the one-leg stand testing. Furthermore, my conclusions were further substantiated by the tests I observed that were performed upon Mr. Alan Thibault at the City of

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Grosse Pointe Farms Department of Public Safety
station.

Further affiant saith not.

/s/Veronica Cashion
VERONICA CASHION

Subscribed and sworn to before me
this 24 day of March, 2016.

/s/Kristen Bigham
Notary Public
County of Wayne, State of MI
My Commission Expires: 9-24-2022

<p>KRISTEN BIGHAM Notary Public, State of Michigan County of Wayne My Commission Expires Sep. 24, 2022 Acting in the County of <u>Wayne</u></p>

EXHIBIT H

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**Case No. 2:15-cv-11358
Hon. Matthew F. Leitman**

[Dated March 24, 2016]

ALAN THIBAUT,)
)
 Plaintiff,)
)
 -vs-)
)
 EDWARD WIERSZEWSKI,)
 individually and in his official)
 capacity as a Public Safety Officer,)
)
 Defendant.)
)

ARI KRESCH (P29593)	GEORGE M. DeGROOD,
SOLOMON RADNER	III (P33724)
(P73653)	Attorney for City of
Attorney for Plaintiff	Defendant
26700 Lahser Road,	400 Galleria Officentre,
Suite 400	Suite 550
Southfield, MI 48033	Southfield, MI 48034
(248) 291-9712	(248) 353-4450
<u>sradner@1800LawFirm.</u>	<u>gdegrood@thomasdegrood</u>
<u>com</u>	<u>.com</u>

AFFIDAVIT OF THOMAS DIONNE

STATE OF MICHIGAN)
)ss.
COUNTY OF WAYNE)

I, Thomas Dionne, after first being duly sworn, deposes and states as follows:

1. That I am over the age of twenty-one (21) and make this affidavit upon my own personal knowledge of all of the facts expressed and explained herein.

2. That I was hired by the City of Grosse Pointe Farms Department of Public Safety on May 11, 2012 as a Public Safety Officer, and have remained employed in that capacity continuously since then.

3. That on December 4, 2014 and December 5, 2014 I was a Public Safety Officer for the City of Grosse Pointe Farms Department of Public Safety and worked the night shift as a Public Safety Officer for the City of Grosse Pointe Farms Department of Public Safety on December 4, 2014 starting at 11:00 p.m. and ending at 7:00 a.m. on December 5, 2014, unless my responsibilities required overtime.

4. That on December 4, 2014 I was assigned Unit (squad car) No. T2 which I operated and used throughout my shift and throughout my patrol duties within the City of Grosse Pointe Farms.

5. That I have reviewed the audio and video recording of the December 5, 2014 stop, detention, testing, search of the tractor and arrest of Alan Thibault as downloaded on a DVD (attached to the Affidavit of Edward Wierszewski as Ex 1), and have

identified the individuals visually depicted and/or audibly recorded on this DVD as including Mr. Alan Thibault, myself, Grosse Pointe Farms Department of Public Safety Sgt. Holly Krizmanich, Public Safety Officer Edward Wierwszewski, and Public Safety Officer Veronica Cashion.

6. That the audio and video recordings of the December 5, 2014 stop, detention, testing, search of the tractor and arrest of Alan Thibault as downloaded on the DVD (attached to the Affidavit of Edward Wierszewski as Ex 1) is a true and accurate depiction of the events recorded on same that I observed when I was at the scene of the stop.

7. That I arrived at the scene of the stop on December 5, 2014 as Mr. Thibault was being placed into the back seat of Unit No. 33 and did remain outside of the rear seat area of Unit No. 33 until Mr. Thibault was removed from Unit No. 33.

8. That on December 5, 2014 I did observe Mr. Alan Thibault attempt to complete a Standard Field Sobriety Test commonly referred to as a Walk-and-Turn, after he was removed from Unit No. 33. During Mr. Thibault's attempt to complete the Walk-and-Turn, I observed several "clues" that led me to believe he may be impaired, including his swaying throughout the instructions given to him by Public Safety Officer Wierszewski with respect to the proper performance of the test, his swaying throughout the time he received the instructions, his usage of his arms to maintain balance throughout both the instruction phase and walking phase of the tests, his rigid body/muscle tone, and his stepping off of the "line." These "clues," together with the clues described to me by Public

Safety Officer Wierszewski and Public Safety Officer Cashion, led me to conclude that Mr. Thibault may have been operating the motor vehicle while impaired or under the influence of a controlled substance or other intoxicating substance and provided probable cause for his arrest.

9. That I personally transported Mr. Thibault from the scene of the stop to the City of Grosse Pointe Farms Department of Public Safety station.

10. That I have reviewed the audio and video recording of the December 5, 2014 activities that took place at the City of Grosse Pointe Farms Department of Public Safety station, including the testing and booking of Alan Thibault, as downloaded onto a DVD and captured by the permanently mounted video/audio recording camera in the booking room (attached to the Affidavit of Edward Wierszewski as Ex 2), and have identified the individuals visually depicted and/or audibly recorded on this DVD as including Alan Thibault, myself, Sgt. Holly Krizmanich, Public Safety Officer Edward Wierszewski and Public Safety Officer Veronica Cashion.

11. That the audio and video recordings of the December 5, 2014 testing and booking of Alan Thibault as downloaded onto a DVD as described above (attached to the Affidavit of Edward Wierszewski as Ex 2) is a true and accurate depiction of the events depicted on said DVD with respect to the observations and participation I had with respect to the events captured on said DVD, including but not limited to my administration of a PBT to Mr. Thibault.

Further affiant saith not.

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/s/Thomas Dionne
THOMAS DIONNE

Subscribed and sworn to before me
this 24th day of March, 2016.

/s/Michelle Hoch
Notary Public
County of Macomb, Acting in Wayne, State of MI
My Commission Expires: 9/3/2017

MICHELLE HOCH Notary Public, State of Michigan County of Macomb My Commission Expires Sep. 03, 2017 Acting in the County of <u>Wayne</u>

EXHIBIT I

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**Case No. 2:15-cv-11358
Hon. Matthew F. Leitman**

[Dated March 23, 2016]

ALAN THIBAUT,)
)
 Plaintiff,)
)
 -vs-)
)
 EDWARD WIERSZEWSKI,)
 individually and in his official)
 capacity as a Public Safety Officer,)
)
 Defendant.)
)

ARI KRESCH (P29593)	GEORGE M. DeGROOD,
SOLOMON RADNER	III (P33724)
(P73653)	Attorney for City of
Attorney for Plaintiff	Defendant
26700 Lahser Road,	400 Galleria Officentre,
Suite 400	Suite 550
Southfield, MI 48033	Southfield, MI 48034
(248) 291-9712	(248) 353-4450
<u>sradner@1800LawFirm.</u>	<u>gdegrood@thomasdegrood</u>
<u>com</u>	<u>.com</u>

AFFIDAVIT OF HOLLY KRIZMANICH

STATE OF MICHIGAN)
)ss.
COUNTY OF WAYNE)

I, Holly Krizmanich, after first being duly sworn, deposes and states as follows:

1. That I am over the age of twenty-one (21) and make this affidavit upon my own personal knowledge of all of the facts expressed and explained herein.

2. That I was hired by the City of Grosse Pointe Farms Department of Public Safety on April 22, 1996 as a Public Safety Officer, and have remained employed with the City of Grosse Pointe Farms Department of Public Safety continuously since then.

3. That on December 4, 2014 and December 5, 2014 I was a Sergeant for the City of Grosse Pointe Farms Department of Public Safety.

4. That on December 4, 2014 I worked the night shift as a Sergeant for the City of Grosse Pointe Farms Department of Public Safety starting at 10:30 p.m. on December 4, 2014 and ending at approximately 6:30 a.m. on December 5, 2014. Furthermore, I was the commanding officer for this night shift.

5. That on December 4, 2014 I was assigned Unit (squad car) No. 32 which I operated and used throughout my shift to complete my responsibilities throughout my shift.

6. That I observed a portion of the stop, detention, testing and arrest of Mr. Alan Thibault on December 5, 2014. I arrived at the scene of the stop shortly before

Mr. Thibault was removed from the rear seat of Unit No. 33.

