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December 27, 2020

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Re: State v. Freddy Collado, Docket # A-000581-20T4

Honorable Judges:

Pursuant to *Rule 2:6-2(b)*, kindly accept this letter brief on behalf of *amicus curiae* American Civil Liberties Union of New Jersey (ACLU-NJ).

TABLE OF CONTENTS

Preliminary Statement.....	1
Statement of Facts and Procedural History.....	2
Argument	3
I. Violation of a knock-and-announce order renders entry into the home illegal.....	3
II. The exclusionary rule applies to violations of knock-and-announce orders.....	4
A. Courts must utilize the exclusionary rule to deter police misconduct.	6
1. Courts have long recognized the power of the exclusionary rule to deter misconduct.	6

2. Remedies other than exclusion will not deter police officers from committing knock and announce violations	8
B. The court has consistently held that the exclusionary rule serves several purposes beyond deterrence.	14
C. It would defy logic to allow suppression for good faith mistakes of law enforcement, but prohibit it for flagrant violations of judicial orders by those same officers.	17
Conclusion.....	20

Table of Appendix

<i>Buss v. Quigg</i> , No. 01-CV-3908, 2002 WL 31262060 (E.D. Pa. Oct. 9, 2002).....	AA1-10
<i>Cincerella v. Egg Harbor Twp. Police Dep't</i> , No. CIV 06-1183(RBK), 2009 WL 792489, at *9 (D.N.J. Mar. 23, 2009).....	AA11-21

Preliminary Statement

In New Jersey, the exclusionary rule plays a critical role in both deterring police misconduct and vindicating the rights of people who fall victim to that misconduct. The State suggests the Court adopt a rule that exempts violations of knock-and-announce requirements contained in search warrants from the reach of the exclusionary rule. Because doing so would encourage disobedience of judicial orders, to the detriment of New Jerseyans' privacy rights, property rights, and safety, the Court should reject such a dramatic departure from New Jersey's historic treatment of the importance of suppression as a remedy.

Entries, such as the one in this case, that flout the requirement that officers knock and announce their presence prior to going inside render the entry unreasonable. (Point I). The question, though, is whether the exclusionary rule applies to those unreasonable entries. It must, for at least three reasons. (Point II). First, suppression is necessary to deter police from violating the knock-and-announce requirements. (Point II, A). For decades, courts have recognized both the effectiveness of exclusion as a deterrent (Point II, A, 1) and the ineffectiveness of other remedies to serve the same purpose. (Point II, A, 2). Second, New Jersey courts have recognized that the exclusionary rule serves laudatory purposes beyond deterrence. (Point II, B). Third, a contrary rule - one that

provided no exclusion remedy for knock-and-announce violations - would depreciate the New Jersey Supreme Court's rejection of the good-faith exception to the warrant requirement and produce absurd result. (Point II, C).

Video reveals that the officers in this case ignored the judge's requirement that they knock and announce their presence. If the State's position prevails, that behavior will become the norm.

Statement of Facts and Procedural History

Amicus accepts the statement of facts and procedural history contained within the State's brief in support of its Motion for Leave to Appeal, highlighting that the uncontested facts reveal that police possessed a warrant that required them to knock and announce their presence prior to entering. Before executing the search warrant, officers detained defendant Freddy Collado. Notwithstanding the knock-and-announce requirement of the warrant, officers entered the closed front door of the apartment without knocking and then said "hello" rather than "police." They did not identify themselves as police officers until they entered the bedroom in which defendant Joelle Carmona was resting. She had no pants on.

Argument

I. Violation of a knock-and-announce order renders entry into the home illegal.

The State frames the issue in this case as whether, when “the police lawfully seized evidence pursuant to a search warrant supported by probable cause, their failure to comply with the knock and announce rule should . . . result in suppression of the evidence[?].” Sbr 17.¹ But why do we assume that police *lawfully* seized the evidence? Justice Breyer asked two rhetorical questions in dissent in *Hudson v. Michigan*: “Would a warrant that authorizes entry into a home on Tuesday permit the police to enter on Monday? Would a warrant that authorizes entry during the day authorize the police to enter during the middle of the night?” 547 U.S. 586, 619 (2006) (Breyer, J., dissenting).

Long-standing principles of both Fourth Amendment and Article I, paragraph 7 jurisprudence instruct those searches violate the Constitution. *See, e.g., United States v. Jones*, 565 U.S. 400, 402-03, n.1 (2012) (explaining that government conceded non-compliance with warrant where agents installed GPS device on the eleventh day and in Maryland, where warrant allowed installation for 10 days in District of Columbia); *cf. State v. Marshall*, 199 N.J. 602, 611 (2009) (rejecting warrant

¹ Sbr refers to the State’s supplemental brief before the Appellate Division.

that failed to particularly describe the place to be searched). In other words, here, the warrant "authorized a search that *complied with*, not a search that *disregarded*, the Constitution's knock-and-announce rule." *Hudson*, 547 U.S. 586, 619 (2006) (Breyer, J., dissenting).

Courts must consider compliance with the knock-and-announce requirement "in assessing the reasonableness of a search or seizure." *Id.* (citing *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995)). "Separating the 'manner of entry' from the related search" as the State suggests, "slices the violation too finely." *Id.* at 615 (Breyer, J., dissenting). "[F]ailure to comply with the knock-and-announce rule, [does not constitute] . . . an independently unlawful event, but . . . [constitutes] a factor that renders the search 'constitutionally defective.'" *Id.* (citing *Wilson*, 514 U.S. at 936; *Ker v. California*, 374 U.S. 23 (1963) (opinion of Brennan, J.)).

II. The exclusionary rule applies to violations of knock-and-announce orders.

There is little debate about the reasons for knock-and-announce requirements. The New Jersey Supreme Court has explained the "most worthwhile purposes" of the knock-and-announce rule: "(i) 'decreasing the potential for violence'; (ii) 'protection of privacy'; and (iii) 'preventing the physical destruction of property.'" *State v. Rodriguez*, 399 N.J. Super.

192, 199 (App. Div. 2008) (quoting *State v. Johnson*, 168 N.J. 608, 616 (2001)) (in turn quoting Wayne R. LaFave, *Search and Seizure* § 4.8(a) at 599-600 (4th ed. 1984)).

The LaFave treatise relied upon by the Court in *Johnson* and the panel in *Rodriguez* provided brief explanations for each justification. As to the first, an "unannounced breaking and entering into a home could quite easily lead an individual to believe that his safety was in peril and cause him to take defensive measures which he otherwise would not have taken had he known that a warrant had been issued to search his home." *Id.* One needs to look no further than the tragic killing of Breonna Taylor in Louisville, Kentucky to see the tragic consequences of the over-use of no-knock entries. See Richard A. Oppel Jr., Derrick Bryson Taylor and Nicholas Bogel-Burroughs, *New York Times*, "What to Know About Breonna Taylor's Death" Oct. 30, 2020.²

Professor LaFave explained that "[a]s to the second [concern], notice minimizes the chance of entry of the wrong premises by mistake and the consequent subjecting of innocent persons to 'the shock, fright or embarrassment attendant upon an unannounced police intrusion.'" *Rodriguez*, 399 N.J. at 199 (quoting *Johnson*, 168 N.J. at 616) (in turn quoting LaFave,

² Available at <https://www.nytimes.com/article/breonna-taylor-police.html>.

Search and Seizure § 4.8(a) at 599-600). Here, one need look no further than the video of the police entry in this case to see the shock, fright, and embarrassment on Ms. Carmona's face when police entered her bedroom as she rested in bed.

Professor LaFave explained the third purpose: "a person should ordinarily 'be allowed the opportunity to voluntarily admit the officer into his home' instead of suffering damage to his property." *Id.* Although police did not damage the door in this case, instances of officers breaking down doors are sufficiently familiar for the Court to understand this rationale.

With these justifications as a backdrop, the Court must determine whether - in light of unquestioned violations of the knock-and-announce requirements - courts should order suppression.

A. Courts must utilize the exclusionary rule to deter police misconduct.

1. Courts have long recognized the power of the exclusionary rule to deter misconduct.

One purpose of the exclusionary rule has always been "to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960); see also *Weeks v. United States*, 232 U.S. 383, 393

(1914) (concluding that without the exclusionary sanction, the Fourth Amendment "might as well be stricken from the Constitution").

In *State v. Shannon*, all six participating justices recognized the critical role that deterrence plays to justify the exclusion of evidence seized in violation of the Constitution's requirements. 222 N.J. 576, 593 (2015) (LaVecchia, J., concurring); *id.* at 597 (Solomon, J., dissenting). Although all justices agreed that deterrence played a role in justifying the exclusionary rule, Justice Solomon's opinion particularly focused on the history of the exclusionary rule as a tool for deterring police misconduct. That dissenting opinion explained that "[t]he development and history of the exclusionary rule illustrates its core purpose: deterrence of future unlawful police conduct." *Id.* at 597 (Solomon, J., dissenting).

After tracing the evolution of the United States Supreme Court's reliance on the exclusionary rule as a method for deterring police misconduct, *id.* at 597-600, Justice Solomon reviewed New Jersey's treatment of the same. *Id.* at 600-04. Ultimately, the dissenting justices concluded that "the exclusionary rule applies where its purposes may best be served, mindful of the costs suppression of evidence imposes on the criminal justice system." *Id.* at 605 (Solomon, J., dissenting).

That is even the dissenting opinion recognized - supported by decades of New Jersey precedent - that where suppression of evidence would deter misbehavior by law enforcement, the exclusionary rule serves an indispensable purpose.

2. Remedies other than exclusion will not deter police officers from committing knock and announce violations.

There are times where, despite violations of the Fourth Amendment or Article I, paragraph 7, courts do not employ the exclusionary rule. *See, e.g., Nix v. Williams*, 467 U.S. 431, 448 (1984) (choosing not to invoke exclusionary rule where government establishes inevitable discovery); *State v. Sugar (II)*, 100 N.J. 214, 238-40 (1985) (same, under State Constitution); *State v. Holland*, 176 N.J. 344, 354 (2003) (rejecting exclusionary rule where State demonstrates independent source to obtain same evidence); *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975) (establishing test for determining whether seizure of evidence is sufficiently attenuated from taint of illegal action); *State v. Gioe*, 401 N.J. Super. 331, 343 (App. Div. 2008) (declining to suppress evidence where officers faxed an affidavit rather than appearing personally to obtain warrant).

As the United States Supreme Court explained in *Nix v. Williams*, the application of these exceptions to exclusion does not undermine the deterrence rationale of the exclusionary rule

because "[a] police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered." 467 U.S. at 445. By contrast, police officers operating under the *per se* rule suggested by the State (where exclusion never applies to knock-and-announce violations) do not have to perform any calculations at all. They know to a certainty that a reviewing court will always regard the evidence they find after a knock-and-announce violation as not subject to exclusion.

In *Gioe*, this Court explained that the exclusionary rule generally applies to violations of the Constitution, but not to statutory violations. Relying on a Ninth Circuit case from 1980, the panel determined that where violations were not constitutional in nature "suppression of evidence would only be required if: "(1) there was 'prejudice' in the sense that the search might not have occurred *or would not have been so* *abrasive* if [the procedural rules] had been followed, or (2) there is evidence of intentional and deliberate disregard of [those rules]." *Gioe*, 401 N.J. Super. at 343 (quoting *United States v. Johnson*, 641 F.2d 652, 656 (9th Cir.1980)) (emphasis added).

Violations of the knock-and-announce requirement, as seen here, fit *both* of the situations under *Gioe* where suppression is

required. Although the search itself may have been authorized, it would not have been conducted with the same level of abrasiveness, had officers abided by the knock-and-announce requirement in the warrant. And the officers appeared to totally flout the requirement. This is not a case where police knocked but failed to wait long enough before they entered; nor is it a case where police believed exigent circumstances excused their failure to announce themselves before they entered. Police simply pretended that the requirement did not constrain their behavior. If courts take the exclusionary rule off the table as a means of deterrence, what will incentivize police officers to follow the dictates of judicially authorized warrants?

Reliance on the possibility of tort liability or civil rights suits as an effective deterrent for knock-and-announce violations does not survive scrutiny.³ Looking to civil liability to deter Fourth Amendment violations is inconsistent with *Mapp*, in which the United States Supreme Court recognized the "obvious futility of relegating the Fourth Amendment [to] the protection of other remedies." *Mapp v. Ohio*, 367 U.S. 643, 652 (1961).

³ Here, the State also suggests that the presence of body cameras will serve as a deterrent to officers disregarding the requirements of a warrant. Sbr 20, n. 6. But this case shows that it does not. It is one thing to document violations; it is something else to prevent them. Although being on camera might impact some people's behavior, it will only do so if people believe that their exist consequences for their misbehavior.

Even if courts were free to carve out such categorical exceptions from the exclusionary rule, the knock-and-announce requirement would be one of the worst candidates for such treatment because violations of that requirement are far less likely to result in tort or civil rights liability than most other Fourth Amendment violations. At the time the United States Supreme Court decided *Hudson*, there did not exist a single decision, reported or unreported, from anywhere in the United States upholding a verdict awarding actual damages for a knock-and-announce violation.⁴ Even if there had been one or two cases in which plaintiffs have recovered actual damages for knock-and-announce violations, those cases must be so exceedingly rare as to have essentially no deterrent effect on the conduct of police officers. In the fourteen years since *Hudson*, not much has changed.

