

NO. 23-1620

In The

**United States Court Of Appeals
For The Fourth Circuit**

CARON NAZARIO,

Plaintiff - Appellant,

v.

**JOE GUTIERREZ, In his Personal Capacity;
DANIEL CROCKER, In his Personal Capacity,**

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT NORFOLK

APPELLANT'S PETITION FOR REHEARING

AND

APPELLANT'S PETITION FOR REHEARING *EN BANC*

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I. **RULE 35(B)(1) PETITION FOR REHEARING EN BANC AND
LOCAL RULE 40(B) PETITION FOR REHEARING
STATEMENT OF PURPOSE**

This petition concerns whether the Appellees had probable cause to believe Lt. Nazario committed obstruction of justice under Virginia law during a traffic stop. To the extent the panel affirmed the trial court's determinations, it did so because of its erroneous probable cause determination.

Virginia's obstruction statute expressly and deliberately exempts a citizen who acts with "just cause." Va. Code § 18.2-460(A); *Rogers v. Pendleton*, 249 F.3d 279, 291-92 (4th Cir. 2001). This is an essential element of the offence, *Thorne v. Commonwealth*, 784 S.E.2d 304, 309 (2016), that the court must consider in a probable cause determination, *Hayes v. Seat of Pleasants*, 469 Fed. Appx. 169, 171-72 (4th Cir. 2012). The opinion failed to analyze this element. In counsel's judgment this is a material legal matter that was overlooked in the decision, under Local Rule 40(B)(i). This published opinion misconstrues a commonplace Virginia criminal law enforced daily in a time of great social tension between citizens and law enforcement, so in counsel's judgment it involves questions of exceptional importance under Local Rule 40(B)(iv) and Appellate Rule 35(b)(1)(B).

The panel recognized the traffic stop was justified by “a single traffic infraction,” and “[f]or nearly all of their stop,” Lt. Nazario “was compliant and presented no danger” to the Appellants. Op. 29.

The panel recognized that leading up to the alleged obstruction (failing to exit his vehicle and holding a door shut with his elbow) the officers initiated a felony traffic stop without probable cause to believe Lt. Nazario had committed *any* crime, unreasonably pointed firearms¹ at Lt. Nazario, placed him in a lethal Catch-22 with inconsistent commands, threatened to kill him, confirmed that he should be afraid to comply with the very command supporting the obstruction allegation, and committed multiple Fourth Amendment violations. **Op. 29-32.**

Under these circumstances, the Court cannot fairly construe the Virginia obstruction statute to conclude Lt. Nazario lacked “just cause.” Thus, the opinion errs in holding a reasonable officer under the circumstances would have probable cause to believe Lt. Nazario had obstructed justice.

¹ The dissent asserts Lt. Nazario conceded the use of the firearms was not excessive. **Op. 47.** The appellant’s position as articulated was that although he brought no **discrete** excessive force claim based **solely** on the appellant’s use of firearms, the use of firearms *was* unreasonable, excessive, and a factor in the probable cause, unlawful seizure, and excessive force analyses. *E.g., Oral Argument, 37:50 to 38:51.*

The panel's obstruction analysis is the lynchpin of its decision to affirm qualified immunity for both officers for excessive force, **Op. 32-37**, and for Crocker's unreasonable detention, **Op. 30-31**, for Lt. Nazario's First Amendment claim, **Op. 38-40**, and the prejudicial jury instructions. **Op. 40-42**. Those must be corrected as well. Thus, the panel, or the Court *en banc*, should accept this petition and reconsider and reverse the decision finding probable cause for obstruction, and all that flowed from it.

