[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 20-14074

MARKI ISOM,

Plaintiff-Appellee Cross Appellant,

versus

PAUL BULSO,
in his official capacity and also individually,
RICK WELLS,
in his official capacity as
Sheriff of Manatee County, Florida,

Defendants-Cross Appellees,

JOSEPH PALMERI,
in his official capacity and also individually,

Defendant-Appellant.

Appeals from the United States District Court
for the Middle District of Florida

D.C. Docket No. 8:18-cv-02035-MSS-SPF

Before WILLIAM PRYOR, Chief Judge, GRANT, and ANDERSON, Circuit Judges.

PER CURIAM:

This case concerns an appeal and cross-appeal from a district court's decision regarding federal and state qualified immunity. Plaintiff Isom brought, among other claims, a 42 U.S.C. § 1983 claim for malicious prosecution under the Fourth Amendment[1]

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[1] When we use the term "malicious prosecution," we do so "as only 'a shorthand way of describing' certain claims of unlawful seizure under the Fourth Amendment." *Williams v. Aguirre*, 965 F.3d 1147, 1157 (11th Cir. 2020) (quoting *Whiting v. Taylor*, 85 F.3d 581, 584 (11th Cir. 1996)). "Section 1983 is 'a method for vindicating federal rights elsewhere conferred.'" *Williams*, 965 F.3d at 1157 (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3

and a state law malicious prosecution claim against Palmeri, Bulso, and the Manatee County Sheriff's Office. The district court granted summary judgment to Defendants on all claims except the § 1983 claim for malicious prosecution under the Fourth Amendment and the state law malicious prosecution claim against Palmeri. Palmeri appealed the district court's interlocutory order denying him summary judgment. Isom cross-appealed the grants of summary judgment to Bulso and the Sheriff's Office. After careful review and with the benefit of oral argument, we dismiss the appeal and cross-appeal for lack of jurisdiction.

I. BACKGROUND

Marki Isom's claims against Palmeri, Bulso, and the Manatee County Sheriff's Office stem from Isom's arrest following a traffic stop that occurred on April 1, 2014. Shortly before two in the morning, Deputy Joseph Palmeri was on the 5700 block of 11th Street East Bradenton, Florida, a block Palmeri believed was a "hot spot" for illegal drug activity. The sound of dogs barking behind 5724 11th Street East led Palmeri to believe there was foot traffic and possible drug activity in the area. Palmeri drove to 10th Street East in order to monitor traffic coming from 57th Avenue Terrace East, a dead end directly behind 5724 11th Street

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(1979)). When we refer herein to a § 1983 claim for malicious prosecution under the Fourth Amendment, we mean a claim for a "seizure pursuant to legal process that violated the Fourth Amendment." *Laskar v. Hurd*, 972 F.3d 1278, 1284 (11th Cir. 2020).

East. Palmeri backed into a driveway on 10th Street East and turned off his headlights.

Shortly thereafter, a pickup truck with a broken headlight pulled out of the dead end. Palmeri then radioed Deputy Gabriel Bogart, who was also patrolling the area, to tell him he was "about to pull over a car." When Palmeri activated his lights to attempt to pull the truck over, the truck did not stop. The truck eventually pulled into the front yard of a house two blocks east of 10th Street East. The driver exited the truck and began to walk away. After exiting his patrol car, Palmeri positioned himself in front of the driver and told him to get back in the truck. The driver responded, "You trippin'," and began walking back to the truck. As Palmeri approached from behind, the driver spun around, struck Palmeri's hand, and ran away.

Palmeri pursued on foot as the driver ran north on 12th Street East and then headed west. Over the radio, Palmeri described the driver as a six-foot-three black male with gold teeth. Bogart later stated that he saw "a black male wearing dark colored clothing" when he arrived at the scene. Bogart joined the chase, but the chase ended when the driver jumped over a stockade fence in a backyard.

After the chase ended, Palmeri and Bogart radioed for assistance to set up a perimeter and called in the K-9 unit. The K-9 unit tracked the driver's scent, leading the officers to 5724 11th Street East—the address Palmeri was monitoring before the traf-

fic stop. The officers knocked on the door of 5724 11th Street East, but there was no answer. The pursuit ended.

Before the truck, which had been abandoned in the yard, was towed, Palmeri and Bogart conducted an inventory search. During the search, Bogart found a plastic grocery bag on the floorboard between the passenger and driver's seats. The bag contained: (1) a loaded handgun, (2) several plastic bags "containing powder cocaine," (3) two "prescription pill bottles . . . containing a large quantity of crack cocaine," (4) three bags containing marijuana, and (5) a "clear sandwich bag" containing 20 pills of Xanax.

