UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

ROLAND GLENN ROLAND,	§	
	§	
Plaintiff	§	
	§	**CIVIL ACTION NO.**
V.	§	
	§	**9:21-CV-00254 - MJT**
	§	
NACOGDOCHES COUNTY, TEXAS	§	
SALOMON LANDEROS,	§	
JUSTIN CODY PIERCE, AND	§	
JOSHUA TIPTON	§	
	§	
Defendants	§	

PLAINTIFF ROLAND GLENN ROLAND'S RESPONSE TO SALOMAN LANDEROS' MOTION FOR SUMMARY JUDGMENT, AND CROSS MOTION FOR SUMMARY JUDGMENT AGAINST SALOMON LANDEROS

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Plaintiff, Cory Glenn Roland ("Roland"), files this Response and Cross Motion and would show as follows:

Defendant Landeros is not entitled to qualified immunity because a reasonable jury could not find that Defendants violated Roland's clearly established rights; Defendant Landeros violated Roland's Constitutional rights through use of excessive force and the Constitutional rights Landeros violated were clearly established, and; Landeros' legal arguments are meritless.

Further, the Court should summarily find that Landeros intentionally injured Roland and find the force used on Roland by Landeros was excessive and unreasonable.

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STATEMENT OF ISSUES

Whether a reasonable jury could find from the police videorecording and other evidence in this case that officer Landeros struck Roland in the face twice with a closed fist.

Whether a reasonable jury could find from the police videorecording and other evidence in this case that Roland did not resist, or at most minimally resisted, Landeros' efforts to take Roland's cell phone from him.

Whether Landeros used excessive force when, without reasonable warning, he tried to rip the phone from Roland's hands and punched him in the face twice with a closed fist, where, as in this case, Landeros does not plead or show he had reasonable suspicion to detain Roland, nor plead or show that he had probable cause to seize Roland's cell phone.

Whether grabbing a subject then pummeling him twice in the face to obtain the subject's personal property, namely, a cell phone, violates clearly established constitutional law prohibiting the use of excessive force, where, as in this case, the subject poses no threat and does not resist, or at most minimally resists, the officer's efforts to seize that personal property without probable cause.

SUMMARY OF THE ARGUMENT

Ordinary citizens who engaged in the conduct captured in the Videorecording would face charges, followed by sentencing, for theft, assault and unlawful restraint under Texas Penal Code §§ 22.01(a)(1), 31.03(a)(1) and 20.01(1)(A). The fact Landeros committed these offenses in a police interview room against a cooperating witness amplifies the gravity of his violation of Roland's Fourth Amendment rights and of Title 42 U.S.C. §1983.

Landeros does not plead in his Motion for Summary Judgment ("LSMJ"), that he had "probable cause" to seize Roland's phone, nor plead that he had "reasonable suspicion" to detain him. Neither does Landeros plead "exigent circumstances."[1] Landeros also fails to show the split second during which Roland pulled his phone away and touched Landeros' forearm was more than minimal resistance.

As shown below, the law clearly establishes that beating Roland in order to seize evidence is an excessive use of force in violation of the Fourth Amendment. Consequently, Defendant's motion for summary judgment based on qualified immunity should be denied, and Plaintiffs cross motion for summary judgment on his Excessive Force claim should be granted.

REPLY TO DEFENDANT'S STATEMENT OF UNDISPUTED FACTS

With regard to alleged "undisputed material fact" #1, Roland not only voluntarily showed text messages, but he also voluntarily showed photos and allowed Landeros to scroll back to images he wanted to review.

With regard to alleged "undisputed material fact" #2, Roland disputes the allegation that Landeros observed "a photo of an air compressor on Roland's cell phone that was potentially stolen equipment." Roland showed Landeros the photo and identified the object in the photo as an air compressor. Landeros did not observe that the air compressor was stolen or potentially stolen. Whether this is a post hoc excuse for seizing the phone is a question for the jury.

[1] The phrase "Probable cause" occurs once, as part of Landeros' attempt to show that he could seize Roland's phone although he "d[id] **not** have probable cause." *LSMJ* at 14 (emphasis added). The other phrases do not occur at all. As Roland shows below, the law has been clear for forty years that in the absent exigent circumstances officers cannot seize items without probable cause. *See Arizona v. Hicks*, 480 U.S. 321, 328 (1987).

