IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

No. 17A582

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, *et al.*,

Petitioners-Applicants,

v.

MARLOW HUMBERT,

Respondent.

SECOND APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATESCOURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice John G. Roberts, Jr., as Circuit Justice for the United States Court of Appeals for the Fourth Circuit

---

Pursuant to Rules 13.5 and 30.2 of this Court, Petitioners-Applicants Mayor and City Council of Baltimore City; Sheila Dixon, former Mayor of the City of Baltimore, in her individual capacity; the Baltimore City Police Department ("BPD"); Chris Jones, Sergeant, individually and as a BPD Officer; Caprice Smith, Detective, individually and as a BPD Officer; Dominick Griffin, Detective, individually and as a BPD Officer, by their undersigned counsel, hereby respectfully request that the time in which they must file a petition for a writ of

certiorari in this matter be extended an additional 30 days, to and including Wednesday, February 2, 2018.

Applicants' petition for a writ of certiorari will seek review of a judgment of the United States Court of Appeals for the Fourth Circuit, invoking this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Court of Appeals issued its judgment August 7, 2017, and amended that judgment August 22, 2017. A. 104. Detectives Caprice Smith and Dominick Griffith (the "Petitioner Detectives") and their supervisor, Sergeant Chris Jones ("Petitioner Sergeant")(all three collectively, "the Officers") timely filed petitions for rehearing and rehearing en banc. The Court of Appeals stayed its mandate on August 22, 2017, pending its ruling on those petitions. On September 5, 2017, the Court of Appeals denied the petitions for rehearing and for rehearing en banc. A. 133.

Your Honor granted Applicants' first application for a 30 day extension of time, so that their petition for a writ of certiorari is now due January 3, 2018, when it was formerly due December 4, 2017. Applicants file this application at least ten days before January 3, 2018. S. Ct. R. 13.5. Applicants have now retained outside counsel experienced in Supreme Court litigation to assist with the preparation of the petition, and he needs time to become familiar with the case.

BACKGROUND

In 2008, the BPD arrested respondent for a rape based on the identification of respondent by the victim. When the victim later told the prosecution that she could not identify respondent as her attacker, the State entered a plea of *nolle*

prosequi. Respondent spent some fifteen months in jail before the State dismissed the charges against him.

Respondent then sued petitioners and former Commissioner of the BPD Bealefeld (who is not a petitioner in this case) in the United States District Court for the District of Maryland for malicious prosecution under 42 U.S.C. § 1983 and the constitution and common law of Maryland.[1] The jury returned a verdict in respondent's favor, awarding him $2.3 million, $1.5 million of which constituted punitive damages. The District Court set aside the verdict, finding that based on the facts as found by the jury in answering special interrogatories, and drawing all reasonable inferences in favor of respondent, the officers had probable cause to arrest respondent and therefore were entitled to qualified immunity, and that respondent had also therefore failed to make out his state law claims. *Humbert v. Jones,* No. WDQ-11-0440, 2015 WL 4042327 (June 22, 2015 D. Md.), A. 55-103.[2]

A unanimous panel of the Court of Appeals reversed. *Humbert v. Mayor and City Council of Baltimore,* 866 F.3d 546 (CA4 2017), A. 104-132. It held that the Petitioner Detectives and the Petitioner Sergeant did not have probable cause when they arrested Respondent Marlow Humbert for the rape, and that the jury thus had properly held them liable under 42 U.S.C. § 1983 and Maryland law for malicious prosecution. It also concluded that no reasonable officer in their position could have believed that probable cause existed, so that the Officers were not

[1] The District Court stayed all proceedings as to Petitioners Mayor and City Council, the BPD, and former Mayor Dixon, as well as to Bealefeld, until it resolved the claims against the three officers. *Humbert v. Mayor and City Council of Baltimore,* 866 F.3d 546, 553 n. 3 (CA4 2017), A. 112.

entitled to qualified immunity. *Id.,* at 551 & 562. The Court of Appeals accordingly reinstated the jury verdict against the Petitioner Detectives and Petitioner Sergeant and remanded the case for further proceedings consistent with its opinion. A. 132.[2]

This case raises issues similar to those currently before the Court in *District of Columbia v. Wesb*y, No. 15-1485, argued before this Court on October 4, 2017. *Wesby* presents the question whether the officers who arrested the respondent in that case had a reasonable belief that they possessed probable cause to arrest respondent in a situation where those officers knew facts weighing both for and against probable cause. Here, too, when the Officers arrested Respondent Humbert, they possessed facts that strongly implicated Mr. Humbert as the rapist, and some facts that tended to negate his involvement. As in *Wesby*, the Court of Appeals in this case applied a probable cause standard that in effect negated the facts known to the Officers supporting probable cause, while giving controlling weight to facts pointing in the other direction. In addition, the Court of Appeals attributed the knowledge of each individual Officer to all three of them collectively, even though the evidence showed that the Officers did not all have knowledge of the same facts that tended to negate probable cause. As in *Wesby*, the Court of Appeals decision in this case contravenes this Court's precedents on qualified immunity. *E.g.,* White *v. Pauly*, __U.S.__, 137 S. Ct. 548 (2017).

This case presents another example where the Court of Appeals of the Fourth Circuit "continues the shift that began in *Henry v. Purnell,* 652 F.3d 524 (CA4 2011)(en

[2] After resolving the claims against the Petitioner Detectives and Petitioner Sergeant, the District Court granted the motion of the other Petitioners for judgment as a matter of law, finding that respondent's claims against those Petitioners could not survive "because the Officers did not commit a constitutional violation," and that as to a remaining state-law claim against Bealefeld, it would decline to exercise supplemental jurisdiction. *Humbert, supra,* 866 F.3d, at 554 & 554 n. 6, A. 115. *See* n. 1, above

banc), where judge[s] engage[] in post hoc evaluation of police conduct. . . [and] imagine some alternative means by which the objectives of the police might have been accomplished." *Hensley v. Price,* No. 16-1294 (Nov. 17, 2017), slip op at 24 (Shedd, J., dissenting)(*quoting United States v. Sharpe,* 470 U.S. 675, 686-687 (1985)).

1. Probable Cause

Each of the Petitioner Detectives and the Petitioner Sergeant in this case separately weighed the evidence both supporting and discrediting probable cause to arrest Mr. Humbert, and concluded that on balance, sufficient evidence to apply for an arrest warrant existed. Given the facts that each of the Officers separately knew at that time, a reasonable officer would have believed he had probable cause to arrest Respondent Humbert.

On April 30, 2008, a young female graduate student at the Maryland Institute, College of Art in Baltimore City, Maryland, was returning to her apartment when a man followed her through the doorway. She said hello to the man, and got a clear look at his face while he stood in the building entranceway. The man then put on a mask, pulled out a gun, and forced the woman into her apartment. He raped her. In addition to the mask, the man wore gloves and a condom. After the man left, the victim called her neighbors, who in turn called the BPD. The BPD assigned the investigation to Petitioner Detectives Griffin and Smith, and assigned Petitioner Sergeant Jones to supervise and assist them.

Immediately after the attack, the victim described her attacker to the Officers as standing 5'7" to 5'9", of medium build, an African-American male, and in his late 30s to early 40s. The victim testified that Petitioner Sergeant Jones asked her

repeatedly whether her attacker was homeless. *Id.,* at 551, A. 108. It was undisputed that Humbert was homeless at the time.

The victim was an accomplished portrait artist, and had seen her attacker's face before he put on the mask. Later on the evening of the attack, she drew a sketch of her attacker's face. Because BPD regulations required a BPD sketch artist to make the official composite sketch, the next day Petitioner Detective Griffin took the victim to a police sketch artist to assist that artist in creating the composite. The BPD artist created a sketch from the victim's description. The victim, as she said at trial, was unhappy with the sketch the BPD artist made, finding it too "generic," *Humbert v. Jones,* No. WDQ-11-0440, 2015 WL 4042327, at *1 (June 22, 2015 D. Md.), A. 57, and "so she worked with [the sketch artist] to redraw parts of it so that it looked as close to her attacker as possible," *ibid.,* in particular by "drawing the nose," *id.,* at *1 n. 8, A. 58, which she said was "one of her attacker's distinctive features." *Id.,* at *18, A. 58. "The Victim testified that she had been satisfied with the composite sketch" once she had made it more accurate. *Id.,* at *1, A. 58.