After the search, Palmeri ran the truck's tags and determined that Hazel Isom was the owner of the vehicle. Hazel Isom is Marki Isom's mother. Palmeri was then informed by an unidentified deputy that the Sheriff's Office had "received an intel bulletin regarding a Marki Isom." This unidentified deputy suggested Marki Isom might be the driver who fled. Palmeri reviewed the intel bulletin and identified Isom as the man he had chased thirty minutes earlier. The bulletin contained three color photographs of Isom, described him as six foot four and 220 pounds, and stated that he "currently resid[es] at 5723 11th Street East" and "CARRIES AN AK-47 RIFLE AT ALL TIMES (around his neck)." Palmeri claims to have confirmed his identification by looking up Isom's driver license photograph in the Florida DHSMV database. Palmeri claims that he was "100 percent posi-

tive" Isom was the driver of the truck. Later that day of April 1, Palmeri filed his report of the incident.

During the evening of April 1, Detective Paul Bulso was informed that Palmeri had conducted the traffic stop. In his investigation, Bulso reviewed Palmeri's incident report and spoke with Palmeri about "the events surrounding the . . . traffic stop." Based on this investigation, Bulso prepared and submitted affidavits in support of arrest warrants charging Isom with (i) trafficking in cocaine in violation of Fla. Stat. § 893.135(1)(b), (ii) possession of marijuana with the intent to sell in violation of Fla. Stat. § 893.13(1)(a)(2), (iii) possession of a firearm by a convicted felon in violation of Fla. Stat. § 790.23(1)(a), (iv) battery of a law enforcement officer in violation of Fla. Stat. § 784.07(2)(b), (v) possession of a controlled substance in violation of Fla. Stat. § 893.13(6)(a), (vi) possession of drug paraphernalia in violation of Fla. Stat. § 893.147(1)(a), and (vii) driving while license suspended with knowledge in violation of Fla. Stat. § 322.34(2)(c).

Bulso's affidavits described the traffic stop and explained that Palmeri identified Isom based on the intel bulletin and Isom's driver license. The affidavits falsely stated that the K-9 track led Palmeri and Bogart to 5723 11th Street East—the house listed as Isom's address on the intel bulletin. As noted above, the K-9 track actually led to 5724 11th Street East. Bulso stated in his deposition that Palmeri told him that the K-9 unit "ended up" at Isom's house. Palmeri denied speaking with Bulso about the arrest in his

deposition, and Palmeri's incident report correctly stated that the K-9 track led to 5724 11th Street East.

The warrants were issued on May 14, 2014. Five days later, Isom was arrested. Isom was released on bond after spending approximately eight hours in jail. Sometime after Isom's release on state charges but before he was arrested on federal charges, Palmeri encountered Isom. Isom says the encounter took place outside his aunt's house on 10th Street. Palmeri claims it took place near the dead end where he first observed the vehicle on the night of the traffic stop. Palmeri claims to have been patrolling the area and was surprised to see Isom out of jail. Palmeri asked Isom how he got out of jail. Isom responded that he was going to sue Palmeri for falsifying an affidavit against him. Palmeri then left. In his deposition, Palmeri claimed it is his job to talk to the public and that was why he made contact with Isom on that occasion.

After the state warrants were issued, Bulso spoke with Derek Pollock, a DEA Task Force Agent, about the incident. On June 3, 2014, Pollock applied for and received a federal arrest warrant that charged Isom with (i) possession with intent to distribute cocaine and cocaine base in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), (ii) possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1), and (iii) possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A).

The affidavit in support of the federal arrest warrant described the traffic stop and noted that Palmeri "was able to identi-

fy the driver of the [truck] as ISOM by photograph." Pollock's affidavit, in contrast to the state affidavit prepared by Bulso, correctly stated that the K-9 track led to 5724 11th Street East and disclosed that Isom was "known to reside" at 5723 11th Street East. Isom was arrested one day after the federal arrest warrant was issued.

After the federal arrest, but also in early June, Pollock told Bulso that Palmeri was "back[ing] off" his identification of Isom as the driver of the truck. Around the same time, Bulso spoke with Palmeri about the possibility that Dennis Simmons—Isom's brother—might have been the driver. Bulso testified that Simmons and Isom are "similar in stature." On June 25, Pollock learned that DNA testing of the handgun and ammunition found in the truck excluded Isom as a contributor.