Courts have remained generally hostile to civil rights claims based on violations of warrants' knock-and-announce requirements. Some courts have refused to let claims proceed

⁴ There was one unreported trial court case, *Buss v. Quigg*, No. 01-CV-3908, 2002 WL 31262060 (E.D. Pa. Oct. 9, 2002), in which the plaintiffs apparently collected nominal damages of \$1 each for a knock and announce violation. Pursuant to R. 1:36-3, that case is attached as AA1-10. In *Kornegay v. Cottingham*, 120 F.3d 392 (3d Cir. 1997), the court allowed a knock and announce claim to proceed but took pains to "not suggest that these officers ought to be liable under section 1983." 120 F.3d at 399 n.5. There is no indication that the officers were held liable on remand.

based on qualified immunity. *See, e.g., Youngbey v. Mar.*, 676 F.3d 1114, 1116 (D.C. Cir. 2012) (finding that officers were "entitled to qualified immunity because neither their no-knock entry of appellees' home nor their nighttime search violated 'clearly established law.'").⁵

But the largest obstacle to civil relief for knock-and-announce violations stems not from judicial obstacles, but from practical limitations: Although privacy interests are a core part of the Fourth Amendment right of the people to be secure in their houses, those interests are singularly difficult to enforce through civil liability, especially when the police do not destroy property. *Cf. Sabbath v. United States*, 391 U.S. 585, 589-590 (1968) (holding that rule generally requiring knocks and announcements protects against unannounced entries even if police do not break door). Even in instances where police do destroy doors or other property, it is highly unlikely that the cost of replacing the door would be worth a lawsuit. In

⁵ *Amicus* has identified at least two cases where knock-and-announce violations have survived motions for summary judgment. *Perez v. Borough of Berwick*, 507 F. App'x 186, 192 (3d Cir. 2012) (vacating and remanding so the District Court could analyze the issues of qualified immunity on knock-and-announce claim); *Cincerella v. Egg Harbor Twp. Police Dep't*, No. CIV 06-1183(RBK), 2009 WL 792489, at *9 (D.N.J. Mar. 23, 2009) (denying qualified immunity because knock and announce rule was a clearly established right). Pursuant to R. 1:36-3 That case is attached as AA 11-21. There is no indication in either case that actual damages were ultimately awarded. And, even if they were, a small number of cases fails to provide the desired deterrent effect.

a typical case, where an unannounced entry would frighten and embarrass any resident, but not cause any physical harm, it would be highly unrealistic to expect that a lawsuit could possibly result in anything more than nominal damages.

Therefore, most victims of knock-and-announce violations will not file a lawsuit at all. The reality that "there may be few civil suits because violations may produce nothing 'more than nominal injury' is to confirm, not to deny, the inability of civil suits to deter violations." *Hudson*, 547 U.S. at 611 (Breyer, J., dissenting).

Even in extreme cases where victims of knock-and-announce violations have a colorable claim for significant damages, recovery still is highly unlikely. For example, in *Doran v. Eckold*, 409 F.3d 958 (8th Cir. 2005) (*en banc*), a jury awarded the plaintiff \$2,000,000 upon finding that he had been shot as the direct result of a knock-and-announce violation, but the Eighth Circuit reversed the judgment on the ground that the no-knock entry was justified by the circumstances. *Id.* at 960, 963-967; see also *Leaf v. Shelnett*, 400 F.3d 1070, 1082-1085 (7th Cir. 2005) (reversing denial of summary judgment to officer who entered and shot resident without knocking and announcing).

B. The Court has consistently held that the exclusionary rule serves several purposes beyond deterrence.

The United States Supreme Court's good-faith exception cases all take as a given that the sole purpose of the exclusionary rule is to deter police misconduct. *Arizona v. Evans*, 514 U.S. 1, 11 (1995). New Jersey courts, however, have repeatedly recognized that the exclusionary rule's "function is not merely to deter police misconduct," but also to protect the integrity of the judicial system and "serve[] as the indispensable mechanism for vindicating the constitutional right to be free from unreasonable searches." *State v. Novembrino*, 105 N.J. 95, 101, 152, 157 (1987). Thus, even were it true that application of the exclusionary rule to violations of knock-and-announce requirements was not critical to deter misconduct - which it is not, as set forth above, see Point II, A - these interests demand suppression where the State, as here, seeks to benefit from evidence that was obtained in violation of a defendant's constitutional rights.

In *State v. Handy*, 206 N.J. 39 (2011), the Court reiterated that "[i]n addition to deterrence, the exclusionary rule 'enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,' and 'assur[es] the people . . . that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in

government.'" *Id.* at 45 (quoting *United States v. Calandra*, 414 U.S. 338 357 (Brennan, J., dissenting)). Quoting at length from Justice Clark's opinion in *Mapp v. Ohio*, the New Jersey Supreme Court declared:

There are those who say . . . that under our constitutional exclusionary doctrine [t]he criminal is to go free because the constable has blundered. In some cases this will undoubtedly be the result. But, . . . there is another consideration - the imperative of judicial integrity. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. . . .

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise.

[*Handy*, 206 N.J. at 46 (quoting *Mapp*, 367 U.S. at 659-60) (internal citations and quotation marks omitted) (alterations in original).]

In short, even where the exclusionary rule has no deterrent effect, it still ensures that "[c]ourts which sit under our Constitution can not and will not be made party to lawless invasions of the constitutional rights of citizens by permitting

unhindered governmental use of the fruits of such invasions."

Terry v. Ohio, 392 U.S. 1, 13 (1968).⁶

Over the past four decades, the United States Supreme Court has abandoned these interests and fixated single-mindedly on the deterrence rationale. New Jersey courts, by contrast, have consistently emphasized that the exclusionary rule exists "to preserve the integrity of the courts by not providing a forum for tainted evidence." *State v. Herrera*, 211 N.J. 308, 330 (2012); accord *State v. Shaw*, 213 N.J. 398, 413-14 (2012); *State v. Williams*, 192 N.J. 1, 14 (2007); *State v. Badessa*, 185 N.J. 303, 311 (2005); *State v. Evers*, 175 N.J. 355, 376 (2003); *State v. Johnson*, 118 N.J. 639, 651 (1990). Indeed, the New Jersey Supreme Court has even suggested that the United States Supreme Court's "fail[ure] to consider the non-deterrent rationales underlying the exclusionary rule" is an appropriate reason for continuing to construe Article I, Paragraph 7 in a manner that is independent of the federal jurisprudence interpreting the Fourth Amendment. *Handy*, 206 N.J. at 51.

In the Court's divided opinion in *State v. Shannon* the Court addressed the divergent views about the role of non-

⁶ See also *Weeks v. United States*, 232 U.S. 383, 392 (1914) ("The tendency . . . to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.").

deterrence considerations supporting the exclusionary rule, with Justice LaVecchia's opinion noting that "*Novembrino's* important purpose to secure vindication of constitutional rights cannot be ignored. . . ." 222 N.J. 576, 593 (2015) (LaVecchia, J., concurring) whereas Justice Solomon's opinion focused on cases that elevated the primacy of the deterrence rationale as a basis for the exclusionary rule. *Id.* at 605 (Solomon, J., dissenting). But, critically, no justice in *Shannon* suggested that even good-faith errors made by *law enforcement* should be overlooked under Article I, Paragraph 7 or not subject to suppression. *Id.* at 593 (LaVecchia, J., concurring); *id.* at 595, 604 (Solomon, J., dissenting) (noting importance of fact that error was made by judicial staff rather than law enforcement).

Failing to apply the exclusionary rule to violations of knock-and-announce orders would require the abandonment of these principles.

C. It would defy logic to allow suppression for good faith mistakes of law enforcement, but prohibit it for flagrant violations of judicial orders by those same officers.

Whereas the United States Supreme Court has created exceptions to the exclusionary rule where officers relied in good faith on the belief that they had a warrant supported by probable cause, the New Jersey Supreme Court has rejected the good-faith exception. *Compare United States v. Leon*, 468 U.S. 987 (1984) with

Novembrino, 105 N.J. at 152-53. Adopting the State's proposed rule here would not only ignore the foundational holdings of *Novembrino*, but would also yield absurd results.

The Court in *Novembrino* looked carefully at how adoption of a good-faith exception to the exclusionary rule would impact police behavior. Ultimately it concluded that adoption of the exception would "tend to undermine the constitutionally-guaranteed standard of probable cause, and in the process disrupt the highly effective procedures employed by our criminal justice system to accommodate that constitutional guarantee without impairing law enforcement. . . ." *Id.* at 158. The State suggests that *Novembrino's* focus on warrants supported by probable cause distinguishes it from this case. See Sbr 18-20. But that takes too narrow of view of *Novembrino's* holding.

It is true that the Court in *Novembrino* noted that adoption of a good-faith exception would "undermine the motivation of law-enforcement officers to comply with the constitutional requirement of probable cause." *Novembrino*, 105 N.J. at 152. But, of course, the Court did not suggest that it endorsed *other* exceptions to the exclusionary rule that undermined the motivation of officers to comply with *other* constitutional requirements. The Court praised the "very sound practice" that had developed before the good-faith exception had been adopted "of going through the warrant-issuing process with the greatest of care," *id.* (quoting 1 W. LaFave,

Search and Seizure: A Treatise on the Fourth Amendment (1978) (1986 Pocket Part), § 1.2, at 20) but did not recommend rules that would discourage care in other aspects of the search warrant process.

The Court noted then that "[i]n the twenty-five years during which we have applied the exclusionary rule in New Jersey . . . , efforts to comply with the constitutional mandate have been enhanced." *Novembrino*, 105 N.J. at 155. At the same time, the Court did not "perceive that application of the exclusionary rule has in any significant way impaired the ability of law-enforcement officials to enforce the criminal laws[, finding t]he statistical evidence is to the contrary." *Id.* The same is true here: in the 33 years since that opinion was drafted, there is simply no evidence that application of the exclusionary rule to knock-and-announce violations has in any way impaired the ability of law enforcement to execute search warrants. For more than half a century, the exclusionary rule has served "as the indispensable mechanism for vindicating the constitutional right to be free from unreasonable searches." *Id.* at 157. It should not be jettisoned or limited lightly.

Imagine if our jurisprudence rejected the good-faith exception (even for mistakes made by Judiciary employees, *Shannon*, 222 N.J. at 593 (LaVecchia, J., concurring)), but allowed officers to ignore the knock-and-announce requirement.

In that case, courts would order suppression where police officers took every available step to avoid error but allow the admission of evidence where the same officer blatantly disregarded orders contained in a warrant. There exists no justification for such an absurd result.

Conclusion

Because the exclusionary rule serves critical and indispensable roles in deterring police misconduct and vindicating the rights of New Jerseyans, the Court should refuse to allow the use of evidence seized in violation of knock-and-announce requirements and affirm the judgement of the court below.

Respectfully submitted,



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Amicus's Appendix

2002 WL 31262060

Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

MARIA T. BUSS, individually and as
administratrix of Cyril F. Buss, Sr.,
deceased, and Dana Buss, Plaintiffs,
v.
Corporal John QUIGG, Defendant.

No. CIV.A. 01-CV-3908.

|
Oct. 9, 2002.

MEMORANDUM AND ORDER

SCHILLER, J.

*1 The question before me is whether plaintiffs who have prevailed on a constitutional claim under § 1983 but have obtained only nominal damages may recover attorney's fees.

Plaintiffs Maria T. Buss, suing on her own behalf and on behalf of the estate of her late husband, Cyril Buss, Sr.,¹ and their daughter, Dana Buss, commenced this 42 U.S.C. § 1983 action on August 2, 2001 against Defendant Pennsylvania State Police Corporal John Quigg. Plaintiffs alleged that Cpl. Quigg unlawfully entered their home and used excessive force against them in violation of rights secured by the Fourth and Fourteenth Amendments. On August 14, 2002, following a jury trial, this Court entered judgment for Plaintiffs with respect to the unlawful entry claim. The Court entered judgment for Defendant with respect to Plaintiffs' claim that they suffered an actual emotional injury as a result of Defendant's unlawful entry, and for Defendant with respect to the excessive force claim. The Court awarded Plaintiffs nominal damages of one dollar each.

Presently before this Court is Plaintiffs' motion for attorney's fees and costs. Plaintiffs assert that they are the prevailing party and seek \$35,560 in attorneys fees and \$7,979 in costs pursuant to 42 U.S.C. § 1988. Defendant responds that Plaintiffs are not entitled to fees and costs because they do not qualify for prevailing party status and have not succeeded sufficiently on their claims. Because I find that Plaintiffs are the prevailing party and have obtained a partial victory, but

also concur with some of Defendant's specific objections to claimed fees and expenses, I grant Plaintiffs' motion in part and award attorney's fees in the amount of \$34,660 and costs in the amount of \$3,479.

I. BACKGROUND

On the afternoon of August 3, 1999, and again on the morning of August 4, Cpl. Quigg, accompanied by other officers, went to the Buss home in Upper Black Eddy, Pennsylvania to serve an arrest warrant upon James Donnelly, then the boyfriend of Dana Buss. This case arises out of the events that occurred on those two occasions. Plaintiffs' amended complaint alleged that on August 3, Cpl. Quigg entered the Buss home without consent, and, without knocking or announcing his presence, proceeded to the second floor of the home and shouted orders at Dana Buss while pointing a gun at her. (Pls.' Am. Compl. ¶ 8,9.) The amended complaint further alleged that on August 4, Cpl. Quigg returned to the Buss home, again entered without permission or notice of his presence, and again proceeded to the second floor where he was confronted by Cyril Buss, Sr., who demanded to see some authorization, such as a warrant, for Cpl. Quigg's entry. (Pls.' Am. Compl. ¶ 11.) The parties agreed that Quigg failed to produce a warrant and that Cpl. Quigg subsequently took Donnelly into custody without incident. (Stip. Facts² ¶ 2.)

