IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-11318-AA

KATELYN EBNER, PRINCESS MBAMARA,
AYOKUNLE ORIYOMI, and BRITTANY PENWELL,
Plaintiffs-Appellants
v.
COBB COUNTY, GEORGIA,
Defendant-Appellee

BRIEF OF APPELLEE COBB COUNTY, GEORGIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

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v.

COBB COUNTY, GEORGIA,

Defendant-Appellee

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Undersigned attorney of record for Defendant-Appellee Cobb County, Georgia hereby certifies that the following persons and entities (including those involved only at the district court) have an interest in the outcome of this case:

1. American Civil Liberties Union Foundation of Georgia, Inc. (ACLU), Attorneys for Plaintiffs-Appellants Katelyn Ebner, et al.;
2. Brown, Hon. Michael L., United States District Judge;

3. Bruce, Lauren S., Attorney for Defendant-Appellee Cobb County and Defendant Tracy Carroll;
4. Carroll, Tracy, Defendant;
5. Cobb County Attorney's Office, Attorneys for Defendant-Appellee Cobb County and Defendant Tracy Carroll;
6. Dance, Deborah L., Attorney for Defendant-Appellee Cobb County and Defendant Tracy Carroll;
7. Dutcher, Pat, Attorney for Defendant-Appellee Cobb County and Defendant Tracy Carroll;
8. Ebner, Katelyn, Plaintiff-Appellant;
9. Greenamyre, Zack, Attorney for Plaintiffs-Appellants;
10. Hollberg & Weaver, LLP, Attorneys for Defendant-Appellee Cobb County and Defendant Tracy Carroll;
11. Khondoker, Aklima, Attorney for Plaintiffs-Appellants;
12. Mbamara, Princess, Plaintiff-Appellant;
13. Mitchell & Shapiro LLP, Attorneys for Plaintiffs-Appellants;
14. Murphree, Laura, Attorney for Defendant-Appellee Cobb County and

Defendant Tracy Carroll;

15. Oriyomi, Ayokunle, Plaintiff-Appellant;

16. Penwell, Brittany, Plaintiff-Appellant;

17. Rowling, High William, Jr., Attorney for Defendant-Appellee Cobb County and Defendant Tracy Carroll;

18. Weaver, George M., Attorney for Defendant-Appellee Cobb County and Defendant Tracy Carroll; and

19. Young, Sean J., Attorney for Plaintiffs-Appellants.

No publicly traded company has an interest in this appeal.

STATEMENT REGARDING ORAL ARGUMENT

Appellee Cobb County regards oral argument as unnecessary. Appellants' brief makes no effective argument that the district court erred in granting summary judgment. The parties' respective positions are clearly described by the briefs and summary affirmance is indicated.

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STATEMENT OF JURISDICTION

The Court has jurisdiction of this appeal under Fed. R. App. P. 4, 28 U.S.C. §1291.

STATEMENT OF ISSUES

1. Whether the failure to appeal a finding that probable cause supported the actions of a county police officer bars Fourth Amendment claims under 42 U.S.C. §1983 against the county employing the officer.
2. Whether Fourth Amendment claims under 42 U.S.C. §1983 for malicious prosecution on DUI charges are barred when probable cause existed to stop, arrest, and charge motorists for traffic violations based on erratic driving committed at the same time.
3. Whether probable cause that satisfies the Fourth Amendment to stop, arrest, and charge motorists for traffic violations based on erratic driving also provides probable cause for related DUI charges.
4. Whether the use of National Highway Traffic Safety Administration Standardized Field Sobriety Testing developed by the U.S. Department of Transportation for recognizing impaired driving can provide probable cause to support DUI charges.
5. Whether a county is deliberately indifferent to constitutional violations by allowing the training of its law enforcement officers to use National Highway Traffic Safety Administration Standardized Field Sobriety Testing developed by the U.S. Department of Transportation for recognizing impaired driving.

6. Whether Plaintiffs' claims for blood draws in violation of the Fourth Amendment are barred by their consent and probable cause.
7. Whether Plaintiffs' focused challenge to the Drug Recognition Expert protocol for recognizing impaired driving, which was not performed regarding any motorist involved in this case, precludes Plaintiffs' challenge to other law enforcement protocols.

STATEMENT OF CASE

I. COURSE OF PROCEEDINGS

Plaintiffs-Appellants Katelyn Ebner, Princess Mbamara, Ayokunle Oriyomi, and Brittany Penwell[1] filed this action on September 25, 2017. (Doc. 1). They subsequently amended their complaint on October 23, 2017. Plaintiffs claim that Defendant Tracy Carroll, a Cobb County police officer, and his employer, Cobb County, Georgia, are liable under 42 U.S.C. §1983 for violations of the Fourth Amendment in connection with traffic stops and charges in 2016. (Doc. 9).

The district court granted summary judgment to both Defendants on March 9, 2020. (Doc. 83). This timely appeal followed. (Doc. 85).

II. STATEMENT OF FACTS

Cobb County

Cobb County, Georgia is a political subdivision of the State of Georgia. (Doc. 9 ¶11). It operates the Cobb County Police Department (CCPD), providing law enforcement services for more than 700,000 citizens of Cobb County. The department comprises over 600 sworn officers, 150 civilian employees, and volunteers. (Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶9).

[1]According to Appellants' counsel, Penwell is deceased.

CCPD is state certified and accredited by the nationwide Commission on Accreditation for Law Enforcement Agencies (CALEA). (Doc. 60-3, Exhibit A (VanHooser Decl.) ¶7; http://www.calea.org/).

At the time of the traffic stops of Plaintiffs, CCPD Traffic Enforcement policy 5.18 was in effect. Its objective is reduction of fatalities, personal injuries, and property damage from traffic crashes. (Doc. 60-3, Exhibit A (VanHooser Decl.) ¶10).

Training

All CCPD officers must complete basic training and obtain certification from the Georgia Peace Officers Safety and Training Council (POST), the accrediting agency for law enforcement officers in Georgia. *See* O.C.G.A. §§35-8-8, -24. Officers are required to maintain certification and participate in continuing training throughout employment. (Doc. 60-3, Exhibit A (VanHooser Decl.) ¶11).

The Cobb County Police Academy provides most training for CCPD officers. The Training Unit develops and implements basic police recruit, advanced/specialized, and annual training programs. This training meets and often exceeds POST requirements. (Doc. 60-3, Exhibit A (VanHooser Decl.) ¶12).

CCPD officers are trained to obey all federal, state, and local laws. O.C.G.A. §§35-8-1, et seq. This includes the Fourth Amendment to the U.S. Constitution and its application to traffic stops and arrests. (Doc. 60-3, Exhibit A (VanHooser Decl.) ¶13).

The training of CCPD officers requires them to respond to and investigate impaired driving and unsafe driving patterns. CCPD training includes instruction on departmental policy regarding impaired driving and the U.S. Department of Transportation, National Highway Traffic Safety Association (NHTSA), Standardized Field Sobriety Testing (SFST) curriculum (www.nhtsa.gov). (Doc. 60-3, Exhibit A (VanHooser Decl.) ¶¶9, 14-15). SFST training consists of instruction on the three phases of DWI or DUI detection: (1) Vehicle in Motion; (2) Personal Contact; and (3) Pre-Arrest Screening. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶10).

The NHTSA SFST guidelines for the first phase, Vehicle in Motion, instruct law enforcement officers to observe driving actions. The NHTSA "DWI Detection Guide" states that observation of the single cue (or clue) of "weaving" or "weaving across lane lines" indicates a greater than 50% probability that a driver is DUI. When another driving cue is observed, such as "[t]urning with a wide radius" or "drifting," the probability jumps to 65%. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶10-12; Doc. 60-6, Attachment 3, at 1-3 (ECF pagination)[2]; Doc. 60-6, Attachment 4, at 7-18).

The second phase of the NHTSA SFST guidelines, Personal Contact, teaches law enforcement officers to look at factors such as bloodshot eyes, cover-up odors, and/or smell of marijuana which are independent indicators of possible impairment. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶13-16; Doc. 60-6, Attachments 5-7).

[2]Unless otherwise indicated, this brief refers to the record and Appellants' brief

The third phase of the NHTSA SFST guidelines, called Pre-Arrest Screening, instructs law enforcement officers regarding three evaluations: (1) Horizontal Gaze Nystagmus (HGN); (2) Walk-and-Turn; and (3) One-Leg Stand. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶17; Doc. 60-7, Attachment 8, at 2-5, 11-17).

The NHTSA HGN evaluation concerns six validated clues (three in each eye) that a trained officer looks for to assist in determining impairment: (1) lack of smooth pursuit, (2) distinct and sustained nystagmus at maximum deviation, and (3) onset of nystagmus prior to 45 degrees. According to NHTSA, the HGN test shows zero clues if a driver has consumed cannabis. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶18-19; Doc. 60-7, Attachment 9, at 25-52; Doc. 60-8, Attachment 10 (ARIDE Drug Class Matrix), at 1).

The NHTSA Walk-and-Turn test is a psychophysical divided attention evaluation. A trained officer looks at the following eight possible validated clues indicating impairment of a driver: (1) cannot keep balance during instruction stage; (2) starts too soon; (3) stops while walking; (4) doesn't touch heel to toe; (5) steps off line; (6) uses arms to balance; (7) turns incorrectly; and (8) counts steps incorrectly. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶20; Doc. 60-7, Attachment 9, at 54-63).

The NHTSA One-Leg Stand test is also a psychophysical divided attention evaluation. A trained officer watches for four possible validated clues for impairment

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of a driver: (1) sways while performing test; (2) raises arms more than six inches for balance; (3) hops around; and (4) puts foot down. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶21; Doc. 60-7, Attachment 9, at 64-70).

After SFST certification, CCPD provides training in the NHSTA Advanced Roadside Impaired Driving Enforcement (ARIDE) curriculum. This program trains officers to observe, identify, and articulate signs of impairment from alcohol, drugs, or a combination of both. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶22, 23; Doc. 60-8, Attachment 11, at 2-6). This includes observing: (1) pupil size; (2) lack of convergence; and (3) performance of the Modified Romberg Balance test. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶22-24; Doc. 60-8, Attachment 11, at 2-6; Doc. 60-8, Attachment 12, at 7-17).