With regard to alleged "undisputed material fact" #3, Landeros did not "ask for" Roland's cell phone at any point, and Roland did not "refuse to relinquish it when [] Landeros asked for it. Landeros muttered "Well, I am going to take it," and then suddenly tried to take the phone.

With regard to alleged "undisputed material fact" #4, Roland did not resist an "attempt." Landeros grabbed the phone, tried to rip it from Roland's hand, then beat Roland in the face.

With regard to alleged "undisputed material fact" #5, Roland did not escalate resistance. Landeros escalated the level of violence. Roland momentarily (i.e., for less than a second) placed his left hand on Landeros' right arm just above the wrist.

With regard to alleged "undisputed material fact" #6, Roland did not grab Landeros' hand and did not pull Landeros to his left side or off balance. Landeros enraged attempt to rip the phone from Roland is what resulted in Landeros' movements captured in the Videorecording.

With regard to alleged "undisputed material fact" #7, the sequence of events is evident from the videorecording. Any implication that Roland, by placing a hand for a split second on Landeros' wrist, caused Landeros' reaction is disputed. Landeros gratuitously struck Roland with a closed fist, in the face, gratuitously or in response to momentary, minimal contact cause by Landeros' attempt to rip the phone from Roland's hand.

With regard to alleged "undisputed material fact" #8, Landeros not only struck Roland twice in the head and face, he assaulted Roland beforehand when he tried to rip the phone from Roland, grabbed Roland's arm and positioned himself right over Roland before beating him.

With regard to alleged "undisputed material fact" #9, Landeros commands were unnecessary and self-serving, as Roland made no attempt to move forward or get up.

With regard to alleged "undisputed material fact" #10, the beating caused Roland to lose his grip on the phone, which fell to the floor on Roland's right side.

With regard to alleged "undisputed material fact" #11, there was no situation to de-escalate other than Landeros' violent conduct.

With regard to alleged "undisputed material fact" #12, there is no dispute.

With regard to alleged "undisputed material fact" #13, there is no dispute.

With regard to alleged "undisputed material fact" #14, this fact is incomplete. Before the interview continued, Landeros said he was seizing the phone as evidence, and when Roland indicated he wanted to go speak with the Sheriff, officers stated that "we're not done with you yet." Roland was then threatened several times with criminal charges during the remainder of the interview.

With regard to alleged "undisputed material fact" #15, no injuries are visible on the Videorecording because of the distance to the camera.

With regard to alleged "undisputed material fact" #16, Roland spoke in the agitated, surprised voice because he had just been beaten; Roland asked police why they beat him, correctly stated that he "didn't do anything," and emphasized again that he was not hiding anything on his phone.

With regard to alleged "undisputed material fact" #17, this allegation is not disputed.

With regard to alleged "undisputed material fact" #18, this allegation is not disputed.

PLAINTIFF'S STATEMENT OF FACTS

On March 5th, 2021, Roland voluntarily appeared at the Nacogdoches Sherriff's Department, to cooperate with an investigation of Charles Seth Alexander. (VR 00:01 *ff.*) Roland was taken to an interview room and questioned by three officers, Landeros, Pierce and Tipton. (VR 00:01 ff.). Roland was unarmed, but he brought his cell phone. (VR 00:01 ff.). Officer Pierce asked if he could see any text messages between Roland and Alexander. (VR 00:20.) Roland agreed to show the officers but held on to his phone. (VR 00:20).

Landeros positioned himself to Roland's right, slightly behind Roland's shoulder so he could see the phone's screen. (VR 00:25). Roland voluntarily showed Landeros communications and pictures on his phone (VR 00:27). When Landeros wanted to see a photo of a piece of equipment, Roland allowed Landeros to touch the screen and scroll back to the image. (VR 00:39). Roland identified the object in the photo as a compressor. (VR 00:43). Landeros held his left hand out, palm up extending it toward the phone, then drew it back and lets his arm fall, while looking at the phone over Roland's right shoulder. (VR 00:44).