II. BACKGROUND

The panel decision states the facts and the procedural history of this case well. **Op. 4-12**. This is summarized as follows:

At night, in Windsor, Virginia, Crocker could not see Lt. Nazario's license plate and so initiated a traffic stop. Lt. Nazario was in uniform. The license plate had been affixed to the inside of the tinted rear window. Lt. Nazario immediately slowed the vehicle to half the legal speed and continued for approximately 1.1 miles before using his turn signal to pull into a gas station, the most well lit place Lt. Nazario could see. Crocker initiated a felony traffic stop without probable cause to believe that Lt. Nazario had committed a single criminal act. Both

officers exited their vehicles and immediately pointed their firearms at Lt. Nazario.

CVI at 18:32:24- :36:11, JA 320.²

The license plate, which prompted the stop, is visible on Crocker's body worn camera as he exited the vehicle, and Crocker admitted he saw it when approaching. **CVI at 18:36:20; JA 428.**

When ordered, Lt. Nazario promptly turned off his vehicle and displayed his hands. The Officers issued conflicting commands to keep his hands out the window and to exit his vehicle. Lt. Nazario's door was locked, and his seatbelt was on, so he could not comply with both. **CVI at 18:36:22-:40:05; JA 320.**

The officers approach Lt. Nazario with guns drawn, and initially, instead of truthfully answering Lt. Nazario's question about why he had been stopped, Gutierrez threatened to kill him, and then told him he should be afraid to comply with the officer's order to exit the vehicle. As he says this, Gutierrez tried to open the door and found it locked. **CVI at 18:37:53-:38:20; JA 221, 689-690.**

Lt. Nazario then stated, "For a traffic violation, I do not have to be out of the vehicle." Gutierrez promptly grabbed Lt. Nazario's arm, over his protest. Gutierrez drew his OC spray, despite Nazario's pleas for the officers to relax and that he didn't do anything. Crocker stepped to the door, unlocked it, and began to open it.

²The appellant adopts the Panel citations. "CVI__" refers to the contents of the of Crocker's first body-worn camera footage. "CVII__" refers to the contents of the Crocker's second body worn camera footage. "JA__" refers to the joint appendix.

Lt. Nazario's forearm held it shut. Gutierrez deployed the OC spray, disabling Lt. Nazario. **CVI at 18:38:07-:39:18.**

After further orders, Gutierrez opened the door. The officers refuse to unbuckle the seatbelt, so Nazario does. Seconds after Lt. Nazario's feet touched the ground the officers struck him, threw him to the ground, and handcuffed him. Minutes later Crocker illegally searched Lt. Nazario's vehicle. **JA787-792, CVI at 18:39:18-:41:45.** Gutierrez and Crocker both acknowledged that Nazario's decision to wait for a safe place to stop for his and their safety was reasonable, happened to law enforcement all the time, and given the climate between minorities and law enforcement, typically a minority does it. **CVII at 19:03:19-:03:32, 19:10:42-:11:04.**

Trying to cover for their unconstitutional, appalling actions, Gutierrez and Crocker, subsequently presented an ultimatum to Lt. Nazario: Either Lt. Nazario can "fight" their actions, which they acknowledge was his constitutional right, and they would charge and arrest him, destroying his military career, or he could "chill and let the issue go" and they would release him. **CVII at 19:06:15-20, 19:07:20-30, 19:08:20-25** (Gutierrez in the presence of Crocker); **CVII at 19:04:40-05:00** (Crocker).

As the panel's opinion correctly summarizes:

All told, during this encounter Lt. Nazario remained calm, raising his voice only when he was on his hands and knees after being

pepper sprayed. Nazario did not engage in erratic or furtive movements, gesticulate wildly, or otherwise threaten the Policemen. He did not remove his hands from the Policemen's view without first telling them of his intention to do so. For part of the traffic stop, the Policemen gave Nazario exclusively inconsistent commands—that is, to keep his hands outside the vehicle and also to exit the vehicle. Nazario was detained for a total of 80 minutes, easily exceeding the length of a normal or reasonable traffic stop.

Op. 12-13.