7. That I have reviewed the audio and video recording of the December 5, 2014 stop, detention, testing, search of the tractor and arrest of Alan Thibault as downloaded on a DVD (copy attached to the Affidavit of Edward Wierszewski as Ex 1), and have identified the individuals visually depicted and/or audibly recorded on this recording as including Mr. Alan Thibault, myself, Public Safety Officer Edward Wierszewski, Public Safety Officer Veronica Cashion, and Public Safety Officer Thom Dionne. Said Exhibit 1 captured the activities completed at the location of the stop.

8. That the audio and video recordings of the December 5, 2014 stop, detention, testing, search of the tractor and arrest of Alan Thibault as downloaded on the DVD (copy attached to the Affidavit of Edward Wierszewski as Ex 1) is a true and accurate depiction of the events for the time frame I observed the stop, detention, testing and arrest of Alan Thibault at the scene of the stop.

9. That I did observe a Standard Field Sobriety Test administered to Mr. Alan Thibault after he was removed from Unit No. 33, yet before his arrest. The Standard Field Sobriety Test I observed was the Walk and Turn test.

10. That I observed sufficient "clues" from Mr. Alan Thibault's attempts to comply with the Walk and Turn test (Standard Field Sobriety Test) administered as I have described above, including his rigid body/muscle tone demonstrated throughout his attempt to complete

this test, his inability to maintain balance while listening to the instructions, his use of his arms to balance himself, and his stepping off line that allowed me to conclude that sufficient probable cause existed for his arrest for operation of a motor vehicle while impaired by a controlled substance or other intoxicating substance, when considered with the totality of other “clues” described to me by Public Safety Officer Wierszewski.

11. That I have reviewed the audio and video recording of the December 5, 2014 activities that took place at the City of Grosse Pointe Farms Department of Public Safety station, including the testing and booking of Alan Thibault, as downloaded onto a DVD and captured by the permanently mounted video/audio recording camera in the booking room (copy attached to the Affidavit of Edward Wierszewski as Ex 2), and have identified the individuals visually depicted and/or audibly recorded on this recording as including Alan Thibault, myself, Public Safety Officer Edward Wierszewski, Public Safety Officer Veronica Cashion, and Public Safety Officer Thom Dionne. Furthermore, said DVD is a true and accurate depiction of the events that I was involved in at the City of Grosse Pointe Farms Department of Public Safety station on said date.

12. That I personally was asked to look up Mr. Thibault’s nostrils at the City of Grosse Pointe Farms Department of Public Safety’s station by Public Safety Officer Wierszewski and did observe a white substance.

Further affiant saith not.

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Subscribed and sworn to before me
this 23rd day of March, 2016.

/s/Kristen Bigham

Notary Public

County of Wayne, State of MI

My Commission Expires: 9-24-2022

<p>KRISTEN BIGHAM Notary Public, State of Michigan County of Wayne My Commission Expires Sep. 24, 2022 Acting in the County of <u>Wayne</u></p>

APPENDIX E

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**Case No. 15-11358
Hon. Matthew F. Leitman**

[Dated June 6, 2016]

ALAN THIBAUT,)
)
Plaintiff,)
)
vs.)
)
EDWARD WIERSZEWSKI,)
individually and in his official)
capacity as a public safety officer,)
)
Defendant.)

MOTION FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE MATTHEW F. LEITMAN
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Monday, June 6, 2016

APPEARANCES:

For the Plaintiff: SOLOMON M. RADNER
26700 Lahser Rd., Ste. 400
Southfield, MI 48033
(248) 291-9712

For the Defendant: MICHELLE A. THOMAS
GEORGE M. DeGROOD, III
400 Galleria Officentre,
Ste. 550
Southfield, MI 48034
(248) 353-4450

*To obtain a copy of this official transcript, contact:
Robert L. Smith, Official Court Reporter
(313) 964-3303 • rob_smith@mied.uscourts.gov*

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Detroit, Michigan
Monday, June 6, 2016
at about 9:53 a.m.

(Court and Counsel present.)

THE LAW CLERK: Please rise.

The United States District Court for the Eastern District of Michigan is now in session, the Honorable Matthew F. Leitman, United States District Judge, presiding.

You may be seated.

The Court calls Case No. 15-11358, Alan Thibault vs. Edward Wierszewski.

Counsel, please state your appearances for the record.

MR. RADNER: Good morning, Your Honor. Solomon Radner appearing on behalf of the plaintiff, Mr. Thibault.

Your Honor, my client is not here yet but he's going to be coming soon. I have no objection with starting the hearing without him being present.

THE COURT: Okay. Thank you.

MS. THOMAS: Good morning, Your Honor. Michelle Thomas and George Degrood on behalf of the defendant, Wierszewski.

THE COURT: Okay.

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MR. DeGROOD: Good morning, Your Honor.

THE COURT: Welcome. Please be seated.

Thank you to everybody for joining me this morning. We are here for a hearing on the defendant's

motion for summary judgment. There is also a motion to exclude some expert testimony.

Before we turn to any of that, let me take up an issue with respect to a notice that the plaintiff filed concerning the filing of a supplemental exhibit in response to the summary judgment motion. The supplemental exhibit is a report -- some sort of a report by Mr. Bugbee, who I understand to be an expert retained by the plaintiff. Is that correct, Mr. Radner?

MR. RADNER: That is correct, Judge, and as soon as we got the report that's when we filed it.

THE COURT: All right. I'm going to strike this report. You can have a seat.

(Plaintiff entered the courtroom at 9:56 a.m.)

THE COURT: There are -- is that your client, Mr. Radner?

MR. RADNER: Yes, Judge.

THE COURT: Okay. All right. As I indicated, Mr. Radner, I am going to strike this report and not consider it, and I want to make sure I explain my ruling. The scheduling order that was entered in this case required

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expert discovery to be completed by February 29th, and expert reports were to be exchanged in 2015. Bugbee's deposition was taken in February, and so I think it would be unfairly prejudicial to consider a report prepared long after the deadline for the exchange of

reports, long after the expert discovery cutoff and after his deposition.

In addition, the report is not properly considered on a motion for summary judgment. An unsworn expert report is hearsay and not properly considered in the context of a summary judgment motion. The authority for that is the 6th Circuit's decision in *Pack vs. Damon Corp*, 434 F.3d 810, at page 815, and *Sigler vs. American Honda Company*, 532 F.3d 469, at 479 and 480.

So just for everybody's frame of reference today, please do not refer to any materials that are part of this supplemental report from Mr. Bugbee.

Okay. With that I may want to hear a little bit about the motion to preclude Mr. Bugbee's testimony but what I would like to do, please, is start with the summary judgment.

MS. THOMAS: Again, Michelle Thomas on behalf of Defendant Wierszewski.

As you indicated, Judge, we are here for summary disposition.

THE COURT: Can you pull that microphone a little

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closer so we can hear you?

MS. THOMAS: Certainly. Is that better?

THE COURT: Yes. Thank you.

MS. THOMAS: We are here to seek dismissal of the claims against Officer Wierszewski of sounding false arrest and malicious prosecution. I would like to dispense with the malicious prosecution claims because I think we can do that fairly quickly and then --

THE COURT: You don't even need to argue that.

MS. THOMAS: Wonderful. We will move on to the false arrest claims. From the inquiry we received from your clerk there is no question the focus this morning is going to be on whether there was -- whether there is undisputed evidence establishing the existence of probable cause. I actually would like to reframe that a little bit because the test here for summary judgment is whether the plaintiff has produced any evidence that would bring into question the officer's determination that there was probable cause.

In this particular case it is undisputed that Mr. Thibault was stopped for erratic driving, it is admitted so we are not dealing with a Terry situation, we are not dealing with an initial stop, they have not challenged that at all. Strictly the focus here -- we are strictly focusing on whether or not his arrest was supported by probable cause, and we have submitted to the Court the dash-cam video which

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has an audio component as well. And essentially our position is when you take that evidence which must, as the Supreme Court ruled in Scott, be considered dispositive where it establishes all the material facts, which in this case it does, and you combine that with the other evidence here that --

THE COURT: Why do you say that if we only had that video and no other evidence, aren't there parts of that video that arguably cut against the finding of probable cause? I watched that video and there are different aspects, some that support the finding of probable cause, some that don't. I mean, the portion where he -- where the plaintiff walks from the cab of his truck to the location immediately in front of the car where they begin the sobriety test, that walk looked pretty solid.