Roland balanced the phone on his fingers, taking his thumb off and extending his hand, so Landeros could clearly see the screen. (VR 00:46). While holding the phone so Landeros could view the screen, Roland tells Landeros, "No, you cannot have my phone. You can look, but you cannot have my phone." (VR 00:47). Landeros suddenly grabs the phone with his left hand, while muttering, "Well, I'm gonna take it." (VR 00:51). Roland pulls his cell phone away and toward his left side. (VR 00:51). Landeros grabs Roland's right arm with his left hand, and takes his right hand out of his jacket, while continuing his efforts to forcibly deprive Roland of his property. (VR 00:52).

Roland put his left hand just above Landeros' right wrist for a fraction of a second. (00:52). While Roland is clutching the phone with two hands held to his chest, Landeros draws back his right hand and beats Roland in the face and head, knocking Roland backwards. (VR 00:53); Exh. '3' (Affidavit of Cory Roland). The cell phone falls to Roland's right. (VR 00:53). The two other officers in the room rush Roland and seize him. (VR 00:54). Landeros picks the phone up from behind the knocked over wastebasket, where it landed. (VR 00:59).

Roland remained sitting the entire time, making no effort to get up or harm any of the officers. (VR 00:59). The time that transpires from when Landeros grabs the phone to when he finishes beating Roland is two to four (2-4) seconds. The time that transpires from when Landros grabs the phone to when police release their hold on Roland is thirteen to fifteen (13-15) seconds.

LEGAL STANDARDS

In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court set forth a two-part framework for analyzing whether a defendant was entitled to qualified immunity. Part one asks the following question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id*. at 201. Part two inquires whether the allegedly violated right is "clearly established" in that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id*. at 202.

ARGUMENT AND AUTHORITIES

I. DEFENDANT LANDEROS IS NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE A REASONABLE JURY COULD FIND THAT DEFENDANT'S VIOLATED PLAINTIFF'S CLEARLY ESTABLISHED RIGHTS.

A. LAMPEROS VIOLATED ROLAND'S CONSTITUTIONAL RIGHTS THROUGH THE USE OF EXCESSIVE FORCE

The facts, undisputed by Landeros, are that Landeros detained Roland and seized Roland's cell phone. Roland's constitutional cause of action arises under the Fourth Amendment guarantee that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const., Amend. XIV.

In order to demonstrate that use of excessive force violated the Fourth Amendment, the plaintiff must show that he suffered "1) an injury that 2) resulted directly and only from the use of force that was excessive to the need and that 3) the force used was objectively unreasonable." *Ballard v. Burton*, 444 F.3d 391, 402 (5th Cir. 2006) (internal quotations omitted).

1. Roland suffered an intentionally inflicted injury.

While the injury suffered by a plaintiff must be more than de minimis, the threshold for what constitutes an injury is subjective in that it is "defined entirely by the context in which the injury arises." *Schmidt v. Gray*, 399 Fed. Appx. 925, 928 (5th Cir. 2010). Furthermore, the Fifth Circuit has recognized that even insignificant injuries may "qualify as a cognizable injury when the victim is maliciously assaulted by a police officer." *Williams v. Bramer*, 180 F.3d 699, 704 (5th Cir.), decision clarified on reh'g, 186 F.3d 633 (5th Cir. 1999). Moreover, the injuries Landeros inflicted were significant. It is undisputed that Landeros beat Roland with his fists.

The Videorecording shows that Landeros maliciously assaulted Roland. The assault began, when Landeros grabbed Roland's phone, grabbed Roland and tried to rip the phone from Roland's

hand.[2] (VR 00:50). The assault culminated with Landeros intentionally beat Roland viciously in the face and head with his closed fist.[3] (VR 00:51-53). As a result of the attack, Roland suffered injuries to the soft tissue and to his cranium.

A reasonable jury could find from the Videorecording that Roland experienced blunt trauma to the face and head. A reasonable jury could find from the Videorecording that the beating left Roland agitated, dazed, and suffering from soft tissue damage. The Videorecording captures Roland rubbing his face where he was struck. Exh. '1' (circa 01:04-01:10). From the audio portion of the videorecording, a reasonable jury could also find that Roland suffered a traumatic brain injury due to the beating. Specifically, a reasonable jury could find that Roland experienced a painful intensification of a headache, which Roland is recorded as saying is "now three times worse." *Id.* (circa 04:08).