This Court's publish opinion holds that, under a summary judgment standard of review, the officers had probable cause to believe Lt. Nazario was obstructing justice because he "refused to exit the vehicle when commanded to do so, stated that he did not need to exit his vehicle, and used his arm to close the vehicle's door as the Policemen sought to open it." **Op. 23.**³ Therefore, the Panel held:

- Only the officers' brandishing of weapons and use of threats factor into the unreasonable detention claim, not for example their use the OC spray, and Crocker is immune. **Op. 28-32.**
- The *Graham v. Connor*, 490 U.S. 386 (1989), factors do not weigh heavily enough in Lt. Nazario's favor to make the force obviously unconstitutional. **Op. 32-36.**
- The First Amendment claim fails under *Nieves v. Barlett*, 587 U.S. 391 (2019). **Op. 38-40.**

³ The Panel indicates shutting the door ultimately provided the probable cause for obstruction. Op. 35.

- The jury instructions referencing probable cause were not unduly prejudicial. **Op. 40-42.**

III. ARGUMENTS AND AUTHORITIES

A. The Officers' Conduct Establishes "Just Cause" Which Precludes Probable Cause for Obstruction.

Virginia's obstruction of justice statute provides:

If any person *without just cause* knowingly obstructs . . . any law-enforcement officer . . . in the performance of his duties as such . . . is guilty of a Class 1 misdemeanor.

Va. Code § 18.2-460(A) (emphasis added). The "without just cause" language limits the scope of the statute, *see, Rogers*, 249 F.3d at 291-92, is an essential element, *see, Thorne*, 784 S.E.2d at 309, and must factor into probable cause, *see Hayes*, 469 Fed. App. at 171-2. As the Virginia Supreme Court has stated:

[Virginia's obstruction statute] prohibits knowingly obstructing, *without just cause*, a law enforcement officer in the performance of the officer's duties. Virginia recognizes a broad distinction between avoidance of a lawful arrest and resistance or obstruction. Merely making the officer's task more difficult but not impeding or preventing the officer from performing that task is not obstruction. Obstruction ordinarily implies opposition or resistance by direct action. The act done must be with an intention on the part of the perpetrator to obstruct the officer himself, not merely to oppose or impede the process.

Cromartie v. Billings, 837 S.E.2d 247, 256 (Va. 2020) (emphasis added) (internal citations and quotations omitted)

Under the summary judgment standard, the Court could not fairly conclude that the officers had probable cause for obstruction while recognizing the excessive and unreasonable nature of the officers' behavior, which provided just cause for Lt. Nazario's peaceable actions. According to the panel, probable cause existed because Nazario "refused to exit the vehicle when commanded to do so, stated that he did not need to exit his vehicle, and used his arm to close the vehicle's door as the Policemen sought to open it." **Op. at 23**. These three actions are addressed in the order in which they occurred.

(1) Nazario remaining in the vehicle.

The Court correctly notes:

[E]ven though Nazario did not comply with the Policemen's commands that he get out of the vehicle, his noncompliance with that conflicting order seemed necessary in order to comply with directives of the Policemen to keep his hands outside the vehicle. If Nazario had lowered his hands into the vehicle—given the Policemen's liberal firearm use—the situation could have quickly turned fatal. A large portion of Nazario's "noncompliance," therefore, was in reaction to the Policemen's actions and inconsistent commands.

Of importance, the pointing of firearms at Lt. Nazario by the Policemen was unreasonably exacerbated by the verbal death threats made by Gutierrez. . . . And both those threats came after Nazario calmly asked the Policemen about the purpose of the stop. *At no point was Gutierrez justified in either threatening or using deadly force.* As a result, *his threats were unwarranted and much more than could be justified.*

Op. 30 (emphasis added).

The Court simply cannot recognize the lethal catch-22 of the firearms and inconsistent commands, and that Gutierrez’s force and death threats were “much more than could be justified,” that Gutierrez told Lt. Nazario he should be afraid to exit the vehicle, while concluding that a reasonable officer would believe Lt. Nazario staying in a vehicle in response to that conduct was “without just cause.” After all, Virginia’s common law explicitly permits a citizen to lawfully and justly resist unreasonable force with reasonable force—even during an otherwise lawful arrest. *See McCracken v. Commonwealth*, 572 S.E.2d 493, 497 (Va. Ct. App. 2002).