MS. THOMAS: It did, but it also documents that he's shaking even though he just exited a warm truck.

THE COURT: What was the date of this stop?

MS. THOMAS: December 4th.

THE COURT: Is that unusual?

MS. THOMAS: Well, I think it is unusual to the extent that he had just exited a warm cab. If he had been standing out there for 10, 15 minutes certainly there would be a reasonable explanation for that, but in this situation it was immediately upon exiting his truck. And, again, that

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is inculpatory evidence according to the officers and according to case law, you know.

THE COURT: Well, let's talk about case law. You cite a number of cases that have gone your way in the probable cause to arrest for suspicion of impaired driving cases where the defendants have been granted summary judgment, and in almost all of them you had one of two things that's not present here, either a

detectable smell of alcohol or an admission that the driver had been drinking or had taken some sort of drug that would impair. Here everybody agrees there wasn't the smell of alcohol and there was a repeated denial of taking any substances that would impair the driving, so what case that you have cited is closest to these facts where a court has granted summary judgment?

MS. THOMAS: Well, there are several cases. There's the Jolley case, Rutherford, Shackelford, Mott, in those cases again there was no detectable odor of alcohol.

THE COURT: In every one of those cases?

MS. THOMAS: In every one of those cases.

THE COURT: Was there both no detectable odor and no admission?

MS. THOMAS: I'm going to double check here but I'm going to say absolutely.

THE COURT: That doesn't square with my recollection.

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MS. THOMAS: Certainly with Mott --

THE COURT: Mott -- I agree with you, Mott is the closest one.

MS. THOMAS: Right, that has no smell of alcohol right in the opinion.

THE COURT: Right.

MS. THOMAS: Jolley similarly, I don't believe that there was an emphasis on the smell of alcohol but, Your Honor, even if you take that aside, first of all, the officer wasn't focusing on alcohol consumption, he was focusing on intoxication by some other intoxicant such as drugs.

THE COURT: I understand that, but what I'm saying though in these cases there was something more in all of them except Mott than arguably bad performance on some sobriety tests, wasn't there?

MS. THOMAS: Yes. In Shackleford there was erratic driving, in Rutherford there was the officer's observation of erratic driving plus windows open on a cold night, which we also have here.

THE COURT: What do you say about the case that I asked you to take a look at --

MS. THOMAS: Green?

THE COURT: Green vs. Throckmorton.

MS. THOMAS: Again, I think that's distinguishable, Your Honor. Basically Green stands for the proposition that

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an uncorroborated report regarding the results of standard field sobriety tests alone would not establish probable cause. In that case everything was exculpatory, and there was explanations offered that were reasonable; the woman was fatigued, she had been on the road a long time, it was a wet and dark night, there was not much ambient light. It simply is not the same -- factually it does not square with what

we have here that it is a well-lighted intersection, the driver admitted he had just started working, he had been driving for less than an hour, it is documented, it is not denied that he ran over a median that was clearly in the road, and he was both attempting to smoke and extinguish an unlit cigarette, that's undisputed. It is also undisputed that he had a flushed face. And even if you throw out the results of the HDN test because you can't see that on the video, no question about it, you have the walk and turn which is clearly demonstrated that this individual could not maintain his balance, he was swaying, he was using his arms, he was also unable to recite the alphabet as instructed.

THE COURT: Have you ever tried to take the sobriety tests that the officer administered here?

MS. THOMAS: No.

THE COURT: I mean, I have to tell you my reaction to these tests, and I'm not sure that my personal opinion here is particularly relevant, but this is an exercise of

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gotcha whoever came up with these tests. These are troubling to say the least. I'm not -- I'm just kind of thinking out loud here, but as I watched that test -- these tests being administered I started acting them out in my own chambers standing in front of the computer seeing what I could do, and it is -- I don't know that there is a better way but it seems troubling to me that's how we are -- it is a good thing most arrests also involve a PBT test because I could see a lot of non-intoxicated people failing these tests.

MS. THOMAS: I think that's why the case law says that the failure to successfully complete these tests can support probable cause, and in this case it wasn't that he failed one test and then just possibly failed it like in Green. Again, the video evidence here is clear and --

THE COURT: But --

MS. THOMAS: -- it is also undisputed that it is corroborated.

In Green it was the officers' word against the driver's word, and we had four officers at the scene.

THE COURT: Well, one of the things undisputed here is, isn't it that the defendant acknowledges that with at least two of the tests -- I'm sorry, yes, the defendant acknowledges that the plaintiff passed at least two.

MS. THOMAS: Yes.

THE COURT: That's not dispositive, but doesn't

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that kind of add to ambiguity and suggest that maybe he has to dig a little further or do something more?

MS. THOMAS: Again, had he not documented that those tests were passed and if those were the only tests administered maybe, but that's not the situation we have here. And the officer made a concerted effort to allow Mr. Thibault to demonstrate that he wasn't impaired. I mean, that second walk and turn it was only after he obviously failed that that he was arrested. You know, before that they were -- they acknowledged

they couldn't find any drugs in the car, that's documented. Again, we don't have a situation where these officers are fabricating something after the fact in order to justify their arrest, this is all documented at the time. And frankly, again, plaintiff has brought forward no evidence challenging any of it, none.

THE COURT: Well, he offers Bugbee's testimony that -- Bugbee's criticism of how some of the tests were administered and Bugbee's interpretations of the results of those tests. Doesn't that --

MS. THOMAS: He does in that written report, he does not in his deposition.

THE COURT: Oh, he does in his deposition.

MS. THOMAS: I think, Your Honor, we have cited pages where Mr. Bugbee said he had no criticisms of the National Highway Traffic Safety Administration standard

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tests. The only criticisms that serve in this case come from that written report.

THE COURT: What is the -- is the horizontal gaze and nystagmus test one of the NHTSA tests?

MS. THOMAS: Yes.

THE COURT: Bugbee testified that -- Bugbee's testimony was a little bit all over the map in that whoever was deposing him asked him do you have any criticisms the way the tests were administered and perhaps in the beginning he said yes, but later on he offered criticisms of the way the tests were

administered. With respect to the horizontal gaze and nystagmus test he testified that that test was combined with the lack of convergent test and it can fatigue the eyes and lead to false positives, and so Bugbee offered criticisms of at least some of the tests --

MS. THOMAS: One test.

THE COURT: -- and offered a different interpretation of whether the plaintiff was passing the tests or not.

Isn't that evidence?

MS. THOMAS: Well, not if -- if you are going to take opinion testimony for whether there is probable cause?

THE COURT: No, very different issue. Whether there is probable cause I see is the ultimate legal question, I agree with you he doesn't get to testify on that, but

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interpreting a specialized sobriety test and how to understand the results of that test, the whole reason your client is able to administer the test and draw conclusions is because as you tell me in his affidavit and all the certificates he has had training and he knows what to look for. Your word in his affidavit based on his specialized training he knows the clues to look for. I wouldn't know what to look for if I saw somebody taking a sobriety test because I don't have that expertise, so it seems to me Bugbee is allowed to offer an opinion about whether a suspect's response to a test is evidence of intoxication or not or how you

interpret the results of the test, and Bugbee offered his opinion that some of the tests were passed. Why isn't that some evidence that he is not intoxicated?

MS. THOMAS: Well, under the case law when these tests -- these standard tests are administered properly, which, again, I'm going to say Mr. Bugbee admitted they were administered properly.

THE COURT: Let's dispense with this issue because I don't want to get hung up on it. I want to point you to the part of his testimony I'm talking about. Let's start with page 66 of Bugbee's testimony.

MS. THOMAS: We are looking at the deposition?

THE COURT: Yes, Bugbee's deposition is attached to your reply brief.

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MR. DeGROOD: I think it is Exhibit R.

MR. DeGROOD: What page or would you like me to give you the pages we rely on?

THE COURT: Start with page 66.

MS. THOMAS: All right.

THE COURT: On page 66, as I read Mr. Bugbee's testimony, he testifies that your client gave an improper instruction on the counting to 30 test. Now, Bugbee may be right or he may be wrong but he testified the test was not properly administered because you don't instruct somebody to count in their head. Do you agree with me that's what Bugbee testified to on page 66?

MS. THOMAS: He does and --

THE COURT: Okay. Hold on. Now with respect to the HGN test, on page 68 Bugbee testifies that your client mixed it with the lack of convergence test.