Landeros' defense (based on his serious misrepresentation of the Videorecording) is that "Landeros delivered two compliance strikes with a closed fist to Roland's right arm and right shoulder." LMSJ at 8. Landeros states that when he beat Roland, he targeted the "Brachial Plexus Tie-in … and the radial nerve." *LMSJ* at 22. These blows, according to Landeros, were meant to "cause temporary motor dysfunction to the affected arm and hand." *Id.* Assuming, for the sake of argument, that a reasonable jury could find Landeros' credibly described the blunt trauma he inflicted, such a jury would still find that Roland suffered an injury. Consequently, a reasonable jury would easily find from the videotaped evidence, or Landeros' testimony, that Roland proved

[2] *See* Texas Penal Code § 22.01, Assaultive Offenses, section (a)(3) (stating that "a person commits an offense if the person … intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative").

[3] *See Id.* §22.01(a)(1).

the first element necessary to establish that Landeros' use of force violated Roland's Fourth Amendment rights.

The maliciousness of the battery Landeros administered is self-evident from the videorecording. Furthermore, under Texas Penal Code § 22.01(a)(1), a person commits an offense if, as in this case, the person intentionally, knowingly, or recklessly causes bodily injury to another. The clear violation of criminal law underscores the gravity of Landeros' gratuitously violent conduct and the violation of Roland's Fourth Amendment rights.

2. Force was excessive in relationship to the need to detain Roland and was objectively unreasonable.

While a police officer's right to conduct a *Terry* stop necessarily authorizes the use of reasonable force to secure a suspect, such a stop must be predicated on reasonable suspicion of criminal activity. *See United States v. Campbell*, 178 F.3d 345, 348–49 (5th Cir.1999). Use of force to detain someone where, as here, a reasonable suspicion of criminal activity does not exist is excessive and violates the Fourth Amendment.

Landeros does not even allege in his motion for summary judgement that at the time he seized Roland's phone and beat Roland that he suspected Roland was engaged in criminal activity or about to do so. The videorecording also flatly contradicts any such inference. Roland appeared voluntarily at the police station to cooperate with their investigation of another person. Roland obviously was not engaged in or about to engage in criminal conduct in the interview room. Roland as unarmed, sat in a chair the whole time, and voluntarily answering questions that Landeros and two other armed officers asked him about a suspect named Seth Alexander whom they were investigating.

Under these circumstances, Landeros used unreasonable force when he grabbed Roland's phone, put his hands on Roland, and tried to rip the phone from Roland's hands. Beyond question, beating Roland in the face and head (or in the arms and shoulders) involved force excessive to the need to effect a detention, and was objectively unreasonable.

b. Even if police had some suspicion, there was no need to use any force at all, which made the beating Roland suffered objectively unreasonable.

Under *Terry v. Ohio*, 392 U.S. 1 (1968), police may initiate minimal physical contact, such as a pat down, only under circumstances where officers "have reason to believe that the individual being investigated is armed and dangerous." *United States v. Berry*, 25 F. Supp. 3d 931, 939 (N.D.Tex. 2014) (citing *Terry*, 392 U.S. at 27). Landeros does not allege such circumstances existed, nor could he without perjuring himself. Roland came come voluntarily to the police station to cooperate with an investigation into another suspect and was doing so when Landeros attacked him. Roland never threatened officers verbally or physically.

Nor does Landeros allege that he thought Roland was going to flee. Roland remained seated throughout the Landeros assault. The only evasive movement Roland made was to turn his head in a vain attempt to avoid getting pummeled. Even after Landeros beat him, Roland remained seated. Given the complete lack of reasons for Landeros to physically contact Roland, a reasonable jury would find that the use of physical force in this case was excessive and objectionably unreasonable and therefore satisfied the second and third elements of Roland's excessive force claim.

3. Force was objectively unreasonable relative to the need to seize Roland's phone.

a. Absence of probable cause to seize Roland's phone makes any force used to effect a seizure objectively unreasonable relative to need.

Since *Arizona v. Hicks,* 480 U.S. 321, 328 (1987), it has been clearly established that, in order to seize an item of evidence in plain view, law enforcement must have probable cause to believe that the item is contraband or useful as evidence of a crime. Landeros' motion and brief in support does not even mention the plain view doctrine or allege Landeros had probable cause, although this theory is the only possible justification for seizing the phone in the first place.