ARIDE teaches officers indications of drug impairment from physical characteristics of a driver. ARIDE evaluations do not carry validated clues associated with pupil dilation, lack of convergence, or the Modified Romberg Balance tests. However, an officer should note all observations associated with these evaluations. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶25-26; Doc. 60-8, Attachment 10 (ARIDE Drug Class Matrix); Doc. 60-8, Attachment 12, at 8-18).

In addition to pupil size, an officer may also observe "rebound dilation." This is pupillary constriction followed by dilation, in which the pupil steadily increases in size and does not return to its original constricted size. Rebound dilation has been

reported in persons impaired by drugs that cause pupillary dilation, with cannabis being most common. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶28-31; Doc. 60-8, Attachment 13, at 19-20).

ARIDE also trains officers to evaluate whether the eyes converge in response to an approaching stimulus. According to this training, consumption of Cannabis may induce lack of convergence in the absence of HGN. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶25; Doc. 60-8, Attachment 10 (ARIDE Drug Class Matrix); Doc. 60-8, Attachment 12 (ARIDE Manual, Session 5), at 7-14).

In addition, ARIDE trains officers to administer the Modified Romberg Balance evaluation. This is a neurological assessment of a driver's internal clock, balance, and presence of tremors (eye and body). According to ARIDE training, a slow internal clock and eyelid tremors can be general indicators of cannabis consumption. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶33-34; Doc. 60-8, Attachment 10 (ARIDE Drug Class Matrix); Doc. 60-8, Attachment 12 (ARIDE Manual, Session 5), at 14-17).

In addition to NHTSA SFST and ARIDE training, some CCPD officers receive specialized training to become certified Drug Recognition Experts (DRE). This program also operates under the auspices of NHTSA along with the International Association of Chiefs of Police (IACP). The training requires officers successfully to complete a seven-day intensive program. The DRE protocol is a systematic, standardized 12-step process, namely: (1) breath alcohol test; (2) interview of the

arresting officer; (3) preliminary examination; (4) examination of the eyes; (5) divided attention tests; (6) examination of vital signs; (7) dark room examinations; (8) examination of muscle tone; (9) examination for injection sites; (10) subject's statements and other observations; (11) opinion of evaluator; and (12) toxicological examination. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶37, 38; Doc. 60-8, Attachment 14 (DRE Expert Course, Session Four), at 21-22).

The 12-step DRE assessment is not conducted roadside at the site of arrest, but in a controlled setting after arrest—usually a precinct or jail. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶39). Thus, it is unrelated to probable cause for arrest. Carroll is a certified DRE. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶41).

Carroll did not perform the post-arrest DRE 12-step assessment on any of the four Plaintiffs. Due to their driving actions and road-side evaluations yielding probable cause, Carroll did not believe it was necessary. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶43).

The CCPD DUI Task Force consists of officers trained in the detection and evaluation of suspected DUI drivers. The Task Force patrols areas where DUI driving and accidents have been common. (Doc. 60-3, Exhibit A (VanHooser Decl.) ¶¶16-19; Doc. 60-4, Exhibit B (Carroll Decl.) ¶42).

CCPD Use of Video

CCPD equips patrol vehicles with cameras to record traffic stops. Some officers also wear body cameras. The roadside evaluations of Plaintiffs were captured on video recordings from patrol vehicle dashboard cameras. (Doc. 60-3, Exhibit A (VanHooser Decl.) ¶¶32-36).

Citizen Complaints

Citizens may file complaints against an officer for failing to assist, improper arrest, and/or improper detention. If investigation shows a citizen's allegations to be "founded," the officer in question is disciplined which may include termination. (Doc. 60-3, Exhibit A (VanHooser Decl.) ¶¶28, 29).

During 2012-2016, CCPD officers interacted with citizens on approximately 1,910,025 occasions—including meetings, stops, warnings, investigations, citations, and arrests. With respect to the 759 complaints received from 2012 to 2016, disciplinary action was imposed in 281 instances. Accordingly, during 2012-2016, complaints were made regarding 0.0397% of police interactions; 0.0147% of interactions resulted in sustained findings and disciplinary action. (Doc. 60-3, Exhibit A (VanHooser Decl.) ¶30).

Law Enforcement Policies and Practices of Cobb County Police Department

CCPD does not authorize or condone violations of the Constitution or any other law in hiring, training, supervision, or discipline of officers. CCPD's policies and

practices are certified by the nationwide Commission on Accreditation for Law Enforcement Agencies (CALEA). (Doc. 60-3, Exhibit A (VanHooser Decl.) ¶¶7, 25).

It has always been the policy of Cobb County and the CCPD to comply fully with the Fourth Amendment to the U.S. Constitution in conducting traffic stops, arrests, searches, and initiating prosecutions. The polices of Cobb County and CCPD require specific and articulable facts indicating a violation before a traffic stop. Their policies also require probable cause to make an arrest, conduct a search, and initiate a prosecution. Cobb County, CCPD, and their management have never been involved in, authorized, or approved of any exception to this policy. (Doc. 60-3, Exhibit A (VanHooser Decl.) ¶¶26-27).

As of 2017, IACP found that, although understaffed, CCPD is an "efficient and well-organized agency with a strong commitment to community policing and collaborative problem solving efforts." Further, it found community responses were 91.5% favorable regarding CCPD. The assessment did not find policies in violation of the Constitution. (Doc. 60-3, Exhibit A (VanHooser Decl.) ¶¶22- 23).

Cobb County is not aware of any judgment against the County or any of its police officers for unconstitutional action at the scene of a traffic stop or in an arrest for traffic violations. (Doc. 60-3, Exhibit A (VanHooser Decl.) ¶24).

Officer Tracy T. Carroll

Officer Tracy T. Carroll graduated from the University of West Georgia in 2007 with a Masters of Arts in Sociology and concentration in Criminology. Carroll joined the CCPD on December 17, 2007 and has worked at CCPD since. Officer Carroll is a POST certified law. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶2, 4-5).

Since joining CCPD, Carroll has completed more than 2630 hours of law enforcement training. This includes 427 DUI related training hours. Plaintiffs' DUI expert, Joshua Ott, agrees that Carroll was well-trained on impaired driving recognition and traffic enforcement officer. (Doc. 56-4 (Ott Dep.), at 74:11-15).

At CCPD, Carroll has served in various capacities including the DUI Task Force and the STEP Unit (Selective Traffic Enforcement Program). At the time of the incidents giving rise to this lawsuit, Carroll was assigned to the DUI Task Force. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶8).

Before Plaintiffs' arrests, Officer Carroll successfully completed the NHTSA SFST curriculum and was proficient in the phases of evaluation. In the NHTSA SFST training, Carroll was trained to observe motor vehicles in motion for erratic driving. This included problems in maintaining proper lane position (i.e., weaving within a lane, drifting, straddling a lane line, and turning with a wide radius). In accordance with the NHTSA publication "The Visual Detection of DWI Motorists," Carroll was trained that there is a 50% or greater probability a driver failing to maintain proper

lane position is impaired. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶10-12; Doc. 60-6, Attachment 3, at 6-7; Doc. 60-6, Attachment 4, at 4-5).

Carroll was also taught in NHTSA SFST training to observe and interview drivers in order to gather any available evidence of alcohol and/or drug influence. This included physical manifestations such as bloodshot eyes, the smell of marijuana, and cover-up odors. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶14, 16; Doc. 60-6, Attachment 5, at 23-26, Attachment 6, at 28, Attachment 7, at 30).

Carroll was trained to administer, observe, and document clues during the Pre-Arrest Screening phase three. This included administering "three scientifically validated Standardized Field Sobriety Tests," namely: (1) HGN, (2) Walk-and-Turn, and (3) One-Leg Stand. (Doc 60-4, Exhibit B (Carroll Decl.) ¶17; Doc. 60-7, Attachment 8, at 2).

Before the incidents involving Plaintiffs, Carroll had also successfully completed the NHTSA ARIDE curriculum and was proficient in observing Pupil Size, lack of convergence, and administering the Modified Romberg test. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶24).

To observe a driver's pupil size, Carroll used a light source such as a penlight to look for rebound dilation. Carroll was also trained that an officer might suspect the presence of cannabis if he observes lack of convergence without HGN. (Doc. 60-4,

Exhibit B (Carroll Decl.) ¶32; Doc. 60-8, Attachment 10 (ARIDE Drug Class Matrix)).

In addition, Carroll was trained to administer the Modified Romberg Balance evaluation, a neurological tool to check a driver's internal clock, balance, and presence of tremors (eye and body). (Doc. 60-4, Exhibit B (Carroll Decl.) ¶33; Doc. 60-8, Attachment 12, at pp. 14-16).

In accordance with the ARIDE protocol, Carroll was instructed that a slow internal clock and eyelid tremors can be general indicators of cannabis consumption. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶34; Doc. 60-8, Attachment 10).

Additionally, Carroll was trained by the ARIDE protocol to look for other "general indicators" of cannabis consumption such as reddening of the conjunctiva, odor of marijuana, plant debris in mouth/tongue, impaired awareness of time, muscles tremors, and eyelid tremors. And he was trained to look for raised taste-buds and discoloration of the driver's tongue. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶35, 36; Doc. 60-8, Attachment 10).

Plaintiffs' Expert Joshua Ott

Joshua Ott worked as a police officer in Roswell, Georgia during August 2005 through July 2016. He served as a Standardized Field Sobriety Testing Instructor and certified Drug Recognition Expert and Instructor. Ott was assigned to the Roswell Police Department DUI Task Force for three years and participated in the arrests of

1700 impaired drivers. (Doc. 56-4 (Ott Dep.), at 16:15-19, 22:12-14; 26:22-25; Dep. Exhibit 16 (Ott CV)).