The BPD reproduced the composite sketch on fliers and distributed them in the area near the victim's home. The victim said that she "recognized" the "composite sketch that appeared on the wanted flyer" as the one she had helped draw and had approved as accurate. *Ibid.* The BPD distributed the flyer with the composite and the victim's verbal description of her attacker to the BPD and in the area near the victim's home. Eight days after the attack, another BPD officer, who was never a party to this case, stopped Respondent Humbert on a street near the victim's home. He did so because respondent matched the composite sketch

and the victim's description of her rapist. The officer showed respondent the composite drawing, and took respondent's photograph.

This photograph was placed in a photo array book, which also contained the photographs of sex offenders recently released from custody and of other persons. Petitioner Detectives Smith and Griffin showed the photo array book to the victim on May 9. The Officers had previously showed the victim two other groups of photos of potential suspects, one a six pack and the second a photo array book. When viewing this third photo array, as soon as she saw the photograph of respondent in the book, the victim made an emotional and emphatic identification of respondent as her attacker. She exclaimed, "That's him," pushed the book out of her sight, and began crying. Petitioner Detective Smith asked her to finish reviewing the entire book, and after she had done so, she returned to the photograph of respondent and wrote "that's him" on the back and signed her name. *Humbert,* 866 F.3d at 551, A.109. The victim then told Petitioner Detectives Smith and Griffin that she wanted to see respondent in a line up and to hear respondent's voice to be positive of her identification. *Ibid.*

Petitioner Detectives Smith and Griffin informed Petitioner Sergeant Jones of the victim's emotional identification of Humbert, but there was no evidence that they ever informed him of her request for a line-up. Insofar as it relates to Petitioner Sergeant Jones, the testimony at trial was that only ***after*** respondent had been arrested did the victim also tell Petitioner Sergeant Jones that she wished to see respondent in a line-up so as to be sure of her identification.

Later on that same day, May 9, Petitioner Detective Smith swore out an arrest warrant application for Humbert's arrest, to which Petitioner Detective Griffin gave input. Petitioner Sergeant Jones reviewed and approved the warrant application. Thus, the evidence in this case establishes (when viewed most favorably for respondent) that when Petitioner Detective Smith swore out the arrest warrant with input from Griffin, and Petitioner Sergeant Jones reviewed and approved it, they knew the following: that the victim was an art student; that the victim had observed her attacker's face; that the victim had given Petitioner Detectives Smith and Griffin a description of the face and physical characteristics of her attacker, and drawn a sketch of him, on the day of the attack; that the next day, the victim helped the BPD artists draw the composite sketch of her attacker, had altered the sketch to make it less generic and more like her attacker, especially as regards the distinctive characteristic of the attacker's nose, and had then approved that sketch as accurate; that BPD had circulated among its officers the sketch as well as the victim's verbal description of her attacker; that respondent "closely matched" the victim's description of her attacker as "a 5/7', African-American male in his late 30s to early 40s who was fairly well-spoken," 866 F.3d, at 559, A. 108; that eight days after the attack, a BPD officer armed with the composite sketch and the verbal description the victim had provided of her attacker stopped respondent on the street because respondent so closely resembled that sketch and description; that the BPD officer stopped respondent within a few blocks of the victim's home and that when stopped the respondent was wearing a woman's stocking on his head; that when shown in a photograph array the photograph that the BPD officer had

taken of respondent on the street, the victim immediately and emphatically identified respondent as her attacker, and then wrote "that's him" and signed her name on the back of respondent's photograph; and that the victim had reacted emotionally to seeing respondent's photograph, crying and pushing the photo array away, as she repeatedly said, "that's him."

Petitioner Detectives Smith and Griffin also knew that, after the victim had emphatically and emotionally identified the photograph of respondent as her attacker, she had said that she wanted to see respondent in a physical lineup and hear his voice to be sure of the identification. Petitioner Detectives Smith and Griffin knew that BPD procedure did not call for such a physical lineup before arrest, because taking a person into custody for such a lineup itself required probable cause to arrest and BPD did not have any facilities to conduct such lineups. In addition, they knew that voice identification was inherently unreliable.

When Petitioner Sergeant Jones approved the arrest warrant, he knew all of the above, except he did *not* know that the victim had told Petitioner Detectives Smith and Griffin that she wanted to see respondent in a physical lineup and hear his voice to be sure of her identification. Only after the arrest of respondent did the victim tell Petitioner Sergeant Jones that she wanted to see the respondent in a physical lineup and to hear his voice so as to be able to be sure of her identification. The victim testified that Petitioner Sergeant Jones showed her a photo of a man at some point, perhaps while she was working on the composite sketch, and told her

that he was her attacker. There was no evidence that Detective Petitioners knew that Sergeant Jones had done this.

There was no evidence that the Petitioner Detectives or the Petitioner Sergeant knew, as Humbert later testified at his civil damages trial, that the BPD officer stopped and photographed Humbert near the homeless shelter where he was staying at the time, only a couple of miles away from where his family members lived. *Humbert,* 866 F.3d at 559, A. 125.

Based upon all this, the Officers believed they had probable cause to arrest respondent. The Court of Appeals held otherwise.

2. The Court of Appeals Decision

The Court of Appeals based its reversal on two findings of fact that it made. First, taking the evidence in the light most favorable to respondent, it found that the evidence showed that Petitioner Sergeant Jones had improperly influenced the victim's identification of the respondent. It said that the evidence showed he had done so by repeatedly asking "the victim multiple times whether her assailant was homeless, and it is undisputed that Humbert was homeless at the time he was stopped," 866 F.3d at 560, A. 127; and by showing the victim a photograph of respondent and identifying him as her attacker, "a day after the assault occurred, either during ***or after*** she completed the composite sketch and only a few days before she saw his photo in the photobook." *Ibid.* (emphasis added). Based on these findings, the Court of Appeals concluded that "the ***Officers*** improperly influenced the investigation from its inception," *ibid.* (emphasis added), thereby

rendering the warrant invalid and requiring a finding that the Officers lacked probable cause to arrest respondent.

Second, the Court of Appeals concluded that the evidence showed that the Officers withheld from the prosecution a report showing that DNA obtained from the victim shortly after the attack did not match respondent's DNA, and that they did so because the victim had said she would not testify against respondent unless there existed DNA evidence implicating him in the attack. These facts, the court said, meant that the "criminal proceedings and pretrial detention also violated [respondent's] Fourth Amendment rights." *Id.* at 561, A. 129.

Based on these findings, the Court of Appeals further concluded that the Officers "had no reasonable basis to believe probable cause existed to seek the warrant or initiate criminal proceedings against Humbert," because no "reasonable officer could have believed that the Fourth Amendment permitted Jones's conduct" in showing her the photograph and telling her it was her assailant. *Id.* at 562, A. 131. Therefore, the court said, none of the three Officers was entitled to qualified immunity.

In making these findings, the Court of Appeals relied on several questionable characterizations of the record. First, it said that Petitioner Sergeant Jones had repeatedly asked the victim if her attacker had been homeless, and added that respondent was homeless at the time. But the Court of Appeals never referred to any evidence that Petitioner Sergeant Jones or anyone else told the victim her attacker was homeless. The only evidence on this point is that the Sergeant

questioned whether she thought he was. This point does not support the Court of Appeals' conclusions.

Second, the court placed reliance on the victim's testimony that when shown the photograph of respondent in the photobook, she had reacted "emotionally to seeing Humbert's photo because his photo looked like the one Jones showed her the day after her attack and Jones indicated that he was her assailant." *Id.* at 551; A. 131. But the Court of Appeals never addressed the fact, as the District Court had concluded, that there exists "no evidence that the Victim communicated the apparent partial source of her distress to Smith or Griffin." A. 88-89. Despite this, the Court of Appeals repeatedly taxed both Petitioner Detectives with knowledge that the victim had reacted to the photo of respondent, and identified him as her assailant, in part because Petitioner Sergeant Jones had shown her a photograph identified as her assailant. If those Petitioner Detectives did not know that Sergeant Jones had shown her the photograph of someone and told her the man in the photograph was her attacker, their probable cause determination cannot be undermined by him having done so.