Nor can probable cause be inferred from Landeros' strained attempt to establish a link between photo on Roland's phone and a reported crime committed by an unidentified suspect Landeros says occurred "weeks ago." Landeros' says he "saw a picture of a large green in color" air compressor on Roland's phone, which is patently not indicative of illegal activity. Consequently, Landeros tries to link the photo to a picture to compressor found in the bed of a stolen truck driven by Alexander that police found parked on Roland's property. *LMSJ* at 6. However, Landeros does not provide any objective reason supporting an inference that the photo on the phone was a photo of the compressor he says was found in the truck bed. Furthermore, the report Landeros cites (APP 0032-0044) lists a compressor as an item seized, but it does not state the compressor was found in the truck bed or confirm it was stolen. Landeros provides no other reason to think the compressor associated with the truck was stolen. Landeros says that police determined other unidentified items in the vicinity of the truck were stolen, but this is not supported by the police report he cites either.

To give a tincture of criminality to the Roland's photo, Landeros states next that the compressor allegedly found in the truck bed matched the *description* of a compressor reported

stolen, by an unknown suspect, "a few weeks earlier." LMSJ at 6; *APP* 0004. However, Landeros does **not** even say that at the time he attacked Roland he realized the compressor reported missing was also "large" and "green in color." *Id.* Furthermore, the police report is not from a "few weeks earlier." The report is dated January 13, 2021, nearly two months earlier.

Were strings of hunches, such as Landeros', about mass-produce items that generically "match" sufficient to show probable cause, police could seize and search the phone of anyone they had reason to believe had a photo of a .38 or 9mm handgun, or, for that matter had a photo of a handbag. Photos of these mass-produced items generically match exemplars stolen and used in crimes on a daily basis. Indeed, using reasoning like Landeros', officers could seize any movable, mass-produced property they across – cars, tools, furniture – based on minimal, completely general similarities to other examples reported missing months ago. However, no reasonable officer would consider shared generic traits – like large and green – of a mass-produced item reported missing months ago probable cause justifying a seizure.

Landeros strained attempt to link phone to crime underscores the complete lack of objective, articulable reasons for concluding Roland's phone contained evidence. Furthermore, Landeros does not say if he reviewed the police reports or say when. Besides being a concatenation of hunches, Landeros' excuses also bear the mark of *post hoc* concoctions. A jury could reasonably find Landeros fabricated his excuse for seizing the phone, especially in light of his incredible claims about the beating he gave Roland.

Because Landeros did not have probable cause to seize Roland's phone, he could not reasonably use any amount of force to seize it. A reasonable, jury could therefore readily find that the beating Landeros administered in effecting the seizure in this case violated Roland's Fourth Amendment rights.

b. Even if Landeros were to have probable cause, the force used to effect a seizure was objectively unreasonable.

"Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Nickols v. Morris*, 705 F. Supp. 2d 579, 589 (N.D. Tex. 2010), aff'd, 419 F. App'x 534 (5th Cir. 2011) (citing *Graham v. Connor*, 490 U.S. 386, 395–96 (1989)). Even when an officer knows that a "suspect is concealing contraband, [that] does not authorize government officials to go to any and all means at their disposal to retrieve it." *Id.* (citing *United States v. Cameron*, 538 F.2d 254, 257 (9th Cir.1976)). Rather, officers may adopt reasonable measures to retrieve contraband and prevent its destruction. *Id.* (citing *Thompson v. Sarasota County Police Department*, No. 8:09–CV–585–T–30TBM, 2009 WL 1850314, at *4 (M.D.Fla. June 26, 2009)). Although police officers can use reasonable force to prevent the destruction of evidence, they may not constitutionally beat and choke suspects in order to gain that evidence. *Id.*

i. Landeros did not face exigent circumstances

Landeros does not plead that he faced exigent circumstances, because the excuse is untenable. Roland was not under arrest, nor detained, nor engaged in criminal activity. Roland made a voluntary appearance at the police station to cooperate and was doing so when Landeros attacked. Landeros does not plead, and cannot, without committing perjury, that he had to use force of any sort to protect himself, protect others or save Roland from self-harm. No factor that might otherwise go toward justifying immediate, forceful police action exist in this case, an no reasonable jury would find one.

ii. Landeros did not have to act forcefully to prevent the destruction of evidence.