As Cpl. Quigg and other officers escorted Donnelly to a police car parked on the street, Cyril Buss, Sr., followed the officers and continued to demand to see a warrant. (Pls.' Am. Compl. ¶ 13.) When, in the midst of his demands, Buss threatened to smash the windshield of the police car, Cpl. Quigg told Buss he was under arrest for disorderly conduct. (Stip. Facts ¶ 13.) Buss immediately ran toward his home, with Cpl. Quigg and another officer in pursuit and Cpl. Quigg attempting to spray Buss with pepper spray. (Stip. Facts ¶ 18.) Buss re-entered his home and locked the door. (Id.) Cpl. Quigg and the other officer re-entered the home, where a physical altercation occurred. (Stip. Facts ¶ 19.) Plaintiffs alleged that during the altercation, Dana Buss was thrown backwards, causing injury, and Maria Buss was kicked in the mid-section by Cpl. Quigg, causing injury. (Pls.' Am. Compl. ¶ 17,19.) Plaintiffs further alleged that once Cpl. Quigg and the other officers had subdued and detained Cyril Buss, Sr., they visited serious physical abuse upon him in the street near the police car, causing injury. (Pls.' Am. Compl. ¶ 20.)

On the basis of these facts and allegations, Plaintiffs' amended complaint alleged, *inter alia*, § 1983 violations pursuant

to the United States and Pennsylvania constitutions and federal and state laws against Cpl. Quigg and alleged supervisory liability for Cpl. Quigg's actions against three unnamed officers. Specifically, Count I alleged that Cpl. Quigg's actions in violation of § 1983 including invasion of privacy, assault and battery, use of excessive force, illegal detention, false arrest, arrest without probable cause, arrest and detention without due process and false imprisonment. Count II alleged supervisory liability against three unnamed supervising officers based on failure to adequately train, supervise, and take remedial action against Cpl. Quigg. Plaintiffs sought total damages of \$150,000 on their claims.

*2 On August 1, 2002, this Court granted in part and denied in part Defendant's summary judgment motion, thereby winnowing Plaintiff's Count I claims to those against Cpl. Quigg in his individual capacity for 1) unlawful entry, by all Plaintiffs and 2) excessive force, by Cyril Buss, Sr. Plaintiffs subsequently abandoned their Count II claims. At the conclusion of three days of trial before a jury, the Court instructed the jury on the unlawful entry and excessive force claims, as well as appropriate damages. The jury found that: (1) Cpl. Quigg unlawfully entered Plaintiff's residence on both occasions; (2) Cpl. Quigg reasonably believed that Donnelly lived at and was present at the Buss residence on both occasions; (3) Cpl. Quigg did not knock and announce his identity and purpose before entering on either occasion; (4) none of the Plaintiffs suffered actual emotional injury as a result of Cpl. Quigg's unlawful entry; and (5) Cpl. Quigg did not use excessive force in arresting Cyril Buss, Sr.

Despite its finding that Cpl. Quigg had violated Plaintiffs' Fourth Amendment rights through unlawful entry into the Buss home, the jury failed to award nominal damages. However, in *Carey v. Phipps*, the Supreme Court established the clear rule that if a jury finds that a constitutional violation has been proven, but that plaintiff has not shown injury sufficient to warrant compensatory damages, plaintiff is entitled to at least nominal damages. See 345 U.S. 247, 266-67, 73 S.Ct. 656, 97 L.Ed. 986 (1978). The source of the error here lay with the Court's instructions, which failed to inform the jury of its obligation to award nominal damages upon the finding of a constitutional violation.³ See *Robinson v. Cattaraugus County*, 147 F.3d 153 (2d Cir.1998) (holding that failure to instruct the jury as to its obligation to award nominal damages constitutes "plain error"). Prior to trial, Plaintiffs' counsel had proposed a proper instruction on nominal damages and the Court erroneously rejected it.⁴ Following the jury verdict, the Court rectified its error and

awarded nominal damages to each of the Plaintiffs,⁵ while entering judgment for Plaintiffs on the unlawful entry claim.⁶

II. DISCUSSION

A. Entitlement to Fees Under Section 1988

*3 Under the Civil Rights Attorney Fees Award Act, 42 U.S.C. § 1988(b), a "prevailing party" in a § 1983 action may recover a "reasonable attorney's fee as part of the costs." *Farrar v. Hobby*, 506 U.S. 103, 109, 113 S.Ct. 566, 121 L.Ed.2d 494 (1987). To be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute that changes the legal relationship of the parties. *Tex. State Teachers Ass'n. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989). Defendant argues that the Plaintiffs' "technical victory" is so "insignificant" that Plaintiffs cannot be said to have "successfully prevailed." On this basis, Defendant asserts that Plaintiffs are not entitled to fees as a matter of law.

Farrar teaches that in civil rights cases in which the plaintiff receives only nominal damages, the court should separate the analysis of "prevailing party" status from the determination of whether plaintiffs have earned merely a "de minimis" or "technical" victory. 506 U.S. at 115 (O'Connor, J., concurring.). The latter inquiry goes to the reasonableness of the fee award, not the question of whether plaintiffs have prevailed. *Id.* I will thus first determine whether plaintiffs are prevailing parties and then address the question of how their limited victory affects the propriety of attorneys fees in this case.

1. Prevailing Party Status

Defendant's assertion that Plaintiffs are not prevailing parties for § 1988 is plainly at odds with the holding of *Farrar*. There, the Supreme Court held that "a plaintiff who wins nominal damages is a prevailing party under § 1988." 506 U.S. at 113. Plaintiffs here have secured nominal damages on one of their § 1983 claims that Defendant violated their Fourth Amendment rights and have, therefore, prevailed for § 1988 purposes.

2. Propriety of Attorney's Fees

Although Plaintiffs are prevailing parties, the appropriateness of attorney's fees under *Farrar* presents a somewhat closer question. The legislative history of § 1988⁷ shows that Congress, in enacting the statute, sought to narrow the disparity in legal representation and resources between opposing parties in civil rights cases, particularly where, as here, the defendant is a public official “with substantial resources available to [him] through funds in the common treasury, including the taxes paid by the plaintiffs themselves.” H.R.Rep. No. 94-1558, 94th Cong., 2d Sess. 7 (1976) (“House Report”).⁸ In enacting § 1988, Congress determined that “the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff.” *Hensley v. Eckert*, 461 U.S. 424, 444 n. 4, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (Brennan, J., concurring in part and dissenting in part). To effectuate this goal, Congress sought to make fees available both to properly compensate plaintiffs' attorneys and to serve a private enforcement function. See *Carey v. Piphus*, 435 U.S. at 257 n. 11 (“[t]he potential liability of § 1983 defendants for attorney's fees [under § 1988] provides additional-and by no means inconsequential-assurance that agents of the State will not deliberately ignore ... [constitutional rights]”); See also *Maine v. Thiboutot*, 448 U.S. 1, 11, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980) (“Congress viewed the fees authorized by § 1988 as ‘an integral part of the remedies necessary to obtain’ compliance with § 1983,” (quoting S.Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976)) (“Senate Report”). These dual objectives are embodied in the language of the Senate Report, which envisions compensation of plaintiffs' attorneys “for all time reasonably expended on a matter.” Senate Report at 6.

In view of this history, the Supreme Court has reasoned that a prevailing plaintiff should ordinarily be awarded attorney's fees unless special circumstances would make an award unjust. See *Hensley*, 461 U.S. at 429-430. Specifically, the Court has held that nominal damages will support an award of attorney's fees based on the vindication of important constitutional rights. See *City of Riverside v. Rivera*, 477 U.S. 561, 575, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986) (“Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private cases, to depend on obtaining substantial monetary relief.”).

*4 In *Farrar*, the Supreme Court narrowed the scope of district courts' discretion to award fees, indicating that there are “some circumstances” in which a plaintiff who “prevails”

for § 1988 purposes should nevertheless not recover attorney's fees. 506 U.S. at 113. In particular, “when a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary damages, the only reasonable fee is *usually* no fee at all.” *Farrar*, 506 U.S. at 115 (emphasis added).

The imperfect guidance of the majority opinion in *Farrar* has given the lower courts an opportunity to fashion more specific rules for approaching nominal damages cases. For example, several circuit courts have addressed *Farrar*'s impact on the ability of district courts to award fees in mixed motive Title VII cases⁹ where no damages or only nominal damages have been awarded, but the plaintiff has prevailed. They have almost uniformly held that the district courts retain their discretion in such cases to determine whether, and how large, an attorney's fee should be awarded. See *Norris v. Sysco Corp.* 191 F.3d 1043, 1051 (9th Cir.,1999); *Akrabawi v. Carnes Co.*, 152 F.3d 688, 695-697 (7th Cir.1998); *Canup v. Chipman-Union, Inc.*, 123 F.3d 1440, 1443-44 (11th Cir.1997); *Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332, 1339 (4th Cir.1996). The Tenth Circuit has gone further to say that even in the face of nominal, de minimis, or no relief, a prevailing Title VII plaintiff should “ordinarily” recover fees. *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074, 1081 (10th Cir.1998). Recently, the Third Circuit held that a plaintiff whose Fair Housing Act rights were violated, but to whom no damages were awarded, was a prevailing party and directed the district court to award costs and fees. *Alexander v. Riga*, 208 F.3d 419, 430 (3d Cir.2000).

In light of these cases, the legislative history of § 1988, and the language of the *Farrar* opinion itself, I decline Defendant's implicit invitation to read *Farrar* as a *per se* bar to attorneys fees in civil rights cases where plaintiffs have secured only nominal damages or no damages at all.¹⁰ See *Milton v. City of Des Moines*, 47 F.3d 944, 946 (8th Cir.1995); *Wilcox v. City of Reno*, 42 F.3d 550, 554 (9th Cir.1994). Instead, I understand *Farrar* to require an inquiry into whether plaintiff's victory may be characterized as so “technical” or “de minimis” that it falls within that category of cases in which “the only reasonable fee is ... no fee at all.” 506 U.S. at 115.

*5 In assessing whether a plaintiff who has secured only nominal damages may reasonably be awarded fees, courts look to the “degree of success obtained” by plaintiff in the litigation. *Farrar*, 506 U.S. at 113 (quoting *Hensley*, 461 U.S. at 434). Justice O'Connor's concurrence¹¹ points to three relevant indicia of success: the “extent of relief,”

the “significance of the legal issue on which the plaintiff prevailed,” and the “public purpose” accomplished by the litigation. 506 U.S. at 120-21; see also *Cartwright v. Stamper*, 7 F.3d 106, 109 (7th Cir.1993).

a. Extent of Relief

The first factor compares the judgment recovered with the judgment sought. In *Farrar*, the plaintiff sought \$17 million in compensatory damages and received only one dollar in nominal damages. 506 U.S. at 107. The Court, noting that the district court had altogether failed to consider this factor in awarding plaintiff attorney's fees, found that it was “hard to envision a more dramatic difference” between the relief sought and that obtained. See *Farrar* 506 U.S. at 120 (O'Connor, J., concurring). In *Romberg v. Nichols*, 48 F.3d 453 (9th Cir.1994), cited by Defendant, plaintiffs sought \$2 million in punitive damages and received only one dollar in nominal damages. See *id.* at 454. The court observed, “as in *Farrar*, plaintiffs requested a substantial sum, but received only one dollar each.” *Id.* at 455. In *Washington v. Philadelphia County Court of Common Pleas*, 89 F.3d 1031 (3d Cir.1996), on which Defendant also relies, the Third Circuit concluded that the district court was “within its broad discretion” when it reduced the requested attorney's fees by fifty percent because, in addition to other factors, plaintiff “hardly won a decisive victory.” 89 F.3d at 1043. There, the plaintiff had requested \$661,776.02 in damages, “a figure which did not include mental anguish, punitive damages, and prejudgment interest, and also did not include the \$103,000 [plaintiff] claimed in lost wages.” *Id.* The jury “ruled against his primary claim, racial discrimination,” and awarded “what amounted to a nominal victory of \$25,000” on his retaliation claim. *Id.*

The instant case is distinguishable. Here, Plaintiffs sought an aggregate award of \$150,000 in damages.¹² This hardly reflects a desire for monetary relief of the scale presented by plaintiffs in *Farrar*, *Romberg* and *Washington*.

*6 Moreover, it is plainly evident that Plaintiffs here sought vindication of their constitutional rights. The gravamen of Plaintiffs' complaint lay with Cpl. Quigg's entries into their home without authorization or exigent circumstances, and his actions during the dispute prompted by those entries. The parties agree that Cyril Buss, Sr. made repeated demands to be shown a warrant upon Cpl. Quigg's entry into his home. (Stip. Facts ¶ 12,15.) These demands, and the demand for an

explanation of the prior day's illegal entry, formed the basis of the dispute between Mr. Buss and Cpl. Quigg from which Plaintiffs' other claims arose. In making an unlawful entry claim, then, Plaintiffs decided to put before a jury the question of whether Mr. Buss had rightly objected to a violation of his and his family's constitutional rights.

