UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERLIN EVER MENCIAS AVILA,

Plaintiff,

v.

MATTHEW DAILEY,

Defendant.

Civil No. 15-cv-2135 (TSC)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO VACATE THE SUMMARY JUDGMENT OPINION

Defendant Matthew Dailey has brought a post-settlement and post-dismissal motion to vacate the Court's summary judgment opinion and reconsideration order in their entireties. In support of vacatur, Det. Dailey rehashes arguments the Court has repeatedly rejected, misconstrues the Court's prior decisions, and complains of unidentified and unexplained consequences arising from the Court's decisions. Contrary to his assertions, the Court has never wavered from its ruling that Det. Dailey had control over the van following the dissipation of probable cause, there is no risk of judicial inconsistency, and it would be inequitable and against the public interest to vacate the Court's prior rulings. Accordingly, Det. Dailey's motion should be denied.

BACKGROUND

I. Facts

A. Det. Dailey's seizure of Mr. Mencias's work van and tools

On September 6, 2014, Plaintiff Erlin Ever Mencias Avila, a home improvement contractor, was present at the scene of an altercation at a restaurant between a day laborer who went by the name Luis and who had been working with Mr. Mencias that day, and others at the restaurant. Mr.

Mencias intervened and drove Luis from the scene in Mr. Mencias's work van. Officers from the Metropolitan Police Department (MPD) arrived at the restaurant after Mr. Mencias and Luis had left, and concluded that Luis was a suspect in an alleged assault. Defendant Matthew Dailey was the lead detective. Later that night, the police found Mr. Mencias's van parked and unoccupied. Concluding that it was the vehicle that had transported Luis away from the restaurant, Det. Dailey seized the van to allow for a search for evidence as to Luis's identity and whereabouts. Mem. Op. 1–5 (Doc. 38).

On September 11, 2014, Mr. Mencias was interviewed by the police after he went to the police station to inquire about retrieving his van and tools. One officer told Mr. Mencias that "any assistance you can give us to close out the case would be helpful in getting your van back." Another officer told Mr. Mencias: "You need your van; we need the suspect ID'ed. That's a small price to pay to get your van back to tell us who this suspect is. … [I]f you're not trying to work with us, that might make things very complicated for you to get your van back … [unless] your friend is more important than your van, you need to tell us who your friend is." *Id.* at 4–5. Mr. Mencias maintained that he had no further information regarding the suspect.

On September 23, 2014, Det. Dailey searched Mr. Mencias's van pursuant to a search warrant and removed the items of evidentiary value. *Id.* at 5–6, 11. Following the search, Det. Dailey "did not have probable cause to believe the van contained evidence." *Id.* at 16. Nevertheless, Det. Dailey continued the seizure without probable cause because he "wanted to speak with Mr. Mencias before releasing it." *Id.* at 15; *see id.* at 28 ("Defendant stated that he kept the van in order to obtain information from Plaintiff."). Det. Dailey did not search the van again, nor did he seek another warrant to do so. Det. Dailey did not initiate the process for the return of Mr. Mencias's

property until November 26, 2015, and Mr. Mencias was not able to retrieve his van and tools from MPD custody until January 13, 2016. *Id.* at 7–8.

B. The role of the United States Attorney's Office (USAO) regarding property the police seize as evidence

MPD is responsible for seizing and classifying property as evidence, and "MPD determines all dispositions of property that they seize during any investigation." Giovannelli Decl. ¶¶ 3–7 (Doc. 24-1 at 27–30). The USAO "has no authority to dispose of and/or retain property seized. [Such] authority rests solely with MPD." *Id.* The MPD officer who seized the property makes the decision to release it and initiates the process by preparing a PD Form 81-C and presenting it to the USAO "to sign indicating that the USAO has no objection to the release and that said property is not needed to be retained as evidence." *Id.*; *see* MPD General Order 601.1(III)(F)(4) (Doc. 24-1 at 224). Once the USAO signs the PD Form 81-C indicating no objection, MPD may release the property. "Defendant does not dispute the USAO's description of the process." Mem. Op. 6.

II. Procedural History

Mr. Mencias sued Det. Dailey under 42 U.S.C. § 1983 for violating his Fourth Amendment right to be free from unreasonable seizures because Det. Dailey lacked probable cause to continue the seizure of Mr. Mencias's work van and tools following the warranted search and removal of the items of evidentiary value.[1] Following discovery, the parties filed cross-motions for summary judgment. As relevant here, the Court granted summary judgment to Mr. Mencias on his Fourth Amendment claim. The Court noted that "[a] seizure that is reasonable at the outset [because based on probable cause] can become unreasonable because of duration," Mem. Op. 9 (citing *Segura v. United States*, 468 U.S. 796, 812–13 (1984)), and that Det. Dailey had "not identified any

[1] Mr. Mencias brought additional claims not relevant here.

legitimate basis for holding the van after he conducted the search, nor pointed to a government interest to balance against [Mr. Mencias's] interest in having and using his van." *Id.* at 10. The Court rejected Det. Dailey's argument that the USAO's "investigation into the assault required him to continue the seizure," because Det. Dailey "proffered no evidence to suggest that the van was pertinent to the ongoing investigation in any way other than as leverage to force [Mr. Mencias's] cooperation." *Id.* at 13. The Court concluded that "[s]eizure of a person's property as bait or as a bargaining chip to elicit information from a third party is not lawful within the Fourth Amendment." *Id.* (citing *Segura*, 468 U.S. at 808).