(2) Lt. Nazario’s claim he did not need to get out of the vehicle.

The panel understood this statement to be made “[e]arly on in the traffic stop.” It was not. The officers had already committed *multiple* Fourth Amendment violations: their weapons, the death threat, confirmation Lt. Nazario should be afraid to exit the vehicle. They had already put him in the lethal Catch-22. **Lt. Nazario had just cause to stay in his vehicle.** *E.g., McCracken*, 572 S.E.2d at 497.

Lt. Nazario’s calm **assertion** of a coherent, albeit erroneous, belief as to the *source* of this right to stay put was not force, action, or opposition. It does nothing to obstruct or intimate a *knowing* obstruction of the officers in the performance of their *lawful* duties—writing a traffic ticket. *E.g., Cromartie*, 837 S.E.2d at 256; *also Rogers*, 249 F.3d at 292 (“[A]cts of purely verbal objection to the officers’ planned

search would not constitute obstruction regardless of the legality of their planned search.”).

(3) *Lt. Nazario’s arm blocking the door from opening.*

By this moment, the Officers had already violated Lt. Nazario’s 4th Amendment Rights. They had and were deploying excessive force via their firearms. The officers had issued their mutually inconsistent commands. Gutierrez had already threatened to kill Lt. Nazario and told him he should be afraid to comply with the very command underlying the obstruction claim.

Gutierrez was facing Lt. Nazario with a Taser. Officer Crocker, who had initiated a felony traffic stop without *probable cause to believe Lt. Nazario had committed any crime*, had his firearm pointed at Lt. Nazario, was then reaching into Lt. Nazario’s vehicle to unlock and open his door. Assuming Lt. Nazario’s action was intentional, not instinctual, the officers’ actions leading to this point provided ample “just cause” to try to keep the door shut—it was the last remaining barrier between himself and the violent escalation that Gutierrez had promised upon Lt. Nazario’s exit.

Lt. Nazario’s actions leading to this point only reinforce the conclusion that there was no probable cause. He had complied with *all* commands but one. **Op. 30.** At all times he kept his hands up, open, and visible. **CVI at 18:36:27-:41:13.** He was pleading with the officers to “please relax.” **CVI at 18:38:38-:39:06.** He

correctly told the officers that he didn't "do" anything. *His license plate was in the wrong place.* **JA 319**

As the Panel put it: "All told, during this encounter Lt. Nazario remained calm Nazario did not engage in erratic or furtive movements, gesticulate wildly, or otherwise threaten the Policemen. He did not remove his hands from the Policemen's view without first telling them of his intention to do so." **Op. 12**

Even assuming that under different circumstances restraining the door would have provided probable cause for obstruction, no reasonable person would believe that, under these circumstances, Lt. Nazario acted *without just cause*—an essential element of obstruction.

The Panel relied on *Thorne*, 784 S.E.2d 304, 308 (Va. Ct. App. 2016) and *Lightfoot v. Commonwealth*, No. 0313-20-2, 2021 WL 1257140, at *5 (Va. Ct. App. Apr. 6, 2021) to support their probable cause analysis. **Op. 23.** However, neither *Thorne* nor *Lightfoot* can provide any meaningful guidance simply because in *neither* of these cases did the officers at issue act like Gutierrez and Crocker. The roles were completely reversed: the officers behaved reasonably, and the citizens did not. *Thorne*, 784 S.E.2d at 305; *Lightfoot*, 2021 WL 1257140, at *3-4.