Third, the Court of Appeals did not properly consider the victim's testimony regarding when Petitioner Sergeant Jones supposedly showed her the photograph. The victim gave conflicting testimony on this point, saying he did so during the drawing of the sketch, then saying he did it after the sketch was complete, finally ending up by testifying that she could not say when the Sergeant had done so. A. Because she was unsure, the District Court found that no basis existed in the evidence to "infer that Jones showed her the picture before the sketch had been

completed." A. 82 n.46. The timing here is important: if Sergeant Jones did not show her the photograph until after the sketch had been completed, the photograph could not have tainted the sketch. So, too, the photograph could not possibly have contaminated her verbal description of the attacker, or the sketch she drew, because she gave that description and drew that sketch the day before anyone showed her any photographs. This factor does not bear the weight the Court of Appeals ascribes to it.

Worse, the Court of Appeals seems to have misapprehended Petitioner Sergeant Jones's testimony about allegedly showing the victim a photograph. The Court of Appeals noted that Petitioner Sergeant Jones had "testified that he did not show 'anybody a photo of anything,'" 866 F.3d at 551, A. 108 (quoting J.A. 622 (trial testimony)), but went on to conclude that Jones had "later stated that if he had shown her a photo, 'it would have been to tell her what features to have drawn on the composite.'" *Ibid.* (quoting J.A. 654 (trial testimony)). No reading of Petitioner Sergeant Jones's testimony can support the Court of Appeals' characterization of it in this regard. Indeed, Petitioner Sergeant Jones testified precisely the opposite: he said he never showed her a photograph, and would not have done so, because doing so would have been tantamount "to tell[ing] her what features to draw on the composite," *ibid.* (quoting J.A. 654 (trial testimony)), and that was exactly what he was trying to avoid. Here is the excerpt from his testimony on this point, putting in context the language upon which the Court of Appeals relied:

"REDIRECT EXAMINATION:

"Q. Okay. And, when you were being asked about the book of 45 photos, you started to say the key thing about the photos is, and then counsel stopped you. Do you remember – do you remember that?

"A. Yes.

"Q. Would you finish that answer.

"A. Ultimately your goal is not to be overly prejudicial, or really prejudicial in any way, so you wouldn't want to show a single photo and say, 'Is this the guy?' The average person would think that's who you want them to pick.

* * *

"[U]ltimately the goal is not to prejudice the person. It's to show them something so they have no idea – I'm sorry – it's to show them something so they have no idea who you're looking for them to identify." A. 176A-176B.

* * *

"RECROSS EXAMINATION:

"Q. I believe you stated a few minutes ago that you don't want to show someone just one guy, because then you'll know that someone wants [*sic*] to select them, correct?

"A. Correct.

"Q. And isn't that exactly what Ms. Doe testified that you did –showed her the picture of one guy?

"A. That's what she said.

"Q. And the probable effect of that, based on your testimony, is that she would know who you wanted her to select; is that correct?

"A. Say that again.

"Q. The probable effect of you showing her one person's photo would be that she knew who you wanted her to select; is that correct?
"A. The probable effect of that – "

"Q. Yes or no?

"A. No, I don't agree with that. I'm trying to explain to you why I don't agree with it. No, I don't agree with that.

"Q. Is that not what you just testified to?

"A. Can I give you more than a 'yes' or 'no' answer?

"THE COURT: If you need to.

"THE WITNESS: So, Your Honor, if -- if that, in fact, was true, it would have been telling her the features that she should describe to the sketch artist. Is that the same thing that you're saying? It wouldn't have been telling her who to pick out. It would been telling her– she was there to do a composite. So it would have been to tell her what features to have drawn on the composite.

"BY [PLAINTIFF'S COUNSEL]:

"Q. It doesn't – does it matter, Detective, whether or not you were trying to signal to her what to draw on the composite, or what to select, or who to select if you did show her a photograph?

"[COUNSEL FOR DEFENDANTS]: Objection.

"THE WITNESS: I didn't.

"[COUNSEL FOR DEFENDANTS]: He didn't. Okay.

"BY [PLAINTIFF'S COUNSEL]:

"Q. If you showed her a photograph, is it your testimony that it wouldn't have contaminated her moving forward?

"[COUNSEL FOR DEFENDANTS]: Objection.

"THE COURT: Sustained." A. 179

Petitioner Sergeant Jones testified that he did not show the victim any photograph, never conceded that he might have done so, and certainly never said that if he had done so, "it would have been to tell her what features to have drawn on the composite," as the Court of Appeals said he did.

In the same way, the Court of Appeals misapprehended the evidence regarding DNA. As noted, the Court of Appeals found that the Officers withheld the lab

reports concluding that the DNA from the victim's kit did not match respondent's DNA. 866 F.3d at 561, A. 128. But the uncontroverted evidence at trial shows that at respondent's arraignment on June 23, 2008, the prosecutor in open court informed the court that he had already learned that the DNA test did not show a match to respondent's DNA, though he added that he had to confirm that result. A. 162 (arraignment transcript). In addition, the Petitioner Detectives testified that prosecutors generally obtain DNA reports directly from the state crime lab, and that their general practice was to provide any reports they obtained to the prosecutor. Thus, the evidence showed the prosecutor knew of the DNA results and was able to get access to them, if he in fact had not in the course of routine proceedings already done so, less than two months into Humbert's detention.

Second, after Humbert was arrested, Petitioner Sergeant Jones truthfully told the victim there was DNA evidence against respondent. During their ongoing investigation of a serial rapist in the Charles Village area, the police had recovered DNA matching respondent on a condom wrapper found outside the residence of a woman raped a month before the attack in this case. A.163-64. Counsel for the Officers sought to get this into evidence at the trial below, but it was deemed inadmissible. *See* A. 171. The issue had also been raised in the Petitioner Detectives' Motion for Summary Judgment. The District Court ruled:

> Another victim—who had been raped on March 30, 2008 on Bolton Street in Baltimore [near Charles Village]—had told officers that her attacker used a Trojan Magnum condom in a gold foil wrapper during the rape. . . . On March 31, 2008, [police] discovered a condom wrapper matching that description near [that] victim's home, and she confirmed that it was the same type her attacker had used. . . . On May 14, 2008,

> she viewed Humbert's picture in a photo array and said he looked 30%-80% like her attacker. . . . In a report dated June 10, 2008, Humbert's DNA was identified on the condom wrapper, along with the DNA of two other unknown individuals. A. 26 n.34.

Thus, when Petitioner Sergeant Jones assured the victim there was DNA evidence against respondent, his statement was accurate. It was not a clearly-established legal rule that this evidence would be excluded from the Humbert civil damages trial or that he violated Humbert's rights in telling the victim about it; instead, the issue required briefing at summary judgment and argument again at trial before the District Court excluded the DNA evidence linking respondent to other rapes in the same area of the city, subject to plaintiff's counsel opening the door through evidence he might elicit at the trial. Police officers are not required to predict how a court might rule on complex and unpredictable evidentiary issues at trial.

3. Issues For Review In This Court

The Court of Appeals decision thus misapprehended the record evidence in important ways that raise serious doubt as to its ruling on probable cause.

First is the issue raised by *Wesby,* that is, whether apart from evidence contradicting a conclusion of probable cause, the officers nevertheless had sufficient evidence that it was reasonable for them to have concluded that they had probable cause to arrest respondent. Second, the Court of Appeals incorrectly attributed what one of the Officers knew to all the other Officers, even though there existed no evidence those other Officers in fact had that knowledge. Thus, though no evidence showed that Petitioner Detectives Griffin or Smith had

any idea that Jones had shown any photographs to the victim, or that he had identified anyone as the attacker, the Court of Appeals denied them qualified immunity on the ground that they in fact possessed such knowledge. So, too, the court attributed to all three Officers knowledge of the victim's statement that she reacted so strongly to the photo of respondent in the photobook because Jones had previously shown her the photograph, even though there is no evidence she told anyone that was the reason, and no evidence that the Officers knew anything about her feeling in this regard.

This Court has held that each officer's entitlement to qualified immunity must be analyzed based only upon the facts known to him or her. *White*, 137 S. Ct. at 550 ("Because this case concerns the defense of qualified immunity, however, the Court considers only the facts that were knowable to the defendant officers." (Citation omitted.). There was no evidence that either Smith or Griffin knew that Jones allegedly showed the victim a single photo.