In his deposition, Ott agreed there can be probable cause for DUI as a result of drugs or alcohol, even though the chemical test later comes back negative. (Doc. 56-4 (Ott Dep.), at 28:10-14). Ott reviewed the four investigations and arrests of Plaintiffs and prepared an expert witness report regarding each. Ott documented Plaintiffs' problems in maintaining proper lane position, including weaving, drifting, straddling lane line, and wide turning radius. Ott also documented NHTSA clues of possible impairment such as bloodshot eyes, cover-up odors, and smell of marijuana. (Doc. 56-4 (Ott Dep.), at 53:15-17); Doc. 60-11 (Ebner Report), at 3-8); Doc. 60-12 (Mbamara Report), at 11-16); Doc. 60-13, at 3-8); Doc. 60-14 (Oriyomi Report), at 3-8).

In the "Pre-Arrest Screening" sections of his reports, Ott stated that an officer might suspect use of cannabis if lack of convergence was observed without HGN. (Doc. 56-4 (Ott Dep.), at 53:15-17; Doc. 60-11, at 8-12; Doc. 60-12 (Mbamara Report), at 16-21; Doc. 60-13 (Penwell Report), at 8-13); Doc. 60-14 (Oriyomi Report), at 8-13).

In each report regarding Plaintiffs, Ott agreed Plaintiffs exhibited no clues from pupil dilation, lack of convergence, or the Modified Romberg test. (Doc. 56-4 (Ott

Dep.), at 53:15-17; Doc. 60-11 (Ebner Report), at 13; Doc. 60-12, at 21-22); Doc. 60-13 (Penwell Report), at 13-14); Doc. 60-14, at 13).

Importantly, Ott did not dispute that probable cause existed to arrest each of the four plaintiffs for impaired driving. (Doc. 56-4 (Ott Dep.), at 106:22-25, 107:1-17, 120: 6-15, 126:21-25, 127:1-6).

Plaintiff Katelyn Ebner

After leaving her restaurant job, Katelyn Ebner was driving a Toyota Camry at 11:49 pm, April 7, 2016, in Cobb County, Georgia. (Doc. 56-3 (Ebner Dep.), at 33:13-19); Doc. 60-4, Exhibit B (Carroll Decl.) ¶71; Doc. 60-9, Attachment 16).

NHTSA Phase 1: Vehicle in Motion

Carroll observed Ebner's car cross a double yellow line when turning from a red light and then cross a white fog line. The Camry continued along the white fog line for approximately six seconds before returning to the proper lane of travel. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶45-48, 71; Doc. 60-9, Attachment 16; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 1 (Video: Ebner1), at 23:49:39-23:50:17)).

Based on his observations, Carroll activated his patrol vehicle blue lights and stopped Ebner's car. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶48, 71; Doc. 60-9, Attachment 16; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 1 (Video: Ebner 1) 23:50:21).

Ebner agreed she made an improper left turn. (Doc. 56-3 (Ebner Dep.), at 38: 9-11; 41:19-20). Plaintiffs' expert Ott concurred Ebner crossed the double yellow lines while turning left and crossed the white fog line. (Doc. 60-11, at 5).

NHTSA Phase 2: Initial Personal Contact

At the traffic stop, Carroll observed that Ebner's eyes looked watery. Ebner agrees. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶50, 71; Doc. 60-9, Attachment 16; Doc. Ebner Dep. 29:17-18, 42:20-21).

While Ebner was still seated in the Camry, Carroll used his flashlight to observe pupil size and rebound dilation. Ebner exhibited rebound dilation but normal pupil size. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶51, 71; Doc. 60-9, Attachment 16).

While in her Camry, Carroll asked Ebner to tilt her head back and close her eyes. He observed eyelid tremors, another general indicator of cannabis consumption. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶52, 71; Doc. 60-9, Attachment 16).

NHTSA Phase 3: Pre-Arrest Screening

Carroll observed a marked reddening of Ebner's conjunctiva. He also observed raised taste buds and rebound dilation. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶54-56, 71; Doc. 60-9, Attachment 16; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 1 (Video: Ebner 1), at 23:54:54)).

Carroll advised Ebner of his observations, including weaving and straddling lane lines. He expressed concern over her ability to drive safely. Carroll asked her to

perform voluntary field evaluations. Ebner consented, replying: "[Y]ea, that's fine. I completely understand." (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶57-58, 71; Doc. 60-9, Attachment 16; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 1 (Video: Ebner1), at 23:55:42- 23:56:12; Doc. 56-3 (Ebner Dep.), at 29:8-11).

In addition, Carroll observed that Plaintiff Ebner's eyes were unable to converge. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶59-60, 71; Doc. 60-5, Attachment 12, at 3; Doc. 60-9, Attachment 16; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 1 (Video: Ebner1) at 23:54:54).

Carroll asked Ebner to perform tests from NHTSA SFST evaluations. In the Horizontal Gaze Nystagmus (HGN), he observed no "clues," although Ebner swayed front to back. Next, Carroll asked Ebner to perform the divided-attention Walk-and-Turn evaluation. Carroll observed four of eight clues. She stopped while walking, turned incorrectly, missed heel-to-toe, and took an incorrect number of steps. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶61-63, 71; Doc. 60-9, Attachment 16; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 1 (Video: Ebner1), at 00:02:40-00:03:26).

Plaintiffs' DUI expert Ott reviewed the dash cam video and observed three of eight clues. He did not dispute the fourth clue seen by Carroll. (Doc. 56-4 (Ott Dep.), at 117:4-13; Doc. 60-11, at 12).

Carroll then asked Ebner to perform the One-Leg Stand test. He observed leg tremors during but no clues. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶64, 71; Doc. 60-9, Attachment 16; Doc. 60-3, Exhibit A (VanHoozer Decl.); Doc. 61, Attachment 1 (Video: Ebner1), at 00:03:40-00:05:22)). Ebner agrees she had leg tremors. (Doc. 56-3 (Ebner Dep.), at 57: 5-16).

Carroll next asked Ebner to perform the Modified Romberg evaluation. She swayed, had eyelid tremors, and estimated 35 seconds as 30 seconds. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶65, 71; Doc. 60-9, Attachment 16; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 1 (Video: Ebner1), at 00:05:29-00:06:37).

Then, Carroll asked Ebner to perform the Finger-to-Nose exercise. Ebner missed the tip of her nose with the tip of her finger on attempts two, three, four, five, and six. She continued to display eyelid tremors. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶66, 71; Doc. 60-9, Attachment 16; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 1 (Video: Ebner1), at 00:06:43-00:00:08:19).

Based on the totality of the circumstances and believing there was probable cause, Carroll arrested Ebner for being an impaired and less safe driver due to marijuana use. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶68). Plaintiffs' DUI expert does not dispute the probable cause to arrest Ebner. (Doc. 56-4 (Ott Dep.), at 120:13-15).

After arresting Ebner, Carroll read her the implied consent warning prescribed by Georgia law. Ebner consented to the state blood test. (Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 1 (Video: Ebner1), at 00:11:57-00:12:48; Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶69, 71; Doc. 60-9, Attachment 16).

Carroll issued two Uniform Traffic Citations: (1) DUI for Less Safe Driving under Influence of Drugs in violation of O.C.G.A. §40-6-391(A)(2), and (2) Failure to Maintain Lane/Improper Lane Change in violation of O.C.G.A. §40-6-48. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶70; Doc. 60-9, Attachment 15).

According to the video recording from Carroll's patrol vehicle, 20 minutes and 23 seconds elapsed from the activation of blue lights until Ebner's arrest. (Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 1 (Video: Ebner1), at 23:50:21-00:10:44).

Post Arrest and Case Disposition

The Cobb County Solicitor General accused Ebner in Cobb County State Court of: (1) DUI for Less Safe Driving under Influence of Drugs, (2) Reckless Driving, and (3) Failure to Maintain Lane. (Doc. 60-10, Exhibit C (Lanning Decl.) ¶5, Attachment 1). The Georgia Bureau of Investigation (GBI) tested Ebner's blood and reported it negative for drugs. (Doc. 60-10, Exhibit C (Lanning Decl.) ¶9, Attachment 5).

Ebner retained defense counsel who engaged in plea negotiations. As a result, the charges were dropped, Ebner performed community service, and received a

drug/alcohol evaluation. (Doc. 60-10, Exhibit C (Lanning Decl.) ¶9; Doc. 56-3 (Ebner Dep.), at 58:23-25, 59:4-25, 60:1).

Plaintiff Princess Mbamara

After attending a party at a Marriott Courtyard in Cobb County, Plaintiff Princess Mbamara was driving her 2016 Hyundai toward DeKalb County at 11:55 pm, March 25, 2016, to meet friends and go to the Mint Lounge. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶98; Doc. 60-9, Attachment 18; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 3 (Video: Mbamara1), at 00:00:02-06; Doc. 56-2 (Mbamara Dep.) at 37: 1-25).

NHTSA Phase 1: Vehicle in Motion

Carroll observed Mbamara's vehicle fail to maintain lane and weave within the lane. Activating his patrol vehicle blue lights, Carroll initiated a traffic stop. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶76-77, 98; Doc. 60-9, Attachment 18; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 3 (Video: Mbamara1), at 23:54:27-23:55:23). Mbamara admitted at her deposition that she drove her car across lane dividers, straddled the lane divider line, and weaved within the lane. (Doc. 56-2 (Mbamara Dep.), at 47:4-10, 48:19-25, 49:1-12).

Plaintiffs' DUI expert Ott agreed that Mbamara crossed the broken white lane lines, drifted to the far left of her lane, and was weaving in her lane. According to

Plaintiffs' DUI expert, Plaintiff Mbamara displayed three NHTSA cues of impairment. (Doc. 56-4 (Ott Dep.), at 55:23, 56:1-4; Doc. 60-12, at 14).

NHTSA Phase 2: Initial Personal Contact

As Mbamara explained she did not know where she was going, Carroll noticed her eyes were bloodshot and she had eyelid tremors. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶79-80, 98; Doc. 60-9, Attachment 18; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 3 (Video: Mbamara1), at 23:56:35).

Mbamara agreed to Carroll's request to perform voluntary field evaluations. Carroll observed a marked reddening of conjunctiva, raised taste buds, and a greenish film on her tongue. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶81-83, 98; Doc. 60-9, Attachment 18; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 3 (Video: Mbamara1), at 00:00:04).