Viewed in this light, Plaintiffs partial victory takes on notable significance. Plaintiffs prevailed on their bedrock claim¹³ of unlawful entry and I awarded one dollar in nominal damages to each plaintiff. In so doing, they gained more than merely the “ ‘moral satisfaction of knowing that a federal court concluded that their rights had been violated’ in some unspecified way.” *Farrar* 506 U.S. at 113 (quoting *Hewitt*, 482 U.S. 755, 762, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987)). Rather, they gained an authoritative determination that they rightly acted to enforce their constitutional right against unreasonable search and seizure in their home. Although it does not readily translate in monetary terms, this is not a trifling accomplishment. It would certainly not “[stretch] the imagination” to consider the result a “victory in the sense of vindicating the rights of the fee claimants.” *Commr's Court of Medina County, Tex. v. United States*, 683 F.2d 435, 442-43 (1982).

Plaintiffs' failure to succeed on their excessive force claim does not upset this analysis. Because excessive force presents a more readily cognizable injury than unlawful entry, succeeding on the excessive force claim would have dramatically increased the likelihood of securing Plaintiffs' damages at the level claimed. Yet I do not perceive that Plaintiffs' excessive force claim ranks higher in importance to their case. Rather, it attends the central claim of unlawful entry and, because of Mr. Buss's resistance to arrest, presents a far more difficult claim on which to succeed. Nor can it be said that plaintiffs “aim[ed] high and fell far short ... in the process inflicting heavy costs on [their] opponent and wasting the time of the court.” *Hyde v. Small*, 123 F.3d 583, 585 (7th Cir.1997). Plaintiffs made a reasonable demand based on the facts alleged, and presented a difficult case efficiently through three days of jury trial.

Two cases present similar facts to the instant case and in each the court affirmed the award of fees. In *Brandau v. Kansas*, 168 F.3d 1179 (10th Cir.1999), the Tenth Circuit upheld an award of attorney's fees and expenses of \$41,598.13 where the plaintiff prevailed on a Title VII hostile work environment sexual harassment claim,¹⁴ and the jury awarded her one dollar in nominal damages. With regard to the first

of Justice O'Connor's factors, the Tenth Circuit noted the district court's determination that the plaintiff sought only 21 months in back pay and \$50,000, in contrast to the \$17 million in *Farrar*, and also noted the fact that plaintiff's suit was not protracted. *See Id.* at 1182. In *Jones v. Lockhart*, 29 F.3d 422 (8th Cir.1994), the plaintiff brought a § 1983 action against prison officials for excessive force and sought \$860,000 in damages. The jury awarded nominal damages of one dollar and punitive damages of one dollar, and the district court awarded \$25,000 in attorney's fees. On appeal, the Eighth Circuit upheld the attorney's fees award, observing that while there was a discrepancy between the amount sought and that recovered, "it pales in comparison to the discrepancy presented in *Farrar*." *Id.* at 424.

*7 The instant case falls in line with *Brandau* and *Jones*. The discrepancy between \$150,000 and \$3 does not approach the level that concerned the court in *Farrar*. Thus, the first and "most important"¹⁵ indicia of success weighs in favor of an award of reasonable fees.

b. Significance of The Legal Issue on Which Plaintiff Prevailed

The second factor examines the significance of the legal issue on which plaintiff prevailed. In *Farrar*, Plaintiffs had alleged deprivation of procedural due process rights by various state and county officials allegedly engaged conspiracy and malicious prosecution aimed at closing a school that plaintiffs owned and operated. 506 U.S. at 104. The lower courts have already established that the legal issue on which Plaintiffs prevailed in *Farrar* falls low on the spectrum of importance. In *Jones*, for example, the Court reasoned that the "vindication of the constitutional right to be free from cruel and unusual punishment is a significant legal issue in contrast to the injury to a business interest alleged in *Farrar*." 29 F.3d at 424. Courts have found, in the same vein, that fundamental constitutional claims achieve the "significance" envisioned by Justice O'Connor. In *Lucas v. Guyton*, the court, following *Jones*, found plaintiffs excessive force claim against correctional officers significant and noting, "the constitutional right to be free from cruel and unusual punishment ... is one of the premises upon which this great nation was founded and that right continues to distinguish this nation today." 901 F.Supp. 1047, 1055 (D.S.C.1995) (citing *Jones* 29 F.3d at 424). Here, Plaintiffs prevailed on an unlawful entry claim under the Fourth Amendment. The importance accorded the protection of the home from

arbitrary entry by law enforcement personnel needs little elaboration. *See Oliver v. United States*, 466 U.S. 170, 178, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) ("The Court since the enactment of the Fourth Amendment has stressed 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.'") (quoting *Payton v. New York*, 445 U.S. 573, 601, 100 S.Ct. 1371, 63 L.Ed.2d 639, n. 8 (1980).) I thus find it difficult to question the legal significance of Plaintiffs' successful claim that Cpl. Quigg unlawfully entered their home on two separate occasions.

Some courts have also interpreted the second factor in terms of the plaintiff's degree of success on their theory of liability, given the defendants sued and the issues raised. *See, e.g. Muhammad v. Lockhart*, 104 F.3d 1069, 1070 (8th Cir.1997); *Maul*, 23 F.3d at 145. In *Farrar*, the jury found that one of six defendants-the only one not found to have engaged in a conspiracy-had deprived one of the plaintiffs of a civil right. 506 U.S. at 104. Here, Plaintiffs suffered summary judgment on their state law claims and their Fourteenth Amendment claim. They also abandoned their claim of supervisory liability. Thus at trial, the only questions before the jury related to unlawful entry and excessive force. As noted, plaintiffs succeeded on their unlawful entry claim. This suffices to tip this factor in their favor. *See Briggs v. Marshall*, 881 F.Supp. 414, 419 (S.D.Ind.1995) (finding that second O'Connor factor weighed in plaintiffs' favor where plaintiffs failed on all claims except excessive force), *aff'd*, 93 F.3d 355 (7th Cir.1996).

c. Public Purpose Served

*8 The third factor examines the public purpose served by Plaintiffs' victory. As in *Romberg*, Plaintiffs' lawsuit failed to achieve "tangible results" in service of a public purpose. 48 F.3d at 455. Plaintiffs suit will not likely cause a change in police policy or training, nor will it have potential collateral estoppel effects. Justice O'Connor, however, recognized the intangible value to the public of the "private attorney general" function of civil rights suits made possible by § 1988.¹⁶ *See Farrar*, 506 U.S. at 120. In *Farrar*, Justice O'Connor was unable to discern-because the district court did not clearly indicate-how the judgment or a fee award would deter future lawless conduct. *Id.* Here, however, the deterrence value is more apparent. The Supreme Court has specifically recognized the value of § 1983 damage actions in deterring illegal entries of dwellings by police. *See Segura v. United*

States, 468 U.S. 796, 812, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984). Cpl. Quigg's conduct undoubtedly affects that of the officers below his rank. Indeed, Cpl. Quigg illegally entered the Buss home on two occasions in the company of junior officers. It can be little doubted that officers in his position routinely confront opportunities to enter dwellings to serve search and arrest warrants. In those situations, the jury verdict in this case teaches a valuable lesson because it carries a plain meaning:¹⁷ you must knock, announce and wait for a response before entering.

Under these circumstances, to characterize Plaintiffs' success as "technical" or "de minimis" such that no attorney's fee could be reasonable would defy the very purpose of the governing statute. Plaintiffs have achieved a victory whose significance cannot be readily cast in monetary terms, yet it is not insignificant. Where law enforcement officers plainly violate constitutional rights, the availability of counsel should not be made to depend on the degree to which plaintiffs endure emotional harm. To so hold is to patently disregard the well-established enforcement function of § 1988.

As the Seventh Circuit, in an opinion written in a case involving an award of \$500 for false arrest, reasoned:

*9 The district court based its decision to award no fees on the small size of the verdict and the fact that the case broke no new ground in the law of police abuses. If these are sufficient grounds it means that routine police misconduct that, although unconstitutional, is neither harmful enough to support a large award of compensatory damages nor malicious enough to justify an award of punitive damages is, as a practical matter, beyond the reach of the law. It is impossible, unless there is an expectation of a fee award (and often not then), to interest a competent lawyer in bringing a suit in federal court to recover a small amount of damages unless the plaintiff is a rich person willing to finance the suit out of his own pocket rather than by means of a contingent-fee contract, the normal way in which tort suits are financed in this country. Yet the cumulative effect of petty violations of the Constitution arising out of the interactions between the police (and other public officers) and the citizenry on the values protected by the Constitution may not be petty, and if this is right then the mere fact that a suit does not result in a large award of damages or the breaking of new constitutional ground is not a good ground for refusing to award any attorneys' fees. *Hyde v. Small*, 123 F.3d 583, 585 (7th Cir.1997) (Posner, J.).

Farrar instructs that where a plaintiff's victory is merely "technical" or "de minimis," the court need not go through the usual complexities of calculating reasonable attorney's fees. 506 U.S. at 117. Because I find that plaintiffs victory here is more than merely "technical" or "de minimis," I now turn to an analysis of reasonable fees and costs.

B. Determination of Reasonable Fees and Costs

Courts assess the reasonableness of a claimed fee using the "lodestar" formula by multiplying the number of hours reasonably expended by the appropriate hourly rate. See *Hensley v. Eckert*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40(1983); *Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir.2001). The prevailing party has the burden of showing the reasonableness of its request. See *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir.1990). The opposing party must challenge the request with sufficient specificity to provide notice to the fee applicant of the portion of the fee that must be defended. See *id.* Once the opposing party's objection is made with the required support, a court has considerable discretion to adjust the fee in light of the objections of the adverse party. See *Bell v. United Princeton Props.*, 884 F.2d 715, 721 (3d Cir.1989).

1. Reasonableness of Hourly Rate

*10 The reasonableness of the claimed hourly rate is generally measured against the "prevailing market rates in the relevant community." *Maldonado*, 256 F.3d at 184 (citing *Blum v. Stenson*, 456 U.S. 886, 895 (1984)). The Third Circuit has held that the attorney's fee schedule composed by Community Legal Services ("CLS") is "a fair reflection of market rates in Philadelphia." *Id.* at 187. Plaintiffs' counsel, Tim Barton, represents that he has over fourteen years of trial experience and that the hourly rate he claims here, \$200.00, is his usual and customary rate. Moreover, Defendants concede both that Mr. Barton's claimed hourly rate complies with the CLS schedule and that it is reasonable. For these reasons, I find Mr. Barton's hourly rate to be reasonable.

2. Reasonableness of Hours Expended

The fee petition must be sufficiently specific to allow the court to determine if the hours claimed are unreasonable for the work performed. See *Maldonado*, 89 F.3d at 1037; *Dellarciprete*, 892 F.2d at 1190. Hours billed that are

excessive, redundant or unnecessary are not reasonably expended and should be excluded from the calculation. *Hensley*, 461 U.S. at 434. Specifically, an attorney may not recover legal fees for easily delegable non-legal work. See *Skaggs v. Hartford Financial Group*, Civ. A. No. 99-3306, 2001 WL 1665334, at *21, 2001 U.S. Dist. LEXIS 20351, at *63 (E.D.Pa.2001) (citing *Ursic v. Bethlehem Mines*, 719 F.2d 670,677 (3d Cir.1995)). Here, Mr. Barton claimed a total of 177.8 hours for legal work performed.

Defendant objects to time claimed for court filings. In particular, the entries objected to include:

1. 1.8 hours-“File complaint in person in USDC.E.D.Pa.; Discuss same and treatment with Maria; Discuss same with Al Maroletti.”
2. 1.5 hours-“Hand deliver Motion to Amend Complaint to Courthouse. Travel.”
3. 4.5 hours-“Revise response to MSJ. Hand deliver MSJ to federal court.”

Defendant tallies these entries to include 5.3 hours of unreasonable time spent on court filings by allocating 2.0 hours of the 4.5 hour entry to delivery time and not allocating any time to the “discussion” component of the 1.8 hour entry. Defendant correctly observes that in *Skaggs* I found that the logistics of filing a document with the court do not require an attorney's legal knowledge and training. 2001 WL 1665334, at *21, 2001 U.S. Dist. LEXIS 20351, at *63. I agree with Defendant that the filing-related activities above do not constitute legal work. Treating 1.5 hours as the time required for Mr. Barton to deliver documents to the court, I will reduce each of the above-claimed entries by 1.5 hours, yielding a total reduction of 4.5 hours.

Defendant also contends that I should not include hours expended on activities relating to claims other than the entry claim. He points out that the vast majority of time spent on this litigation pertained to the use of force claim, while only a small portion pertained to the entry claim. I will treat this argument as a request to adjust the lodestar calculation downward based on plaintiffs' lack of success and take up this issue after calculating the lodestar.

*11 My own review of Mr. Barton's work activity report reveals that the claimed hours are well documented and, outside of those expended on court filings, do not reflect an unreasonable expenditure of time. Mr. Barton devoted

6.6 hours to pre-filing case evaluation and meetings; 23.1 hours to preparing and filing the pleadings; 67.4 hours to discovery (Mr. Barton's depositions of the defendant and three other officers required a total of only 10.5 hours.); 7.4 hours to preparing and responding to the motion for summary judgment; 40.0 hours to trial preparation; 23.0 hours to the trial itself; 2.3 hours to the counsel fee petition. These hours appear to suggest that Mr. Barton worked efficiently. His hours thus require only a reduction based on the claims for filing documents.