The Court rejected Det. Dailey's "attempt to transfer blame to the USAO and reduce his role to 'deferring to the United States' ongoing criminal prosecution and determination that it had a continued need for Plaintiff's van,'" *id.* at 15 (quoting Def. Summ. J. Reply 1 (Doc. 33)), finding the argument "both unsupported by the record and legally insufficient to rebut Defendant's liability," *id.* Noting that "the type of causal link required between the officer's act and the deprivation in the section 1983 context [is] similar to the type of causation required for tort liability," *id.* at 17 (citing *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986)), the Court placed particular emphasis on Det. Dailey's failure to initiate return of the van by filling out a PD Form 81-C and submitting it to the USAO:

> It is undisputed that Defendant was responsible for the original seizure of Plaintiff's van. It is undisputed that MPD initiates release of seized property by filling out a form PD 81-C and submitting it to the USAO to sign. The fact that the USAO would have had to sign the form before the van could be released does not break the causal chain making Defendant responsible for the ongoing seizure. Had Defendant sent the form to the USAO and the USAO refused to sign it, the causal link would be broken and Defendant would not be liable under section 1983.

Id.

Having found Det. Dailey responsible for the violation of Mr. Mencias's constitutional right to be free from unreasonable seizures, the Court addressed Det. Dailey's entitlement to qualified immunity. The Court explained that qualified immunity involves a two-step analysis: (1) whether the officer's conduct violated a constitutional right; and (2) whether the right was clearly established at the time of the incident. *Id.* at 26 (citing *Corrigan v. District of Columbia*, 841 F.3d 1022, 1029 (D.C. Cir. 2016)). Because it had already held that Det. Dailey violated Mr. Mencias's Fourth Amendment rights, the Court focused on the second prong of qualified immunity and concluded that the right was clearly established because "[n]o reasonable law enforcement officer would believe that keeping a vehicle that has already been searched, and its contents with evidentiary value removed, in order to coerce its owner into providing information to the police, is lawful." *Id.* 28. "It is well established that seizure of property requires probable cause, and that continued seizure requires continued probable cause." *Id.* (citing *United States v. Place*, 462 U.S. 696, 709 (1983)). Thus, the Court concluded that "[b]ecause Defendant was responsible for the continued seizure of Plaintiff's van despite there no longer being probable cause, and because seizure of a personal vehicle requires a strong government interest which Defendant has failed to show, Defendant is not entitled to qualified immunity." *Id.* at 30.

Det. Dailey moved for reconsideration, arguing that the Court erred in finding that Det. Dailey violated Mr. Mencias's Fourth Amendment rights, and in denying qualified immunity. As to qualified immunity, he argued that "even if [he] did not have probable cause to retain Plaintiff's van," he could satisfy the second prong of the qualified immunity analysis if he could show that the USAO directed him to continue the unlawful seizure. Def. Mem. in Supp. of Recons. 6 (Doc. 40). Under Det. Dailey's new theory, the second prong of the qualified immunity analysis would turn on whether Det. Dailey "knew or should have known that he had the affirmative constitutional

obligation to reject the USAO's clear instruction to retain Plaintiff's van." Def. Recons. Reply 5 (Doc. 42). In other words, Det. Dailey argued that he might be entitled to qualified immunity if he could show that he was "just following orders" from the USAO when he continued the seizure of Mr. Mencias's van despite lacking probable cause, even though Det. Dailey had failed to initiate the PD Form 81-C process.

The Court granted Det. Dailey's motion in part, explaining that its original finding that Det. Dailey violated Mr. Mencias's Fourth Amendment rights "remains unaltered," but allowing Det. Dailey an opportunity to prove—as a matter of fact—that the USAO "directed him to maintain possession of the van to aid its continued investigation." Order of Aug. 1, 2017, 1–2 (Doc. 47). The Court reasoned that "[i]f a jury finds that an AUSA did require Defendant to maintain possession of the van, the court's finding that Defendant violated Plaintiff's Fourth Amendment rights would still stand, but the court's previous conclusion that Defendant violated clearly established law in doing so would not." *Id.* at 5. The Court concluded that "[a]bsent specific direction from the USAO, Defendant's actions are not shielded by qualified immunity." *Id.* at 6. The Court later clarified that, *even if* Det. Dailey "received specific direction from a prosecutor in the [USAO] to continue the seizure following the search of the van, Defendant will not necessarily be entitled to qualified immunity." Order of June 1, 2018, 1 (Doc. 79). Rather, the Court would then have to decide—as a matter of law—whether Det. Dailey is entitled to qualified immunity by determining whether "it was objectively reasonable for Detective Dailey to comply with the [prosecutor's] request that he continue the unlawful seizure of the van."[2] May 31, 2018, Hr'g Tr. 13:12–15 (Doc. 83).