Carroll did not detect rebound dilation and Mbamara's pupil size appeared normal. But her eyes were unable to converge. (Exhibit B (Carroll Decl.) ¶¶24, 85-87, 98; Doc. 60-9 Attachment 18; Doc. 60-8, Attachment 12 (ARIDE Manual), at 9-14).

Carroll asked Mbamara to perform the NHTSA SFST battery. In the HGN evaluation, he observed no "clues" but she swayed front to back. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶88, 98; Doc. 60-9, Attachment 18). In the divided attention Walk-and-Turn test, Carroll observed four of eight clues. Mbamara stopped while walking,

turned incorrectly, missed heel-to-toe, and took an incorrect number of steps. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶89, 91, 98; Doc. 60-9, Attachment 18; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 3 (Video: Mbamara1) at 00:06:17-00:08:05).

Plaintiffs' DUI expert Ott reviewed the video of Mbamara's evaluation and observed three of eight clues. He did not dispute the fourth clue seen by Carroll. (Doc. 56-4 (Ott Dep.), at 64:13-25; Doc. 60-12, Exhibit 18).

In the One-Leg Stand, Mbamara swayed and exhibited one clue. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶92, 98; Doc. 60-9, Attachment 18; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 3 (Video: Mbamara1), at 00:08:29-00:10:00). Ott also observed Mbamara sway and display one clue. (Doc. 56-4 (Ott Dep. at 65-66); Doc. 60-23, at 21).

In the Modified Romberg evaluation, Mbamara swayed, exhibited eyelid tremors, and estimated 26 seconds as 30 seconds. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶93, 98; Doc. 60-9, Attachment 18; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 3 (Video: Mbamara1), at 00:10:10 – 00:11:01).

In the Finger-to-Nose exercise, Mbamara missed the tip of her nose with the tip of her finger on attempts two, four, five, and six. She showed eyelid tremors when her eyes were closed. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶94, 98; Doc. 60-9, Attachment 18).

Based on the totality of the circumstances, Carroll believed he had probable cause to arrest Mbamara for being an impaired and less safe driver due to marijuana consumption. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶95, 98; Doc. 60-9, Attachment 18). Plaintiffs' DUI expert Ott does not dispute Officer Carroll's conclusion that there was probable cause to arrest. (Doc. 56-4 (Ott Dep.), at 107:7-14).

After the arrest, Carroll read Mbamara the implied consent warning prescribed by Georgia law and she consented to the state blood test. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶96, 98; Doc. 60-9, Attachment 18; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 3 (Video: Mbamara1), at 00:11:57- 00:12:47-48).

Carroll issued two Uniform Traffic Citations: (1) DUI for Less Safe Driving under Influence of Drugs in violation of O.C.G.A. 40-6-391(A)(2), and (2) Failure Maintain Lane/Improper Lane Change in violation of O.C.G.A. 40-6-48. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶97; Doc. 60-9, Attachment 17).

From the activation of Carroll's blue lights until the arrest of Mbamara, 19 minutes 15 seconds elapsed. (Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 3 (Video: Mbamara1 23:55:20- 00:14:35).

Post Arrest and Case Disposition

The Cobb County Solicitor General's Office reviewed Mbamara's traffic stop and arrest and filed an accusation in Cobb County State Court against Mbamara for: (1) DUI for Less Safe Driving under Influence of Drugs, and (2) Failure to Maintain

Lane. The Georgia Bureau of Investigation (GBI) tested Mbamara's blood, and generated a toxicology report negative for drugs. As a result, the prosecutor dismissed the case by nolle prosequi on October 4, 2016, but noted on the filed order "probable cause existed." (Doc. 60-10, Exhibit C (Lanning Decl.) ¶10, Attachments 2, 6).

Plaintiff Brittany Penwell

At 11:40 pm, March 11, 2016, Brittany Penwell was driving a 2013 Kia Rio in Cobb County, Georgia. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶101, 127; Doc. 60-9 Attachment 20; Doc. 56-1 (Penwell Dep.), at 28:5-10).

NHTSA Phase 1: Vehicle in Motion

Carroll observed Penwell's car cross onto a double yellow lane divider with the driver's side tires and then again cross onto the double yellow line. Carroll initiated a traffic stop. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶101-102, 127; Doc. 60-9, Attachment 20; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 4 (Video: Penwell2), at 23:37:59-23:38:46).

Penwell admitted in her deposition she failed to maintain her lane. (Doc. 56-1 (Penwell Dep.), at 29: 22-25). Plaintiffs' DUI expert Ott agreed that Penwell crossed onto the double yellow line. (Doc. 60-13, at 5-6).

NHTSA Phase 2: Initial Personal Contact

Carroll immediately detected a floral cover-up odor from the interior of Penwell's Kia. Carroll observed that Penwell had bloodshot eyes and Penwell agreed.

He also observed rebound dilation, eyelid tremors, raised taste buds, and a greenish film on her tongue. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶34, 107-111, 127; Doc. 60-8, Attachment 10 (ARIDE Drug Class Matrix); Doc. 60-9, Attachment 20; Doc. 60-13, at 8).

NHTSA Phase 3: Pre-Arrest Screening

Based on Penwell's driving and physical manifestations, Carroll asked Penwell to participate in voluntary field sobriety tests and she agreed. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶112, 127; Doc. 60-9, Attachment 20; Penwell Dep. 33:1-5).

Penwell showed rebound dilation in both eyes and lack of convergence. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶113-114, 127; Doc. 60-9, Attachment 20; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 56-1, Attachment 4 (Video: Penwell2), at 23:57:18 -23:58:07).

Carroll observed no clues in the HGN. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶115, 127; Doc. 60-9, Attachment 20; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 4 (Video: Penwell2), at 23:58:35-00:00:00), Attachment 5 (Video: Penwell1), at 00:00:00-00:01:36)).

In the Walk-and-Turn evaluation, Penwell missed heel-to-toe, walked off-line, and raised her arms for balance. Although not a clue, he noted Penwell swayed during the instructional stage of the evaluation. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶117,

127; Doc. 60-9, Attachment 20; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 5 (Video: Penwell1), at 00:01:52 - 00:03:49).

Ott reviewed the video of Penwell's evaluation and observed three of eight clues in the Walk-and-Turn test. Ott also noted Penwell sway during the instructional stage. (Doc. 60-4 (Ott Dep.), at 103:24-25, 104:1-2; Doc. 60-13, at 12-13).

In the One-Leg Stand test, Penwell swayed and put her foot down during the evaluation, exhibiting two of four clues for impairment. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶118, 127; Doc. 60-9, Attachment 20; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 5 (Video: Penwell1), at 00:03:55 – 00:05:29). Ott also observed two of four clues. (Doc. 60-13, at 13).

In the Modified Romberg evaluation, Penwell swayed front to back, displayed eyelid tremors, and estimated 24 seconds as 30 seconds. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶119-120, 127; Doc. 60-9, Attachment 20; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 5 (Video: Penwell1), at 00:05:35-00:06:40).

In the Finger-to-Nose exercise, Penwell missed the tip of her nose with the tip of her finger on attempts two, five, and six. Penwell continued to have eyelid tremors. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶121, 127; Doc. 60-9, Attachment 20; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 5 (Video: Penwell1), at 00:07:16 – 00:08:33).

Carroll also observed marked reddening of Penwell's conjunctiva. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶122, 127; Doc. 60-9, Attachment 20).

Based on the totality of the circumstances, Carroll believed there was probable cause to arrest Penwell for being an impaired and less safe driver due to marijuana consumption. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶124, 127; Doc. 60-9, Attachment 20). Ott does not dispute Carroll's view that probable cause existed to arrest Plaintiff Penwell. (Doc. 56-4 (Ott Dep.), at 107:7-14).

After the arrest, Carroll read Penwell the implied consent warning prescribed by Georgia law and she consented to the state blood test. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶125, 127; Doc. 60-9, Attachment 20; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36, Doc. 61, Attachment 5 (Video: Penwell1), at 00:10:46, 00:11:41).

Carroll issued two Uniform Traffic Citations to Penwell: (1) DUI for Less Safe Driving under Influence of Drugs in violation of O.C.G.A. 40-6-391(A)(2), and 2) Failure Maintain Lane/Improper Lane Change in violation of O.C.G.A. 40-6-48. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶126; Doc. 60-9, Attachment 19).

The duration of the detention of Penwell, as indicated by the video recording from Carroll's patrol vehicle, was 17 minutes from activation of blue lights until arrest. (Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 4 (Video:

Penwell2), at 23:38:46-23:41:08, 23:54:12-00:00:28), Attachment 5 (Video: Penwell1), at 00:00:46-00:09:50).[3]

Post Arrest and Case Disposition

The Cobb County Solicitor's Office received Penwell's traffic citations but did not accuse the case. The GBI tested Penwell's blood sample, and returned a toxicology report negative for drugs. The prosecutor dismissed the case by nolle prosequi on June 24, 2016. (Doc. 60-10, Exhibit C (Lanning Decl.) ¶¶8, 12).

Plaintiff Auokunle Oriyomi

On June 12, 2016, at 12:12 am, Auokunle Oriyomi was driving his 2003 Acura in Cobb County, with passenger Frederick Brown. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶130, 154; Doc. 60-9, Attachments, 21, 22; Doc. 56-5 (Oriyomi Dep.), at 57:16-24). Oriyomi had attended a Kennesaw State University party and was driving his impaired passenger Brown to his home. (Doc. 56-5 (Oriyomi Dep.), at 45:7-15, 57:16-24). Oriyomi testified in deposition that marijuana was smoked at the party by attendees, including Brown. (Doc. 56-5 (Oriyomi Dep.), at 45:7-15, 64:21-25, 65:1-5).

[3]When Carroll stopped Penwell, a second vehicle travelling with her pulled over to the side of the road with Penwell. Carroll was obligated to investigate the second vehicle. He ultimately arrested the driver for driving on a suspended license. Therefore, not all of Officer Carroll's time was devoted to Penwell. The 17 minutes noted above was the time Carroll devoted to investigating Penwell's erratic driving. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶127; Doc. 60-3, Attachment 20).