Landeros primary excuse is that he had to beat Roland to preserve evidence. However, this is belied by the videorecording. Landeros does not point the Court to a single piece of objective evidence indicating that Roland was in the process of or intended to delete anything on his phone. For example, Landeros does not say that before he grabbed the phone, Roland shielded the phone or manipulated the phone in a manner that indicated he was deleting information. In fact, Landeros does not plead that he believed that Roland was in the process of deleting evidence from his phone. To do so would be to commit perjury.

The first 60 seconds of the videorecording show that instead of acting like he was deleting information, Roland was openly displaying the content of his phone to Landeros. (VR 00:45-00:51). Landeros insinuates that Roland "quickly scrolled away" from the photo of the compressor but has to admit that Roland scrolled back immediately when Landeros requested and identified the item in the photo when asked. *Landeros MSJ* at 6. In fact, Roland let Landeros touch the phone to scroll back to images Landeros wanted to see. (VR 00:39-00:43).

At no point, did Roland put limitations on what he was willing to show the police. At no point, does Roland make any movement from which a reasonable person might infer Roland was deleting information from his phone. As the Videorecording makes clear, before Landeros tried to deprive Roland of his property, Roland was balancing the phone on the fingers of one hand so Landeros could clearly see what was on the screen. (VR 00:44).

Instead of articulating specific reasons justifying use of force to seize evidence, Landeros simply says experience and training taught him the general proposition that evidence on cellphones can be deleted. *Landeros MSJ* at 6. Landeros also says that while he was forcibly taking the phone

from Roland, he feared evidence would be damage or destroyed. However, Landeros does not give any reason to think that Roland was, at the time, damaging his phone or deleting information from it. A reasonable jury could easily find from the Videorecording that if Landeros had not seized the phone or tried to rip it violently from Roland's hand, Landeros would not have had reason to entertain, if he did, this entirely insufficient excuse for beating Roland.

Moreover, a reasonable jury could find, form the Videorecording, that the Landeros flew into a rage, gratuitously beat Roland and unlawfully deprived him of his phone, **not** because Landeros thought evidence would be damaged or destroyed, but simply because Roland told him he could see what was on his phone, but could not have it. A reasonable jury therefore would readily find from the evidence in this case that the second and third elements necessary to establish a Fourth Amendment excessive for claim is satisfied.

B. CONSTITUTIONAL RIGHTS LANDEROS VIOLATED WERE CLEARLY ESTABLISHED

Even if officers are in the course of making a lawful arrest or detention, which is not the case here (nor alleged by Landeros), use of non-trivial force in the face of minimal resistance violates clearly established Fourth Amendment law. In fact, "a robust consensus of persuasive authority," existing before the injuries inflicted in this case, gave Landeros fair notice that his alleged behavior violated a constitutional right. *Clarkston v. White*, 943 F.3d 988, 993 (5th Cir. 2019), cert. denied, 140 S. Ct. 2763 (2020); *Smith v. Ray*, 781 F.3d 95, 98-103 (4th Cir. 2015) (affirming denial of summary judgment in favor of a defendant officer when he threw to the ground a plaintiff—suspected of, at most, a nonviolent misdemeanor—after she pulled her arm away from him twice and used a racial slur); *McCaig v. Raber*, 515 F. App'x 551, 553-56 (6th Cir. 2013) (affirming denial of summary judgment in favor of defendant officer who "slamm[ed]" to the ground a plaintiff that the officer was arresting for battery when the plaintiff jerked his hand away

from the officer's attempt to put him in handcuffs); *Blankenhorn v. City of Orange*, 485 F.3d 463, 478-79 (9th Cir. 2007) (reversing summary judgment in favor of defendant officers who "gang tackled" a plaintiff suspected of trespass when his resistance was limited to pulling free of one officer's grasp, using expletives, throwing his driver's license on the ground, and refusing to kneel down); *Rowland v. Perry*, 41 F.3d 167, 172-74 (4th Cir. 1994) (affirming denial of summary judgment in favor of defendant officer who punched a plaintiff suspected of stealing five dollars, threw him to the ground, and used a "wrestling maneuver" to break his leg when the plaintiff "instinctively tried to free himself" after the officer grabbed the plaintiff's collar and jerked him without warning).

These cases plainly establish that law enforcement officers use unconstitutional excessive force when they violently take citizens to the ground who are suspected of non-severe crimes and who offer minimal resistance—such as pulling an arm away. They make it even clearer that viciously beating the citizen in the head and face violates constitutional rights when, as here, a citizen is not suspected of committing any crime, poses no danger, and pulls his hand away to avoid an officers sudden attempt to take his property. This is because,

> "[t]he central concept is that of 'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.'"