[2] The D.C. Circuit "has never held that qualified immunity permits an officer to escape liability for his unconstitutional conduct simply by invoking the defense that he was 'just following orders.'" *Wesby v. District of Columbia*, 765 F.3d 13, 29 (D.C. Cir. 2014), *rev'd on other grounds*, 138 S. Ct.

Because Det. Dailey's qualified immunity defense rested on his ability to prove that he was "just following orders" when he continued the seizure of Mr. Mencias's van despite the lack of probable cause, the Court set a trial to resolve the factual dispute as to whether a prosecutor specifically directed Det. Dailey to continue the seizure after the search. The Court made clear that the jury would be asked "whether the Defendant received specific direction from the U.S. Attorney's Office to continue holding Plaintiff's van and work tools following the dissipation of probable cause." *Id.* at 6:11–14; *see id.* at 15:21–23 ("[T]he jury's only task is to determine whether prosecutors in this case specifically directed the Defendant to maintain possession of the van."), 21:16–19 ("The sole issue before the jury, aside from damages, is whether the U.S. Attorney's Office specifically directed Defendant to hold the van and tools after probable cause for the seizure had dissipated."). Det. Dailey had repeatedly claimed to have received such direction.[3] The three prosecutors involved were each expected to testify that they made no such request.

As the trial date approached, Det. Dailey conceded that he would *not* testify that he was specifically directed by a prosecutor to continue the seizure after the search. Joint Pretrial Statement 2 (Doc. 75). The parties then reached a settlement and filed a joint stipulation of

577 (2018). To the contrary, four factors are considered to determine whether an officer is entitled to qualified immunity for actions taken at the direction of a superior: (1) whether the act was a clear constitutional violation; (2) the experience of the officer; (3) the officer's role in the investigation; and (4) the officer's efforts to obtain clarity about the legality of requested conduct. *See Corrigan v. Glover*, 254 F. Supp. 3d 184, 195 (D.D.C. 2017) (citing *Wesby*, 765 F.3d 13, *and Elkins v. District of Columbia*, 690 F.3d 554 (D.C. Cir. 2012)).

[3] *See, e.g.*, Def. Recons. Reply 5 (characterizing the issue as whether Det. Dailey "knew or should have known that he had the affirmative constitutional obligation to reject the USAO's *clear instruction* to retain Plaintiff's van." (emphasis added)); Order of Aug. 1, 2017, 2 ("Defendant claims that the [USAO] staff *directed him* to maintain possession of the van." (emphasis added)), 4 ("[A] jury could infer from the response that the AUSA *directed Defendant* to hold the van." (emphasis added)), 5 ("Absent *specific direction* from the USAO, Defendant's actions are not shielded by qualified immunity." (emphasis added)).

dismissal (Doc. 91). On August 10, 2018, the Court entered an order (Doc. 93) dismissing the case with prejudice and retaining jurisdiction to enforce the settlement agreement and to consider a motion by Defendant to vacate the Court's summary judgment ruling.

STANDARD OF REVIEW

Det. Dailey asks the Court to vacate both its original and reconsidered summary judgment opinions in their entireties pursuant to Federal Rule of Civil Procedure 60(b). "[T]he party seeking to invoke Rule 60(b) bears the burden of establishing that its prerequisites are satisfied." *Owens v. Republic of Sudan*, 864 F.3d 751, 819 (D.C. Cir. 2017) (internal quotation marks and comma omitted).

Although Det. Dailey invokes Rule 60(b)(1) as a basis to correct a supposedly "obvious error of law" by the Court, that provision is inapplicable because Det. Dailey has failed to identify any intervening change in the law. "Rule 60(b)(1) typically encompasses 'mistake, inadvertence, surprise, or excusable neglect' of the parties, but this circuit also allows the rule to reach the court's alleged legal errors in the very limited situation when the controlling law of this circuit changed between the time of the court's judgment and the Rule 60 motion." *Bestor v. FBI*, 539 F. Supp. 2d 324, 328 (D.D.C. 2008) (citing *Ctr. for Nuclear Responsibility, Inc. v. U.S. Nuclear Regulatory Comm'n*, 781 F.2d 935, 940 (D.C. Cir. 1986)); *see Muñoz v. Bd. of Trustees of Univ. of D.C.*, 730 F. Supp. 2d 62, 67 (D.D.C. 2010) (citing *D.C. Fed'n of Civic Ass'ns v. Volpe*, 520 F.2d 451, 451–53 (D.C. Cir. 1975) ("Standing alone, a party's disagreement with a district court's legal reasoning is rarely, if ever, a basis for relief under Rule 60(b)(1). … [The D.C. Circuit] has only recognized the possibility where the district court has made an 'obvious error,' such as basing its legal reasoning on case law that it failed to realize had been recently overturned.")).