About one week after the DNA results, the Magistrate Judge granted the United States' motion to dismiss the federal charges, and Isom was released. The state charges were nolle prossed shortly thereafter.

On May 15, 2018, Isom sued Bulso, Palmeri and the Manatee County Sheriff's Office in Florida state court. The case was removed to federal court on August 16, 2018. After a motion to dismiss, Isom filed a second amended complaint that alleged: (1) state law false arrest and malicious prosecution claims against Bulso and Palmeri in their individual capacities, (2) a state law negligent supervision and retention claim against Sheriff Wells, (3) a § 1983 claim against Sheriff Wells in his official capacity, (4)

§ 1983 claims for false arrest and false imprisonment under the Fourth Amendment[2] against Bulso and Palmeri in their individual capacities and against Sheriff Wells in his official capacity, and (5) § 1983 claims for malicious prosecution under the Fourth Amendment against Bulso and Palmeri in their individual capacities.

Defendants moved for summary judgment on all claims. The district court granted summary judgment to Sheriff Wells on all claims. The district court also granted summary judgment to Bulso on all claims. While the district court granted summary judgment to Palmeri on most of the claims against him, the district court denied summary judgment to Palmeri on the § 1983 malicious prosecution claim and the state law malicious prosecution claim. The district court found that Palmeri was not entitled to federal qualified immunity on the § 1983 claim because a reasonable jury could find that Palmeri knowingly misidentified Isom. The district court found that Palmeri was not entitled to summary judgment on the merits of the state law malicious prosecution claim for the same reason. Palmeri appealed the denial of summary judgment. Isom cross-appealed the grant of summary judgment to Bulso and Wells.

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[2] The terms "false arrest and false imprisonment" are also shorthand for describing "certain claims of unlawful seizure under the Fourth Amendment." *Williams*, 965 F.3d at 1157. "A claim of false arrest or imprisonment under the Fourth Amendment concerns seizures without legal process." *Id.* at 1158 (citing *Wallace v. Kato*, 549 U.S. 384, 388–89 (2007)).

II. JURISDICTION

We must first determine whether we have jurisdiction before we may address the merits. *Hall v. Flournoy*, 975 F.3d 1269, 1274 (11th Cir. 2020) (citing *Ex parte McCardle*, 74 U.S. 506, 514 (1869)). Because Palmeri seeks to appeal an interlocutory order denying him federal qualified immunity and only challenges the sufficiency of the evidence, we lack jurisdiction to hear his appeal at this stage of the litigation. *See Hall*, 975 F.3d at 1274. We focus first on our jurisdiction of Palmeri's appeal of the district court's denial of his claim of qualified immunity from Isom's § 1983 claim for malicious prosecution under the Fourth Amendment, but our rationale also applies to Palmeri's claim of state law immunity from Isom's state law malicious prosecution claim.

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). We "possess only that power authorized by Constitution and statute." *Id.* The Constitution provides that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. Congress has provided that the "courts of appeals . . . shall have jurisdiction of appeals

from all final decisions of the district courts of the United States." 28 U.S.C. § 1291.[3]

The Supreme Court has long given 28 U.S.C. § 1291 a "practical rather than a technical construction." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). This means that a decision can be final within the meaning of § 1291 without being "the last order possible to be made in a case." *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964). One such example are orders that fall within the collateral order doctrine. *See Mitchell v. Forsyth*, 472 U.S. 511, 524–25 (1985) (citing *Cohen*, 337 U.S. at 546). The collateral order doctrine provides that there is jurisdiction over an appeal if the order 1) "conclusively determine[s] the disputed question, [2)] resolve[s] an important issue completely separate from the merits of the action, and [3)] [is] effectively unreviewable on appeal from a final judgment." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375 (1981) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

Qualified immunity affords protection to government officials "against 'the costs of trial [and] the burdens of broad-reaching discovery,' as long as their conduct does not 'violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hall*, 975 F.3d at 1274–

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[3] Congress has also provided a statutory grant of jurisdiction over a limited number of interlocutory decisions. 28 U.S.C. § 1292. Those limited exceptions are not at issue here.