Kinney v. Weaver, 367 F.3d 337, 350 (5th Cir. 2004) (*en banc*) (quoting *Hope v. Pelzer*, 536 U.S. 730, 740 (2002)).

To prevent Landeros from using force to deprive him of his phone, Roland moved the hand holding the phone away from Landeros'. Landeros' allegation that Roland pulled him is another intentionally misleading statement. A reasonable jury could find that Landeros hung onto

the phone and stepped in front of Roland in order to beat him square in the face. A reasonable jury could also find that Landeros' account is a false, misleading exaggeration. Landeros tries to create the impression that there was a struggle over time that Roland escalated. *Landeros MSJ* at 3, 7, 17. However, a reasonable jury could find that Landeros became enraged because Roland would not let Landeros take his property, so he beat Roland viciously on the spot.

A reasonable jury would also find that Roland placed his left hand on Landeros' lower arm near or slightly above the wrist for no more than a second and that Roland mildly reacted in response to Landeros' attempt to rip the phone from his hands. A reasonable jury could and would find that the contact was transient and incident to Landeros' assaultive conduct. Furthermore, Landeros does not allege the contact caused any discomfort or put him in fear of bodily injury, and no objective evidence supports such assertions. *Id.* A reasonable jury could also reject, as outright lies, Landeros' allegations that he was being pulled by Roland's "strong grip" on the phone or his wrist. *Id.* at 7.

II. LANDEROS'S LEGAL ARGUMENTS ARE MERITLESS

A. *Terry v. Ohio* and progeny are far off point.

As primary support for the objective reasonableness of the beating in this case, Landeros cites *Terry v. Ohio*, 392 U.S. 1 (1968), and progeny. *Landeros MSJ* at 14. However, Landeros avoids setting out the predicate for conducting a *Terry* stop, which is whether the agents had reasonable suspicion that Roland was engaged in criminal activity. *Campbell*, 178 F.3d at 348–49. Landeros does not articulate what crime Landeros he suspected Roland was presently engaged in or about to commit. *Terry* also involved a pat down of a defendant whom the officer reasonably suspected possess a weapon under circumstances that put a reasonable officer in fear for his safety.

None of the essential factors that justified the minimal force used in *Terry* are present in the instant case.

B. Caselaw Landeros cites involving preservation of evidence provides no support his position.

Landeros cites *United States v. Van Leeuwen*, 397 U.S. 249, 252 (1970). *Landeros MSJ* at 24. However, this case does not involve excessive force. *Van Leeuwen* does not even implicate the Fourth Amendment. In *Van Leeuwen*, police detained, not a person, but a package placed in the U.S. Mail.

Next Landeros relies on a line of cases that expanded the power of police to search for contraband incident to a lawful arrest. *Id.* 15 (citing *United States v. Chadwick*, 433 U.S. 1 (1977), and *Segura v. United States*, 468 U.S.796 (1984)). However, Roland was not lawfully arrested (Landeros does not even allege Roland was ever in custody), and there was no contraband. Furthermore, excessive force was not an issue in *Chadwick* or *Segura*.

Riley v. California, 573 U.S. 373, 388 (2014), at least deal with cell phones, but as with the foregoing authority, the issue was the search of a cell phone seized incident to a lawful arrest, not excessive force. Meanwhile, *City of Los Angeles v. Patel*, 576 U.S. 409 (2015), has no relevance. *Patel* held a California ordinance unconstitutional, which allowed police, upon serving subpoena, to access hotel registries immediately, without giving the hotel opportunity to file a motion to quash.

C. Authorities Landeros cites in which law enforcement used force against persons are not even analogous to the instant case.

Espinoza v. United States, 278 F.2d 802 (5th Cir. 1960), *Bramer*, 180 F.3d at 702, *Surratt v. McClarin*, 851 F.3d 389, 390 (5th Cir. 2017), all deal dealt with seizure of evidence incident to

a lawful arrest. In all cases, the arrestee was indisputable attempting to destroy contraband. The circumstances required immediate action to preserve evidence.