MS. THOMAS: Which is all part of the same test as is explained in the brief and verified.

THE COURT: No. What I'm saying to you is, look, I'm not saying I'm not ultimately going to rule in your favor but you're not going to win by saying there is no evidence, no evidence at all. There is evidence from Mr. Bugbee about whether this plaintiff here, I keep thinking of him as a defendant in a criminal case, there is absolutely evidence from Mr. Bugbee that this plaintiff did not fail the tests

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that your client says he failed and there is evidence that your client improperly administered the tests. What weight to assign to it seems to me to be another question, but am I wrong when I say there is evidence on those other points?

MS. THOMAS: Your Honor, I think what I said was plaintiffs don't cite to any evidence and --

THE COURT: I agree with you.

MS. THOMAS: That to me is different, and that's what I'm saying. I will concede that you can read some of these depositions and you can draw out some statements, but I will go back to the pages we cite of the deposition, 51, 53, 55, where Bugbee admits that the walk and turn was properly administered.

THE COURT: The problem here is that you filed a properly-supported motion for summary judgment and cited to evidence that supports the argument you are making, and the plaintiff's burden at that point was then to come forward and point to the specific evidence that he claims countered what you said, he didn't do that, but I read the deposition anyway.

MS. THOMAS: And we attached it. We are not trying to hide anything.

THE COURT: I'm not suggesting that you are trying to hide it, and maybe you win because he didn't properly respond to your motion, but when I read the whole deposition

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as I do when I'm preparing for these things I recognize that your citation of Bugbee's early question about were the tests administered properly, yes, he said that, I agree with you, but my point is later on when you guys got a little more specific about the tests he did raise some concerns about the way they were administered and he did raise some questions about whether the results were consistent with intoxication or being under the influence.

MS. THOMAS: And if you toss that then, if you toss the results of the HGN test and you toss the results of the, you know, silently counting to 30 test, you still have evidence that this individual failed other -- both generally used standard sobriety tests and the ones approved by NHTSA.

Again, the case law is clear, there is not a violation of the Constitution to arrest an innocent

person. There is no dispute here that the tests came back negative, the test for certain drugs I would like to emphasize, they don't test for everything, that came back negative. All right. But there is no protection in the Fourth Amendment for that, nor does this officer have to be 100 percent certain, it just has to be a likelihood there was impaired driving. And especially when you get to the qualified immunity test we have a balance --

THE COURT: You have even stated your burden higher than it is. There -- for him to win here he only has to show

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according to the 6th Circuit in Green that he could reasonable, even if erroneously, had believed that the arrest was lawful, so he doesn't --

MS. THOMAS: Exactly.

THE COURT: That's the burden here. The question isn't whether it is lawful. I'm not sitting as a state court, district court judge on a motion to suppress so the burden is even lower.

MS. THOMAS: And when you balance that against the counterveiling consideration that somebody is driving impaired in a congested community at 2:00 a.m. with evidence of strange behavior and failing certain of the tests undisputably, certainly the second walk and turn, which again is what prompted the arrest, it is certainly reasonably objective analysis on the part of this officer that you have a likelihood that he's impaired. The courts have recognized driving while impaired is against public policy, and the obligation of

these officers is to protect the community that they serve, and this officer would have been in dereliction of duty had he let an impaired driver go to drive around Grosse Pointe Farms or wherever he's going in a semi truck.

And, again, I think much different from Green, similar to the cases we have cited, there was -- even if you toss the disputed test results that Mr. Bugbee thought were not absolutely correct or the results weren't absolutely

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clear there is more than enough evidence in this to support it.

THE COURT: Okay. Thank you very much.

Mr. Radner, as you are approaching let me begin with a question, if I might. You have a claim for malicious prosecution against this defendant; is that correct?

MR. RADNER: Correct, Judge.

THE COURT: When I look at the elements for a claim of malicious prosecution there are two elements that I want to ask you about. The first element, of course, is that a criminal prosecution was initiated against the plaintiff, and another element is that the plaintiff suffered a deprivation of liberty apart from the initial arrest by the officer. Let's take that one first.

How did the plaintiff here suffer a deprivation of liberty separate and apart from the arrest?

MR. RADNER: He was prosecuted.

THE COURT: How?

MR. RADNER: Prosecution in and of itself. While the prosecution was pending I had to file a motion, he obviously had to retain a lawyer, and none of that should have happened.

THE COURT: But what was the deprivation of liberty apart from the initial arrest?

MR. RADNER: The deprivation of liberty is that he

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was being prosecuted for a crime in violation of due process.

THE COURT: Do you have any cases that talk about a deprivation of liberty being the filing of a criminal charge? The filing of a criminal charge is the first element of this, that a prosecution was initiated, but the second one -- this last element is that there is a deprivation of liberty and what are you pointing to, the filing of a criminal charge standing alone is a deprivation of liberty?

MR. RADNER: Yes, that's what I'm saying. I'm saying that when there is a prosecution pending against you that's the deprivation of liberty; you have bond restrictions, he was not able to work during those weeks and months because he had this prosecution pending and those were all liberties that he was being deprived of.

THE COURT: Where are the bond restrictions in the evidence here?

MR. RADNER: I --

THE COURT: In the record?

MR. RADNER: I did not include them.

THE COURT: What were they?

MR. RADNER: I don't recall off the top of my head, Your Honor, but just to get over the burden, which obviously is on the defense when filing this motion, there certainly is enough evidence in the record that he was prosecuted for a crime and prosecution comes with restrictions and

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deprivations of liberty. He testified that he couldn't work during those times and that he was being deprived of the liberty to hold employment.

THE COURT: Did he explain how he was deprived of liberty to hold employment because his employer wouldn't let him drive, is that why?

MR. RADNER: I'm quite certain it is in the transcript somewhere, Judge. I can try to find it if you want but I can't point to that right now standing here right now.

THE COURT: Is there testimony in the record that he was actually charged with a crime?

MR. RADNER: Well, there is, and I don't believe that's being challenged at all.

THE COURT: I'm just asking you.

MR. RADNER: The defense even admitted that we had to file a motion to dismiss so obviously he was charged with a crime.

THE COURT: Okay. All right.

MR. RADNER: Your Honor, the only point that I want to make, unless Your Honor has questions, it is kind of like Your Honor said, these tests were administered for a gotcha purpose, that's what Mr. Bugbee essentially testified to, that's what Mr. Thibault essentially testified to, and it is what the defendant actually said on the audio recording by

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accident, it probably was a hot mic moment, he said I'm not happy. Why is that? Because I want there to be something and there is not something. He wanted to arrest Mr. Thibault, that's what he wanted. When he pulled him over that night he wanted to put him in jail, he wanted to take away his pickup truck, I don't know why, but he wanted to. And he was going to interpret or misinterpret all of these tests and do whatever was necessary to cover his own actions to ensure --

THE COURT: Mr. Radner, let me start, if I could, just to make sure I understand which facts are in dispute and which aren't. I have a little list here that I'm looking at, and I want to take them one at a time.

It seems to me that it is undisputed that a portion of the tractor-trailer that your client was driving drove up and over the median?

MR. RADNER: Absolutely, exactly like in the Green case.

THE COURT: Okay. It is, as I understand it, undisputed that the window was down as he was driving; is that true?

MR. RADNER: Yes.

THE COURT: Okay. It is undisputed as far as I can tell that the radio volume was turned up high; is that true?

MR. RADNER: No, that's disputed, it was not

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turned up exceptionally high. I think what the defense is saying, that it was exceedingly high or exceptionally high, it wasn't, and when Your Honor watched the video I'm sure you were looking for that.

THE COURT: Is the only evidence of the radio on the video? Did your client testify about the radio, do you recall?

MR. RADNER: I don't recall off the top of my head but, again, I addressed it in the response just to the effect that the defense was claiming that the radio was high and we simply said that's not true.

THE COURT: There is testimony and an affidavit from the defendant that your client was attempting to smoke an unlit cigarette. Is that disputed?

MR. RADNER: This is -- yes, that's disputed. He had an unlit cigarette in his mouth. He was not attempting to smoke it. This again goes to the interpretation of this defendant, he wanted to make it look bad. You can look at anybody at any point and say

look at the face he's making, look at the way he's tapping his feet, look at the way he's shaking his fingers, he has to be on something.