Likewise, there was no evidence that prior to Humbert's arrest, Jones had any knowledge that the victim had qualified her photo identification by stating that she wanted to see Humbert in a line up. To reverse the District Court's grant of qualified immunity and reinstate the jury's malicious prosecution verdict, the Court of Appeals attributed to Petitioner Sergeant Jones knowledge that (according to the evidence) only Petitioner Detectives Smith and Griffin had.

The Court of Appeals held that the Petitioner Detectives and Petitioner Sergeant Jones caused legal process to be "instituted and maintained" without probable cause because they failed to disclose the negative DNA report and

assured the victim there was DNA implicating Humbert. *Humbert,* 866 F.3d at 561. The evidence showed that only Petitioner Sergeant Jones assured the victim there was DNA evidence (which was an accurate statement), and there was no evidence the Petitioner Detectives knew Jones told her that. In addition, the evidence showed that as far the Petitioner Detectives and Petitioner Sergeant Jones knew the normal business process was for the prosecutor to obtain the lab report directly from the state crime laboratory.

The decision of the Court of Appeals in this case cannot be squared with the record evidence, and conflicts with the many decisions of this Court holding that officers are entitled to qualified immunity unless each officer is himself "plainly incompetent" or "knowingly violate[s] the law." *Mullenix v. Luna,* —— U.S. ——, 136 S. Ct. 305, 308 (2015)(citations omitted). The officer's "*particular* conduct" and the "specific context" must be examined, and immunity may be denied only when the constitutional right is so clearly defined that "every reasonable officer would have understood that what he is doing violates that right." *Ibid.* The panel decision in this case failed to meet this standard, because even on the facts viewed most favorably to respondent, the Petitioner Detectives and Petitioner Sergeant reasonably believed they had probable cause to institute the prosecution of respondent.

REASONS FOR GRANTING A SECOND EXTENSION OF TIME

Applicants respectfully request that the time in which they must file a petition for a writ of certiorari be extended for an additional thirty days, for the following reasons:

1. As described above, this case presents complicated issues of importance warranting a carefully-drafted petition for a writ of certiorari.

2. Good reasons exist for this Court carefully to consider whether to grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit in this case, given that the panel opinion departed from this Court's precedents in important ways.

3. Counsel of Record, and the City Solicitor's Office generally, is currently stretched thin with limited resources. We act as general counsel to the BPD, which is currently in the beginning stages of implementing a wide-ranging United States Department of Justice consent decree for police reform. We must contend with high rates of violent crime. We also act as general counsel to the Mayor and City Council of Baltimore and all City agencies.

4. The City Solicitor's Office has now retained William Alden McDaniel, Jr. of Ballard Spahr LLP as associate counsel. Mr. McDaniel is an experienced litigator who has handled matters in this Court. He will assist in the preparation of the Petition for a Writ of Certiorari and he will need time to get up to speed on this matter.

5. If no extension is granted, that petition would be due in less than a month, which is insufficient time.

6. Granting this motion will not unnecessarily of unduly delay this action or prejudice any party.

Respectfully submitted,

ANDRE M. DAVIS
City Solicitor

/s/ Suzanne Sangree
Senior Public Safety Counsel
Counsel of Record
Dan Beck, Chief of Police Legal Affairs
Kara Lynch, Assistant City Solicitor
Baltimore City Solicitor's Office
City Hall, Room 109
100 N. Holliday Street
Baltimore, MD 21202
443-388-2190

Counsel for Petitioners/Applicants

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2017, I served the foregoing Second Application for an Extension of time within Which to File A Petition for Writ of Certiorari To The United States Court of Appeals For the Fourth Circuit, upon the following parties by UPS Ground Transportation, postage prepaid at the following address:

Charles Edwards
Law Office of Barry Glazer
1010 Light Street
Baltimore MD 21230
410-547-8568
Counsel to Respondent Marlow Humbert

/s/ *Suzanne Sangree*
Suzanne Sangree

APPENDIX

TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND, NORTHERN DIVISION

MARLOW HUMBERT,	*	
Plaintiff,	*	
v.		CIVIL NO.: WDQ-11-0440
MARTIN O'MALLEY, *et al.*,	*	
Defendants.	*	

* * * * * * * * * * * * *

MEMORANDUM OPINION

Marlow Humbert sued several police officers and others[1] for constitutional violations under 42 U.S.C. § 1983 and state law claims. ECF No. 1. Pending are five police officers' motions for summary judgment and to strike Humbert's response in opposition. ECF Nos. 74, 120. No hearing is necessary. Local Rule 105.6 (D. Md. 2011). For the following reasons, the motion

[1] Humbert sued: (1) Baltimore City police officers Chris Jones, Keith Merryman, Caprice Smith, Dominick Griffin, and Michael Brassell, in their individual and official capacities (together, the "police defendants"); (2) Martin O'Malley, individually and in his official capacity as Governor of the State of Maryland and former Mayor of the city of Baltimore; (3) the Mayor and City Council of Baltimore City; (4) Sheila Dixon, the former Mayor of Baltimore City, individually; (5) the Baltimore City Police Department (the "Police Department"); (6) Frederick Bealefeld, individually and in his official capacity as Police Commissioner of the Police Department; (7) Cinese Caldwell, individually and in her official capacity as a Baltimore City laboratory technician and police officer; and (8) Baltimore City police officers John and Jane Does 1-20s and Baltimore City police supervisors Richard and Jane Roes 1-20s, in their individual and official capacities. ECF No. 1 at 8-14.

for summary judgment will be granted in part and denied in part, and the motion to strike will be denied.

I. Background[2]

A. Report and Investigation of Rape

On April 29 or 30, 2008,[3] a woman[4] told police that she had been raped at her home in Baltimore's Charles Village neighborhood.[5] *See* ECF No. 74-2 at 3; Pl. Exs. A at 1, E at 17, I. She was interviewed by Sergeant Jones and Detective Griffin shortly thereafter. *See* ECF No. 74-2 at 3. The Victim reported that, while walking home from the store, she had observed a man standing on a porch near her home. *See id.* She walked past the man, opened her front door, turned around, and discovered that he had followed her into her apartment. *See id.* The man put on a white face mask and black gloves and placed a black handgun to

---

[2] The facts are taken from the police defendants' motion for summary judgment, ECF No. 74, Humbert's opposition, ECF No. 121, the police defendants' reply, ECF No. 136, and their supporting exhibits. In reviewing a motion for summary judgment, the nonmovant's evidence "is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

[3] The record lists both dates in various places. *See, e.g.*, ECF No. 74-2 at 3; Pl. Ex. A at 1.

[4] Although the woman is referred to by name in the parties' submissions, because she is not a party to the lawsuit the Court will refer to her as the "Victim."

[5] This was one of a series of sexual assaults in the Charles Village area during the spring of 2008. *See* Pl. Exs. D at 23, F at 19-20.

her head. *See id.* He demanded money, but she told him she had no money. *See id.* The man then pushed her onto a nearby couch and raped her. *See id.* He told her that he had a condom on, but she did not remember him stopping to put on the condom. *See id.* He then ordered her to go into the basement and took her cell phone. *See id.* However, when she told him she had a young son and needed the phone to call someone to pick him up, the man apologized and left the phone in the home. *See id.* He then left through the front door. *See id.*

The Victim described her assailant as a fairly well-spoken black man in his early to mid-30s, five-foot-seven to five-foot-nine inches tall,[6] and wearing a blue T-shirt with a pink logo and tennis shoes.[7] *See id.* After taking her statement, Detective Griffin accompanied the Victim to the hospital for a medical examination. *See* ECF No. 74-2 at 4; Pl. Ex. E at 18. A

---

[6] Humbert is five-foot-five inches tall and has noticeable cosmetic problems with his teeth. ECF No. 136-10 at 16; *see* Pl. Ex. C at 47-48.

[7] In a declaration dated January 24, 2013, the Victim avers that her description "[c]learly" did not describe Humbert. Pl. Ex. A at 1, 3. She also states that officers "insisted" repeatedly that the man who raped her was homeless, but she "insisted" in return that she "knew nothing about the life circumstances of the man who raped [her]." *Id.* at 1. Detective Griffin testified that he did not remember suggesting to her that her assailant might be homeless. Pl. Ex. E at 18. Detective Smith said only that one of the leads given to her to investigate was a homeless man. Pl. Ex. D at 27. Humbert was homeless when the rape occurred. ECF No. 136-10 at 10-11.

laboratory technician searched the Victim's home for physical evidence, but none was recovered. Pl. Ex. K.