As shown above, Roland was not lawfully arrested or detained. Landeros did not have probable cause to believe Roland's phone was contraband or contained evidence of a crime. A reasonable jury could find Landeros maliciously beat Roland without any justification whatsoever, because that it precisely what the Videorecording shows Landeros did.

WHEREFORE, Roland requests that Landeros' motion for summary judgment be **DENIED** in all respects.

CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Roland requests that this Court grant partial summary judgment, in Roland's favor, as to liability (as opposed to monetary damages) under 42 U.S.C. §1983.

STANDARDS

This Court may grant summary judgment in favor of a moving party who demonstrates "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The party moving for summary judgment bears the initial burden of showing the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to identify specific facts showing there is a genuine issue of material fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). "The mere existence of a scintilla of evidence" in support of the opposing party's position is insufficient; "there must be evidence on which the jury could reasonably find for the plaintiff." *Id*. at 252.

STATEMENT OF FACTS

Facts alleged, and law and arguments marshalled, in the foregoing Response to Defendant Landeros' motion for summary judgment are incorporated and realleged as if fully set forth herein.

ARGUMENT AND AUTHORITIES

I. COURT SHOULD SUMMARILY FIND LANDEROS INTENTIONALLY INJURED ROLAND.

There is no dispute regarding the fact that Defendant suffered an injury. Landeros admits he intentionally struck Roland with his fists. Landeros merely disputes Roland's allegation that Landeros struck him in the face and head on the ground that he instead beat Roland's arms and shoulder, targeting nervous structures. Landeros contends these blows were sufficient to cause Roland, whom Landeros describes as a strong man with strong hand, to drop the phone. Consequently, this Court may summarily find, from Landeros' pleading, that Landeros forcefully struck Roland and that Roland suffered an injury.

Furthermore, Landeros maintains, and Roland does not dispute the contention, that the Videorecording in this case is an adequate basis for determining whether Roland was subjected to excessive force. The Videorecording clearly shows that Landeros forcefully struck Roland in the face and head area twice with a closed fist, injuring Roland. Consequently, based on Videorecorded proof that the parties agree definitively, accurately and indisputably records and depicts Landeros' conduct, this Court may find that Roland suffered injuries to the head and neck and grant summary judgment as to this element of Roland's excessive force claim.

II. COURT SHOULD SUMMARILY FIND THAT FORCE USED WAS EXCESSIVE AND OBJECTIVELY UNREASONABLE.

For reasons set forth in the Response to Defendant's Motion for Summary Judgment, this Court may summarily find that Roland has established the remaining elements of his claims – excessive and objectively unreasonable use of force – thereby, entitling Roland to judgment as a matter of law.

Landeros can avoid summary judgment only by producing evidence that shows the force he used to detain and secure the phone was reasonable under the circumstances. However, Landeros not made or supported allegations raising a material question of fact regarding the lawfulness of the detention of Roland and seizure of the phone in this case.

Based on facts set forth above it is undisputed, and indisputable, that there are no objective facts giving rise to a reasonable suspicion that Roland, then and there, in the interview room was engaged in or about to engage in criminal activity when Landeros seized Roland and struck him with his fists. Indeed, Landeros does not contend that he suspected Roland was then and there engaged in or about to engage in criminal activity. Consequently, as a matter of law, the use even of insignificant, but more than de minimis, force to effect a detention was excessive and objectively unreasonable.

Based the facts and argument set forth above in Roland's Response, *supra*, it is undisputed, and indisputable, that there no objective facts sufficient give Landeros probable cause to seize Roland's phone exist. Even assuming that Landeros has not fabricated implications that he believed that the photo of a compressor he says he glimpsed on Roland's phone was related to a compressor stolen "weeks ago, no reasonable jury would find that the connection Landeros

endeavors to make gave rise to probable cause for seizing Roland's phone. Consequently, the force Landeros used to seize the phone was excessive and objectively unreasonable.

Finally, the complete absence of threats, exigent circumstances, or flight is indisputable. Nor does Landeros allege or produce any evidence that Roland was in the process of destroying, or about to destroy, evidence. Consequently, the force indisputably used in this case, namely, a beating, whether to Roland's head or to his arms and shoulder, was excessive and objectively unreasonable.

WHEREFORE, Plaintiff respectfully requests that this Court grant summary judgment against Landeros with respect to liability for use of excessive force in violation of the Fourth Amendment.

Respectfully submitted,

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