The Panel's reliance on *Pennsylvania v. Mimms*, 434 U.S. 106 (1975) is likewise misplaced. The Supreme Court *assumed* that the officers in question would behave *reasonably*. *Id.* at 110-12. As the panel recognizes, the officers here

did *not*, meaning the assumption of reasonable officer conduct underpinning *Mimms* is absent from this case and *that* Lt. Nazario had just cause to keep the door closed: self-preservation and reasonable resistance to unreasonable force. *E.g.*, *McCracken*, 572 S.E.2d at 497.

These actions, individually and collectively, do not establish obstruction of justice. Rather, they establish that Lt. Nazario acted with just cause. One cannot reasonably, standing behind the barrel of a firearm and after making a death threat, tell someone that they should be afraid to comply with your commands and then expect compliance.

No one wants to die. No one wants to find out why you “should be” afraid to get out of your vehicle. No one wants to be the next Black man to ride the lightning because of a misplaced license plate, in a backwoods Virginia town.

**B. The Erroneous Probable Cause Determination Established
Crocker’s Qualified Immunity for Prolonging the Traffic Stop.**

The panel correctly determined that Lt. Nazario made out a constitutional claim for unreasonably prolonging the traffic stop against both officers. It agreed with the District Court that Crocker was protected by qualified immunity but ruled Gutierrez was not, due to the threats. **Op. 30.** The panel erred as to Crocker because it ignored the bystander liability and the subsequent violence.

Under 42 U.S.C. § 1983, an officer may be held liable “if he: (1) knows that a fellow officer is violating an individual’s constitutional rights; (2) has a

reasonable opportunity to prevent the harm; and (3) chooses not to act.” *Randall v. Prince George’s Cty.*, 302 F.3d 188, 204 (4th Cir. 2002). Gutierrez was correctly denied qualified immunity, meaning a reasonable officer would have known that a constitutional violation was in progress. Crocker had the opportunity to speak out against Gutierrez’s excesses, decline to participate, or even actively obstruct Gutierrez, yet Crocker focused on Lt. Nazario. Thus, Crocker had the chance to intervene and did not take it. This provides for bystander liability, and there is no qualified immunity.

Moreover, because the Court determined the officers had probable cause for an arrestable offense, they implicitly disregarded any of the officers’ conduct after that point (such as the OC spray, the body blows, jumping on Lt. Nazario, and the handcuffs) which also extended the stop, providing additional liability to Gutierrez and Crocker for the violation. As Crocker participated in all the violence, apart from the threats and the OC, and as this violence prolonged the traffic stop, he has direct liability. Further, since the video demonstrates Crocker had ample time to try to stop Gutierrez’s use of OC spray and chose not to, he has bystander liability as well.

C. The Erroneous Probable Cause Determination Established the Officers’ Qualified Immunity for Excessive Force.

In analyzing the officers’ claim of qualified immunity for excessive force, the panel decision found that all four *Graham v. Connor*, 490 U.S. 386 (1989)

factors favored Lt. Nazario, and the second factor (threats to the officers) strongly favored him. **Op. 33-35.** However, the Court’s probable cause determination weighed against Lt. Nazario in the first and third factors—severity of the crime at issue, and active resistance or evasion—leading the Court to grant qualified immunity for the excessive force claims. **Op. 33-36.**

Since there was no probable cause for *any* crime, all the factors *strongly* favor Lt. Nazario – and the weakness for the officers is so apparent, that the court erred in granting the officers qualified immunity.

For the first factor, since there was no probable cause for obstruction of justice, all the force—verbal threats, threatening actions, physical force, and chemical force—was used because of a misplaced license plate: a traffic infraction, not a criminal offense, so minor a Court may dismiss the summons prior to the hearing upon proof of compliance. **Va. Code §§ 18.2-8, 46.2-113, 46.2-716(D).** Without obstruction of justice, this factor *strongly* favors Lt. Nazario.