NHTSA Phase 1: Vehicle in Motion

Cobb County Police Sgt. G.L. Johnson observed Oriyomi's vehicle fail to maintain its lane and drift multiple times back and forth—touching lane line dividers several times. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶130, 154; Doc. 60-9, Attachment 22; Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 3 (Video: Oriyomi3), at 12:11:43 – 12:13:40).

Johnson a initiated a traffic stop. When Johnson explained to Oriyomi why he pulled him over, Oriyomi stated "my bad about that." (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶130-131, 154; Doc. 60-9, Attachment 22; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 6 (Video Oriyomi3), at 12:15:04-12:15: 08; Doc. 56-5, Oriyomi Dep. 56:20-24). Plaintiffs' DUI expert Ott agreed Oriyomi drifted, struck lane lines, and swerved while driving. (Doc. 56-4 (Ott Dep.), at 121:12-21; Doc. 60-14, at 5).

NHTSA Phase 2: Initial Personal Contact

Johnson observed Oriyomi had glassy eyes and a strong odor of marijuana came from inside the vehicle. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶131, 154; Doc. 60-9, Attachment 22). In his report, Ott stated that the smell of marijuana during the initial contact with a driver may be evidence of drug impairment according to the SFST Manual. (Doc. 56-4 (Ott Dep.), at 121:12-21; Doc. 60-14, at 8).

Johnson suspected Oriyomi was impaired and requested that Carroll come to the location for an impaired driving investigation. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶132, 154; Doc. 60-9, Attachment 22). Carroll arrived at 12:18 am. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶133; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 7 (Video: Oriyomi1), at 00:18:20). Carroll smelled burnt marijuana on Oriyomi's person, and observed Oriyomi's bloodshot and glassy eyes. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶13, 154; Doc. 60-9, Attachment 22).

NHTSA Phase 3: Pre-Arrest Screening

Oriyomi agreed to perform voluntary field sobriety tests. Carroll asked Oriyomi to tilt his head back and shut his eyes. Carroll observed eyelid tremors. He also observed reddening of Oriyomi's conjunctiva. Carroll asked Oriyomi to stick his tongue out, and observed raised taste buds and light colored film on his tongue. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶135-139, 154; Doc. 60-9, Attachment 22; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 7 (Video: Oriyomi1), at 00:20:54-00:20-57, 00:21:28-31, 00:21:42).

Carroll also observed rebound dilation and inability of Oriyomi's eyes to converge. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶14, 140, 154; Doc. 60-9, Attachment 22; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 7 (Video: Oriyomi1), at 00:21:55, 00:22:13-00:22:42).

In the HGN, Carroll observed no clues although Oriyomi swayed front to back. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶142, 154; Doc. 60-9, Attachment 22; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 7 (Video: Oriyomi1), at 00:22:45 – 00:26:10).

In the Walk-and-Turn, Oriyomi exhibited three of eight clues. He stopped on the ninth step, separated his heel to toe position, and turned improperly. During the instructional stage of the evaluation, Oriyomi used his arms to maintain balance. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶143-144, 154; Doc. 60-9, Attachment 22; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 7 (Video: Oriyomi1), at 00:26:22-00:28:25). In reviewing video of the traffic stop, Ott also observed Oriyomi exhibit three of eight clues in the Walk-and-Turn. Ott also observed Oriyomi's use of arms during the instructional stage. (Doc. 56-4 (Ott Dep.), at 124:23-25, 125:1-7; Doc. 60-14, at 12).

In the One-Leg Stand, Oriyomi swayed during the evaluation, had leg tremors, and exhibited one of four clues of impairment. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶146, 154; Doc. 60-9, Attachment 22; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 7 (Video: Oriyomi1), at 00:28:35-00:30:01). Ott observed the same one of four clues. (Ott Dep. at 125:16-19); Doc. 60-14, at 12).

Oriyomi, in the Modified Romberg evaluation, swayed front to back, exhibited eyelid tremors, put his left arm against his leg, and estimated 34 seconds as 30

seconds. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶147-148, 154; Doc. 60-9, Attachment 22; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 7 (Video: Oriyomi1), at 00:30:03-00:32:07).

In the Finger-to-Nose exercise, Oriyomi missed the tip of his nose with the tip of his finger on attempts two, four, five, and six. He used the pad of his finger on all attempts. Oriyomi continued to display eyelid tremors his eyes were closed. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶149, 154; Doc. 60-9, Attachment 22; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 7 (Video: Oriyomi1), at 00:32:20 – 00:33:58).

When Carroll explained he could smell marijuana, Oriyomi admitted being at an apartment where marijuana was smoked. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶150, 154; Doc. 60-9, Attachment 22; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 7 (Video: Oriyomi1), at 00:34:11).

Based on the totality of the circumstances Carroll believed there was probable cause to arrest Oriyomi for being an impaired and less safe driver due to marijuana consumption. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶151, 154; Doc. 60-9, Attachment 22). Plaintiffs' DUI expert Ott does not dispute the existence of probable cause to arrest Oriyomi. (Doc. 56-4 (Ott Dep.), at 126:21-25, 127:1-6).

After the arrest, Carroll read the implied consent warning prescribed by Georgia law and Oriyomi consented to the state blood test. (Doc. 60-4, Exhibit B (Carroll

Decl.) ¶¶152, 154; Doc. 60-9, Attachment 22; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 7 (Video: Oriyomi1), at 00:36:22-00:37:20).

Carroll issued two Uniform Traffic Citations to Plaintiff Oriyomi: (1) DUI/Drug/Less Safe in violation of O.C.G.A. §40-6-391(A)(2), and (2) Failure to Maintain Lane/Improper Lane Change in violation of O.C.G.A. §40-6-48. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶153; Doc. 60-9, Attachment 21).

According to the video from Johnson's patrol vehicle, the time duration from activation of blue lights until Carroll arrived to investigate for impaired driving was 6 minutes, 20 seconds. (Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 6 (Video: Oriyomi3), at 12:13:40-12:20:00). The second video shows the passage of 16 minutes, 26 seconds from the beginning of Carroll's investigation until arrest. Thus, the total duration of Oriyomi's detention at the scene was approximately 22 minutes, 46 seconds. (Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 7 (Video: Oriyomi1), at 00:18:20-00:35:14).

Post Arrest and Case Disposition

The Cobb County Solicitor's Office reviewed the police reports, noted probable cause, and filed an accusation charging Oriyomi with DUI Drugs, Reckless Driving, and Failure to Maintain Lane. Oriyomi's blood was submitted to the GBI for testing, and the toxicology report returned negative for drugs. Oriyomi obtained defense counsel for case and entered a negotiated plea on December 14, 2016. He pled nolo

contendere to Count 3 of the accusation, Failure to Maintain Lane. As part of the plea bargain, Counts 1 and 2 were dismissed by nolle prosequi. (Doc. 60-10, Exhibit C (Lanning Decl.) ¶¶7, 11; Attachments 3, 7).

III. STANDARD OF REVIEW

The grant of summary judgment is reviewed *de novo*. *Penley v. Eslinger*, 605 F.3d 843, 848 (11th Cir.2010); *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1237 (11th Cir. 2004).

SUMMARY OF ARGUMENT

This Court should affirm summary judgment in favor of Cobb County. Plaintiffs have failed to appeal the finding that Officer Carroll's actions were supported by probable cause and did not violate the Fourth Amendment. (Doc. 83, 15 39). By appealing only as to Carroll's employer, they cannot show they were "deprived of a right 'secured by the Constitution and laws' [of the United States]." Baker v. McCollan, 443 U.S. 137, 140 (1979). As the First Circuit concluded in Willhauck v. Halpin, 953 F.2d 689 (1st Cir. 1991), the "failure to challenge . . . determinations [as to officers] on appeal means that we are bound by the findings below that there were no violations of [plaintiff] Willhauck's constitutional rights. . . . It follows ineluctably that where there are no constitutional violations by municipal employees there can be no claim of inadequate supervision or training against a municipal employer." Id. at 714.

Moreover, Plaintiffs' Fourth Amendment claims are barred by probable cause that they concede existed for related traffic offenses based on erratic driving. The single offense rule of Devenpeck v. Alford, 543 U.S. 146, 149-50, 152-55 (2004), supports this conclusion and the Eleventh Circuit's recent decision in Williams v. Aguirre, ___ F.3d ___, 2020 WL 3957991 (11th Cir. July 13, 2020), does not dictate a different outcome. In Aguirre, Plaintiff Williams was indicted, prosecuted, and held over 16 months for two counts of attempted murder and not for the minor charge of carrying a concealed weapon without a permit. Aguirre, 2020 WL 3957991, at *3. Thus, probable cause for the weapon's charge did not satisfy the need for probable cause to support the attempted murder charges. In our case, each Plaintiff was in fact prosecuted for related non-DUI traffic offenses based on erratic driving. And none was held longer than 24 hours before release. (Appellants' Brief, at 25). The Devenpeck single offense principle thus leads to the conclusion that Plaintiffs' Fourth Amendment claims for malicious prosecution on DUI charges are barred.

Regardless of their other arguments regarding supposed Fourth Amendment violations, Plaintiffs must show Cobb County is responsible for a culpable official policy that proximately caused violations of the Fourth Amendment rights. This is required under the Supreme Court's landmark decision in Monell v. Department of Social Services of City of New York, 436 U.S. 658, 690 (1978) (a government entity may be held liable under 42 U.S.C. §1983 only if the conduct of its agents is pursuant

to an "official" municipal policy); Owens v. City of Atlanta, 780 F.2d 1564, 1567 (11th Cir. 1986) (in order to result in §1983 liability, a policy must contain a "fault element").

Plaintiffs in this case have not identified and pled any plausible defective policy that satisfies Monell. In their complaints, they pled that the County is liable for the use of a NHTSA formulated protocol called Drug Recognition Expert (DRE) that was not even used as to any of the four Plaintiffs. (Doc. 83, at 16-17).

Apparently, Plaintiffs wish to challenge on appeal Carroll's training and that of other Cobb County DUI Task Force officers. These officers have been trained to follow the national DOT NHTSA ARIDE and SFST protocols in investigating and enforcing traffic laws including those against impaired driving.