Instead, Det. Dailey's motion should be considered under Rule 60(b)(6), the "catch-all provision" that "should be only sparingly used." *Kramer v. Gates*, 481 F.3d 788, 792 (D.C. Cir. 2007). Relief under Rule 60(b)(6) is available "only in 'extraordinary circumstances,'" *Owens*, 864 F.3d at 818 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)), such as where "a previously undisclosed fact … central to the litigation … shows the initial judgment to have been manifestly unjust," *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980); *see also Salazar ex rel. Salazar v. District of Columbia*, 633 F.3d 1110, 1120 (D.C. Cir. 2011) (citing *Gonzalez v. Crosby*, 545 U.S. 524, 537 (2005), *and Lijeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863–64 & n.11 (1988)) (explaining the Supreme Court's "restrictive understanding of Rule 60(b)(6)" has made "extraordinary circumstances" a prerequisite for relief under that provision).

Regardless of whether Det. Dailey's motion is brought under Rule 60(b)(1) or 60(b)(6), Det. Dailey must carry a heavy burden. "Relief under Rule 60(b)(1) motions is rare." *Hall v. CIA*, 437 F.3d 94, 99 (D.C. Cir. 2006). Relief "under Rule 60(b)(6) is even more rare." *Owens*, 864 F.3d at 818.

ARGUMENT

I. There Is No Dispute of Fact Regarding Det. Dailey's Control Over the Van Following the Dissipation of Probable Cause.

Det. Dailey's primary argument for vacatur is a familiar one: He is not responsible for the violation of Mr. Mencias's constitutional rights because he lacked control over the van during the pendency of the USAO's grand jury investigation. Def. Mem. in Supp. of Mot. to Vacate 6–8 (Doc. 97) (Def. Vacatur Mem.); Def. Mem. in Supp. of Summ. J. 11–12, 13–15 (Doc. 17); Def. Mem. in Supp. of Recons. 2–6. But Det. Dailey has never offered any admissible evidence to rebut the Giovannelli Declaration, which establishes that control over property the police seize as

evidence "rests solely with MPD" unless and until the USAO objects to release of the property by refusing to sign a PD Form 81-C. Giovannelli Decl. ¶¶ 3–7; *see* MPD General Order 601.1(III)(F)(4). Indeed, this Court has found Det. Dailey "does not dispute the USAO's description of the process." Mem. Op. 6. Instead, Det. Dailey rests his motion for vacatur on misstatements regarding the Court's prior rulings and a double-hearsay statement the Court held was inadmissible and insufficient to break the "causal chain" of Det. Dailey's responsibility for the deprivation of Mr. Mencias's Fourth Amendment rights.[4] A motion for relief under Rule 60(b) "is not simply an opportunity to reargue facts and theories upon which a court has already ruled." *Williams v. Brennan*, --- F. Supp. 3d ---, No. 17-1285 (RDM), 2018 WL 4078581, at *1 (D.D.C. Aug. 22, 2018) (internal alterations and quotation marks omitted) (quoting *Black v. Tomlinson*, 235 F.R.D. 532, 533 (D.D.C. 2006)). Thus, Det. Dailey's rehashing of arguments the Court has already rejected cannot establish the "rare" or "extraordinary circumstances" necessary to obtain relief under Rule 60(b).

First, Det. Dailey incorrectly states that the Court held, in ruling on his first motion for reconsideration, "that Detective Dailey had established 'enough of a dispute of fact' on the question of control that a jury could find that the USAO controlled the van." Def. Vacatur Mem. 6. That is not what the Court held. The Court found that there was "enough of a dispute of fact" as to whether the USAO "directed Defendant to hold the van," Order of Aug. 1, 2017, 4–5, to allow

[4] The Court found that the interrogatory responses on which Det. Dailey relies are inadmissible hearsay that could not be used at trial pursuant to Federal Rule of Evidence 802. Pre-trial Conference July 16, 2018; *see also* July 31, 2018, Hr'g Tr. 18:21–25 (Doc. 89). Accordingly, Det. Dailey may not rely on them here. *See Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958, 969 (D.C. Cir. 2016) (non-movant may only rebut a motion for summary judgment with evidence that would be admissible at trial). Det. Dailey could have built the summary judgment record as to what the prosecutors told him and when, but he chose not to. Having failed to produce admissible evidence to support his theory, Det. Dailey cannot now rely on speculation as to the testimony that would have been offered at a trial that will never happen.

Det. Dailey an opportunity to prove his claim that he was following orders from the USAO when he continued the seizure despite the absence of probable cause. The Court did not disturb its finding that Det. Dailey violated the Fourth Amendment. Rather, its reconsideration order dealt only with the possibility that Det. Dailey could establish the second prong of qualified immunity if, in fact, the USAO directed him to continue the seizure. As detailed above, the *only* issue of fact remaining for trial was whether Det. Dailey received "specific direction from the USAO" to continue the seizure of the van. *E.g.*, *id.* at 6. At no point did the Court conclude that there was any dispute of fact about *control* over release of the van.