THE COURT: Do you agree that it is undisputed that your client had an unlit cigarette in his mouth?

MR. RADNER: That's undisputed as people often do when they are not smoking or in a place they shouldn't be

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smoking but have that addiction and keep it in their mouth. You see it in casinos all the time -- I don't know if you see it in casinos all the time but people do it in -- I will stop.

THE COURT: Is it -- is there any evidence disputing the defendant's point that your client made a motion as if to try to put out or extinguish the unlit cigarette?

MR. RADNER: That never happened.

THE COURT: Is there evidence -- do you recall the defendants -- the defendant or their witnesses taking that position either in an affidavit or their deposition?

MR. RADNER: I recall them saying it in a motion but it is baseless, it is completely baseless, and we just pointed that out.

THE COURT: What is your -- you're quick to tell me things aren't true but what is the evidence that that didn't happen? Where should I look to determine that that didn't happen?

MR. RADNER: Can I have one second, please?

THE COURT: Sure. I'm not sure where I saw that, I may be making that up.

MR. RADNER: Where you saw what?

THE COURT: Let me ask Ms. Thomas, is there an affidavit or deposition testimony that the plaintiff was

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attempting to put out the unlit cigarette or did I make that up?

MS. THOMAS: Yes, it is in the officer's affidavit and it is also in the audio, I can give you that cite in a minute, where the officers discuss this amongst themselves.

THE COURT: Where is the affidavit, which exhibit is that?

MS. THOMAS: The affidavit is Exhibit A to our motion -- our initial motion and brief, it is Officer Wierszewski's affidavit, and it would be --

MR. DeGROOD: Number 19.

MS. THOMAS: Paragraph 19 in Wierszewski's affidavit.

THE COURT: Okay. I see it now.

MS. THOMAS: It was also in his deposition testimony.

THE COURT: Mr. Radner, what I have is a sworn statement by the defendant that your client was

smoking or puffing an unlit cigarette and subsequently attempted to extinguish the same. What is the evidence in the record that I should look at to determine that there is a dispute as to that fact?

MR. RADNER: Page 50, line 4 of Alan Thibault's deposition.

THE COURT: All right. Hold on. What exhibit is [p.26] that?

MR. RADNER: It is document number 12, Exhibit 7. I think it was attached by the defense actually.

THE COURT: All right. Let me catch up. What page?

MR. RADNER: Page 50, line 4. I will tell you now it doesn't address specifically --

THE COURT: Hold on. Give me a second.

So you would have me interpret that testimony on page 50 as Mr. Thibault saying he would just keep it in his mouth?

MR. RADNER: Right, he's explaining what the cigarette was doing in his mouth. He was not attempting to smoke it, which you can infer he wasn't extinguishing it. That came after the lawsuit was filed as far as I recall because I saw it in the affidavit but I don't really remember seeing too much of it beforehand, so they were focusing on he was trying to smoke this unlit cigarette, that's not true, that's not what he was doing. He had an unlit cigarette, some people have

toothpicks in their mouths and some people have pens in their mouths, he puts a cigarette in his mouth. Everybody's driving with a cigarette in his mouth is now going to have to spend some time in jail and be charged with a crime?

THE COURT: All right. Is there any dispute that [p.27]

Mr. Thibault spoke slowly as the officers claim?

MR. RADNER: Well, Your Honor, I know the video was submitted and it is dispositive based on whatever is in front of the Court. Is that particularly slowly? I don't think it is. It is a little different than most people would speak because he has a slight speech impediment but, again, that doesn't rise to the level of probable cause.

THE COURT: I don't think anybody is suggesting that standing alone the different speech rises to the level of probable cause, but one thing that struck me about the Green vs. Throckmorton case, which I asked you to take a look at, both sides, was the point that officers can't be held responsible for not knowing information about the plaintiff that's not communicated to them. And in your brief when you were addressing the speech issue you explained as you did now that, yes, there might have been an unusual aspect to the speech but that's easily explained by his speech impediment, but from the perspective of the officer how could the officer had possibly known about the speech impediment?

MR. RADNER: If the officer would have asked him why are you talking so funny he would have learned that information very quickly.

THE COURT: One of the early questions the officer asked was do you have any medical conditions?

MR. RADNER: Right, and to somebody who has spent

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time in the military and has seen real medical conditions and probably even if you asked doctors -- if you would poll doctors about whether you consider Mr. Thibault's very slight, it is very slight, speech impediment, you heard it on the video, if you would consider that or classify that as a medical condition, I think a lot of them would probably say no, but certainly somebody standing at the side of the road I wouldn't consider that a medical condition. If somebody is asking me if I have a medical condition I'm thinking medical conditions, I'm thinking heart problems, liver problem, kidney problems, broken bones, torn rotator cuffs, things of that nature, things that are more commonly viewed as medical problems. If he wanted to know about his speech impediment he could have asked him very simply why do you sound like that, just like he asked him why did you clip the road, why did you clip the median. He didn't want to know the answer to that.

THE COURT: Is there any dispute about the claim by the defendant that Mr. Thibault was flushed or red in the face at the time of the encounter?

MR. RADNER: We can't really dispute that because you can't look at your own face other than what's on the video. I know the video is before the Court, I know the Court had a chance to view it, he didn't look particularly flush to me but it was very cold that night and that's

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certainly a reason for faces to appear flush but, again, this is explicitly out of the Green case, that's the officer's objective, uncorroborated claim and that coupled with the test -- two tests that came back completely negative for a long list of potential drugs that obviously the Michigan State Police feel are the drugs to test for, according to the Green case that casts a doubt on the officer's claims such as the fictional powder in my client's nose.

THE COURT: Did you watch the portions of the videotape involving the test where he walked on the line, whatever that test is called, I forget the name of it.

MR. RADNER: Yes, I did. I think that's the walk and turn.

THE COURT: The walk and turn. At the beginning of both of those tests there is a loss of balance by your client that struck me as significant. As frustrated as I was with my ability to try to do those tests as I was walking around my chambers, I didn't come close to -- just so we are clear, I'm not making any decision in this case based on my -- giving myself these tests, I'm just trying to understand how they work. The loss of balance twice on both of those tests struck me as

substantial. Do you disagree with that at the beginning of the test?

MR. RADNER: I don't know about the word substantial. I think that would be a question of fact how

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substantial it was. I know the Green case says explicitly that losing balance, hopping, swaying, using arms for balance does not rise to the level of probable cause. Now, what you can do in your chambers in a nice climate-controlled room where there is proper lighting where you don't have a cop who is just dying to throw you in jail looking over your shoulder is probably different than doing it at the side of the road in the --

THE COURT: Let me just interrupt for a second. If this case goes to a jury you can certainly make that argument to a jury, but let me be clear just so you and I are communicating on the same page and I'm kind of laying my cards on the table, whether you win or lose this motion I don't buy for a second, not for one second, that this officer was dying to arrest your client.

MR. RADNER: Okay.

THE COURT: This was a very, very difficult situation, and I'm wrestling with how to try to understand what happened here, and if this case goes to a jury you are certainly free to argue that but at least for our discussion today I want to be very candid that I don't see it that way. If you win this motion it seems to me it would be because I ultimately after wrestling with this again determined that perhaps a

jury could find enough of these disputed facts to go your way, but the impression I'm left with, and this is

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not my role as summary judgment judge but if I were a juror is this officer is facing a very, very difficult situation, it is 2:00 in the morning, he's seen the driving that's troubling, there are some circumstances -- at least some that everybody would have to agree raise a concern, and what's he supposed to do? Should he have just let your client drive away?

MR. RADNER: Yes. There was no evidence that my client had committed a crime, absolutely nothing. He didn't even give him a PBT because he knew it would come back in zeros and that's not what he wanted to be reflected in the report, he didn't do that until they got back to the station.

Your Honor, I would point to the Green case quotes the Miller case in which the plaintiff failed all but one test and in that case that was also considered not to be probable cause. These tests, like you said, like anybody who really looks at them objectively, are created for gotcha moments.