3. Adjusting the Lodestar

As noted, Defendant argues that I should “discount” plaintiffs' fee award based on their failure to prevail on the excessive force claim. The Supreme Court in *Hensley* discussed factors that might lead a court to adjust the lodestar figure upward or downward, including the “important factor of the results obtained.” 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40. There, the Court rejected the “mathematical approach” of comparing the total number of issues in the case with those actually prevailed upon. *Id.* at 435. Here, Defendants adopt what must be termed a mathematical approach by calculating the percentage of page numbers in deposition transcripts, pleadings and motions pertaining to the unlawful entry claim. Based on a calculation that six percent of the nine non-expert depositions pertained to the entry claim and eighteen percent of the summary judgment pleadings pertained to the entry claim, Defendants conclude that twelve percent represents a reasonable estimate of “the portion of the trial allocated to the unlawful entry claim.” Applying these percentage figures to the hours claimed with great precision, Defendants request a reduction from 177.8 hours to 18.3 hours.

In order for the Court to make these reductions, the time entries must be “distinct in all respects from claims on which the party did succeed.” *Rode*, 892 F.2d at 1183. I find it difficult to distinguish in this way between time devoted to successful and unsuccessful claims based, for example, on the number of pages in the transcript of a deposition devoted to both the unlawful entry and excessive force claims.

The Supreme Court has held that-rather than pursue the kind of mathematical sophistry in which Defendants engage-the judge should consider whether or not the plaintiff's unsuccessful claims were related to the claims on which he succeeded, and whether plaintiff achieved a level of success that makes it appropriate to award attorneys fees for hours

reasonably expended on unsuccessful claims. *Hensley*, 461 U.S. at 435. Where successful and unsuccessful claims share a common core of facts and related legal theories, or where counsel's time is dedicated to the litigation as a whole, the lodestar value should not be modified downwards. *Id.*; *Adams v. Lightolier*, 50 F.3d 1204, 1222 (3d. Cir.1995); *W. Va. Univ. Hosps. v. Casey*, 898 F.2d 357, 361 (3d. Cir.1991); *Northeast Women's Ctr. v. McMonagle*, 889 F.2d 466, 475 (3d Cir.1989). Here, as noted, plaintiffs' claim for unlawful entry shares a common nucleus of operative fact with plaintiffs' excessive force claim as well as the state law and Fourteenth Amendment claims that did not survive summary judgment. Plaintiffs' claims all arose out of the events surrounding Cpl. Quigg's entry into the Buss home in August, 1999.

*12 The analysis does not finish there, however. The Court also indicates that

A plaintiff who has won "substantial relief" should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

Hensley, 461 U.S. at 440. Fees need not be reduced to maintain a proportionate ratio with the damages awarded-but only to reflect a limited degree of success obtained. See *Washington*, 89 F.3d at 1042; *Tumolo v. Triangle Pac. Corp.*, Civ. A. No. 98-4213, 1999 WL 672913, at *3, 1999 U.S. Dist. LEXIS 13431, at *8 (E.D.Pa. 1999). Here, Plaintiffs have achieved limited success by securing nominal damages on their unlawful entry claim. I must thus determine whether this limited success warrants a general reduction in the overall fee award.

Courts in this circuit have taken a wide array of approaches to the reduction of attorneys fees for lack of success. See, e.g., *Washington*, 89 F.3d at 1043, finding that the district court's reduction of plaintiff's attorney's fees by fifty percent was appropriate where plaintiff had requested more than \$750,000 in damages and the jury "ruled against his primary claim, racial discrimination," and awarded "what amounted to a nominal victory of \$25,000" on his retaliation claim.); *Hall v. American Honda Motor Co.*, Civ. A. No. 96-8103, 1997 WL 732458 at *4, 1997 U.S. Dist. LEXIS 18544, at *11 (E.D.Pa. Nov.24, 1997) (reducing award by ten percent where plaintiff sought damages in this case in excess of \$50,000.00 and received final judgment of \$4,000.00); *Hilferty v. Chevrolet*

Motor Div. of the General Motors Corp., Civ. A. No. 95-5324, 1996 WL 287276, at *6-7, 1996 U.S. Dist. LEXIS 7388, at 24-25 (E.D.Pa. May 30, 1996) (reducing fee award by approximately two-thirds where plaintiff recovered only eight percent of damages sought), *aff'd*, 116 F.3d 468 (3d Cir.1997). Here, Mr. Barton seeks a modest sum in relation to the issues at stake in this litigation. In view of that fact, and the foregoing analysis, I will make no reduction in Plaintiffs' requested attorney's fee award because they failed to succeed on all of their claims.

4. Expenses

*13 Expert fees are not compensable for successful § 1983 claims under the fee-shifting provisions of § 1988. See *Casey*, 499 U.S. at 102; *Abrams*, 50 F.3d at 1225. Accordingly, I will not grant Plaintiff's expert witness fees he seeks in the amounts of \$4,000 for Dr. Boylan and \$500 for Dr. Burmeister.

III. CONCLUSION

For the forgoing reasons, I will grant Plaintiffs' petition for attorney's fees. I will, however, reduce the claimed hours by 4.5 to reflect time spent non-legal matters. I will also reduce the expenses awarded by \$4,500 to reflect those expenses accounted for by expert fees. Thus, I will award Plaintiffs \$34,660 in attorney's fees and \$3,479 in costs. An appropriate order follows.

ORDER

AND NOW, this day of October, 2002, upon consideration of Plaintiffs' Motion for Attorney Fees and Costs (Document No. 33) and Defendant's response thereto (Document No. 34), and for the set forth in the forgoing memorandum, it is hereby ORDERED that:

1. Plaintiffs' motion is GRANTED IN PART AND DENIED IN PART as follows: Plaintiff is awarded \$34,660 in attorney's fees and \$3,479 in costs.

All Citations

Not Reported in F.Supp.2d, 2002 WL 31262060

Footnotes

- 1 On April 29, 2002, Maria Buss was substituted as administratrix of the estate of Cyril Buss, Sr., who died on November 9, 2001, over two years after this litigation began.
- 2 "Stip. Facts" refers to Plaintiffs' and Defendant's Joint Pre-Trial Stipulations, Agreed Facts.
- 3 The court instructed the jury, "if you find for the plaintiffs, but you find that the plaintiffs have failed to prove ... actual damages, you can award an amount even for \$1. It's up to you. You decide." (Trial Tr. at 19)
- 4 Plaintiffs' proposed instruction read, "If you find for plaintiffs, but you find that the plaintiffs have failed to prove actual damages, you shall return an award of nominal damages not to exceed one dollar." (Pls.' Proposed Instructions at 9)
- 5 Plaintiffs' proposed instruction met the "timely request" requirement announced in *Campos-Orrego v. Rivera*, 175 F.3d 89, 88 (1st Cir.1999)(requiring that plaintiff request nominal damages either before or after trial). See also *Alexander v. Riga*, 208 F.3d 419,429 (3d. Cir.2000) ("The entitlement to nominal damages is not automatic; Plaintiff must make a timely request.") (citing *Campos-Orrego* 175 F.3d at 88). Indeed, Plaintiffs have even satisfied even the most restrictive interpretation of *Carey*, which requires a plaintiff to have at least requested a mandatory nominal damage instruction in their proposed jury instructions. See, e.g., *Kerr-Selgas v. American Airlines, Inc.*, 69 F.3d 1205 (1st Cir.1995). The Ninth Circuit has held that the entitlement to nominal damages is automatic. See *Floyd v. Laws*, 929 F.2d 1390 (9th Cir.1990).
- 6 It is well established in the Third Circuit that a failure to knock and announce in serving an ordinary arrest warrant, absent certain exigent circumstances, works a deprivation of the Fourth Amendment rights of the residents, then present, of the dwelling entered. See *U.S. v. Wilson*, 123 F.Supp.2d 278, 284 (E.D.Pa.2000):

The "knock and announce rule" is rooted in the Fourth Amendment's protection against unreasonable search and seizures. See *Wilson v. Arkansas*, 514 U.S. 927, 931, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995). The rule requires police first to knock on the door and announce their purpose and identity before attempting a forcible entry of a dwelling. See *Kornegay v. Cottingham*, 120 F.3d 392, 396 (3d Cir.1997) ... Courts have upheld dispensing with the knock-and-announce requirement in four situations: (1) the individual inside was aware of the officers' identity and thus announcement would have been a useless gesture; (2) announcement might lead to the sought individual's escape; (3) announcement might place the officers in physical peril; and (4) announcement might lead to the destruction of evidence. *Kornegay*, 120 F.3d at 397.

Here, the jury found that Cpl. Quigg failed to knock and announce his identity in attempting to serve an ordinary arrest warrant on Donnelly, whom he believed to be in the Buss residence. Defendants did not suggest the existence of exigent circumstances justifying Cpl. Quigg's failure to knock and announce, and I can discern none from the record. Under these circumstances, the finding that Cpl. Quigg reasonably believed that Donnelly was in the Buss home does nothing to mitigate the constitutional violation.
- 7 The Supreme Court has thoroughly reviewed the legislative history of § 1988. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984); *Webb v. Bd. of Edu.*, 471 U.S. 234, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985).
- 8 The House Report further noted, "[w]hile damages are theoretically available under the statutes covered by [§ 1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected." House Report at 8.
- 9 The standards for awarding fees are generally the same as under the fee provisions of the 1964 Civil Rights Act. See *Hensley*, 461 U.S. at 433 n. 7.
- 10 The Supreme Court has upheld awards of attorneys fees in civil rights cases where plaintiffs obtained no damage award whatsoever. See, e.g., *Maher v. Gagne*, 448 U.S. 122,129 (1980) ("For purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." (quoting Senate Report at 5)). In *Ganey v. Edwards* 759 F.2d 337, 339 (4th Cir.1985), the Fourth Circuit-through a bizarre construction of *Carey*-upheld the district court's refusal to award nominal damages to a successful § 1983 plaintiff, but nevertheless deemed plaintiff to be the prevailing party. On remand, the district court awarded attorney's fees and costs. On a subsequent appeal, the Fourth Circuit affirmed the award of attorneys fees and costs under § 1988. *Ganey v. Garrison*, 813 F.2d 650, 651 (4th Cir.1987). Under this reasoning, even if I had declined to correct the errant failure to award nominal damages, awarding attorney's fees in this case would not be unreasonable as a matter of law.
- 11 Many of the circuit courts have relied on Justice O'Connor's concurrence in *Farrar* for guidance in determining whether a prevailing party awarded nominal damages has achieved the sort of "technical" or "de minimis" recovery that would

render an attorney's fee award inappropriate. See, e.g., *Cabrera v. Jakabovitz*, 24 F.3d 372 (2d Cir.1994); *Johnson v. Lafayette Fire Fighters Ass'n Local 472*, 51 F.3d 726 (7th Cir.1995); *Briggs v. Marshall*, 93 F.3d 355 (7th Cir.1996); *Jones v. Lockhart*, 29 F.3d 422 (8th Cir.1994); *Morales v. City of San Rafael*, 96 F.3d 359 (9th Cir.1996), *amended by* 108 F.3d 981 (9th Cir.1997); *Phelps v. Hamilton*, 120 F.3d 1126 (10th Cir.1997); *Brandau v. Kansas*, 168 F.3d 1179 (10th Cir.1999)

12 The Court notes that parties frequently allege damage in excess of \$150,000 render the case ineligible for compulsory arbitration procedures. (See Local Rule 53.2)

13 In *Franz v. Lytle*, 854 F.Supp. 753, 757 (D.Kan.1994), plaintiffs originally pleaded several section 1983 claims, on behalf of both a minor plaintiff and her parents, based on two alleged illegal searches of the minor by defendant police officer. The court ruled that the parents had not suffered any injury actionable under section 1983, but that the search was unreasonable and illegal. Plaintiffs had requested \$50,000 in damages on the minor plaintiff's two section 1983 claims. The jury awarded \$250 for one of the searches and found in favor of the defendant for the other. After applying *Farrar*, the court awarded the full amount of the requested attorney's fees, noting that one plaintiff had "prevailed on the central issue in this case." *Franz*, 854 F.Supp. at 757.

14 The legislative history of § 1988 indicates that the standards for awarding fees are generally the same as under the fee provisions of the 1964 Civil Rights Act. *Hensley*, 461 U.S. at 433 n. 7.

15 See *Maul v. Constan*, 23 F.3d 143, 145 (7th Cir.1983).

16 See also *McCann v. Coughlin*, 698 F.2d 112, 128 (2d Cir.1983) (upholding grant of attorneys fees where plaintiff received only nominal damages on due process claim and noting, "the policy underlying [§ 1983] is to encourage litigants to assume the role of a private Attorney General. This policy may be served by granting a fee request even where a plaintiff is unable to prove actual damages resulting from his constitutional deprivation."); *Muraresku v. Amoco Oil Co.* 648 F.Supp. 347, 349 (E.D.Pa.1983) ("A nominal verdict may serve as an incentive for the defendant to abstain from future unlawful behavior and create a precedent for other action against this or similarly situated defendants.").

17 See *Farrar*, 506 U.S. at 122 (noting that verdict could not deter misconduct because "it teaches no valuable lesson because it carries no discernable meaning.")

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2009 WL 792489

Only the Westlaw citation is currently available.

Not for Publication

United States District Court, D. New Jersey.

Mario P. CINCERELLA, Plaintiff,

v.

EGG HARBOR TOWNSHIP POLICE
DEPARTMENT, et al., Defendants.

Civil No. 06-1183 (RBK).

Docket Entry Nos. 38, 39, 47, 51.

March 23, 2009.