For the third factor, the Court first misconstrues the chronology, claiming “[e]arly on” in the traffic stop Lt. Nazario “argued with the Policemen that he did not have to exit the vehicle for a traffic stop.” **Op. 34-35.** This “argument,” consisting of a single erroneous legal assertion, was not early in the stop. It was the last statement Nazario made before Gutierrez applied actual physical violence.

CVI 18:36:00-:38:38

Second, the Court determined that Lt. Nazario using his arm to close the door that Crocker had begun to open “cannot be excused.” **Op. at 35.** Yet, as discussed in part IIIA, *supra*, at all points prior to this action, the officers had provided Lt. Nazario substantial “just cause” for this peaceable action. To ignore this prologue is improperly fabricating artificial divisions in timing and sequence. *E.g. Smith v. Ray*, 781 F.3d 95, 101 (4th Cir. 2015) The Court is wrong to say that Lt. Nazario’s response cannot be excused, *e.g., McCracken*, 572 S.E.3d at 497, and his conduct was in fact “indicative of ‘instinctively trying to protect himself from the [Policemen's] onslaught.’” Viewed correctly, without artificial divisions in timing and sequence, and without probable cause for *any* arrestable offense, this factor also *strongly* favors Nazario.

Finally, in the fourth factor, the Court disregarded the Officers’ painful knee strikes, jumping on Lt. Nazario’s back, forcing him to the ground after they had already blinded him, and the other physical force the officers applied to Lt. Nazario. Including this violence increases the weight of that factor to *strongly* favor Lt. Nazario.

Without obstruction, the weakness of the *Graham* factors was so apparent for the officers, and they so strongly favored Lt. Nazario that any reasonable officer would have realized that the force employed was excessive. *See Ray*, 781 F.3d at 106.

D. The Probable Cause Determination Undermined Lt. Nazario's First Amendment Claim.

The panel's opinion relied on its erroneous probable cause determination for obstruction of justice to dismiss Lt. Nazario's First Amendment claim. The panel found that Lt. Nazario established the first and third elements of a First Amendment retaliation claim: protected speech and retaliatory conduct. **Op. 39.** However, it found that under *Nieves v. Bartlett*, 587 U.S. 391, 400 (2019), the existence of probable cause for obstruction undermined the causation element. **Op. 39.** Because this probable cause determination was erroneous, this dismissal of the First Amendment claim was likewise erroneous.

E. The Probable Cause Determination Legitimized the Jury Instructions.

The panel's opinion relied on its probable cause determination for obstruction to uphold the jury instructions concerning probable cause, stating, "[I]f there is probable cause for obstruction of justice . . . the trial court could have nevertheless instructed the jury that the Policemen possessed probable cause to arrest Nazario. . . . Therefore, Nazario has failed to show that the erroneous instructions seriously prejudiced his trial, and we will not set aside the verdict." **Op. 42.** Since there was no probable cause for obstruction, *or any other crime*, these instructions seriously prejudiced Lt. Nazario, and the conclusion must be revisited and the verdict set aside.

IV. CONCLUSION

The Panel incorrectly concluded that the Officers had probable cause to believe that Lt. Nazario obstructed justice when he declined to exit the vehicle, made an erroneous legal claim why he did not have to, and restrained the door from opening, but the Officers' unreasonable, and violent, and explicitly threatening conduct and statements over a simple traffic infraction provide Lt. Nazario with just cause to remain in his vehicle and keep his door shut. Since he had just cause, and a reasonable officer would have known he had just cause, these officers did not have probable cause for obstruction.

Probable cause may be a low bar, but it is a bar. It is not and cannot be set this low, especially when the statute expressly excludes from its scope even knowing obstruction if there is "just cause." This obstruction ruling, and all that flowed from it, must be set right. Thus, the panel, or the circuit *en banc*, should take this opportunity to either correct the error itself or certify the question of probable cause to the Virginia Supreme Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with Fed. R. App. P. 35(b)(2) and 40(b)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,893 words, based on the word count feature of Microsoft Word. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft 365 Word in Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2024, I or my agent will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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