Over the next few days, officers interviewed the Victim's neighbors but were unable to locate any witnesses to the crime. *See* ECF No. 74-2 at 4-5. They reviewed surveillance footage from exterior cameras on a school located across the street from the Victim's home. *See id.* at 3, 5. Although the cameras captured the Victim walking down the street on the night of the rape, no other "persons of interest were observed prior to seeing the victim or after the incident." *See id.* at 5. Also, the porch on which the Victim saw the man initially was not visible on the video, and the video moved so that parts of the surveillance area were not shown for minutes at a time. *See id.* at 3, 5; Pl. Ex. C at 32.

After the attack, the Victim--a trained artist--completed a sketch of her attacker. Pl. Ex. A at 1. The Victim declares that officers told her "they were unsatisfied with the subject matter," and she had to complete a composite with a police sketch artist.[8] *Id.* Detectives Smith and Brassell and Sergeant Jones testified that the Police Department would not allow victims to create sketches in lieu of creation of a composite by

[8] Detectives Smith and Griffin testified that they were unaware that the Victim had created her own sketch. Pl. Exs. D at 34, E at 19-20.

a police sketch artist. *See* Pl. Exs. C at 66-69, D at 34, G at 11.

On May 1, 2008, Detective Griffin and Sergeant Jones took the Victim to meet with Detective Brassell, a sketch artist.[9] ECF No. 74-2 at 5. Detective Brassell completed a composite sketch that was reproduced on flyers which were distributed in the area around the Victim's home. *See id.* The Victim declares that "the features of [her] assailant from [her] sketch" and her "communications with the sketch artist were not incorporated into the composite sketch." Pl. Ex. A at 1. However, Detective Brassell noted that all sketches are graded by the witness from one to 10, and only sketches graded seven and above are used to identify suspects. *See* ECF No. 136-8 at 18-22.

On May 5, 2008, Detective Smith met with the Victim and showed her 45 photos of registered sex offenders. *See* ECF No. 74-2 at 6; Pl. Ex. D at 37-40 & #4.[10] After reviewing the book of photos, the Victim stated that two of the photos resembled

---

[9] Detective Brassell testified that, if a victim produced a sketch of her attacker, he would not see the sketch because it would "defeat[] the purpose of [his] drawing." Pl. Ex. G at 12. Further, the composite that he produced would be under the "total control" of the witness--the officers on the case would not contribute any feedback on the drawing. *Id.* at 14-16. He also noted that only "[v]ery rarely" would the detectives on the case follow up with him on whether the drawing produced any leads. *Id.* at 13.

[10] Documents identified by "#" indicate an exhibit to a deposition.

her attacker but did not identify either of them as her attacker. *See* ECF No. 74-2 at 6; Pl. Ex. D at #4, #5. She declares that she told the officers that she needed to see suspects in person and hear their voices to identify her attacker. Pl. Ex. A at 2.

On May 7, 2008, a police officer[11] stopped Humbert on the street near the Victim's home and photographed him. *See* ECF No. 136-10 at 31; Pl. Exs. C at 42, D at #6. After the stop, the officer placed Humbert "on a list of potential suspects due to the similarities between [his] likeness and the composite." *See* ECF No. 74-5 at 7.

On May 8, 2008, Detectives Smith and Griffin showed the Victim an array of photos[12] which included "photos of men who had been arrested in the area for other offenses[,] those identified from leads from the composite flyer," and Humbert's photo.[13] ECF Nos. 74-2 at 9, 74-5 at 7. The Victim wrote on Humbert's photo "that's him," *see* ECF No. 136-7 at 1-2, but her reaction to Humbert's photo is otherwise disputed. The investigative notes, and the testimony of Smith and Griffin, maintain that the Victim

---

[11] This officer is not a named defendant. *See* ECF No. 74-5 at 7.

[12] When Humbert's counsel asked Detective Smith if she used a "mug book of sorts" to show the Victim the photos, she responded "I think you're using jargon." Pl. Ex. D at 43.

[13] The Victim declares that neither of the photo arrays she was shown displayed skin tone, which prevented her from making a positive identification. Pl. Ex. A at 2.

saw Humbert's photo, pointed at it, and said "that's him." *See* ECF No. 74-2 at 9; Pl. Exs. D at 48 & #6, E at 24. The notes and Detective Griffin also state that the Victim became emotional when she saw the photo, but the officers encouraged her to review the rest of the photographs, and the Victim again affirmed that the pictured man was her attacker. *See* ECF No. 74-2 at 9; Pl. Ex. E at 34-35. However, the Victim declares that she saw Humbert's photo, said that "might" be him, and told the officers that she wanted to see "all the people who might have been my attacker in person and to hear their voices." Pl. Ex. A at 2. She declares that she was "made to sign something, and despite my protests, was assured that it was just procedure." *Id.* She also declares that the officers told her that no arrests would be made until she saw the suspects in person and heard their voices. *Id.* Detectives Smith and Griffin testified that they did not remember the Victim requesting to see the suspect in person or to hear his voice.[14] Pl. Exs. D at 44, E at 24.

[14] Detective Smith also testified that, even if the Victim requested a physical line-up, she did not believe that she could "facilitate that request" because she had never seen a physical line-up done at the Police Department. Pl. Ex. D at 45. Sergeant Jones confirmed that he had never seen the Police Department conduct physical line-ups. *See* ECF No. 136-6 at 31, 40.

B. Humbert's Arrest

On May 9, 2008, Detective Smith applied for an arrest warrant for Humbert.[15] ECF No. 74-4 at 4-5. The warrant application summarized the Victim's description of the rape and noted that, during the investigation, "the victim completed a sketch of the suspect [that] was disseminated throughout the community." *Id.* at 5. The application then stated that the sketch resulted in "[s]everal leads . . . one of which [led] to Marlow Humbert." *Id.* His photograph was then shown to the Victim, "along with several other similar photographs, when the victim positively identified him as her attacker."[16] *Id.* Based on this application, a judge issued a warrant for Humbert's arrest. Pl. Ex. Q.

---

[15] Detective Smith testified that she wrote the warrant application herself, but Sergeant Jones--her supervisor--and Detective Griffin--her partner--would have relayed to her some of the information that she included in the application. Pl. Ex. D at 53-54. They also likely would have discussed "whether or not there was a positive identification." *Id.* at 52. However, Detective Smith stated that there was no indication on the warrant that a supervisor had reviewed the warrant application. *Id.*

[16] Detective Smith testified that, if the Victim had requested to see a physical and voice line-up, she still would have considered the Victim's selection of the photo as reflected in the investigative notes (stating "that's him and pointing at it) a "positive identification." *See* Pl. Ex. D at 50-51. She also agreed with Humbert's counsel that the Victim's identification was the only evidence in the warrant application specific to Humbert. *See id.* at 55-56.

On May 10, 2008, Officer Larry Smith[17] arrested Humbert. ECF Nos. 74-2 at 10, 74-4 at 1. Detective Merryman interviewed Humbert, who waived his *Miranda* rights. Pl. Ex. R. Humbert denied any wrongdoing and "ended the interview by stating he had nothing more to say and he was going to get a good lawyer." ECF No. 74-2 at 10-11.

The Victim declares that, after she learned Humbert was arrested, "she called the investigators and again told them that [she] could not identify anyone until [she] was able to see the men in person and hear their voices." Pl. Ex. A at 2. She was told "it was procedure to make arrests absent a witness' identification of a potential suspect." *Id.*

C. Post-Arrest Investigation

On May 14, 2008, pursuant to a search warrant, officers obtained oral swabs of Humbert's DNA. ECF No. 74-2 at 11. They were submitted to the police crime lab with the request that the lab compare them to DNA evidence recovered from the Victim. *Id.*

In a report dated May 27, 2008,[18] the Police Department crime lab found the DNA of at least two unknown persons in the Victim's underwear and at least two more on her stockings. Pl.

---

[17] This Officer Smith is not a named defendant.

[18] Sergeant Jones noted that the date on the report indicates the date the report was generated, not the date it was sent to the investigator or the State's Attorney's Office. *See* ECF No. 136-6 at 45-47.