But Plaintiffs have not argued or cited to the district court, or to this Court in their opening brief, the applicable "deliberate indifference" standard for municipality liability based on failures in training. City of Canton v. Harris, 489 U.S. 378, 389 n.8 (1989). Plaintiffs should be precluded from making this argument now. Cita Tr. Co. AG v. Fifth Third Bank, 879 F.3d 1151, 1156 (11th Cir. 2018) ("As a general matter, 'issue[s] not raised in the district court and raised for the first time in an appeal will not be considered by this [C]ourt.' ") (citation omitted); Starship Enterprises of Atlanta, Inc. v. Coweta Cty., Ga., 708 F.3d 1243, 1254 (11th Cir. 2013) ("We do not consider the argument because [Appellant] Starship failed to present the argument in

its opening brieF. That it raised it in its reply brief will not suffice.").

Even if Plaintiffs had preserved their apparent contention regarding training, they must point to evidence in the record supporting the conclusion that Cobb County was deliberately indifferent to Fourth Amendment rights by allowing officers to be trained to observe and document erratic driving, poor performance on SFST, other factors indicating impaired driving, and then read the implied consent warning which allows drivers to refuse a chemical test. Plaintiffs have not done this nor can they.

Moreover, standard training of law enforcement officers generally precludes a deliberate indifference in training claim. Cannon v. Taylor, 782 F.2d 947, 951 (11th Cir. 1986). It is not plausible that Cobb County has been deliberately indifferent in training its DUI Task Force officers by allowing them to learn national law enforcement standards promulgated by federal agencies.

This appeal also fails because numerous facts other than the eye observations challenged by Dr. Neil Adams support the existence of probable cause for the DUI charges against Plaintiffs. "Probable cause does not require overwhelmingly convincing evidence, but only 'reasonably trustworthy information,' and probable cause 'must be judged not with clinical detachment but with a common sense view to the realities of normal life.' " Marx v. Gumbinner, 905 F.2d 1503, 1506 (11th Cir. 1990) (citations omitted).

Facts other than eye observations supporting probable cause include each Plaintiff's admitted erratic driving leading to concededly valid and arrestable traffic charges. They also include clues (or cues) from the Walk-and-Turn, Modified Romberg, Finger-to-Nose, One-Leg Stand field sobriety tests, and tongue or marijuana odor observations.

The same facts also defeat Plaintiffs' Fourth Amendment claims based on the blood draws. Although implied consent laws are constitutional, Birchfield v. North Dakota, 136 S. Ct. 2160, 2185 (2016), Cobb County agrees that there must be reasonable grounds or probable cause to suspect impairment before a driver can be asked to consent to a chemical test. Again, the record shows that numerous undisputed factors other than eye observations supported the existence of probable cause to arrest Plaintiffs and prosecute them for underlying traffic offenses and DUI. These include admittedly erratic driving, clues from SFST, and other observations by Carroll.

ARGUMENT AND CITATIONS OF AUTHORITY

Each Plaintiff was stopped late at night while driving erratically. As courts have emphasized, impaired driving is a critical public safety concern and only a small percentage of impaired drivers is apprehended. Delaware v. Prouse, 440 U.S. 648, 659 n.18 (1979) (recognizing that "apprehension . . . of drivers under the influence of alcohol or narcotics . . . is subsumed by the [state's] interest in roadway

safety"); Wayne R. LaFave, 5 Search & Seizure § 10.8(d) (5th ed.) ("it has been reliably estimated that only one of every 2,000 drinking drivers is apprehended"). The Constitution provides room for law enforcement to police impaired driving, despite Plaintiffs' misguided attacks.

I. Plaintiffs' Appeal is Barred by Failure to Appeal Finding that Probable Cause Supported Actions of Officer Carroll.

Plaintiffs have not appealed the finding of the district court that "Plaintiffs did not suffer any constitutional deprivations." Restating its finding, the lower court ruled that "no constitutional violation occurred in Officer Carroll's execution of the arrests of each of the four Plaintiffs." (Doc. 83, at 39).

A plaintiff bringing a claim under 42 U.S.C. §1983 must prove the violation of a federally-protected right. The Supreme Court has held: "The first inquiry in any §1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws' [of the United States]." Baker v. McCollan, 443 U.S. 137, 140 (1979); *see* City of L.A. v. Heller, 475 U.S. 796, 799 (1986) (per curiam) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point."); Hamilton ex rel. Hamilton v. Cannon, 80 F.3d 1525, 1528 (11th Cir. 1996) ("Before a person, county, or municipality can be held liable under section 1983, a plaintiff must establish that she suffered a constitutional deprivation.").

Plaintiffs failed to appeal the district court's finding that "Plaintiffs did not suffer any constitutional deprivations." In Willhauck v. Halpin, 953 F.2d 689 (1st Cir. 1991), a §1983 case, plaintiff Willhauck appealed a judgment in favor of municipal entities in Massachusetts but did not appeal as to individual police officers. The First Circuit ruled: "Plaintiff's failure to challenge these determinations [as to officers] on appeal means that we are bound by the findings below that there were no violations of Willhauck's constitutional rights by any of the police officers involved in the car chase and alleged beating. It follows ineluctably that where there are no constitutional violations by municipal employees there can be no claim of inadequate supervision or training against a municipal employer." Id. at 714.

Thus, Plaintiffs' appeal does not reach first base. The failure of Plaintiffs to appeal the finding of no constitutional violation by Carroll precludes their appeal of the judgment in favor of Cobb County.

II. Plaintiffs' Fourth Amendment Arrest Claims are Barred by Probable Cause to Arrest and Prosecute for Other Offenses.

Probable cause for the arrest and prosecution of Plaintiffs on the underlying non-DUI traffic offenses bars their claims based on the DUI charges. Plaintiffs concede on appeal that "the traffic stops were justified" and explain that "they are not challenging the initial decision to arrest." (Appellants' Brief, at 18). They limit their appeal to Cobb County's alleged responsibility for blood draws, prolonged detentions, and criminal prosecutions. (Appellant's Brief at 9).

Plaintiffs argue that probable cause as to the non-DUI traffic charges does not bar their claims based on the DUI charges. (Appellants' Brief, at 30). This argument is fallacious.

In Devenpeck v. Alford, 543 U.S. 146 (2004), the Supreme Court held that, if there is probable cause for an arrest, the reason given by the officer is irrelevant. Id. at 152-55. The Court ruled that, although a motorist had been arrested and charged with two offenses for which there was no probable cause to arrest, there was probable cause to support his arrest for another offense that was not cited by the arresting officer. The Court ruled that the arresting officer's state of mind is "irrelevant to the existence of probable cause." Id. at 149-50, 152-54 ("the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken so long as the circumstances, viewed objectively, justify that action") (citations omitted).

Other courts have followed Devenpeck. In Jaegly v. Couch, 439 F.3d 149, 150 (2d Cir. 2006) (Sotomayor, J.), the Second Circuit cited Devenpeck in holding that "a claim for false arrest will not lie so long as the arresting officer had probable cause to arrest the plaintiff for some crime." Jaegly, 439 F.3d at 150. *See also* Holmes v. Village of Hoffman Estates, 511 F.3d 673, 682 (7th Cir. 2007) ("[P]robable cause to believe that a person has committed any crime will preclude a false arrest claim, even if the person was arrested on additional or different charges for which there was no

probable cause.").

Even before Devenpeck, some courts recognized that probable cause for a single offense was sufficient to satisfy the Fourth Amendment, although there was no probable cause for other offenses cited in the arrest or prosecution. United States v. Atkinson, 450 F.2d 835, 836-39 (5th Cir. 1971)[4] (regardless of whether there was probable cause for a felony "false pretenses" charge, an arrest was valid based on probable cause for the misdemeanor charge of "operating [an] automobile with an improper tag"); United States v. Hathorn, 451 F.2d 1337, 1341 (5th Cir. 1971) (per curiam) (arrest for drunken driving validated because the defendant also could have been arrested for being drunk in a public place), abrogation in part on other grounds recognized, U.S. v. Boche-Perez, 755 F.3d 327 (5th Cir. 2014).

The Eleventh Circuit has now clarified that the Devenpeck any-offense or single offense rule does not apply to claims under 42 U.S.C. §1983 for malicious prosecution in violation of the Fourth Amendment. In Williams v. Aguirre, ___ F.3d ___, 2020 WL 3957991 (11th Cir. July 13, 2020), this Court recently held: "Regardless of its applicability to warrantless arrests, the any-crime rule does not apply to claims of malicious prosecution under the Fourth Amendment." Id., at *9. *See also* Elmore v. Fulton Cty. Sch. Dist. 605 F. App'x 906, 915 (11th Cir. 2015).

[4]The Eleventh Circuit has adopted as binding precedent all decisions of the Fifth Circuit issued before the close of business on September 30, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981).

Cobb County contends that Plaintiffs' concededly valid traffic charges for non-DUI violations in our case, however, bars under Devenpeck their malicious prosecution claims for unconstitutional prosecutions in violation of the Fourth Amendment. In Aguirre, Plaintiff Williams was indicted and prosecuted only for two counts of attempted murder. Aguirre, 2020 WL 3957991, at *3. Although the arrest report listed carrying a concealed weapon without a permit, he was not prosecuted for that offense. Moreover, "Williams spent longer in pretrial detention—more than 16 months—than the maximum one-year sentence of imprisonment he could have received if a jury convicted him of the 'other' crime—carrying a concealed firearm without a permit, a Class A misdemeanor." Id., at *8.

Our facts are different, producing a different result. Here, each Plaintiff was in fact prosecuted for related non-DUI traffic offenses based on erratic driving. And none was held longer than 24 hours before release. (Appellants' Brief, at 25). The Devenpeck single offense principle thus leads to the conclusion that Plaintiffs' Fourth Amendment claims for malicious prosecution on DUI charges are barred.

III. Plaintiffs Cannot Show Cobb County is Responsible for a Culpable Policy.

Plaintiffs' claims against Cobb County also fail because Plaintiffs cannot satisfy the requirements for municipal liability. Judge Brown correctly held that not only was there no underlying constitutional violation, "The Court alternatively finds that Plaintiffs have failed even to plead adequately a formal or informal policy that could

support liability against Defendant Cobb County." (Doc. 83, at 39).