THE COURT: If this was just a test case I would be more inclined to that view. The tests alone can be troubling, I agree with you, but in this case one of the reasons I was asking you what is undisputed is as I kind of think about the evidence what I see is the driving that is undisputed and would raise a concern on any reasonable officer, somebody going up on the curb, the flushed face, the

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cigarette in the mouth, the attempt to put out the unlit cigarette, the swaying on the walk test that is on the video and in my view a substantial swaying. This isn't just a case where these tests that could or -- may or may not cause somebody some serious concern lead to an arrest, there is more than that here and that's what makes this a hard case.

MR. RADNER: I'm not saying that this is an easy case. What I'm saying is that the Green case is incredibly on point. The similarities between this case and the Green case are astounding, and in the Green case there was not to be -- considered to be probable cause.

THE COURT: Why didn't you cite the Green case?

MR. RADNER: I probably should have. I will every time I ever have a case like this again, I don't know how I missed it but I did. I found a bunch of other cases that weren't as good but thankfully Your Honor did find it.

Then, of course, there is something very important here though is that anything that only the officer's testifying to such as the horizontal gaze test, the HGN test, this powder in the nose, the face being flush red, these are all things that are contradicted by the negative tests which straight out of Green -- Green says explicitly that evidence alone is sufficient to cast doubt on the truthfulness of Throckmorton's testimony regarding Green's pupils, the test alone. And when you look at that -- if the jury looks at

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that testimony of the officer and says he's lying about that, he's lying about this ridiculous explanation he came up with months later at the testimony as to why he said he's not happy because, quote, I really want something to be there, if the jury finds that he's lying about all of those things then the jury could very well find he's lying about how he interpreted these tests, as Mr. Bugbee testified.

And one thing I want to quickly say about Mr. Bugbee's testimony, Mr. Bugbee is not a professional witness, he just started doing this very recently. I took one look at his resume and I said I'm not going to find anybody with a better resume so take a look at the case and tell me what you think. He took a look and he told me what he thought and we used him as an expert, and we have used him as an expert several times since then just because he's incredibly truthful and his resume is hard to deal with, but once he becomes more professional like most defense experts are and like some plaintiff experts are I'm sure he will figure how do you navigate through defense counsel's questions and become a better answerer to those questions, but as Your Honor pointed out and as the defense agreed, he did give his opinions as to what this officer did wrong, and a jury can certainly look into all of that coupled with the other statements, the completely uncorroborated statements made by the officer, the statements made by the officer that

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the negative tests, not test, but tests seemed to contradict and say this officer is lying.

This officer, I don't know why, I don't know what was going on, maybe he wasn't dying to put him in jail, but maybe this was a power trip, I don't know. I have seen enough of that, I have seen enough of that in my only six years as a lawyer that it wouldn't shock me, it never does. What's kind of funny about the Green case is that it happened in Goose Pointe and this happened in Grosse Pointe, the similarities are just astonishing. He failed some tests, he passed some test. She got caught in the seat belt, that could be viewed as similar to the lit cigarette except he had a good explanation for it, he's trying to quit smoking and so he keeps it in his mouth, lights it up once in a while, takes a couple puffs and puts it back out. That's just how he does what he does, that's how he's trying to quit, there's extensive discussion about that in his transcript. Mr. DeGrood asked him all about his smoking habits.

But this was a stop, why did the officer even ask him to get out of the car? The Green case says that when you see somebody do a traffic infraction you're allowed to pull them over for just long enough to write them up. Why is he telling him to get out of the car? He's trying to create something, he's trying to find something, and he tried, he tried really hard and sent this man to jail and made him lose

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his job for a couple months, completely unnecessary.

THE COURT: Okay. Anything else?

MR. RADNER: Yeah. One other thing I want to point out is that Your Honor was asking me questions about why I didn't address this claim about that he was trying to extinguish the cigarette. Your Honor, looking

at the affidavit that was produced on page 7, paragraph 19, the subsequent attempt to extinguish is in parentheses. What the focus was why is there a lit -- why are you trying to smoke an unlit cigarette, why are you trying to smoke an unlit cigarette, and that's why in my response I explained why there was an unlit cigarette in his mouth. I didn't go through every single aspect of that though and I should have and I will next time, but the fact that I didn't cite to anything specific where he says I did not attempt to extinguish the cigarette because they managed to throw it into parentheses in this affidavit I don't think that would be fair.

THE COURT: Well, I mean, let me push back on that a little bit.

MR. RADNER: Okay.

THE COURT: To me as I was reading this you have offered what you're arguing as a plausible explanation why somebody might have an unlit cigarette in their mouth, and whether it squares with my life experience or not is beside

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the point but at least I understand the explanation, but if you accept that explanation that somebody trying to quit could reasonably have an unlit cigarette in their mouth, if there are two ways to interpret an unlit cigarette, one is somebody is impaired and has no idea what they are doing or your way it is consistent with somebody who is not impaired but trying to quit or whatever and you add in the fact that there is an attempt to extinguish the unlit cigarette, that to me is pretty significant because I think your client would

agree, and I think you would agree, that somebody quitting with an unlit cigarette in their mouth there is no reasonable explanation for why you would try to extinguish an unlit cigarette.

MR. RADNER: Your Honor, if that's what this case is going to hinge on I will beg the Court for an opportunity to file a supplement to include an affidavit from my client saying he was not attempting to extinguish a cigarette. And this is -- I guess I'm a fairly young lawyer, I'm learning that defense counsels that I'm going up against that are far more experienced than me know how to sneak in these things and make them seem small by making them in parentheses, footnotes and things of that nature and almost appears as afterthoughts and in reality they end up being what the whole case hangs on. It is something -- certainly a learning experience but I don't think it is fair for Mr. Thibault to

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suffer because of that.

THE COURT: Okay.

MR. RADNER: Thank you.

MS. THOMAS: Your Honor, if I may just briefly respond to some of his positions?

THE COURT: You can, and you don't have to be brief.

MS. THOMAS: Okay. Well, I think we all understand what this case hinges on, and one of the -- again, the critical factors here is, as I think Your Honor has realized, there is no evidence cited by plaintiff to

support all of the alleged plausible explanations, and I mean evidence that the officer was advised as to why Mr. Thibault was attempting to smoke and then extinguish an unlit cigarette, and there is evidence that that, in fact, occurred not only from Officer Wierszewski but Officer Cashion and it is on the audiotape and at no point was any explanation given for that.

THE COURT: Did he ask for explanation?

MS. THOMAS: He did not but none was offered, unlike Green I would point out. In Green that particular driver kept explaining to the officer why his concerns were not based on her intoxication but there were other explanations.

THE COURT: But how was -- how was Mr. Thibault to

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know that the cigarette was even a concern if it was in the officer's mind and when the officers were separate were discussing it, how would Mr. Thibault even know to address that?

MS. THOMAS: Well, I'm not saying that the burden was on him to know it at the time but there still is no evidence that the officers were aware of it, and that's the test here. What were the officers aware of at the time of the arrest, not after, not during Mr. Thibault's deposition, not a month later when he had -- when the blood results came back, that's all legally irrelevant. The only test is what he knew at the time, the totality of the circumstances at the time.

THE COURT: Say I agree with you that at least in principle that the relevant time frame is what they knew on the scene, I get that, but it seems to me an interesting question of whether if there is some fact that they are attaching significance to they are free to simply take the fact as they interpret it at the moment without asking any additional follow-up or clarification?

MR. DeGROOD: Your Honor, may I address that specific issue?

Early on before Mr. Thibault is escorted back to squad car 33 with the defendant, the defendant upon Mr. Thibault's exit from the truck specifically states to [p.39]

Mr. Thibault, and it is clear, as clear as can be, do you realize you are smoking an unlit cigarette? Mr. Thibault responds no, it goes out often. I may not have it word for word but it is there and it is clearly an opportunity for Mr. Thibault to explain, yeah, I've got an unlit cigarette, I have been trying to kick it, I need a little nicotine here and there, maybe he's not supposed to drive smoking in the truck if he's been cited for doing that in the past, which if we have to go to trial it will probably come out, but that is specifically stated by the defendant to the plaintiff and that's the only explanation that was given. Thank you, Your Honor.

THE COURT: Thank you, that's helpful.

MS. THOMAS: And the bottom line here, Judge, is even if there may be, and we are not conceding there are enough disputed facts that might prevent summary

judgment on the basis of no Constitutional violation established, plaintiffs have not argued nor can they overcome the qualified immunity test. There is no question that the case law in existence at the time of this arrest allowed Officer Wierszewski to rely on the very factors he did, and they have produced no evidence, none, that this officer acted in an effort, as they claim, to railroad Mr. Thibault, which is required to establish a defense to qualified immunity, and again the burden is on them, not us.