Ex. M. In a report dated June 2, 2008 and addressed to Detective Griffin,[19] "the crime lab excluded [Humbert] as the DNA contributor to the Sample taken from [the Victim]." *Id.*; ECF No. 74-5 at 8. In a second report dated December 15, 2008 and also addressed to Detective Griffin, Humbert was again excluded as a DNA contributor to the sample taken from the Victim.[20] Pl. Ex. N.

Another victim--who had been raped on March 30, 2008 on Bolton Street in Baltimore--had told officers that her attacker used a Trojan Magnum condom in a gold foil wrapper during the rape. *See* ECF Nos. 74-3 at 3, 74-8 at 1-2. On March 31, 2008, Detective Elkner[21] discovered a condom wrapper matching that description near the victim's home, and she confirmed that it

---

[19] Detective Griffin testified that he would not automatically send DNA reports to the State's Attorney's Office upon receipt, because he "would assume that everything [he has], the State's Attorneys have, so they would already have it. Because if it's sent to [him], it's sent to them." *See* Pl. Ex. E at 14. However, if the State's Attorney's Office requested a copy of the report, he would send it, even if he was awaiting a second set of results. *See id.* at 15-16. Detective Smith similarly noted that, in her experience, "the State's Attorneys call the DNA labs themselves and get the results." *See* Pl. Ex. D at 64-65.

[20] Detective Merryman also received a copy of this report. Pl. Ex. F at 12-14. He testified that he passed the results on to the lead detective in the case, Detective Smith. *See id.* at 14-15. He also noted that he had very little involvement with the investigation overall. *See id.* at 16.

[21] Detective Elkner is not a named defendant in this case.

was the same type her attacker had used. *See* ECF Nos. 74-3 at 3, 74-8 at 4; Pl. Ex. C at 36-38. On May 14, 2008, she viewed Humbert's picture in a photo array and said he looked "30%-80%" like her attacker. ECF Nos. 74-5 at 4, 74-8 at 12. In a report dated June 10, 2008, Humbert's DNA was identified on the condom wrapper, along with the DNA of two other unknown individuals. *See* ECF No. 136-11 at 13-14. Humbert was not charged with this rape[22] or the rape of a third victim who also viewed Humbert's picture and said he strongly resembled her attacker. *See* ECF Nos. 74-5 at 4, 74-8 at 13.

D. Humbert is Charged

Assistant State's Attorney Tan was assigned to prosecute Humbert for the rape of the Victim. ECF No. 74-6 at 1. On June 23, 2008, Humbert was arraigned on one charge of rape and pled not guilty. ECF No. 74-7 at 1, 5.

The Victim attended the arraignment. Pl. Ex. A at 2. There is conflicting evidence about her actions there. The Victim declares that she told officers at the arraignment that she "could not identify Mr. Humbert and that after seeing him in person, [she] had even more doubt as to whether he was [her]

---

[22] Assistant State's Attorney Joakim Tan told investigators that, because of "the lack of indisputable DNA evidence from the recovered condom," and the relative weakness of the victim's identification, there was insufficient evidence to prosecute Humbert on this rape charge. *See* ECF No. 74-8 at 12-13.

attacker." *Id.* In contrast, in an affidavit dated October 25, 2012 (the "October Affidavit"), Tan avers that the Victim "expressed certainty that Mr. Humbert was her attacker at [the] arraignment." ECF No. 74-6 at 1. However, in a declaration dated January 24, 2013 (the "January Declaration"), Tan states that, at the arraignment, the Victim nodded at him from the audience. Pl. Ex. B. at 1. He took this gesture to be a positive identification of Humbert "against the backdrop of the investigator's assertions that the victim had made a positive identification of Mr. Humbert as her attacker." *Id.* He states that the investigators never told him "that the victim was unable to make a positive identification" and was even less sure about her identification after attending the arraignment. *Id.*

According to a transcript of the arraignment proceeding, Tan told the Court in the presence of defense counsel that he had heard--but had not confirmed--that Humbert's DNA did not match any DNA recovered from the Victim but did match another pending rape case. ECF No. 74-7 at 3. In the October Affidavit, however, Tan avers that he could "not remember the date [he] became aware" that Humbert was excluded as a DNA contributor. ECF No. 74-6 at 1. Finally, in the January Declaration, Tan states that he is "unable to state for certain if the investigators informally informed [him] about the DNA

results," because of "the erosion of time," but he did not receive the formal reports until May 2009. Pl. Ex. B at 1.

The evidence is unclear about how the DNA results affected Tan's decision to continue to pursue charges against Humbert. In the October Affidavit, Tan notes that "[g]iven the nature of the case, a rape that allegedly occurred with a condom, the lack of matching DNA may not be dispositive of a lack of probable cause as long as [the Victim] was still able to testify with certainty of Mr. Humbert's identity." ECF No. 74-6 at 1. He states that he decided to drop the charges against Humbert, because he "learned from the victim that she was not sure she could identify Mr. Humbert." *Id.* at 2. "That together with the lack of witnesses and DNA analysis that excluded Mr. Humbert as a contributor created reasonable doubt in [his] mind." *Id.* However, in the January Declaration, Tan declares he would have dismissed the case against Humbert "shortly following the receipt" of the DNA results *or* information about the Victim's uncertainty of her attacker's identity. Pl. Ex. B at 1. He also states that he could not drop the charges against Humbert until he received the formal DNA reports.[23] *Id.*

[23] Tan declared that he requested these reports from investigators but did not receive them until May 11, 2009. Pl. Ex. B at 1. Sergeant Jones noted that sometimes conflict occurs between the Police Department and the State's Attorney's Office about disclosure of evidence to the State's attorneys. *See* Pl. Ex. C at 85.

The Victim declares that Tan called her "just prior to when the charges against Mr. Humbert were dropped," and she told him that she was unsure that Humbert was her attacker. Pl. Ex. A at 3. She had not spoken to Tan before this phone call, and had "believed that [her] repeated concerns that [she] voiced about [her] inability to identify [her] assailant were being communicated to Mr. Tan." *Id.*

On May 19, 2009, the DNA reports were mailed to Humbert's counsel. ECF No. 74-2 at 12. On July 30, 2009, Tan "chose to nolle prosequi the case against Mr. Humbert," and Humbert was released. *See* ECF No. 74-6 at 2.

E. Procedural History

On February 17, 2011, Humbert filed a 19-count complaint against the defendants. ECF No. 1. The following claims were asserted against the police defendants: (1) § 1983 claims for malicious prosecution (count three), suggestive identification procedures (count seven), failure to disclose exculpatory evidence and fabrication of inculpatory evidence (count eight), and false arrest and imprisonment (count ten), in violation of Humbert's Fourth and Fourteenth Amendment rights; (2) § 1983 claim for failure to investigate, in violation of Humbert's Fourteenth Amendment rights (count nine); (3) violations of

Articles 24[24] and 26[25] of Maryland's Declaration of Rights (count eleven); (4) battery (count twelve); (5) false arrest and imprisonment (count thirteen); (6) abuse of process (count fourteen); (7) negligence (count fifteen); (8) negligent failure to warn (count sixteen); (9) malicious prosecution (count eighteen); and (10) intentional infliction of emotional distress ("IIED") (count nineteen).[26] ECF No. 1 at 45-47, 50-68, 70-74. Humbert also brought a § 1983 claim against, *inter alia*,[27] Jones for supervisory misconduct in violation of his Fourth and Fourteenth Amendment rights (count two). *Id.* at 44-45. On

---

[24] Article 24 provides that: "no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

[25] Article 26 provides that:

> [A]ll warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

[26] Humbert also asserted three counts of violations of 42 U.S.C. § 1985 against all defendants (counts four through six). ECF No. 1 at 47-50. In a previous opinion, the Court dismissed these counts for failure to state a claim. ECF No. 35 at 23-25.

[27] This count was also asserted against the Police Department, O'Malley, Bealefeld, Dixon, and Richard and Jane Roes. ECF No. 1 at 44.

April 19, 2011, the police defendants answered Humbert's complaint. ECF No. 17.

On March 27, 2012, the Court granted the defendants' motion to bifurcate the case and stay discovery on all claims except those asserted against the police defendants. ECF Nos. 52-53.