Second, there is no "irreconcilable conflict" between the Court's summary judgment opinion and its reconsideration order. In *rejecting* Det. Dailey's argument that he lacked sufficient control over the van to be held liable at summary judgment, the Court determined "[i]t is undisputed that MPD initiates release of seized property by filling out a PD Form 81-C and submitting it to the USAO to sign." Mem. Op. 17. Because Det. Dailey admits that he never submitted a PD Form 81-C to the USAO that the USAO refused to sign, the Court determined there was no break in the "causal link" between Det. Dailey's seizure of the van and the violation of Mr. Mencias's Fourth Amendment rights. *Id.* Rather than suggesting the refusal to sign a PD Form 81-C was just an "example" of how the causal link could be broken as Det. Dailey argues, Def. Vacatur Mem. 6, the Court determined the USAO's refusal to sign the PD Form 81-C is necessary to break the "causal link." "Had Defendant sent the form to the USAO and the USAO refused to sign it, the causal link would be broken and Defendant would not be liable under section 1983." Mem. Op. 17. The Court's conclusion is unremarkable, given that the only evidence establishing the process for the release of property seized as evidence are MPD General Order 601.1 and the Giovanelli Declaration. Det. Dailey submitted no evidence to contradict either one,

and each makes clear that the release of seized property *must* begin with the presentation of a PD Form 81-C by the MPD officer running the investigation to the USAO. As such, the Court found Det. Dailey possessed the requisite control over Mr. Mencias's van to be liable for its unlawful seizure because he did not submit a PD Form 81-C for the van's release until November 2015—at which time the USAO promptly signed off on it—over a year after the van had been searched and probable cause had dissipated.

There is no conflict between the Court's summary judgment ruling on liability and its subsequent reconsideration order on qualified immunity. The Court did not revisit its finding that Det. Dailey had control of the van because there was no new or overlooked evidence that undermined the Court's previous findings that (1) "MPD initiates release of seized property by filling out a PD Form 81-C and submitting it to the USAO to sign" and (2) the USAO never objected to release by refusing to sign the PD Form 81-C in this case. The Court's reconsideration ruling made clear that whether the USAO provided "specific direction" to Det. Dailey affected only its qualified immunity determination: "If a jury finds that an AUSA did require Defendant to maintain possession of the van, the court's finding that Defendant violated Plaintiff's Fourth Amendment rights would still stand, but the court's previous conclusion that Defendant violated clearly established law would not." Order of Aug. 1, 2017, 5. In other words, although a factual finding that the USAO specifically directed Det. Dailey to continue the seizure may have affected the objective legal reasonableness of Det. Dailey's failure to submit a PD Form 81-C prior to November 2015, it would not change the fact that Det. Dailey was the person who was required to submit a PD Form 81-C to initiate the release of Mr. Mencias's van. As a result, there was a "causal link" between Det. Dailey's actions and the unconstitutional continued seizure of Mr. Mencias's van. Mem. Op. 17.

Third, Det. Dailey is simply wrong that Assistant U.S. Attorney Kara Traster "verbally refused to release the van." Def. Vacatur Mem. 7. AUSA Traster stated only "that [Mr. Mencias's] van was being held as evidence in a criminal proceeding." Order of Aug. 1, 2017, 4. AUSA Traster did not refuse to release the van, state that she was responsible for the seizure, or even indicate that the USAO was the decisionmaker concerning its release. Indeed, as previously explained, the Court relied on this statement to conclude only that there was a potential dispute of fact as to whether "the AUSA directed Defendant to hold the van." *Id.* at 4. Det. Dailey argued in his motion for reconsideration that this evidence absolved him of liability and established the USAO's control over the van, but the Court rejected that argument in ruling that this evidence affected only its ruling as to the second prong of qualified immunity. Moreover, Det. Dailey wholly fails to acknowledge that the Court reaffirmed the limited nature of its reconsideration ruling in granting Mr. Mencias's motion for clarification. Order of June 1, 2018 ("Even if the jury finds that Defendant Matthew Dailey received specific direction from a prosecutor in the United States Attorney's Office to continue the seizure following the search of the van, Defendant will not necessarily be entitled to qualified immunity.").

Finally, Det. Dailey's newly cited cases provide no support for his arguments. In *Madewell v. Roberts*, the incarcerated plaintiffs brought claims under § 1983 against prison officials and members of the Arkansas Board of Correction alleging cruel and unusual punishment, as well as retaliatory and discriminatory actions based on the plaintiffs' mental disabilities. 909 F.2d 1203, 1204–05 (8th Cir. 1990). In affirming the dismissal of claims against certain defendants—such as the members of the Arkansas Board of Correction—the Eighth Circuit concluded these defendants had no "personal connection with the working conditions alleged to amount to cruel and unusual punishment … or with the alleged retaliatory and discriminatory acts" and, thus, could not be held

liable because § 1983 does not provide for respondeat superior liability. *Id.* at 1208. However, the court reversed the dismissal of claims against one defendant who "was directly responsible for the conditions and at least some of the actions" and also against two defendants who "had personal knowledge of [the conditions and actions] through their review of relevant grievances." *Id.* The dismissed defendants in *Madewell* would be analogous to the chief of police or the mayor in Mr. Mencias's case, i.e. high-level officials that had no personal involvement in the underlying action. *Madewell*'s discussion of those defendants is inapplicable here as there is no serious dispute that Det. Dailey had a "personal connection" to the violation of Mr. Mencias's Fourth Amendment rights.