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THE COURT: It is not -- they don't have to show that Thibault -- excuse me, that your client tried to railroad him, he keeps arguing that, he can win even if I don't believe that. What he has to show is that your client could not reasonably have believed that the arrest was lawful. So you point out about the factors that an officer can look at, and there are certainly cases that says an officer can look at each factor, but it seems to me the toughest point that you need respond to is you and I can agree for the sake of this question on the framework that your client is allowed to apply to the facts, what he's allowed to consider, but when we look at the facts that he can consider today and the context of the motion I have to take those facts in the light most favorable to the plaintiff and then see if based on those facts your client reasonably could have believed that he was under the influence. And so when I'm trying get my head around the right approach to this I have to say okay, take Bugbee's view of the tests and some of these other facts and on that favorable to the plaintiff's view could your client have reasonably believed that the plaintiff was impaired?

MS. THOMAS: That is absolutely correct as far as the standard of review over whether or not there was a Constitutional violation. I would add a caveat there, you have to accept the evidence in plaintiff's favor to the

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extent that it is not inconsistent with that dash-cam recording.

THE COURT: To the extent that it is not blatantly contradicted.

MS. THOMAS: Right.

THE COURT: And the dash cam on some issues is clear and on some there is room for interpretation in terms of where the camera was aimed and how much you can hear and the sound goes in and out, so I agree with you, where the video is conclusive on a point I agree with you that that controls, but isn't the standard for qualified immunity not whether the arrest was lawful, I get that, but it is whether your client could reasonably have believed, even if erroneously, that's what the 6th Circuit says on -- the quote here from Green is an officer is entitled to qualified immunity under Section 1983 if he or she could reasonably, even if erroneously, have believed that the arrest was lawful in light of the clearly-established law and the information possessed at the time by the arresting agent. That's the standard.

MS. THOMAS: Right, and it is a very -- from the standpoint of the defendants a very forgiving standard. The United States Supreme Court has made it very clear that it is the totality of the circumstances with a

very loose standard as to whether there is probable cause because the courts are

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not to engage in 20/20 hindsight, and we get back to the countervailing factor here and that is if the officer is mistaken that he is not impaired and lets him go what is the danger to the public, and is then that officer on the hook for dereliction of duty? That's what Officer Wierszewski had to deal with at the time and only with the information he had then. He didn't have Mr. Bugbee's view of this situation, he didn't have any explanations from the plaintiff even when given the opportunity to provide them, and he had negative answers to whether there were any factors that this officer should consider when he's reviewing the test results, negative response every time he was asked.

And finally with their citation out of context that the officer wasn't happy that he didn't find evidence of drugs. Yeah, he starts there and the rest of that phrase is because he's afraid he's missing something. Missing what? Missing evidence that this individual driver could be a menace on the streets. That's an appropriate consideration here, and I think has pretty solid weight in light of the fact that this man is driving a semi truck in a suburban community -- a densely-populated suburban community at that.

THE COURT: Was the defendant here aware of the signage issue? You've attached an affidavit from the city manager saying there was never a sign there, but I just want to be clear.

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MS. THOMAS: Yes.

THE COURT: Your client didn't include as one of the reasons for the arrest plaintiff said he didn't see a sign and I was aware there wasn't a sign there; is that correct?

MS. THOMAS: That is correct, and the audio conclusively establishes that the plaintiff never said he was confused because of a no-truck sign, and it would have been a stretch had he had because there is no no-truck sign but that again was not offered to the officer at the time, and he's only bound to know that, he's not bound to guess what's in Mr. Thibault's head if he doesn't share that information.

THE COURT: Okay. Anything else?

MS. THOMAS: I have nothing unless you have other questions?

THE COURT: No, I don't. Thank you.

MS. THOMAS: Thank you.

MR. RADNER: Your Honor, may I very briefly respond to that?

THE COURT: You can, and you don't have to be very brief, but I just want to return to one other point. Do you have a case from the 6th Circuit or anywhere else that says that a malicious prosecution claim based on deprivation of liberty lies under the facts that are on this record here?

MR. RADNER: I don't off the top of my head.

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THE COURT: Okay. Go ahead.

MR. RADNER: But that's what malicious prosecution would be, and I know that there is a state claim for that.

There are two very brief points that I want to make.

THE COURT: You don't have to be very brief, that's the beauty of being in federal court.

MR. RADNER: Yeah, I'm going to try to be anyway.

Your Honor, the discussion about the cigarette is on the video and Your Honor saw it. I don't believe he was ever asked other than in passing as they were walking to the truck why there is an unlit cigarette in his mouth, to which my client explained he lights it, puts it out, he was never asked to explain further why there was an unlit cigarette in his mouth and never really given a chance to do so. This whole thing happened with a purpose, everything that was done was done with a purpose, and it was not to find out why he had an unlit cigarette in his mouth.

Further, the totality --

THE COURT: Hold on though. If the purpose was to later use the unlit cigarette against him in a parentheses in affidavit and a motion before me the officer wouldn't have mentioned it. The whole point of mentioning it now puts the issue on the table, and when somebody says do you realize you have an unlit cigarette in your mouth that seems to me to

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call for a response if you've got one.

MR. RADNER: He did, he said it goes out a lot, he lights it up, takes a few puffs, puts it out, it goes out a lot. He was asked, he answered, and there was nothing further about it. It was almost like a very quick exchange as they were walking towards the back of the truck as I'm sure Your Honor saw.

THE COURT: So your point is that's not only an explanation, that's a reasonable explanation that once given to the officer should have taken the unlit cigarette issue right off the table?

MR. RADNER: It should have, and if he didn't believe it he could have asked follow-up questions but he didn't, he proceeded to let's see you walk along this line in freezing cold weather late at night with my flashlight in your face and see how well you do.

I want to move on to something else, why was he out of the truck in the first place, because that's something that Green talks about at length. If you look at the officer's -- the defendant's --

THE COURT: What page on Green?

MR. RADNER: This is page 6, which is paragraph 19 of Exhibit A of the defense.

THE COURT: Hold on a second.

MR. RADNER: Okay. The defendant's affidavit.

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THE COURT: What section of Green, I want to get my head around this?

MR. RADNER: Page 7 towards the bottom.

THE COURT: What heading is it under?

MR. RADNER: Green's detention for field sobriety tests.

THE COURT: All right. Hold on. Okay.

MR. RADNER: So what I want to focus on for a second is what happened before Mr. Thibault got out of the car, and that's on page 6, paragraph 19 of the defendant's exhibit.

THE COURT: Hold on. Give me a second. Let me ask you a fairly direct question. In the section on Green, Mr. Radner, where the 6th Circuit just ahead of section B-1 that says Green's detention for field sobriety tests, the 6th Circuit explains that Green asserts that Throckmorton violated her Constitutional rights twice, first by detaining for field sobriety tests without having a reasonable suspicion she was impaired and then again by arresting her. Do you have a claim in this case that the detention based on the -- for administering the field sobriety tests was itself a Constitutional violation?

MR. RADNER: Not as a separate claim but it is all there together with the false arrest. It is included in the complaint, those facts are certainly included in the

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complaint, and then Count 1 is the false arrest which was based on those field sobriety tests, so I didn't make it a separate count.

THE COURT: You still -- you want to tell me that he shouldn't have had your client out of the truck in the first place?

MR. RADNER: Yes.

THE COURT: Go ahead.

MR. RADNER: I will point to something specific. If you look at page 8 of Green in the middle where it addresses Throckmorton's claims and you compare that with paragraph 19 of the defendant's affidavit --

THE COURT: How does the paragraph start that you want me to read about Throckmorton?

MR. RADNER: Where it says -- where it is kind of indented and it says parens 1, Green's pupils were constricted.

THE COURT: Hold on.

MR. RADNER: It is on page 8, at least the copy that I printed out.

THE COURT: I see it.