On April 3, 2013, the police defendants moved for summary judgment. ECF No. 74. On April 19, 2013, the Court stayed the deadline for Humbert to respond to the motion pending the close of discovery. ECF No. 87. On December 5, 2013, after the close of discovery, the Court ordered Humbert to file his opposition by December 20, 2013. ECF No. 115. On December 9, 2013, the Court approved the parties' joint stipulation extending the deadline to December 27, 2013. ECF No. 118.

On December 30, 2013, Humbert opposed the motion for summary judgment. ECF No. 119; Pl. Oppos. The same day, the police defendants moved to strike Humbert's opposition as untimely. ECF No. 120. On January 2, 2014, Humbert filed a notice of filing of lengthy memorandum and exhibits. ECF No. 121. On January 16, 2014, Humbert opposed the motion to strike. ECF No. 124. On March 12, 2014, the police defendants replied to Humbert's opposition to their motion for summary judgment. ECF No. 136.

II. Analysis

A. Motion to Strike

Federal Rule of Civil Procedure 6(b)(1) provides that "[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time . . . on motion[28] made after the time has expired if the party failed to act because of excusable neglect." To determine if the delay is excusable neglect, the court "consider[s] all relevant circumstances, including the danger of prejudice to the non-moving party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *See Perry-Bey v. City of Norfolk, Va.*, 679 F. Supp. 2d 655, 658-59 (E.D. Va. 2010) (*quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993)). The reason for the delay is the most important factor. *See Thompson v. E.I. DuPont de Nemours & Co., Inc.*, 76 F.3d 530, 534 (4th Cir. 1996). "'Excusable neglect' is not easily demonstrated,"

---

[28] The Court will construe the tardy response to the summary judgment motion, and the opposition to the motion to strike which explains the reasons for the tardy filing, as a motion for an extension of time to file the response. *See, e.g., Harty v. Commercial Net Lease LP Ltd.*, 5:09-CV-495-D, 2011 WL 807522, at *1 (E.D.N.C. Mar. 1, 2011) (construing "the filing of the [untimely] amended complaint and the notice of late filing as a motion for extension of time to file the amended complaint").

it should be found "only in the '*extraordinary cases* where injustice would otherwise result.'" *Id.* (emphasis in original). The party seeking the extension has the burden of demonstrating excusable neglect. *Id.*

The police defendants moved for the Court to strike Humbert's opposition to their motion for summary judgment, because they assert Humbert had "no reason or excuse" for his untimely filing. ECF No. 120 at 3. In response, Humbert's counsel contends that he tried to upload the opposition through the Court's electronic filing system on December 27, 2013, but the documents would not upload, presumably because of their size. ECF No. 124 at 2. He then "immediately prepared" the filing and sent it out for delivery to the Court and the police defendants. *See id.* He asserts that "any delay in the Court's receipt of the Plaintiff's paper filing . . . was due to a weekend and New Year's Day." *See id.* On January 2, 2014, after the Court received the paper filing, the Clerk's office informed him that he needed to file a notice of lengthy memorandum and exhibits, which he filed that same day. *See id.*; ECF No. 121.

Here, Humbert's opposition was received in paper form by the Court on January 2, 2014--six days after the filing deadline. *See* ECF No. 121. There is no apparent bad faith on Humbert's part or prejudice to the defendants as a result of this relatively short delay. Also, there is no indication that

Humbert's counsel knew in advance that he might have technical difficulties uploading the filing. Finally, Humbert's counsel acted promptly to correct the problem by mailing paper copies of the filing to defense counsel and the Court. *See* ECF Nos. 119, 124 at 2. When, as here, counsel lacks advance notice of computer problems that caused a short delay in filing, and those problems were not in counsel's reasonable control, there is excusable neglect for the untimely filing. *See Fernandes v. Craine*, 538 F. App'x 274, 276 (4th Cir. 2013) (finding excusable neglect because nothing in the record suggested that counsel was aware of the computer problems that led to the untimely filing or "was willfully blind to the status of the electronic docket"); *Alamjamili v. Berglund Chevrolet, Inc.*, CIV.A.7:09CV00213, 2009 WL 4348386, at *2 (W.D. Va. Dec. 1, 2009) (finding excusable neglect when counsel's computer network unexpectedly failed, and the three-day delay in filing was short). The motion to strike will be denied.

B. Legal Standard for Summary Judgment

The Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).[29] In considering the motion, the judge's function

[29] Rule 56(a), which "carries forward the summary-judgment standard expressed in former subdivision (c)," changed "genuine

is "not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

The Court must "view the evidence in the light most favorable to . . . the nonmovant and draw all reasonable inferences in [his] favor," *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 645 (4th Cir. 2002), but the Court must abide by the "affirmative obligation of the trial judge to prevent factually unsupported claims and defenses from proceeding to trial,"[30] *Bouchat v. Balt. Ravens Football Club,*

'issue' [to] genuine 'dispute,'" and restored the word "'shall' . . . to express the direction to grant summary judgment." Fed. R. Civ. P. 56 advisory committee's note.

[30] In his opposition to the police defendants' summary judgment motion, Humbert includes citations to, and quotations from, numerous newspaper articles that he contends provide factual support for his claims. *See, e.g.*, Pl. Oppos. at 23 & n.163. The police defendants argue that these articles are "inadmissible as evidence." *See, e.g.*, ECF No. 136 at 10. Humbert has not submitted these articles with his motion, and even if he had submitted them, in the Fourth Circuit "newspaper articles are inadmissible hearsay to the extent that they are introduced 'to prove the factual matters asserted therein.'" *United States v. ReBrook*, 58 F.3d 961, 967 (4th Cir. 1995) (affirming district court grant of defendants' motion to strike newspaper articles submitted by plaintiff in response to defendants' motion for summary judgment). Accordingly, the Court will disregard Humbert's references in his opposition to these unattached articles, and any facts derived solely from those articles.

Inc., 346 F.3d 514, 526 (4th Cir. 2003) (citation and internal quotation marks omitted).

C. Section 1983 Claims

Section 1983 provides a remedy against any person who, acting under color of law, deprives another of constitutional rights. 42 U.S.C. § 1983. It "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266, 271, 114 S. Ct. 807, 127 L.Ed.2d 114 (1994) (internal quotation marks and citation omitted).

The police defendants assert that they are entitled to qualified immunity on Humbert's § 1983 claims. ECF No. 74-1 at 11.

Government officials performing discretionary functions are shielded from liability for civil damages under § 1983 when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009) (internal quotation marks and citation omitted) (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982)). Qualified immunity "protects law enforcement officers from 'bad guesses in gray areas' and ensures that they are liable only 'for transgressing bright lines.'" *Wilson v. Layne*, 141 F.3d 111,

114 (4th Cir. 1998) *aff'd*, 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999) (*quoting Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992)). Humbert does not dispute that the police defendants may assert a qualified immunity defense. *See* Pl. Oppos. at 32-33.

To determine if the defendants are entitled to qualified immunity, the Court must decide: (1) whether the facts that the plaintiff has alleged or shown make out a violation of a constitutional right; and (2) whether the right at issue was "clearly established" at the time of the alleged misconduct. *Pearson*, 555 U.S. at 232, 129 S. Ct. at 815-16. The district court has discretion in deciding which prong of the qualified immunity analysis should be addressed first. *Id.* at 236, 129 S. Ct. at 818. When qualified immunity is asserted, the plaintiff bears the burden of showing a constitutional violation occurred. *Henry v. Purnell*, 501 F.3d 374, 377 (4th Cir. 2007); *Richter v. Maryland*, 590 F. Supp. 2d 730, 739 (D. Md. 2008) *aff'd sub nom. Richter v. Beatty*, 417 F. App'x 308 (4th Cir. 2011).

A constitutional right is clearly established "when its contours are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 313 (4th Cir. 2006) (*citing Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515, 153 L. Ed. 2d 666 (2002) (internal quotations and

punctuation omitted)). There are three ways in which law becomes clearly established in Maryland: (1) an authoritative decision by the United States Supreme Court; (2) an authoritative decision by the Fourth Circuit Court of Appeals; or (3) an authoritative decision by the Court of Appeals of Maryland. *Wilson*, 141 F.3d at 114. The defendants bear the burden of proof on whether the constitutional right was clearly established at the time of the alleged violation. *See Henry*, 501 F.3d at 378.