Liability against an entity has been imposed under §1983 only where the wrongdoing is authorized by a policy-making agent of the entity or the entity creates or implements a policy that causes the wrongdoing. *See* Hill v. DeKalb Regional Youth Detention Center, 40 F.3d 1176, 1192 (11th Cir. 1994) (citation omitted), overruled in part on other grounds, Hope v. Pelzer, 536 U.S. 730 (2002). In order to impose liability in this manner, there must be an "authoriz[ed]" policy and conduct "pursuant to [that] policy." Los Angeles v. Lyons, 461 U.S. 95, 106 n.7 (1983).

In its landmark decision in Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978), the Supreme Court held that a government entity may be held liable under §1983 only if the conduct of its agents is pursuant to an "official" municipal policy. Id. at 690. *See also* Oklahoma City v. Tuttle, 471 U.S. 808, 816-17 (1985); McMillian v. Monroe County, Al., 520 U.S. 781, 783-85 (1997); Collins v. City of Harker Heights, Tx., 503 U.S. 115, 121 (1992) ("municipalities may not be held liable 'unless action pursuant to official municipal policy of some nature caused a constitutional tort' "); Pembaur v. City of Cincinnati, 475 U.S. 469, 471, 478-80 (1986) (plurality opinion) (citation omitted).

The Supreme Court has held that the statutory language of §1983 does not allow the imposition of municipal liability by *respondeat superior*, which is a variety of causation-in-fact. Monell, 436 U.S. at 690-95; Tuttle, 471 U.S. at 817-19; Williams

v. Bennett, 689 F.2d 1370, 1389 (11th Cir. 1982), cert. denied, 464 U.S. 932 (1983) (plaintiff "must prove that each individual defendant proximately caused the unconstitutional conditions in the prison").

It is clear then that a municipality, county, or government agency can be held responsible only for conduct which it authorizes by "official" policy. Since Monell, the Court has reiterated this rule. In Tuttle, the Court said: "Monell teaches that the city may only be held accountable if the deprivation was the result of municipal 'custom or policy.' " 471 U.S. at 817. Moreover, the "official policy must be 'the moving force of the constitutional violation.' " Polk County v. Dodson, 454 U.S. 312, 326 (1981), *quoting* Monell, 436 U.S. at 694.

In order to support §1983 liability, a policy must be culpable and deliberate. Bd. of Cty. Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 415 (1997) ("municipality liability" imposes "rigorous requirements of culpability and causation"); Owens v. City of Atlanta, 780 F.2d 1564, 1567 (11th Cir. 1986) (in order to result in §1983 liability, a policy must contain a "fault element"); Rizzo v. Goode, 423 U.S. 362, 373-77 (1976) (only "deliberate policies" can subject nonparticipating defendants to §1983 liability); Farred v. Hicks, 915 F.2d 1530, 1532-33 (11th Cir. 1990).

The courts have also ruled that, in order for a municipality to be liable for the conduct of a subordinate pursuant to a policy, a §1983 plaintiff must show there is "an

authoriz[ed]" policy and conduct "pursuant to [that] policy." Los Angeles v. Lyons, 461 U.S. 95, 106 n.7 (1983). *See also* Rizzo v. Goode, 423 U.S. 362, 371 (1976) ("As the facts developed, there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct.").

In granting summary judgment to Cobb County, Judge Brown correctly ruled:

> Finally, because Plaintiffs did not suffer any constitutional deprivations, they cannot recover from the County under section 1983. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *see also Montanez v. City of Orlando*, 678 F. App'x 905, 912 n.3 (11th Cir. 2017) (per curiam) ("Because we conclude that no violation of [plaintiff's] constitutional rights occurred, we need not consider whether the City had an official policy."). The Court alternatively finds that Plaintiffs have failed even to plead adequately a formal or informal policy that could support liability against Defendant Cobb County. For these reasons, the Court thus grants summary judgment to Defendants on that issue and dismisses all claims against Defendant Cobb County.

(Doc. 83, at 39-40).

In their first amended complaint, Plaintiffs directed their defective policy allegations against Cobb County exclusively at the Drug Recognition Expert (DRE) protocol. (Doc. 9 ¶¶55-60, 65, 69, 72, 80). Although Carroll was trained as a DRE, the DRE protocol is not used roadside at a traffic stop and was not employed in the evaluations and arrests of Plaintiffs. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶37-39; Doc. 60-8, Attachment 14 (DRE Expert Course, Session Four), at 21-22).

Plaintiffs tearfully argue on appeal that they have been misunderstood and were

mistreated by the district court as the result of their use of the DRE acronym. (Appellants' Brief, at 11, 13-17, 20-23, 26-32, 43, 45-51). Plaintiffs did not even mention, must less allege, in either version of their complaint that the Advanced Roadside Impaired Driving Enforcement (ARIDE) or Standardized Field Sobriety Testing (SFST), also developed by the U.S. Department of Transportation, National Highway Traffic Safety Association (NHTSA), constitute constitutionally defective policies. (Doc. 1, 9). This is so even though DRE, ARIDE, and SFST do share some evaluation mechanisms.

Thus, it is not surprising that the district court held:

> Some CCPD officers also receive specialized training to become certified Drug Recognition Experts. Many of the parties' facts concern the reliability of the Drug Recognition Expert ("DRE") protocol. Yet it is undisputed that Officer Carroll never used the DRE protocol on any of the four Plaintiffs. . . . The facts about the DRE protocol and its reliability (or lack thereof) are thus immaterial to the Court's summary judgment determination.

(Doc. 83, at 16-17) (citations omitted).

Plaintiffs should be held to their pleadings. They alleged in their complaints that only the DRE protocol or policy was constitutionally defective. Neither the district court nor Defendants can be expected to read Plaintiffs' minds or reinterpret the allegations of the complaints.

But, even disregarding waiver, Plaintiffs' attack on appeal against NHTSA ARIDE and SFST standards are without merit. As Appellee argues in this brief, Plaintiffs claims against Cobb County are invalid because of their conceded violation

of non-DUI traffic laws which independently supported their arrests, furnishing of non-eye related clues in the roadside SFST delivering probable cause for DUI charges, and failure to argue or point to evidence showing deliberate indifference by Cobb County in the training of police officers assigned to its DUI Task Force.

IV. Plaintiffs Cannot Establish, and Have Not Even Argued, Deliberate Indifference by Cobb County in Training of Police Officers Assigned to its DUI Task Force.

Failure to train, which can be seen as a policy subset, may serve as a basis for liability against a municipality under 42 U.S.C. §1983. To hold a municipality liable for failure to train, a plaintiff must prove "deliberate indifference" in the training process. City of Canton v. Harris, 489 U.S. 378, 389 n.8 (1989). Plaintiffs in our case have never cited City of Canton or the liability standard for failure to train.

Thus, any argument Plaintiffs seek to make in their reply brief to this Court regarding the legal standard for failure to train will a new argument—not presented to the district court or in their primary brief to this Court. As a result, Plaintiffs should be precluded from any such argument. Cita Tr. Co. AG v. Fifth Third Bank, 879 F.3d 1151, 1156 (11th Cir. 2018) ("As a general matter, 'issue[s] not raised in the district court and raised for the first time in an appeal will not be considered by this [C]ourt.' ") (citation omitted); Starship Enterprises of Atlanta, Inc. v. Coweta Cty., Ga., 708 F.3d 1243, 1254 (11th Cir. 2013) ("We do not consider the argument because [Appellant] Starship failed to present the argument in its opening brief. That it raised

it in its reply brief will not suffice.").

Our Plaintiffs cannot meet the strict requirements for policy liability. They argue that Cobb County trained Officer Carroll "to do the wrong thing" by allowing him to be taught NHTSA Standardized Field Sobriety Tests. (Appellants' Brief, at 42). Plaintiffs never mention City of Canton or the deliberate indifference standard. Plaintiffs' agenda is certainly ambitious, making the Olympic-sized argument that a local government is deliberately indifferent to constitutional rights by allowing its officers to be taught to follow standards developed by federal agencies, USDOT and NHTSA, and universally observed by U.S. law enforcement agencies.

Although all training programs can be improved, only deliberate indifference in training may result in civil rights liability. As noted, the Supreme Court held in City of Canton v. Harris that mere negligence in training is insufficient to support §1983 liability: "We hold today that the inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."). City of Canton, 489 U.S. at 389 n.8. "To establish a 'deliberate or conscious choice' or such 'deliberate indifference,' a plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action." Gold v. City of Miami, 151 F.3d 1346, 1350 (11th Cir. 1998); *see also* Skop v. City of Atlanta, 485 F.3d 1130, 1145 (11th Cir.

2007). Plaintiffs do not attempt to satisfy this standard nor can they.

Generally, completion of state-mandated training is sufficient to avoid liability based on training deficiencies. In Cannon v. Taylor, 782 F.2d 947 (11th Cir. 1986), the Eleventh Circuit held that a Columbus, Georgia police officer who caused the death of Lema Cannon in an automobile collision was adequately trained and supervised:

> The testimony and documentary evidence reveals that Officer Taylor received the standard police academy training on operating his vehicle and on applicable state laws. Additionally, the state law on operating police vehicles over the speed limit was reproduced in the Columbus police manual. This Court is unwilling to say that this training procedure is so inherently inadequate as to subject the City to liability in the absence of past officer misconduct resulting from lack of training.

Id. at 951. Because Cannon predated City of Canton v. Harris, the court in Cannon applied the less stringent standard of "gross negligence." Yet, even under this more plaintiff-friendly standard, the Court found the training in Cannon adequate. Id.