MR. RADNER: Okay. It lists those six things and comparing those six things with what's listed in paragraph 19 of the affidavit, which is what the defendant used as a premise to ask Mr. Thibault to step out of the car in the

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first place, the similarities are not identical but very close. There's the pupils being constricted, that's the face being flush, appeared to be confused, appeared disoriented, reactions were slow, again appeared disoriented I think is very close to that, activated her high beams, that's very similar to hitting the -- that's the initial infraction that was created. Crossed over the fog line, if this would have been a fog line instead of an island that would have been identical, but in the Green case the plaintiff crossed over the white fog line on the side of the road and in this case the plaintiff bumped the island. Unsteady on her feet, I mean, that's already afterwards but the claims are almost, if not -- they are very close, Your Honor, very, very close, and the Green case was pretty clear that those claims are not enough.

THE COURT: All right.

MR. RADNER: Then also if I can just add one more thing, if there is anything that the drug tests contradict the Green case is very clear is evidence of the police lying and that the jury could conclude that the officer was lying. So this claim about appearing disoriented and failing the eye tests, things that only the officer knows, those are certainly things that are contradicted by the tests.

THE COURT: Hold on. Can I see your computer, Scott?

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THE LAW CLERK: Yes.

THE COURT: Okay.

MR. RADNER: The last point that I want to make is just looking at the totality of the circumstances includes looking at all the claims made by the officer in this case that the jury could find he was lying about it, and there is a lot of those, particularly the white substance in the nose, all of the claims that he made that the drug tests contradict and the HGN test, anything that was subjective that only the police were able to see is something that the test straight out disputes. So unless the Court has any further questions for me I don't have anything further?

THE COURT: No, I don't.

MR. RADNER: Thank you.

THE COURT: Thank you. Anything else from the defense?

MS. THOMAS: Well, since we are going to look at the specifics of the various case law which would have been in existence at the time of this arrest I would refer the Court to the Kinlin vs. Kline case, K-L-I-N-E.

THE COURT: Okay. Hold on, let me track this down.

MS. THOMAS: 749 F.3d 573.

MR. RADNER: Did you say Kline?

MS. THOMAS: Kline, and that's the defendant's name.

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On the last page of the case, so if you have a printout from Westlaw or Lexis it is going to be page 9, as far as the official reporter it is going to be on page

580, and in that case the plaintiff was relying heavily on Green using the exact same arguments that plaintiff counsel is using here, and the 6th Circuit rejected and said the plaintiff's proposed analysis would turn a totality of the circumstances determination into a requirement that an officer have clear and convincing evidence before making an arrest. The Fourth Amendment however requires only probable cause in light of the totality of the circumstances. And there the court cites to Miller, which, by the way, the plaintiff is relying on it now, it is not cited in his brief, but the Miller case had no dash-cam video and it has been distinguished several times on that basis.

THE COURT: Kinlin is one of those cases that you have two very important undisputed facts, which are that the suspect smelled of alcohol and admitted to consuming alcohol and three times refused a field sobriety test. Those facts were undisputed.

MS. THOMAS: Those facts were undisputed, but I think it is the legal analysis that I'm looking at here, Your Honor, and that is unlike Green and like many of the cases we rely on, the facts that we are relying on as far as the officer's observations are corroborated unlike Green where it

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was the officer's word against the driver, we had three other officers present and we also have a dash-cam video that corroborates what this officer was saying.

THE COURT: Let's talk about that in terms of the level of -- the video has, as I indicated earlier in your -- when I was questioning you, parts of it --

certainly the part where the walk test, I keep forgetting --

MS. THOMAS: Walk and turn.

THE COURT: The walk and turn test, I agree with you that the initial portion of that test twice is to me substantial balance problem that I think could be viewed as raising a question about impairment, but I was listening closely to that video for the sound of the -- to hear plaintiff's voice, and that didn't strike me as particularly unusual. Again, I watched how the plaintiff walked from the cab of his truck to the area of the tests, you know, that was at a normal speed so arguably that part of the video undercuts some notion that there was an impairment substantial enough to interfere with the ability to operate a motor vehicle. Parts of the video I agree raise questions, parts don't necessarily corroborate what the defendant was saying here.

MS. THOMAS: That's fine. I mean, there can be exculpatory evidence, and it is not as if Officer Wierszewski ignored that. In his report he documented that Mr. Thibault

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did pass several of the tests he gave, he's not trying to hide anything. That was -- that's not disputed. The question is based on the information available to the officer that moment was it sufficient evidence of probable cause, and the test is probable cause, not actual guilt but probable cause that he might be intoxicated.

THE COURT: Okay. Anything else?

MS. THOMAS: I have nothing else, Your Honor, no.

THE COURT: Okay. All right. I'm going to take this motion under advisement. Thank you very much for the briefing argument. This is one that is going to require some substantial wrestling through the record by me, and a careful reading of these controlling 6th Circuit cases. We will issue a written opinion on this, and we will also address the docket number 13, the motion to preclude Bugbee's testimony, I don't need oral argument on that, I will decide that on the papers.

Anything else while we are together today for the record?

MR. DeGROOD: Yes, Your Honor. George DeGrood again on behalf of the defendant.

Just because I get a little paranoid with dates, I'm certain the Court will issue pursuant to local rule 16(1)(F) a new schedule for the joint pretrial order that was due today by the parties, and that local rule

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clearly indicates when there is a pending motion for summary judgment at least seven days before the due date the Court will go back and take a look and reissue new dates.

THE COURT: Yes. All dates are off, so whatever dates are currently set are off and if necessary I will issue a new scheduling order.

MS. THOMAS: Thank you, Your Honor.

THE COURT: Anything else for the record? I want to talk off the record a little bit before we leave, but anything else for the record?

MR. RADNER: One last thing, Judge. Can I please, and I can do this by motion if necessary unless the defense would agree, file an affidavit from my client saying that he did not attempt to extinguish the unlit cigarette just in case that's ultimately what this case is going to hinge on?

THE COURT: You can file a motion for permission to do that within three days, and attach the proposed affidavit. I don't want to give you any false hope here. I expect the defendants to respond -- let me tell you why I'm not making this on the fly. You can submit your motion for leave to supplement with the affidavit and include the proposed affidavit, and in the defendant's response what I want you to explain to me is why you believe it would be unfairly prejudicial and how your -- for instance, how your examination of the plaintiff at his deposition might have

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been different and how you are prejudiced now. I want to have a real clear picture of that. How long do you need to respond to that?

MR. DeGROOD: I would ask for at least a week, Your Honor.

THE COURT: That's fine. So once Mr. Radner files if you would please file your response in a week, I don't need a reply brief.

Mr. Radner, just to protect the record for yourself, I think you ought to include in your motion why you didn't do it earlier because if I deny it you will want to tell the 6th Circuit that I made a mistake so put as much in there as you can.

MR. RADNER: I was going to try to keep it brief but I will include all of that.

THE COURT: Far be it for me to tell anybody how to practice law, whatever you think is fine with me.

Anything else for the record before we go off the record?

MR. RADNER: Nothing for the plaintiff.

MS. THOMAS: No, Your Honor.

THE COURT: Okay. We are done.

(An off-the-record discussion was held at 11:10 a.m.)

(Proceedings concluded at 11:23 a.m.)

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CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the

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matter of ALAN THIBAUT vs. EDWARD
WIERSZEWSKI, individually and in his official
capacity as a public safety officer, Case No. 15-11358,
on Monday, June 6, 2016.

s/Robert L. Smith _____
Robert L. Smith, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 10/05/2016
Detroit, Michigan

APPENDIX F

AFFIDAVIT OF ALAN THIBAUT

STATE OF MICHIGAN)
) SS.
COUNTY OF OAKLAND)

I, Alan Thibault, being first duly sworn, deposes and states as follows:

1. Affiant states that, if sworn as a witness, Affiant can testify competently to the facts stated herein this Affidavit and attest that the statements are true.
2. At no point during my December 5, 2014 encounter with Officer Edward Wierszewski did I attempt to extinguish an unlit cigarette.

FURTHER, AFFIANT sayeth not.

By: /s/Alan Thibault
Alan Thibault

Subscribed and sworn to before me
This 20 day of June, 2016.

/s/Chester I. Balmaceda, Notary Public
Wayne County, Michigan
Acting in Monroe County, MI
My commission expires: May 23, 2021

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CHESTER I BALMACEDA
NOTARY PUBLIC, STATE OF
MICHIGAN
COUNTY OF WAYNE
My Commission Expires,
May 23, 2021
Acting in the County of Monroe