Pardue v. Glass, in which the plaintiff brought claims under § 1983 alleging that he had unlawfully been placed in a restraining chair while he was being questioned, is likewise inapposite. No. 05-5004, 2008 WL 249173, at *1 (W.D. Ark. Jan. 29, 2008). Specifically, the plaintiff alleged (1) the use of the restraining chair at all was unlawful, (2) the length of time the restraining chair was used was unlawful, and (3) there was excessive force used against him while he was in the restraining chair. *Id.* at *17–22. The court concluded that only the length of time the restraining chair was used violated the plaintiff's constitutional rights. *Id.* at *20–21. In dismissing the plaintiff's claim against one police officer, the court explained that officer had only been involved in securing the plaintiff in the restraining chair "upon direct order of his supervisor" and was not involved in the plaintiff's "remaining in the chair a protracted period of time"—the only action found to violate the constitution. *Id.* at *23. The *Pardue* officer's role was, thus, akin to the line officers that assisted in the *initial* seizure of the van upon the decision by Det. Dailey to do so; that action was not unlawful, and those officers could not be held liable for the continued seizure that did not involve them. But Det. Dailey was responsible for every step of the seizure: He made the

decision to seize the van as evidence; he obtained the search warrant, searched the van, and removed the items of evidentiary value; he continued the seizure even though he lacked probable cause to do so; and he eventually submitted the necessary PD Form 81-C to initiate the release of the van.

As the Court has already held, § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Mem. Op. 17 (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)). The "natural consequence" of a failure to submit a PD Form 81-C—undisputedly the required first step for the release of seized property—is that the seizure of the property will continue. Thus, Det. Dailey had "direct responsibility for" the unlawful continued seizure of Mr. Mencias's van, and he is not entitled to vacatur.

II. There Is No Risk of Judicial Inconsistency.

For many of the same reasons already discussed, no risk of judicial inconsistency arises from the Court's previous opinions. As the Court is well aware, the qualified immunity analysis proceeds in two steps. At the first step, the court determines "whether the facts in the record show the officer[']s] conduct violated a constitutional right." *Corrigan*, 841 F.3d at 1029. If so, at the second step, the court then determines "whether the constitutional right was clearly established at the time of the incident." *Id.* "This inquiry [at step two] turns on the 'objective legal reasonableness of the action, assessed in light of the legal rules that were established at the time it was taken.'" *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (quoting *Wilson v. Layne*, 526 U.S. 603, 614 (1999)).

As explained above, the Court never reconsidered or altered its determination at step one nor the underlying determination that Det. Dailey had control over the van. *See supra* Argument Part I. The only factual dispute remaining at the time of the parties' settlement was whether Det.

Dailey received specific direction from the USAO to continue the seizure after the search. Resolution of that factual dispute would have affected only the *reasonableness* of Det. Dailey's actions for purposes of the second prong of qualified immunity, not whether his actions violated the Fourth Amendment. As the Court explained in granting Mr. Mencias's motion for clarification, "[e]ven if the jury finds that Defendant Matthew Dailey received specific direction from a prosecutor in the United States Attorney's Office to continue the seizure following the search of the van, Defendant will not necessarily be entitled to qualified immunity. At that time, the court will determine whether Defendant is entitled to qualified immunity, applying the relevant legal standard." Order of June 1, 2018. Thus, contrary to Det. Dailey's argument, even if the case had not settled, the jury could not have made a finding that would have "rendered the causal link broken so that Defendant would not be liable under Section 1983," Def. Vacatur Mem. 9, because that question would not have been put to the jury. Further, and most fundamentally, there is no risk of "inconsistency between the Court's and the jury's findings," *id.*, because the parties have settled the case and there will never be a jury determination.

Det. Dailey additionally accuses the Court of "misinterpret[ing] … qualified immunity jurisprudence" by "shifting the resolution of factual disputes onto the 'pure question of law' prong" of qualified immunity. Def. Vacatur Mem. 8, 9. But that is not what the Court did. Although Det. Dailey is correct that "whether a defendant's conduct violates the 'clearly established' rights of the plaintiff is a pure question of law that must be resolved by the court," *Pitt v. District of Columbia*, 491 F.3d 494, 509 (D.C. Cir. 2007), sometimes, as in this case, "the facts establishing what the challenged conduct was are legitimately in dispute and must first be decided by the jury before the court answers the ultimate legal question whether a defendant is entitled to qualified immunity," *Zhi Chen v. District of Columbia*, 808 F. Supp. 2d 252, 259 (D.D.C. 2011). Disputes

of fact may relate to both causation and the reasonableness of the officer's actions, Def. Vacatur Mem. 9 (citing *Halcomb v. Wash. Metro. Area Transit Auth.*, 526 F. Supp. 2d 20 (D.D.C. 2007)), but that is not the situation in this case. Here, there is no dispute as to causation. The only dispute is whether Det. Dailey received specific direction from the USAO to continue the unlawful seizure. If he did, the Court would still have to determine as a matter of law whether that fact entitled him to qualified immunity.