In many other cases, courts have found compliance with state training requirements sufficient to defeat §1983 claims based on inadequate training. *See* Perez v. City of Sweetwater, 770 Fed. App'x 967, 976 (11th Cir. 2019), cert. denied 140 S. Ct. 618 (2019); Wakefield v. City of Pembroke Pines, 269 Fed. App'x 936, 941 (11th Cir. 2008) (plaintiff failed to put forth evidence of a "pattern of improper training" to which the City was deliberately indifferent where "the City had a formal policy concerning the use of excessive force" and "all of its officers receive[d]

mandatory use of force training and . . . complete[d] extensive psychological and background checks"); Grayson v. Ross, 454 F.3d 802, 811 (8th Cir. 2006) ("[B]oth McAllister and Porter were trained in the Basic Jail Standards Training Course. Appellant has advanced no evidence or case law that this training was deliberately indifferent to Grayson's rights . . . ."); Colburn v. Upper Darby Twp., 946 F.2d 1017, 1022, 1028 (3d Cir. 1991) (finding no deliberate indifference where police officers had completed state police academy course); Walker v. Norris, 917 F.2d 1449, 1456 (6th Cir. 1990) (prison guard who completed a three-week state academy course and received annual in-service training was adequately trained).

As the district court found in our case, Officer Carroll was very well trained: "It is also undisputed that Officer Carroll was an extraordinarily experienced and well-trained officer, and he may rely on his training and experience in making a probable cause determination." (Doc. 83, at 31). Although, as noted, Plaintiffs have not even argued that Cobb County was deliberately indifferent in Carroll's training, it is difficult to fathom how they would prove this element of their claims. Apparently, they now contend (without having argued the point previously) that a jury should be allowed to decide that Cobb County was deliberately indifferent to Fourth Amendment rights by allowing its officers to be trained under DOT and NHTSA standards. But, even if this far-fetched scenario were theoretically viable, Plaintiffs claims would still fail. This is so because, as argued in this brief, they concededly

violated non-DUI traffic laws and they furnishing non-eye related clues in the roadside SFST. These cumulative facts furnished probable cause for Plaintiffs' DUI arrests and charges—independently of their eye related clues.

V. Facts Other Than Eye Observations Establish Probable Cause for the Law Enforcement Actions in Question.

Even if the eye observations by Officer Carroll are disregarded, the remaining facts are sufficient to establish probable cause. "Probable cause does not require overwhelmingly convincing evidence, but only 'reasonably trustworthy information,' and probable cause 'must be judged not with clinical detachment but with a common sense view to the realities of normal life.' " Marx v. Gumbinner, 905 F.2d 1503, 1506 (11th Cir. 1990) (citations omitted).

Facts other than eye observations supporting probable cause include each Plaintiff's admitted erratic driving leading to concededly valid traffic charges. They also include clues (or cues) from the Walk-and-Turn, Modified Romberg, Finger-to-Nose, One -Leg Stand field sobriety tests, and tongue or marijuana odor observations.

Ebner exhibited four of eight clues of impairment in the Walk-and-Turn and performed poorly in the Modified Romberg evaluation. She also failed the Finger-to-Nose test on five consecutive tries. And Ebner had raised taste buds. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶54-55, 63, 65-66, 71; Doc. 60-9, Attachment 16; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 1 (Video: Ebner1), at 00:02:40-00:03:26, 00:06:43-00:00:08:19).

Mbamara showed four of eight clues in the Walk-and-Turn, one of four in the One-Leg Stand, and performed poorly in the Modified Romberg. She failed the Finger-to-Nose test on four tries. She also had raised taste buds and a greenish film on her tongue. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶81-83, 91-92, 98; Doc. 60-9, Attachment 18; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 3 (Video: Mbamara1), at 00:00:04, 00:07:23-00:11:01).

Penwell displayed three of eight clues in the Walk-and-Turn, two of four in the One-Leg Stand, and performed poorly in the Modified Romberg. On the Finger-to-Nose, she missed her nose on three attempts. Her car also contained a floral cover-up odor, her taste buds were raised, and her tongue had a greenish film. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶106, 111, 116-121, 127; Doc. 60-9, Attachment 20; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 5 (Video: Penwell1), at 00:03:55 – 00:06:40, 00:07:16 – 00:08:33; Doc. 56-1 (Penwell Dep.), at 30:8-23).

Oriyomi showed three of eight clues on the Walk-and-Turn, one of four on the One-Leg Stand, and performed poorly on the Modified Romberg. In addition, his vehicle smelled of marijuana, his taste buds were raised, and he had a light colored film on his tongue. (Doc. 60-4, Exhibit B (Carroll Decl.) ¶¶13, 131, 134, 137-139, 143-144, 146-149, 150, 154; Doc. 60-9, Attachment 22; Doc. 60-3, Exhibit A (VanHoozer Decl.) ¶36; Doc. 61, Attachment 7 (Video: Oriyomi1), at 00:21:31, 00:21:42, 00:26:22-00:32:07, 00:32:20-00:34:11).

In Smallwood v. Ainsworth, 2013 WL 12123773 (N.D. Ga. Mar. 5, 2013), aff'd, 542 F. App'x 807 (11th Cir. 2013), this Court upheld a custodial arrest where there was probable cause to believe that a motorist appeared to drift in her lane and then furnished some clues of impairment in field sobriety tests. Id. at *5–6. The district court in our case cited Smallwood. (Doc. 83, at 26-27) ("The standard thus 'must be judged not with clinical detachment[ ] but with a common-sense view to the realities of normal life." (*quoting*, Smallwood, 542 F. App'x at 809).

Further, as Judge Brown recognized, Plaintiffs have misunderstood and misapplied the probable cause standard:

> Plaintiffs misapply the applicable standard throughout their brief. They seem to assume that, in order for probable cause to exist, Defendants have to show that every officer and every juror would agree that probable cause existed. They specifically assert that "[a] reasonable jury could conclude after viewing each Plaintiffs' dashcam videos and considering other evidence that . . . there was no probable cause or reasonable suspicion to stop them." (Dkt. 65 at 17–18.) In determining whether probable cause (or arguable probable cause) existed, a court inquires into whether an officer could reasonably believe probable cause to arrest or reasonable suspicion to stop existed.

(Doc. 83, at 37-38). In other words, Plaintiffs failed to understand in the district court that the probable cause question asks whether an arrest or search is "objectively reasonable based on the totality of the circumstances." Wood v. Kesler, 323 F.3d 872, 878 (11th Cir. 2003). The question is not whether an officer or jury could disagree with the decision of the arresting officer.

In this appeal, Plaintiffs continue their tradition of fundamentally

misunderstanding probable cause. Mantra-like, they repeatedly quote Dr. Adams' opinion that the eye observations police are trained to do are no better than "flipping a coin." (Appellants' Brief, at 4, 11-15, 22, 29, 31, 42, 47-48, 51-52). But this is not inconsistent with the existence of probable cause inasmuch as probable cause does not require even a 50% probability. Texas v. Brown, 460 U.S. 730, 742 (1983) (probable cause "does not demand any showing that such a belief be correct or more likely true than false"); United States v. Ludwig, 641 F.3d 1243, 1252 (11th Cir. 2011) (" '[T]he requisite "fair probability" is something more than a bare suspicion, but need not reach the fifty percent mark.' ") (*quoting* United States v. Garcia, 179 F.3d 265, 269 (5th Cir. 1999)). Further, as argued above, Plaintiffs' arrests and DUI charges were not based solely on eye observations. Probable cause was well-supported by numerous other facts.

VI. Plaintiffs' Claims for Coerced Blood Draws are Barred by Probable Cause and by Their Consent.

The argument that Plaintiffs' consents to blood tests were coerced and invalid—resulting in Fourth Amendment violations—is specious. According to Plaintiffs, the implied consent warnings were inherently coercive because they threatened potential loss of drivers' licenses.

Plaintiffs argue: "The Fourth Amendment prohibits the government from drawing a person's blood without a warrant unless, at a minimum, there is 'probable cause' to believe that the person has committed a crime justifying drawing blood." In

support of this conclusion, they cite: Mitchell v. Wisconsin, 139 S. Ct. 2525, 2539 (2019), and other cases. (Appellants' Brief, at 32-36).

The Supreme Court has upheld searches based on drivers' consent and implied-consent laws. According to the Court, "It is well established that a search is reasonable when the subject consents. . . . Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." Birchfield v. North Dakota, 136 S. Ct. 2160, 2185 (2016). The Court recently affirmed: "We have held that forcing drunk-driving suspects to undergo a blood test does not violate their constitutional right against self-incrimination." Mitchell v. Wisconsin, 139 S. Ct. 2525, 2533 (2019).

Defendant agrees that, without reasonable grounds or probable cause indicating DUI, an implied consent request could be coercive. But, as shown in Appellee's brief, numerous factors other than eye observations supported the existence of probable cause to arrest Plaintiffs and prosecute them for underlying traffic offenses and DUI. These include admittedly erratic driving, clues from SFST, and other observations by Carroll. *See* Smallwood, 542 F. A'ppx at 807.

We must also remember that Cobb County is the only remaining Defendant. Thus, as shown above, Plaintiffs must prove that Cobb County maintained a defective policy that proximately caused violations of the Fourth Amendment in their blood

draws. The only defective policy that Plaintiffs might be understood to argue against the County in this Court is its training of police officers. Plaintiffs have not cited or argued the "deliberate indifference" standard for unconstitutional training.

Assuming the argument of deliberate indifference in training is properly presented (which it is not), Plaintiffs must point to evidence in the record supporting the conclusion that Cobb County was deliberately indifferent to Fourth Amendment rights by allowing its DUI Task Force officers to be trained to observe and document erratic driving, poor performance on SFST, other factors indicating impaired driving, and then read the implied consent warning which allows drivers to refuse a chemical test. Under Plaintiffs' regime, a municipality or county would have to train its officers not to stop and evaluate suspected impaired drivers. Otherwise, it would be liable for deliberate indifference to the Constitution. To state this argument is to refute it.

CONCLUSION

For these reasons, this Court should affirm the grant of summary judgment to Cobb County.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Counsel certifies that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). According to the word-processing system used to prepare it, this brief contains 13,000 words.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-11318-AA

KATELYN EBNER, PRINCESS MBAMARA,
AYOKUNLE ORIYOMI, and BRITTANY PENWELL,

Plaintiffs-Appellants

v.

COBB COUNTY, GEORGIA,

Defendant-Appellee

CERTIFICATE OF SERVICE

I hereby certify that I have this date filed a copy of BRIEF OF APPELLEE with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record, and I have also served these attorneys by First Class Mail:

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