75 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982)). For qualified immunity to apply, a government official "first must show that she was acting within the scope of her discretionary authority." *Paez v. Mulvey*, 915 F.3d 1276, 1284 (11th Cir. 2019) (citing *Oliver v. Fiorino*, 586 F.3d 898, 905 (11th Cir. 2009)). Once that is established, the plaintiff must meet the following two requirements: 1) the officer "violated a federal statutory or constitutional right," *Paez*, 915 F.3d at 1284, and 2) "the violation contravened 'clearly established statutory or constitutional rights of which a reasonable person would have known'" at the time of the officer's conduct, *Hall*, 975 F.3d at 1275 (quoting *Castle v. Appalachian Tech. Coll.*, 631 F.3d 1194, 1197 (11th Cir. 2011)). The first requirement "may be a mixed question of law and fact" while the second is "purely a question of law." *Hall*, 975 F.3d at 1275.

The Supreme Court has held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291." *Mitchell*, 472 U.S. at 530. The Supreme Court later clarified the importance of the requirement that the appeal "turn[] on an issue of law." *Id.* The Court held that "a portion of a district court's summary judgment order that, though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency' . . . is not appealable." *Johnson v. Jones*, 515 U.S. 304, 313 (1995). There, the Supreme Court held that those types of evidence sufficiency issues do not meet the second prong of the collateral order doctrine because that question is not sepa-

rate from the merits of the plaintiff's underlying claim. *Id.* at 314. The Court held that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Id.* at 319–20. Our jurisdiction is not foreclosed just because "there are controverted issues of material fact." *Behrens v. Pelletier*, 516 U.S. 299, 312–13 (1996). But "jurisdictional issues arise when the *only* question before an appellate court is one of pure fact." *Hall*, 975 F.3d at 1276.

We recently held that we lacked jurisdiction over an appeal from an interlocutory order when the officer "only ask[ed] us to review the factual sufficiency of the district court's decision classifying the dispute at issue—whether the marijuana found in Hall's accessory building was planted—as genuine." *Id.* at 1277. In *Hall*, the officer "concede[d] that the planting of evidence, if true, would violate clearly established law." *Id.* And, we continued, "[o]ur precedents are, of course, also unequivocal that a law enforcement officer who plants evidence violates clearly established law." *Id.* (citing *Jones v. Cannon*, 174 F.3d 1271, 1289 (11th Cir. 1999)). Because of that, "all we [we]re left with [wa]s the factual review of what happened—was Hall's version of events right, or was Flournoy's?" *Hall*, 975 F.3d at 1277. Because we were asked only to determine whether "there was a genuine dispute of material fact over whether the marijuana was planted," we lacked jurisdiction over that appeal. *Id.* at 1279.

Hall controls our decision here, and we similarly lack jurisdiction. The district court found that a reasonable jury could find that Palmeri knowingly misidentified Isom as the suspect. On appeal, Palmeri argues that the evidence does not support the district court's finding. Palmeri challenges whether the summary judgment record supports the district court's conclusion that a reasonable jury could find that the identification was suspicious or that the identification may have been impermissibly suggestive. In an attempt to undermine the significance of his omission from his written incident report of the fact of the suspect's gold teeth, Palmeri argues that he did not know Isom at the time and did not know he did not have gold teeth; and he argues that the photographs for his identification did not show Isom's teeth. Thus, he argues that his omission of the gold teeth was not an attempt to bolster his identification, contrary to the district court's suggestion. Similarly, Palmeri also argues that the evidence shows that he saw the suspect's face, a claim the district court found disputed. Palmeri also makes arguments which attempt to explain and undermine the significance of his misleading indication to Bulso that the K-9 unit led the officers to Isom's residence. Ultimately, Palmeri argues that "[t]he record evidence here supports at best nothing more than a case of possible mistaken identity by Deputy Palmeri which would not support a constitutional violation." Palmeri's brief at 29. But these arguments all merely challenge the sufficiency of the evidence. Palmeri, then, is simply arguing that, although the district court held that a reasonable jury could find that he knowingly misidentified Isom, he, in fact, only mis-

takenly misidentified him. But "we do not have jurisdiction to entertain such appeals when the defendant's argument is merely, 'I didn't do it.'" *Bryant v. Jones*, 575 F.3d 1281, 1294 n.19 (11th Cir. 2009).

While Palmeri dresses up his argument as if he were challenging a legal question, Palmeri only really challenges the sufficiency of Isom's evidence. Specifically, Palmeri argues that the "legal question for this Court to determine is whether the law was sufficiently clearly established so as to provide fair warning to Deputy Palmeri that as of April 1, 2014 it was a violation of constitutional law for him to utilize the identification procedure that he did here." Palmeri's brief at 22. But Palmeri's restatement of the question belies the idea that he is challenging an issue of law. Palmeri's restatement puts the relevant question as follows: "whether it was a violation of constitutional law for Palmeri to identify Plaintiff Isom only from a Sheriff's office Intelligence Bulletin photograph as well as a DHSMV database photograph after seeing the man's face who fled from him during an attempted traffic stop long enough to note that he was 6'3" black male with gold teeth." *Id.* However, as indicated above in the preceding paragraph, all of Palmeri's arguments that his identification procedure was constitutional are evidence sufficiency arguments.