Corrigan v. Glover, 254 F. Supp. 3d 184 (D.D.C. 2017), illustrates this point. In that case, the D.C. Circuit had "expressly held that [MPD's] search violated [the plaintiff's] rights under the Fourth Amendment" but remanded the case to the district court to determine whether a particular officer was nevertheless "entitled to qualified immunity for following his superior's order to conduct the warrantless … search." *Id.* at 192–93. The court then analyzed the reasonableness of the officer's reliance on his superior's direction, based upon the content of the exchanges between the officer and his superior, the officer's experience, the officer's role in the unlawful action, and the circumstances of the unlawful action. *Id.* at 193–98. In other words, these facts were relevant *only* to the reasonableness of the officer's action, not to whether the underlying search was unlawful. Further, both recent D.C. Circuit decisions concerning an officer's reliance on a superior's direction analyze the facts surrounding that direction only in the context of whether the officer acted reasonably for purposes of the second prong of the qualified immunity analysis, not as to whether the underlying action violated the law. *See Wesby*, 765 F.3d at 25, 28–29; *Elkins*, 690 F.3d at 564, 567–69. Consistent with these decisions, factual disputes concerning Det. Dailey's reliance on the specific direction of the USAO to continue seizure—including whether he received such specific direction—would affect only the Court's reasonableness determination at step two, not its previous finding of a constitutional violation.

III. Equitable Considerations Support Denial of the Motion to Vacate.

Det. Dailey concludes his motion by asserting that "equitable considerations" support vacating the Court's original and reconsidered summary judgment opinions in their entireties.[5] Def. Vacatur Mem. 9–11. The considerations put forward by Det. Daily are unpersuasive and unsupported, and, in addition, other equitable considerations—the need to deter unconstitutional seizures and to provide guidance to law enforcement—support denial of Det. Dailey's motion.

First, Det. Dailey argues that his longstanding—and repeatedly rejected—claim that he did not control the continued seizure of Mr. Mencias's van is "consistent with" the double-hearsay statement of AUSA Traster, an email from AUSA Traster, and an MPD webpage. Def. Vacatur Mem. 9–10. As an initial matter, Det. Dailey's subjective belief that he lacked control—repeatedly rejected by the Court—is not an "equitable consideration" that amounts to "extraordinary circumstances" warranting vacatur of the Court's opinion. Next, and for the reasons previously explained, the double-hearsay statement of AUSA statement does not support Det. Dailey's position. *See supra* Argument Part I. Further, the email referenced by Det. Dailey shows only that AUSA Traster requested that Det. Dailey initiate the release of Mr. Mencias's van; far from indicating the USAO controlled the release, this email supports the Court's prior conclusion that Det. Dailey was responsible for "initiat[ing] release of seized property by filling out a PD Form 81-C and submitting it to the USAO to sign." Mem. Op. 17. Otherwise the USAO could have simply ordered the release of the van without involving Det. Dailey. Lastly, the webpage identified by Det. Dailey is of no persuasive value. Rather than being the "MPD Property Manual" Det. Dailey claims, the webpage appears to be no more than a general description of the Evidence

[5] This argument reinforces that Det. Dailey's motion must be for relief under Rule 60(b)(6) rather than Rule 60(b)(1) because "equitable considerations" are not grounds for a Rule 60(b)(1) motion.

Control Branch on MPD's website. Mr. Mencias has never disputed that the USAO must sign off on a PD Form 81-C, and Det. Dailey cannot seriously maintain that one line on an MPD webpage governs MPD policy to the extent it conflicts with MPD's own General Orders and a sworn declaration on behalf of the USAO.[6] Moreover, Det. Dailey stated in his deposition that he was not aware of "any other documents that reflect MPD policy regarding property seized as evidence" other than MPD General Order 601.1. Dailey Dep. 33:19–22 (Doc. 27-2 at 23).

Second, Det. Dailey states the Court's prior summary judgment opinion "will have grave consequences for him professionally," Def. Vacatur Mem. 10, but Det. Dailey has provided no description of such "grave consequences," nor has he produced evidence as to the likelihood that he will suffer such consequences. Det. Dailey has not, for example, provided evidence of MPD policies related to discipline of officers found to have conducted an unlawful seizure, nor has he produced evidence that such officers cannot be promoted or find post-retirement work in law enforcement. Given that Det. Dailey's argument is premised upon the finding in the summary judgment opinion itself, not the entry of final judgment against him—which has not and cannot occur in light of the stipulation of dismissal—Det. Dailey has already been subject to the consequences of the Court's finding for almost eighteen months. Even so, Det. Dailey has offered no evidence that he has suffered any consequences.[7] Moreover, because the Court has already

[6] It is doubtful that the Court can even consider this newly provided information. Det. Dailey did not move for relief under Rule 60(b)(2) based on "newly discovered evidence," and the D.C. Circuit has limited consideration of a "previously undisclosed fact" under Rule 60(b)(6) to that which is "so central to the litigation that it shows the initial judgment to have been manifestly unjust," *Good Luck Nursing Home*, 636 F.2d at 577.

[7] Even as to the *Giglio*/*Lewis* Questionnaire counsel for Det. Dailey referenced at the last status conference, counsel's argument was that Det. Dailey *may* be required to answer question no. 6 in the affirmative. July 30, 2018, Hr'g Tr. 5:8–7:9, 29:10–30:12. Counsel did not state whether Det. Dailey is already required to answer various questions on the form in the affirmative, nor did

concluded that Det. Dailey violated the constitution and has repeatedly stated that it will not revisit that ruling, it would be inequitable to vacate the prior opinion simply to relieve Det. Dailey of the consequences, if any, of his unlawful actions.