West KeySummary

1 Federal Civil Procedure **Civil Rights Cases in General**

Genuine issues of material fact existed as to whether officers complied with the knock and announce rule before entering an arrestee's apartment pursuant to an outstanding child support bench warrant. The officers argued that even if they did not knock and announce their presence before entering, they knew the arrestee had a criminal history and entered in concern for a woman's safety despite the fact there was no evidence on the record to support their claim. Because there were no exigent circumstances present to justify the officers entry into the arrestee's residence without announcing their presence, the officers' motion for summary judgment was denied. [Fed.Rules Civ.Proc.Rule 56\(c\)](#), 28 U.S.C.A.; [42 U.S.C.A. § 1983](#).

Attorneys and Law Firms

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OPINION[KUGLER](#), District Judge.

*1 This action arises out of the arrest and detention of Plaintiff Mario P. Cincerella on March 14, 2004. Plaintiff brought numerous claims pursuant to [42 U.S.C. § 1983](#) and state law against the dispatcher and police officers involved in his arrest, the Egg Harbor Township Police Department, former Egg Harbor Township Chief of Police John J. Coyle, and John Doe Probation Officers. Presently before the Court are motions for summary judgment filed by all remaining defendants in this matter.¹ For the reasons discussed below, the motions filed by Casey Simerson, Gary Rzemysk, John J. Coyle and the Egg Harbor Township Police Department will be granted. The motion filed by Charles Davenport, Paul Roden and Edward Bertino will be granted in part and denied in part. In addition, the John Doe defendants will be dismissed.

I. BACKGROUND**A. Facts**

On March 13, 2004, Officer Gary Rzemysk of the Egg Harbor Township Police Department stopped a car in which Plaintiff Mario P. Cincerella ("Plaintiff") was a passenger. Rzemysk notified Egg Harbor Township Police Dispatcher Casey Simerson that he had stopped a vehicle while on patrol and provided Simerson with the "tag number" of the vehicle. Simerson knew that this vehicle was registered to Carol Callahan, whom Simerson knew to be the daughter of Mary Moore, another Egg Harbor Township Police Dispatcher. Simerson believed that the passenger in the car was Plaintiff, who was Callahan's boyfriend. Simerson believed Plaintiff was a gang member and drug user. Simerson ran an in-house search for prior arrests, which revealed Plaintiff's birth date. Simerson then used Plaintiff's birth date to run a National Crime Information Center ("NCIC") search; this search revealed an outstanding child support bench warrant. This warrant had been issued on October 9, 2003, and stated that Plaintiff could be released "upon payment of \$630.00."

After the vehicle stop ended, Simerson called Rzemysk to advise him of the warrant. She called Rzemysk again the next day and told him that she had heard that Mary Moore was upset that Plaintiff had not been arrested.

On March 14, Rzemysk informed Officer Charles Davenport of the outstanding warrant. Davenport contacted Simerson, who re-ran the NCIC search and confirmed that there was an active warrant for Plaintiff. Davenport, along with Officer Edward Bertino and Officer Paul Roden, went to the address listed on the warrant to arrest Plaintiff. When they arrived, they learned that Plaintiff no longer lived at that address. They saw Callahan, however, who told them that Plaintiff was at home with their children. Defendants claim that Callahan gave them Plaintiff's new address; Plaintiff claims that she did not give them her full address, but gave the name of the apartment complex where she and Plaintiff lived.

Davenport, Roden and Bertino then went to Plaintiff's apartment to arrest him. The officers claim that they knocked on the front door and no one responded; Plaintiff states that the officers never knocked. The officers then climbed over the railing of an enclosed porch and entered the apartment through a sliding glass door. According to Plaintiff, this door was locked. Once inside the apartment, the officers found Plaintiff under a bed and handcuffed him. According to Plaintiff and Callahan, Plaintiff tried to explain that there was no warrant for his arrest and he and Callahan tried to show the officers Plaintiff's pay stubs to prove that money was being deducted from them to satisfy his child support obligations. Callahan, who was on the phone with her mother, Moore, asked the officers to speak to Moore, but they refused.

***2** The officers removed Plaintiff from the apartment and put him in the police car. Plaintiff states that he injured his hand when he was pushed into the police car with his handcuffed hands behind his back. Plaintiff was taken to the Egg Harbor Township Police Department for processing. The Police Department would not accept payment from Plaintiff of the \$630.00 he allegedly owed in child support. Plaintiff was taken from the Police Department to Shore Memorial Hospital for examination and treatment of his hand. Plaintiff claims that at the hospital, Roden stated loudly that Plaintiff was an escaped murderer from Alabama.

After being examined at the hospital, Plaintiff was taken to the Atlantic County jail, where he was held for approximately twelve hours. Plaintiff was released on the morning of April 15 without being required to pay the \$630.00. At some point

after Plaintiff was arrested, the warrant for his arrest was vacated.

B. Procedural History

On March 14, 2006, Plaintiff filed a complaint against the Egg Harbor Township Police Department, the State of New Jersey, Chief of Police John J. Coyle, and John Does Probation Officers. Plaintiff filed an amended complaint on September 12, 2007, adding Davenport, Roden, Bertino, Rzemysk and Simerson as defendants.

In Count One of the Amended Complaint, Plaintiff alleges that the actions of Davenport, Roden, Bertino, Rzemysk, Simerson and the John Does resulted in his false arrest and detention, in violation of his rights under the Fourth and Fourteenth Amendments of the U.S. Constitution, [42 U.S.C. § 1983](#) and the laws of the State of New Jersey. Plaintiff further states that the Egg Harbor Township Police Department did not allow him to pay the child support he allegedly owed. In Count Two, Plaintiff repeats his allegations of false arrest and imprisonment. Plaintiff further states that Roden loudly called Plaintiff "an escaped murderer from Alabama" even though Roden knew this statement was false. In Count Three, Plaintiff alleges that Coyle and the Police Department failed to use reasonable care in hiring, failed to properly train, supervise, and discipline officers and dispatchers, and failed to provide adequate safeguards to prevent Plaintiff's false arrest, detention, imprisonment and malicious prosecution. Count Four contains claims against the State of New Jersey, and Count Five contains claims against John Doe Probation Officers.

All Defendants filed motions for summary judgment. In an earlier opinion and order, this Court granted the motion for summary judgment filed by the State of New Jersey.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate where the Court is satisfied that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." [Fed.R.Civ.P. 56\(c\)](#). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence 'is to be believed and all justifiable

inferences are to be drawn in his favor.’ ” *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir.2004) (quoting *Anderson*, 477 U.S. at 255).

*3 “[T]he party moving for summary judgment under Fed.R.Civ.P. 56(c) bears the burden of demonstrating the absence of any genuine issues of material fact.” *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1080 (3d Cir.1996). The moving party may satisfy its burden either by “produc[ing] evidence showing the absence of a genuine issue of material fact” or by “ ‘showing’-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party satisfies its burden, the nonmoving party must respond by “set [ting] out specific facts showing a genuine issue for trial.” Fed.R.Civ.P. 56(e)(2). “If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.” *Id.*

III. DISCUSSION

A. Casey Simerson

In her motion for summary judgment, Simerson argues that she is entitled to summary judgment because: (1) Plaintiff had no privacy interest in information in the NCIC database and therefore Simerson did not violate his state or federal constitutional rights in conducting an NCIC search; (2) Simerson cannot be held liable for Plaintiff’s arrest, any excessive force used against Plaintiff, and any inappropriate comment made about Plaintiff; (3) Plaintiff has not articulated a claim for conspiracy; and (4) Simerson is entitled to qualified immunity with regard to the NCIC search.

The Court finds that Simerson’s search of the NCIC database did not violate the federal or state constitution, that Plaintiff’s arrest was lawful, and that Simerson cannot be held liable for any excessive force used by her co-defendants or any inappropriate comment Roden made about Plaintiff. Thus, Simerson’s motion for summary judgment will be granted.

1. The NCIC Search

The Court finds that Simerson did not violate Plaintiff’s federal or state constitutional rights by running Plaintiff’s birth date through the NCIC database. “The touchstone of Fourth Amendment analysis is whether a person has a ‘constitutionally protected reasonable expectation of privacy.’ ” *California v. Ciraolo*, 476 U.S. 207, 211, 106 S.Ct.

1809, 90 L.Ed.2d 210 (1986) (citation omitted). A person does not have a reasonable expectation of privacy in public records such as those accessed through the NCIC database. See *United States v. Ellison*, 462 F.3d 557, 562 (6th Cir.2006) (finding individual did not have expectation of privacy in information regarding outstanding warrant retrieved from computer database); *Eagle v. Morgan*, 88 F.3d 620, 628 (8th Cir.1996) (finding Plaintiff had “no legitimate expectation of privacy in the contents of his criminal history file”). Because a person has no reasonable expectation of privacy in the information in the NCIC database, searching a person’s record through the NCIC database does not violate the federal or state constitution. See *Eagle*, 88 F.3d at 628 (finding NCIC search did not violate Plaintiff’s federal constitutional rights); *State v. Sloane*, 193 N.J. 423, 939 A.2d 796, 803-04 (N.J.2008) (finding NCIC search did not violate federal or state constitution). The motives of the person searching the NCIC database are not relevant to the issue of whether there has been a constitutional violation. See *Eagle*, 88 F.3d at 627-28 (finding no Fourth Amendment violation even though officers accessed NCIC for improper purpose). Thus, Simerson’s act of running Plaintiff’s birth date through the NCIC database, regardless of her motives, did not violate Plaintiff’s constitutional rights.

2. Arrest

*4 Simerson argues that Plaintiff’s arrest was lawful, and that even if it was not, she cannot be held liable for it because she did not participate in the arrest. The Court finds that the arrest was lawful, and that Simerson is therefore entitled to summary judgment on Plaintiff’s claims arising out of his arrest.

An arrest is lawful if it is supported by probable cause. See *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964) (addressing Fourth Amendment claim); *Wildoner v. Borough of Ramsey*, 162 N.J. 375, 744 A.2d 1146, 1154 (N.J.2000) (addressing claims of false arrest based on U.S. Constitution and state law). Probable cause exists if, at the time of the arrest, “the facts and circumstances within [the arresting officers’] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [plaintiff] had committed or was committing an offense.” *Beck*, 379 U.S. at 91. In this case, Plaintiff does not dispute that there was an outstanding warrant for his arrest on March 14, 2004. (Statement of Undisputed Material Facts by Davenport et al. and Plaintiff’s Response at ¶ 28, 36). While “an erroneously issued warrant cannot provide probable cause for an arrest,” *Berg v. County*

of *Allegheny*, 219 F.3d 261, 269-70 (3d Cir.2000), Plaintiff does not assert that the warrant for his arrest was erroneously issued. Further, while an arrest warrant that had already been quashed at the time of the arrest cannot provide probable cause, see *Murray v. City of Chicago*, 634 F.2d 365, 366 (7th Cir.1980), Plaintiff admits that the warrant for his arrest was not vacated until after he was arrested. (Statement of Undisputed Material Facts by the Egg Harbor Township Police Department and Coyle and Plaintiff's response at ¶ 67.)

Plaintiff's arrest pursuant to an outstanding warrant did not become unlawful simply because Davenport, Roden and Bertino refused to look at his pay stubs or speak to Moore on the phone. The fact that money was being deducted from Plaintiff's paycheck for child support does not prove that Plaintiff had paid the \$630.00 required by the warrant. Further, even if Moore had the chance to tell Davenport, Roden and Bertino that the warrant was invalid, they were not required to believe her version of events.

3. Excessive Force and Roden's Comment

The Court finds that Simerson is entitled to summary judgment with respect to Plaintiff's claim that Davenport, Roden and Bertino used excessive force and that Roden called Plaintiff an escaped murderer from Alabama.

Assuming that the arresting officers used excessive force, Simerson cannot be held liable for the use of such force. A police officer may be liable for excessive force even if that officer does not personally inflict the injury. See *Smith v. Mensinger*, 293 F.3d 641, 650-52 (3d Cir.2002). However, in order to be held liable in such circumstances, the officer must either know or have reason to know that other officers are using excessive force, have a reasonable opportunity to prevent the use of such force, and fail to act. See *id.* (finding that plaintiff could recover if he could show that another officer attacked him and defendant "ignored a realistic opportunity to intervene"). Here, Plaintiff has not pointed to any evidence that Simerson knew or had reason to know that the arresting officers would use excessive force and ignored a reasonable opportunity to intervene. Thus, Simerson is entitled to summary judgment with respect to Plaintiff's excessive force claim.

*5 Similarly, even if Plaintiff's constitutional rights were violated when Roden stated that Plaintiff was an escaped murderer from Alabama, there is no evidence that Simerson either caused Roden to make the comment or had reason to

know that Roden would make the comment and ignored a reasonable opportunity to intervene.

Plaintiff argues that Simerson can be held liable for any constitutional violations by Davenport, Roden and Bertino because she caused the violations. Liability under § 1983 extends not only to those who directly participate in a constitutional violation, but also to those who proximately cause a constitutional violation. See *Malley v. Briggs*, 475 U.S. 335, 345 n. 7, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (noting officer whose request for a warrant contained insufficient information could be held liable for subsequent arrest even though he did not participate in arrest). A person is "responsible for the natural consequences of his actions." *Id.* (quoting *Monroe v. Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961)). The Court finds that any excessive force used by Davenport, Roden and Bertino was not the natural consequence of Simerson's actions. Nor was Bertino's comment about Plaintiff.