Moreover, another significant problem with Palmeri's "legal question" is that the district court did not hold that the identification procedure was constitutionally infirm. The district court held—based on numerous factual circumstances—that a reasona-

ble jury could find that Palmeri knowingly misidentified Isom; and the district court held that knowingly misidentifying a suspect violates clearly established law. Palmeri fails to challenge the district court's holding that such conduct does violate clearly established law. Instead, Palmeri asks us to reevaluate the evidence, agree with his reading of the facts, and then find that his was a mistaken—not an intentional—misidentification. He then argues that a mistaken identification does not violate clearly established law. Therefore, although Palmeri mimics the arguments of a legal challenge, the substance of his argument is a mere challenge to the sufficiency of the evidence.

As noted, Palmeri does not challenge the district court's holding that an intentional misidentification would violate clearly established law. Nor could he. To be clearly established, the law must be set forth in precedent by the United States Supreme Court, Eleventh Circuit, or Florida Supreme Court. *See Vinyard v. Wilson*, 311 F.3d 1340, 1351 n.22 (11th Cir. 2002). We have previously held that "the Constitution prohibits a police officer from knowingly making false statements in an arrest affidavit about the probable cause for an arrest." *Cannon*, 174 F.3d at 1285. And we have held that this extends to any officer "who provided information material to the probable cause determination." *United States v. Kirk*, 781 F.2d 1498, 1503 n.5 (11th Cir. 1986) (quoting *United States v. Leon*, 468 U.S. 897, 923 n.24 (1984)). The district court held that a reasonable jury could find that Palmeri knowingly misidentified Isom—i.e., made a knowing

false statement to establish probable cause for an arrest. Since that conduct violates clearly established law, and Palmeri fails to argue otherwise, Palmeri's argument that he is entitled to qualified immunity challenges only the sufficiency of the evidence underlying the district court's conclusion. We have no jurisdiction to review an appeal of an interlocutory order raising solely that question.

The one difference between this case and *Hall* is that Palmeri does not expressly concede that knowingly misidentifying Isom would violate clearly established law. But, as discussed above, although Palmeri does not expressly concede that knowingly misidentifying Isom violates clearly established law, the district court so held and Palmeri does not challenge that decision. Moreover, just as we found in *Hall* that our precedents were "unequivocal that a law enforcement officer who plants evidence violates clearly established law," 975 F.3d at 1277, the same is true here for knowingly misidentifying a suspect. Although Palmeri tries to couch his arguments in the language of challenging whether his conduct violated clearly established law, the substance of his argument is merely that the evidence does not support a finding that he intentionally or recklessly misidentified Isom. Thus, at this stage of the proceedings, we lack jurisdiction over Palmeri's appeal of the district court's denial of qualified immunity on Isom's § 1983 claim for malicious prosecution under the Fourth Amendment.

Palmeri also appeals the district court's denial of his defense of Florida state law immunity from the state law malicious prosecution claim. Although the district court held that Palmeri's summary judgment brief did not fairly raise state law immunity and thus declined to entertain the issue, that issue would not be immediately appealable in any event for the same reasons Palmeri's challenge to qualified immunity on the § 1983 claim is not. We, thus, lack jurisdiction over Palmeri's appeal of his state law immunity claim as well.

Finally, we dismiss the cross-appeal for lack of jurisdiction also. Because we lack jurisdiction over an interlocutory appeal from a grant of summary judgment that does not dispose of all claims of all parties, *Cottrell v. Caldwell*, 85 F.3d 1480, 1484 (11th Cir. 1996), the cross-appeal must be "inextricably intertwined" with an appealable order for us to exercise jurisdiction under the doctrine of pendent appellate jurisdiction, *Jones v. Fransen*, 857 F.3d 843, 850 (11th Cir. 2017). "Matters may be sufficiently intertwined where they 'implicate[] the same facts and the same law." *Smith v. LePage*, 834 F.3d 1285, 1292 (11th Cir. 2016) (quoting *Jackson v. Humphrey*, 776 F.3d 1232, 1239 (11th Cir. 2015)). But, because we lack jurisdiction over Palmeri's appeal, there is no appealable order with which the issues in the cross-appeal can be "inextricably intertwined." And even if there were, neither issue in the cross-appeal—the appeal against Bulso or Sheriff Wells—is inextricably intertwined with Palmeri's appeal. The claim against Bulso requires the evaluation of what information Bulso knew