Third, Det. Dailey argues that the Court's summary judgment opinion "will provide future litigants with a hook to ensure that police officers bear the sins of the USAO despite that Office's superior position of authority." Def. Vacatur Mem. 10–11. However, the Court's opinion is clear that police officers will not be liable for "the sins of the USAO" but only their own: When probable cause dissipates, the responsible officer must complete a PD Form 81-C and submit it to the USAO; if the USAO objects to release and refuses to sign the PD Form 81-C, "the causal link would be broken and [the officer] would not be liable under section 1983." Mem. Op. 17. Det. Dailey is liable in this case because he waited more than a year after the search of the van and the dissipation of probable cause to complete and submit the PD Form 81-C. Had he done so as soon as he knew that there was no probable cause for continuing the seizure, he would not be liable, regardless of whether the USAO signed off on or objected to the release. As the Court has explained, "No reasonable law enforcement officer would believe that keeping a vehicle that has already been searched, and its contents with evidentiary value removed, in order to coerce its owner into providing information to the police, is lawful." *Id.* at 28.

Fourth, Det. Dailey misconstrues comments by the Court at two hearings regarding the complexity of the record as an indication that "the record in this case is in tension with *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018)." Def. Vacatur Mem. 11. At the first hearing, the Court was explaining its view that the parties should work towards settlement because the issues did not

counsel offer any explanation as to the ramifications of affirmative answers beyond pure speculation.

seem "unsolvable" and because "the record is not great *either way*," such that any trial victory could end up reversed by the court of appeals *on qualified immunity*. Feb. 14, 2018, Hr'g Tr. 5:7–6:3 (emphasis added) (Doc. 69). At the second hearing, the Court again emphasized that "[g]oing to trial in this case is going to be risky for both sides," listed some potential risks for both sides, and "encourage[ed] [the parties] … to continue trying to reach a resolution in this case." May 31, 2018, Hr'g Tr. 34:19–35:18. Far from stating the record was in tension with *Wesby*, the Court simply identified *Wesby* of an example where victory on qualified immunity at one level of the judicial system does not guarantee victory at another level, in an effort to have the parties honestly assess the risks *both* faced moving forward. Indeed, if the Court truly considered its past ruling to have been in conflict with *Wesby*, there is no reason why the Court would not have revisited the opinion *sua sponte* or called for briefs on the matter as any interlocutory order "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b).

Finally, there is a strong public interest in the preservation of the Court's summary judgment opinion. As noted above, the qualified immunity analysis requires courts to assess (1) whether a constitutional violation occurred and (2) "whether the constitutional right was clearly established at the time of the incident." *Corrigan*, 841 F.3d at 1029. To make the "clearly established" determination, courts analyze the "objective legal reasonableness of the action, assessed in light of the legal rules that were established at the time it was taken." *Pearson*, 555 U.S. at 244. Although *Pearson* overruled the previously-mandated order of resolving these two prongs of qualified immunity established in *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court reiterated *Saucier*'s conclusion that resolution of the first prong is "beneficial" as it "promotes the development of constitutional precedent." *Pearson*, 533 U.S. at 236; *see Saucier*,

533 U.S. at 201 (explaining that resolution of the first prong promotes the public interest by allowing for "the law's elaboration from case to case"). Indeed, court decisions on the first question are often necessary for future courts to determine the "legal rules that were established at the time." *See Saucier*, 533 U.S. at 201 ("In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established."). This elaboration of constitutional law is beneficial both to the general public and to law enforcement in providing clarity as to what actions are and are not unlawful. Moreover, in holding that there is no entitlement to vacatur when parties *jointly* move for such following settlement, the D.C. Circuit explained there is a "social value of the precedent" as "a public act of a public official," which litigants may not simply use as "a bargaining chip in the process of settlement." *In re United States*, 927 F.2d 626, 628 (D.C. Cir. 1991). Where, as here, only one settling party favors vacatur and the other opposes it, the Court should be even more reluctant to deprive the public of the value of the Court's work.

The Court's finding of a constitutional violation in this case will prevent future unlawful seizures of property by instructing police officers that they cannot use "seizure of a person's property as bait or as a bargaining chip to elicit information," Mem. Op. 13, but must instead take the affirmative action required of them when probable cause dissipates—submission of a PD Form 81-C for the release of the property. The Court's decision will also provide guidance to prosecutors that, when presented with a PD Form 81-C in the absence of probable cause, they must sign off on the release or risk liability themselves. Rather than "serv[ing] an agenda far removed from this particular case," Def. Vacatur Mem. 10, the Court's ruling provides clarity on the applicability of the Fourth Amendment to prolonged seizures. The social value of this precedent—both as a general

matter and specifically as to the elaboration of constitutional law for qualified immunity purposes—outweighs any private interest Det. Dailey may have in vacatur. Accordingly, equitable considerations firmly support the denial of his motion.

CONCLUSION

For the above stated reasons, the Court should deny Det. Dailey's motion to vacate.

Respectfully submitted,

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September 18, 2018