Plaintiff also argues that Simerson can be held liable for the actions of her co-defendants because she was part of a conspiracy. "To demonstrate a conspiracy under § 1983, a plaintiff must show that two or more conspirators reached an agreement to deprive him or her of a constitutional right 'under color of law.' " *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 700 (3d Cir.1993) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)), *abrogated on other grounds*, *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir.2003). Here, Plaintiff has not shown that there is evidence that Simerson entered into an agreement to deprive Plaintiff of his constitutional rights. As previously stated, the arrest itself did not violate the Fourth Amendment. Furthermore, Plaintiff has not shown that there is evidence that Simerson entered into an agreement with anyone else to use excessive force against Plaintiff or make an insulting comment about him. In sum, Plaintiff has not shown that there is evidence to support a claim against Simerson for excessive force or for any claim arising out of Roden's comment.

B. Gary Rzemysk

Rzemysk argues that he is entitled to summary judgment because there is no evidence that he participated in a conspiracy in violation of federal or state law or that either he or his co-defendants violated Plaintiff's constitutional rights. He also argues that Plaintiff is not entitled to punitive damages or damages for pain and suffering or economic loss. Because the NCIC search and arrest were lawful, and because Plaintiff

cannot connect Rzemysk to any of his other claims through a conspiracy or causation theory, the Court finds that Rzemysk is entitled to summary judgment.

In order to support his claims of conspiracy under federal and state law, Plaintiff must present some evidence of an agreement to commit an unlawful act. See *Parkway Garage*, 5 F.3d at 700 (describing § 1983 conspiracy claim); *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 876 A.2d 253, 263 (N.J.2005) (“In New Jersey, a civil conspiracy is ‘a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage.’ ” (citation omitted)). As previously explained, Plaintiff’s arrest did not violate federal or state law. Therefore, Rzemysk cannot be held liable for conspiracy with respect to the arrest. Further, Plaintiff has not demonstrated that there is any evidence of an agreement between Rzemysk and anyone else to violate the law in any other way. Plaintiff’s reliance on evidence that Rzemysk communicated with his co-defendants in order to serve an outstanding warrant does not support a conspiracy claim.

*6 Plaintiff, again relying on *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271, asserts that Rzemysk can be held liable for causing any constitutional violations committed by his co-defendants. As previously explained, the search of the NCIC database and arrest of Plaintiff were lawful. Furthermore, there is no evidence that Rzemysk’s actions, passing the information he received from Simerson to Davenport, proximately caused any excessive force or inappropriate comment by his co-defendants.

C. Officers Davenport, Roden and Bertino

In their motion for summary judgment, Davenport, Roden and Bertino argue that they are entitled to summary judgment with respect to all claims against them because they were not named as defendants until after the statute of limitations had run. In addition, they argue that the arrest of Plaintiff was lawful, that they were authorized to enter Plaintiff’s residence to effectuate the arrest, and that even if they were not authorized, Plaintiff did not suffer any damages as the result of the entry and they are entitled to qualified immunity. Further, they argue that there is no legal basis to conclude that they used excessive force in handcuffing Plaintiff or that Plaintiff’s rights were violated when Roden said that Plaintiff

was an escaped murderer from Alabama. They also claim that Plaintiff may not recover punitive damages.

The Court finds that there is insufficient evidence to determine whether Davenport, Roden and Bertino are entitled to summary judgment based on the statute of limitations, and therefore the Court must address each of Plaintiff’s substantive claims. For the reasons previously expressed with regard to the other defendants, Davenport, Roden and Bertino are entitled to summary judgment on Plaintiff’s claim of false arrest. The Court also finds that Davenport, Roden and Bertino are entitled to summary judgment with respect to Plaintiff’s claim regarding Roden’s comment. However, the Court finds that they are not entitled to summary judgment with respect to the claims related to violating the knock and announce rule, using excessive force, and punitive damages.

1. Statute of Limitations

Defendants argue, and Plaintiff does not dispute, that the two-year statute of limitations began to run on March 14, 2004, the date of his arrest. Plaintiff filed his original complaint on March 14, 2006, within the limitations period; this complaint named only the Egg Harbor Township Police Department, the State of New Jersey, and John Does Probation Officers as defendants. Plaintiff filed his amended complaint, which added Davenport, Roden and Bertino as defendants, on September 12, 2007 after the statute of limitations had run. Thus, the claims against Davenport, Roden and Bertino are “barred by the statute of limitations unless the amendment relates back to the original complaint.” See *Urrutia v. Harrisburg County Police Dep’t*, 91 F.3d 451, 457 (3d Cir.1996).

Plaintiff argues that Magistrate Judge Joel Schneider ruled on the statute of limitations issue when he granted Plaintiff’s motion to amend his complaint. However, Judge Schneider’s opinion and order do not address the statute of limitations, and so the Court must address the issue now.

*7 At this time, the Court lacks sufficient information to determine whether the amended complaint relates back to the date that the original complaint was filed. An amended complaint relates back when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim ... that arose out of the conduct, transaction, or occurrence set out-or attempted to be set out-in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

[Fed.R.Civ.P. 15\(c\)\(1\)](#).

Under [Rule 15\(c\)\(1\)\(A\)](#), the Court will allow relation back if New Jersey law provides for it. However, New Jersey's general rule regarding relation back contains almost exactly the same requirements as the federal rule. See [N.J.R. 4:9-3](#). While New Jersey also allows the use of a fictitious name to toll the statute of limitations, the fictitious party rule applies "if the defendant's true name is unknown to the plaintiff" when the plaintiff files a complaint. [N.J.R. 4:26-4](#). Here, Plaintiff referred to Davenport, Roden and Bertino by name in his original Complaint; thus, the fictitious party rule is inapplicable.

The first requirement of Federal [Rule 15\(c\)\(1\)\(C\)](#) and New Jersey Rule 4:9-3 is met in this case because Plaintiff's claims against Davenport, Roden and Bertino arise out of the same conduct described in Plaintiff's original complaint, Plaintiff's arrest on March 14, 2004. However, the Court has insufficient information to determine whether the second requirement, notice to the new defendants, has been met. Neither Plaintiff nor Defendants have addressed this issue. Therefore, the Court cannot determine at this time whether Plaintiff's claims against Davenport, Roden and Bertino are barred by the statute of limitations.

2. Entry into Plaintiff's Residence to Effectuate the Arrest

Defendants argue that the arrest warrant gave them the authority to enter Plaintiff's residence, that they complied with the knock and announce rule, and that even if they did not comply with the knock and announce rule, their entry was lawful. Further, they argue that even if their entry was not

lawful, Plaintiff did not suffer any damage as a result of it because the warrant subjected him to arrest at any time. Finally, Defendants argue that they are entitled to qualified immunity, because a reasonable police officer would have believed that he was authorized to enter Plaintiff's apartment to execute the arrest warrant. The Court finds that there is conflicting evidence as to whether the officers complied with the knock and announce rule, and that exigent circumstances did not excuse any failure to comply with the rule. Further, the Court finds that the fact that the officers had a valid arrest warrant does not excuse a violation of the knock and announce rule. Finally, the Court finds that Defendants are not entitled to summary judgment on the basis of qualified immunity.

*8 Police officers may enter a dwelling to execute an arrest warrant if they have reason to believe that the subject of the warrant is inside. [Payton v. New York](#), 445 U.S. 573, 603, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). However, police officers usually must first announce their presence and purpose. See [Wilson v. Arkansas](#), 514 U.S. 927, 929, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995) (holding that "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment"). If officers have complied with the knock and announce rule, they may break a locked door in order to execute a warrant. See [id.](#) at 931 (describing common law principles). Even if they have not complied with the knock and announce rule, police officers may forcibly enter a residence to execute an arrest warrant if they "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." [Richards v. Wisconsin](#), 520 U.S. 385, 394, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997).

In this case, the Court finds that the officers had reason to believe that Plaintiff was inside his home at the time they entered. Plaintiff argues that the evidence suggests that the officers were "not even certain" that Plaintiff was inside. (Plaintiff's Opposition Brief at 4.) However, certainty is not required. Officers need only have "a reasonable belief the arrestee (1) lived in the residence, and (2) is within the residence at the time of entry." [United States v. Veal](#), 453 F.3d 164, 167 (3d Cir.2006) (quoting [United States v. Gay](#), 240 F.3d 1222, 1226 (10th Cir.2001)). The Third Circuit Court of Appeals has not decided whether this reasonable belief standard is the same as the probable cause standard or is less demanding. See [Veal](#), 453 F.3d at 167 n. 3 (noting that

higher probable cause standard had been met). Under the probable cause standard, courts must “apply a ‘common sense approach’ and consider ‘the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality.’” *Id.* at 168 (citation omitted).

In this case, Plaintiff concedes that Callahan told the officers that he was “at home” with their children. (Statement of Undisputed Material Facts by Davenport et al. and Plaintiff’s response at ¶ 46.) Further, while Plaintiff denies that Callahan gave the police their full address, he admits that she gave them the name of the apartment complex in which she and Plaintiff lived. (*Id.* at ¶ 47.) Plaintiff admits that immediately after speaking to the police, Callahan drove to her current home, and arrived approximately three to five minutes after her conversation with the police. (*Id.* at ¶¶ 52, 53, 55.) Plaintiff concedes that when the officers arrived at his home, Davenport saw Callahan’s car parked behind the apartment where she and Plaintiff lived, and that Davenport felt that the car was still warm. (*Id.* at ¶¶ 69, 70.) Davenport called the dispatcher at the Egg Harbor Township Police Department and confirmed that Callahan was the registered owner of the car. (*Id.* at ¶¶ 71-74.) Based on these facts and circumstances known to the arresting officers in the moments preceding the arrest, the Court finds that they had probable cause to believe that Plaintiff lived in the apartment and was present at the time they entered.

*9 However, the Court finds that there is a genuine issue of material fact as to whether the officers complied with the knock and announce rule. While Bertino testified that the officers identified themselves as police officers as they knocked on the front door to the apartment (Deposition of Bertino at 93), Roden testified that they did not (Deposition of Roden at 65). Further, Plaintiff testified that he did not hear the officers until they pried the sliding door open. (Deposition of Plaintiff at 121.)

Defendants argue that even if they did not knock and announce their presence and purpose before entering, exigent circumstances justified their forced entry. Specifically, Defendants argue that they were concerned for Callahan’s safety. At the time Plaintiff was arrested, Roden knew that Plaintiff had been arrested, in the 1990s, for crimes including robbery, aggravated assault, simple assault, theft and burglary. (Statement of Undisputed Material Facts by Davenport et al. and Plaintiff’s response at ¶ 37; Deposition of Roden at 14-16.)² Further, Defendants state that they knew Callahan was inside the apartment, and that they heard movement

inside the apartment before they entered. However, there is no evidence that Plaintiff had a history of domestic violence or had a weapon at the time of his arrest. Further, the arrest warrant was for a non-violent offense. The Court finds that the information the officers possessed at the time they entered Plaintiff’s apartment was insufficient to create a reasonable suspicion that Callahan was in danger.

Defendants next argue that even if they violated the knock and announce rule, and were not justified in doing so because of exigent circumstances, they are entitled to summary judgment because Plaintiff did not sustain any damage as a result of their forced entry. Defendants argue that a valid warrant made Plaintiff susceptible to arrest at any time. However, a valid arrest warrant does not, as Defendants seem to suggest, relieve Defendants of the need to comply with the knock and announce rule. *Cf. Richards, 520 U.S. at 393 n. 5* (“While it is true that a no-knock entry is less intrusive than, for example, a warrantless search, the individual interests implicated by an unannounced, forcible entry should not be unduly minimized.”). Moreover, Plaintiff need not produce evidence of damages to defeat Defendants’ motion for summary judgment.

Finally, defendants argue that even if they violated the knock and announce rule without justification, they are entitled to qualified immunity because a reasonable police officer in their position would have believed he was authorized to enter Plaintiff’s apartment. Government officials are entitled to qualified immunity where “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Pearson v. Callahan, --- U.S. ---, ---, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009)* (quoting *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)*). The Court finds that it is not appropriate to grant Defendants’ motion for summary judgment on the basis of qualified immunity. At the time of Plaintiff’s arrest, the knock and announce rule was a clearly established right. *See Kornegay v. Cottingham, 120 F.3d 392, 396-97 (3d Cir.1997)* (finding “officers are shielded by qualified immunity only if they ‘could reasonably have decided that an urgent need existed for ... entry into the premises’” without knocking and announcing (citation omitted)). In this case, a reasonable person would have known that the police must comply with the knock and announce unless there are exigent circumstances and would have known that there were no exigent circumstances at the time of the entry into Plaintiff’s residence.

3. Excessive Force

*10 Plaintiff claims that Defendants used excessive force by handcuffing him, making the handcuffs too tight, and pushing him into the police car. Claims that police officers used excessive force in an arrest are analyzed under the Fourth Amendment objective reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Reasonableness “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* at 396. “ ‘Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,’ violates the Fourth Amendment.” *Id.* (internal citation omitted). In assessing whether the use of force was objectively reasonable, courts consider “the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.* Courts may also consider the following factors:

the possibility that the persons subject to the police action are violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time.

Kopec v. Tate, 361 F.3d 772, 777 (3d Cir.2004). While reasonableness is often a question for the jury, summary judgment in favor of defendants is appropriate “if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances.” *Id.* (quoting *Abraham v. Raso*, 183 F.3d 279, 290 (3d Cir.1999)).

The use of handcuffs by itself cannot support an excessive force claim in this case. Defendants used handcuffs in the course of an arrest of an individual who had been arrested for violent crimes before and who was found lying on the floor, partly underneath a bed, before he was handcuffed. Under these circumstances, the use of handcuffs was objectively reasonable.