when he applied for the warrant, facts that are not relevant for Palmeri's appeal. *See Paez*, 915 F.3d at 1291 (finding that "[i]ssues are not 'inextricably intertwined' with the question on appeal when 'the appealable issue can be resolved without reaching the merits of the nonappealable issues'" (quoting *In re MDL-1824 Tri-State Water Rts. Litig.*, 644 F.3d 1160, 1179 (11th Cir. 2011))). And the claim against Sheriff Wells "raises the wholly separate issue of whether [the office] had a policy, custom, or practice," an issue that need not be considered in resolving Palmeri's appeal. *Fransen*, 857 F.3d at 850. We, therefore, dismiss the cross-appeal for lack of jurisdiction.

III. CONCLUSION

For the foregoing reasons, we dismiss the appeal and cross-appeal for lack of jurisdiction.

DISMISSED.

WILLIAM PRYOR, Chief Judge, concurring:

I agree that we lack jurisdiction over the appeal and cross-appeal but write separately to express concern about one aspect of the order denying qualified immunity to Joseph Palmeri. As part of its determination that "a reasonable jury could find that the circumstances of [Palmeri's] alleged identification [of Isom] were highly suspicious," the district court faulted Palmeri for "not mak[ing] the alleged identification until after he learned that the truck belonged to Isom's mother." This timing, the district court concluded, "may have improperly predisposed [Palmeri] to identify Isom as the suspect." In support of this conclusion, the district court cited *Swanson v. Scott*, 334 F. Supp. 3d 1203, 1217 (M.D. Fla. 2018), for the proposition that "in [a] [s]ection 1983 malicious prosecution action," a court may "consider[] . . . whether [the] officer's identification procedure was 'impermissibly suggestive.'" But the district court was mistaken. The impermissibly suggestive nature of an identification is not an element of a Fourth Amendment claim and, to the extent that it is relevant, the timing hurts, not helps, Isom's case.

The "impermissibly suggestive" test has no basis in our Fourth Amendment jurisprudence. *Swanson* derived the test from a "two-step analysis" our Court has adopted for "assessing the constitutionality of a trial court's decision to admit an out-of-court identification." *See id.* at 216–17 (citing *United States v. Diaz*, 248 F.3d 1065, 1102 (11th Cir. 2001)). But the impermissibly suggestive nature of an out-of-court identification implicates "a

defendant's right to due process" under the *Fifth* and *Fourteenth* Amendments. *See Neil v. Biggers*, 409 U.S. 188, 198 (1972). We have never held that the "impermissibly suggestive" test has a role to play in determining whether an officer's identification of a suspect violated the *Fourth* Amendment. And the Supreme Court has warned against importing rules derived from the Fifth Amendment into our Fourth Amendment jurisprudence. *See, e.g.*, *United States v. Knights*, 989 F.3d 1281, 1299–1300 (11th Cir. 2021) (Rosenbaum, J., concurring in the judgment) (recounting how "the Supreme Court has . . . dismissed this and other courts' suggestions to adopt a Fourth Amendment version of the *Miranda* rule . . . [used] in the Fifth Amendment context").

The district court reasoned that evidence of an impermissibly suggestive identification "could lead a reasonable jury to conclude that Palmeri was never able to identify Isom, and that Palmeri's alleged identification was knowingly false," but the opposite is true. To recover against Palmeri, Isom must prove that Palmeri "intentionally or recklessly made misstatements or omissions necessary to support the warrant." *Williams v. Aguirre*, 965 F.3d 1147, 1165 (11th Cir. 2020). Yet, an unduly suggestive identification procedure raises due process concerns because it can cause a witness *unintentionally* to misidentify a suspect. *See Manson v. Brathwaite*, 432 U.S. 98, 111–12 (1977) (explaining that the "driving force" behind the rule against impermissibly suggestive identification methods is that "[t]he witness'[s] recollection . . . can be distorted easily by the circumstances"). So, if the district

court is correct that learning that the truck belonged to Isom's mother had an impermissibly suggestive effect on Palmeri, a reasonable jury could conclude that unintentional error—as opposed to intentional or reckless conduct by Palmeri—was the cause of the misidentification.