However, the way Plaintiff was treated after he was handcuffed may support an excessive force claim. In assessing whether certain uses of handcuffs constitute excessive force, the Third Circuit Court of Appeals considers the intensity of the plaintiff's pain, the officer's awareness of the plaintiff's pain, whether the plaintiff asked to have the

handcuffs removed and how long after those requests the handcuffs are removed, whether there were circumstances justifying a delay in removing the handcuffs, and the severity of the injury the plaintiff suffered. See *Gilles v. Davis*, 427 F.3d 197, 207-08 (3d Cir.2005) (finding insufficient evidence of excessive force where plaintiff claimed his singing should have alerted police to his pain, there were no “obvious visible indicators” of plaintiff's pain, plaintiff did not express discomfort when handcuffed, and plaintiff did not “seek or receive medical treatment after the fact”); *Kopec*, 361 F.3d at 777 (reversing grant of summary judgment for arresting officer where plaintiff alleged that officer excessively tightened handcuffs and ignored his repeated requests to loosen them for ten minutes and that he suffered permanent nerve damage, and where court found that given lack of danger, delay in loosening handcuffs was not justified).

*11 Here, Plaintiff testified that he sustained an injury as a result of the officers excessively tightening his handcuffs and pushing him into the police car. (Deposition of Plaintiff at 152-56.) Plaintiff testified that when he told the officers that “something popped in his hand” and asked them to loosen his handcuffs, they refused. (*Id.* at 152.) In addition, Plaintiff sought medical treatment after sustaining this alleged injury. This evidence is sufficient to raise an issue of fact as to the reasonableness of the force used.

Defendants argue that they are entitled to summary judgment because Plaintiff has not produced an expert report suggesting that the force used was in excess of the force generally used by police officers in similar circumstances. However, Defendants have cited no authority, and the Court has been unable to find any, that suggests that in order to survive a motion for summary judgment on an excessive force claim, a plaintiff must produce an expert report evaluating the reasonableness of the defendants' actions. Indeed, some courts have noted that expert testimony is not always needed to evaluate whether force is reasonable under the circumstances. See *Jennings v. Jones*, 499 F.3d 2, 15 (1st Cir.2007) (suggesting that some excessive force claims “may be susceptible to a common sense determination by the jury”); *Pena v. Leombruni*, 200 F.3d 1031, 1034 (7th Cir.1999) (finding jury could determine, without expert testimony, whether officer's use of deadly force was reasonable).

Defendants further argue that they are entitled to summary judgment because, at most, Plaintiff claims that the manner in which the handcuffs were applied aggravated a pre-existing

injury. However, the aggravation of a pre-existing condition may be evidence of excessive force. See *Turmon v. Jordan*, 405 F.3d 202, 207-08 (4th Cir.2005) (noting that while it was unclear whether force used would have caused injury even if plaintiff did not have pre-existing condition, summary judgment was not appropriate).

In sum, because the court finds sufficient evidence to create an issue of fact as to whether the force used was reasonable, the court will deny Davenport, Roden and Bertino's motion for summary judgment as to the excessive force claim.

4. Roden's Comment

The Court finds that Davenport, Roden and Bertino are entitled to summary judgment with respect to Plaintiff's claim that they violated his state and federal constitutional rights when Officer Roden told hospital personnel that Plaintiff "was an escaped murderer from Alabama." Plaintiff claims that his rights under the Fourth and Fourteenth Amendments to the U.S. Constitution were violated. However, because Officer Roden's comment did not constitute or cause a search or seizure, it cannot be a Fourth Amendment violation. If Plaintiff's Fourteenth Amendment claim is a due process claim, it must fail because damage to one's reputation alone, which does not alter or extinguish a "right or status previously recognized by state law," is not a property or liberty interest protected by the Due Process clause. See *Paul v. Davis*, 424 U.S. 693, 711-712, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). If Plaintiff's Fourteenth Amendment claim is an equal protection claim, it must fail because he has presented no evidence that the defendants acted with a discriminatory intent. See *City of Memphis v. Greene*, 451 U.S. 100, 119, 101 S.Ct. 1584, 67 L.Ed.2d 769 (1981) ("[T]he absence of proof of discriminatory intent forecloses any claim that the official action challenged ... violates the Equal Protection Clause of the Fourteenth Amendment."). Other than the Fourth and Fourteenth Amendments, Plaintiff does not specify, and the Court is unable to identify, any other federal or state constitutional provisions that could have been violated when Roden made the comment at issue. Therefore, Defendants are entitled to summary judgment on Plaintiff's claim arising out of Roden's comment.

5. Punitive Damages

*12 Defendants argue that they are entitled to summary judgment on Plaintiff's claim for punitive damages because Plaintiff cannot establish that their conduct was motivated by evil motive or intent. Defendants focus on only one

portion of the standard for determining whether an award of punitive damages is appropriate in a § 1983 action. A plaintiff may recover punitive damages when a "defendant's conduct is motivated by evil motive or intent, **or** when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983) (emphasis added); see also *Savarese v. Agriss*, 883 F.2d 1194, 1204 (3d Cir.1989) ("[F]or a plaintiff in a section 1983 case to qualify for a punitive award, the defendant's conduct must be, at a minimum, reckless or callous. Punitive damages might also be allowed if the conduct is intentional or motivated by evil motive, but the defendant's action need not necessarily meet this higher standard."). Based on Plaintiff's account of events, a jury could conclude that Defendants acted with reckless indifference to Plaintiff's federally protected rights by entering his apartment by force without first announcing their presence and purpose and by using excessive force in arresting him. Therefore, the Court will deny Davenport, Roden and Bertino's motion for summary judgment with respect to punitive damages.

D. Egg Harbor Township Police Department

Defendants argue that the Police Department should be dismissed from this case because police departments are not legal entities distinct from the municipalities they serve. See *N.J. Stat. Ann. 40A:14-118* (West 1993) (stating that police departments are "an executive and enforcement function of municipal government"). Plaintiff concedes that the Police Department is not a separate legal entity. Because the department is not a distinct legal entity, it is not a proper defendant in this case and the claims against it will be dismissed. See *Adams v. City of Camden*, 461 F.Supp.2d 263, 266 (D.N.J.2006) (granting Police Department's motion for summary judgment).

E. Police Chief John J. Coyle

Coyle argues that he is entitled to summary judgment with respect to the § 1983 and state law claims, and also argues that Plaintiff should not be entitled to recover damages for pain and suffering or punitive damages.³ The Court finds that Coyle is entitled to summary judgment with respect to all claims against him, and therefore will not address his arguments with respect to damages.

1. Section 1983 Claims

Plaintiff does not state whether he is suing Coyle in his individual or official capacity.⁴ Regardless of the capacity in which Coyle was sued, he is entitled to summary judgment on the § 1983 claims. A supervisor may be liable in his individual capacity if (1) as a policymaker, he “with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the] constitutional harm;” or (2) if he “participated in violating the plaintiff’s rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates’ violations.” *A.M. ex rel. J.M.K. v. Luzerne County Juvenile Det. Ctr.*, 372 F.3d 572, 586 (3d Cir.2004) (citations omitted). A suit against a supervisor in his official capacity is essentially a suit against the governmental entity that employs him. *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). For a governmental entity to be liable under § 1983, “the plaintiff must identify a policy or custom of the entity that caused the constitutional violation.” *A.M.*, 372 F.3d at 580 (citing *Bd. of County Comm’rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 403, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997)).

*13 Plaintiff alleges that Coyle’s inadequate supervision led to an atmosphere in dispatch which in turn caused his arrest and incarceration. Plaintiff focuses on Simerson’s personal relationships and feelings towards Moore. Having already determined that the NCIC search⁵ and the arrest of Plaintiff were constitutional, the Court finds that Coyle cannot be held liable under § 1983 in his individual or official capacity for these acts. Furthermore, with respect to Plaintiff’s claims that Davenport, Roden and Bertino violated the knock and announce rule and used excessive force, Plaintiff does not allege that Coyle participated in these violations, directed others to inflict them, or had knowledge of the violations and acquiesced in them. Nor does Plaintiff explain how Coyle’s alleged failure to supervise caused these violations. Plaintiff’s statement that Coyle hired, trained and supervised the officers is not sufficient. Coyle may not be held liable for violations by individual officers merely because he was their supervisor at the time of the alleged violations. See *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir.1988) (finding civil rights liability cannot be based on respondeat superior theory).

Plaintiff further contends that Coyle may be held liable for the Egg Harbor Township Police Department’s policy of not allowing people with child support warrants to pay the release amount on the warrant. While there is some dispute over who

promulgated this policy, the Court finds that even if this was the Police Department’s policy, it did not cause a violation of Plaintiff’s constitutional rights. Plaintiff did not have a right to be released upon payment to the township Police Department. The child support warrant for Plaintiff contained a release form to be signed by the County sheriff, not by the Chief of Police or any officer of a municipal police department. (Egg Harbor Township Police Department Ex. 9.) Thus, the Court finds that Coyle may not be held liable for the refusal of Egg Harbor Township officers to accept Plaintiff’s payment of the release amount on his warrant.

Plaintiff also contends that Coyle may be held liable for his inadequate supervision of the internal affairs investigation that followed Plaintiff’s arrest. However, the internal affairs investigation occurred after all of the violations Plaintiff alleges in his complaint. Coyle’s supervision of the investigation could not have caused any of the violations contained in Plaintiff’s complaint. Plaintiff may not now raise a claim that he did not raise in his complaint. *Anderson v. DSM N.V.*, 589 F.Supp.2d 528, 534 n. 5 (D.N.J.2008).

2. State Law Claims

Coyle argues that the state law claims against him should be dismissed because Plaintiff did not file a sufficient Tort Claims Act notice. Before filing a lawsuit against a public entity or employee under the Tort Claims Act, a person must provide notice to the defendants. *N.J. Stat. Ann. 59:8-3*. When a plaintiff sues a public employee, it is sufficient to send a notice to the public entity that employs the defendant. *Velez v. City of Jersey City*, 180 N.J. 284, 850 A.2d 1238, 1246 (N.J.2004) (“[W]e reject the State’s invitation to extend the Act’s notice requirements to mandate that written notice also be given to public employees. Although we note that the better practice is for a potential plaintiff to give notice to both the public entity and the public employee, *N.J.S.A. 59:8-8* only requires that notice be given to the public entity.”). The notice need not name the defendants, so long as it describes them. See *Henderson v. Herman*, 373 N.J.Super. 625, 862 A.2d 1217, 1222 (N.J.Super.Ct.App.Div.2004). (“[W]e cannot accept that it was the intention of the Legislature that a claimant be barred from suit ... when the identity of the employee or employees was nearly as clear from the designation or description provided as it would have been by the inclusion of his or her name.”).

*14 In this case, Plaintiff filed a Tort Claims Act Notice with the Egg Harbor Township Police Department within the required time period. (Egg Harbor Township Police

Department and Coyle Ex. 3.) If this notice had adequately described Coyle, it may have been sufficient. However, the notice does not indicate that the Chief of Police will be a defendant. Therefore, it does not provide adequate notice of a claim against Coyle.

Plaintiff states that the internal affairs investigation, which was conducted within ninety days of his arrest, provided sufficient notice. The internal affairs report does not suggest that Plaintiff mentioned any claims against Coyle. Plaintiff has not cited any evidence that he gave notice of an intention to sue Coyle. Therefore, the Court finds that Coyle is entitled to summary judgment with regard to all state tort claims against him.

Plaintiff also argues that Egg Harbor Township received sufficient notice of his claims. However, the Township is not named as a defendant.

F. Dismissal of John Doe Defendants

In their motion for summary judgment, the Egg Harbor Township Police Department and Coyle argue that the

John Doe defendants should be dismissed from this case. Plaintiff concedes that they should be dismissed. (Plaintiff's Opposition Brief at 7.)

IV. CONCLUSION

For the foregoing reasons, the motions for summary judgment filed by Casey Simerson, Gary Rzemysk, John J. Coyle and the Egg Harbor Township Police Department will be granted. The motion filed by Charles Davenport, Paul Roden and Edward Bertino will be granted in part and denied in part. In addition, the John Doe defendants will be dismissed. As a result, the only remaining claims in this case are the claims against Davenport, Roden and Bertino for the violation of the knock and announce rule and the use of excessive force. Further, Plaintiff may seek punitive damages with respect to these claims. An accompanying order shall issue today.

All Citations

Not Reported in F.Supp.2d, 2009 WL 792489

Footnotes

- 1 In a January 30, 2009 opinion and order, this Court granted a motion for summary judgment filed by the State of New Jersey.
- 2 Plaintiff had been arrested on contempt charges more recently. (Statement of Undisputed Material Facts by Davenport et al. and Plaintiff's Response at ¶ 37.)
- 3 Coyle also argues that he is entitled to summary judgment with respect to any conspiracy claim against him. However, in his opposition brief, Plaintiff states that he does not allege conspiracy against Coyle. (Plaintiff's Brief at 6.)
- 4 Defendants argue that Coyle was sued in his official capacity because "all allegations in the amended complaint pertain to his employment in his official capacity of as the Chief of Police of the [Egg Harbor Township Police Department]." (Brief in Support of Motion for Summary Judgment by Egg Harbor Township Police Department and Coyle at 4.) This is not the correct standard. See *Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) (rejecting argument that "state officials may not be held liable in their personal capacity for actions they take in their official capacity.")
- 5 Even if, as Plaintiff alleges, Simerson's NCIC search violated the Police Department's policy, it did not violate Plaintiff's rights under the Constitution.