The Fourth Circuit has emphasized "the importance of resolving the question of qualified immunity at the summary judgment stage rather than at trial." *Wilson v. Kittoe*, 337 F.3d 392, 397 (4th Cir. 2003). *Wilson* recognizes, however, that "the qualified immunity question can . . . at times require factual determinations respecting disputed aspects of a defendant's conduct." *Id.* (*quoting Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992) (internal quotations and punctuation omitted)). "The importance of summary judgment in qualified immunity cases does not mean . . . that summary judgment doctrine is to be skewed from its ordinary operation to give substantive favor to the defense, important as may be its early establishment." *Id.*

1. Probable Cause

The police defendants argue that the plaintiff's § 1983 claims of malicious prosecution, suggestive identification procedures,[31] and false arrest[32] fail because there was probable

---

[31] Humbert has not identified the source of his claim that the Fourth Amendment protects him from "suggestive identification procedures." *See* ECF No. 1 at 50. Although the Fourteenth Amendment protects against unnecessarily suggestive identification procedures, this right "only protect[s] . . . against the admission of unconfronted and unreliable identification evidence at trial." *Antonio v. Moore*, 174 F. App'x 131, 134-36 (4th Cir. 2006) (affirming dismissal of claim that suggestive identification procedure violated the Fourteenth Amendment because defendant pled guilty to charged crime and was not tried). Humbert was never tried on the charge of the rape of the Victim. *See* ECF No. 74-6 at 2. Further, Humbert does not show how the photo array used by the police defendants was "unnecessarily suggestive." Humbert argues that Detective Smith was unfamiliar with the term "mug book," and that *none* of the photos shown to the Victim displayed skin tone. *See* Pl. Oppos. at 16-18. However, this evidence does not establish that Humbert's photo was emphasized to the Victim during the identification procedure. *See, e.g., Hogan v. Paderick*, 399 F. Supp. 1014, 1018 (E.D. Va. 1975) ("The danger of misidentification is increased when the police show the eyewitness a series of photographs in which the image of a single individual frequently recurs or is emphasized, or when the police indicate that they have other evidence that the person pictured committed the crime."). Accordingly, because Humbert has not shown a constitutional violation with respect to count seven, the defendants have qualified immunity and will be granted summary judgment on this claim.

[32] Because Humbert was arrested pursuant to a warrant that he acknowledges was "facially valid," his § 1983 false arrest claim fails. *See* Pl. Oppos. at 33; *Waker v. Owen*, RWT 09CV2380, 2010 WL 1416145, at *4 (D. Md. Apr. 6, 2010) (*citing Porterfield v. Lott*, 156 F.3d 563, 568 (4th Cir. 1998) ("[A] claim for false arrest may be considered only when no arrest warrant has been obtained.")); *Whitley v. Prince George's Cnty., MD*, PWG-12-3428, 2013 WL 3659949, at *5 (D. Md. July 11, 2013). Instead, his claim that he was arrested without probable cause is properly

cause for Humbert's arrest. ECF No. 74-1 at 14-15. Humbert contends that the police defendants lacked probable cause to arrest him.[33] Pl. Oppos. at 33.

The Fourth Amendment prohibits unreasonable searches and seizures, and no warrant may issue without probable cause. "Probable cause to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense."

---

pursued under count three (malicious prosecution). *Waker*, 2010 WL 1416145, at *4 (*citing Montgomery Ward v. Wilson*, 339 Md. 701, 724, 664 A.2d 916 (1995) ("[W]hile procuring a warrantless arrest by giving false information to a police officer may constitute false imprisonment, falsely procuring an arrest through wrongfully obtaining a warrant is ordinarily malicious prosecution."). The police defendants will be awarded summary judgment on count ten.

[33] Humbert also argues that summary judgment should be denied, because the testimony of the police defendants' expert witness, Charles Key, on, *inter alia*, whether the police defendants acted reasonably in determining that probable cause existed for Humbert's arrest, should be precluded. *See* Pl. Oppos. at 27-32. As neither party has submitted evidence from Key that is relevant to whether summary judgment is warranted on Humbert's claims, these arguments will not be considered now. Humbert may renew these arguments at trial. Further, in a footnote, Humbert "quests leave to obtain additional expert evidence and to [depose] Mr. Key" on his opinions of the "objective reasonableness" of the police defendants' actions if summary judgment is granted. *See* Pl. Oppos. at 32 n.195. If Humbert wishes to reopen discovery, he must file a motion with the Court. *See* Fed. R. Civ. P. 7(b)(1) ("A request for a court order must be made by motion.").

United States v. Dickey-Bey, 393 F.3d 449, 453 (4th Cir. 2004) (*quoting Michigan v. DeFillipo*, 443 U.S. 31, 37, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979) (internal quotations omitted)). To determine if there was probable cause to arrest, the Court considers only "facts and circumstances known to the officer at the time of the arrest."[34] *Wilson*, 337 F.3d at 398 (internal quotations and punctuation omitted). Probable cause does "not require officials to possess an airtight case before taking action," and officers "must be given leeway to draw reasonable conclusions" from information. *Taylor v. Farmer*, 13 F.3d 117, 121-22 (4th Cir. 1993). Probable cause requires more than "bare suspicion," but "less than evidence necessary to convict." *Pleasants v. Town of Louisa*, 524 F. App'x 891, 897 (4th Cir. 2013) (internal quotations omitted). To establish a § 1983 malicious prosecution claim, Humbert must show that "he was seized without probable cause and that he obtained a favorable

[34] In their motion, the police defendants rely on evidence of Humbert's guilt obtained after Humbert's arrest to justify his pretrial detention, such as his identification by other rape victims and the presence of his DNA on a condom wrapper found near the home of a rape victim. *See, e.g.*, ECF No. 74-1 at 7 & n.1. However, as this information was not known to officers when the arrest warrant was obtained, it cannot be considered in determining whether there was probable cause for his arrest. *See Wilson*, 337 F.3d at 398.

termination of the proceedings against him."[35] *Pinder v. Knorowski*, 660 F. Supp. 2d 726, 735-36 (E.D. Va. 2009).

a. Warrant as Written

Humbert was arrested pursuant to a warrant. Pl. Ex. Q. In the warrant application, Detective Smith swore that Humbert was identified as a suspect following the release of a composite sketch created by the Victim, and that the Victim "positively identified" Humbert as her attacker when she was shown his picture in a photo line-up. ECF No. 74-4 at 5. Humbert argues that, "[e]ven assuming . . . that the[se] facts . . . were true," the warrant was not supported by probable cause. *See* Pl. Oppos. at 34-35. However, the positive identification of a suspect by a witness is generally sufficient to establish probable cause for an arrest, unless officers have reason to believe the witness is unreliable or have other exculpatory evidence.[36] *See Bailey v. Town of Smithfield, Va.*, 19 F.3d 10, at *3, *6 (4th Cir. 1994) (finding that a single positive identification of the defendant as the robber from a photo array

---

[35] Humbert has shown that he obtained a favorable termination of the proceedings, because the charges against him were *nol prossed*. *See De Ventura v. Keith*, 169 F. Supp. 2d 390, 398-99 (D. Md. 2001).

[36] The police defendants' evidence is that the Victim unequivocally identified Humbert as her attacker by pointing at his picture and stating "that's him." *See* ECF No. 74-2 at 9; Pl. Exs. D at 48 & #6, E at 24.

sufficed to establish probable cause for arrest); *United States v. Beckham*, 325 F. Supp. 2d 678, 687-88 (E.D. Va. 2004).[37] Also, as Humbert was identified as a suspect because he resembled a composite created by the Victim, the facts in the warrant application--if true--were more than sufficient to establish probable cause to arrest Humbert. *See, e.g., Shriner v. Wainwright*, 715 F.2d 1452, 1454 (11th Cir. 1983) (probable cause for arrest existed when suspect closely resembled composite sketch and was found shortly after the crime in the same area).

b. Material Omissions in Warrant Application

Humbert also argues that probable cause for his arrest was lacking, because of "fabrications and omissions" in the warrant application that were "necessary to the judicial determination" of probable cause. *See* Pl. Oppos. at 36. The police defendants contend that probable cause existed because of the Victim's identification of Humbert, "regardless of any qualifications [the Victim] wanted (or now wants) to place on her identification." *See* ECF No. 136 at 13-14. They also assert that it was the State's Attorney's responsibility "to follow up

---

[37] *See also Crouch v. City of Hyattsville*, CIV.A. DKC 09-2544, 2012 WL 6019296, at *6 (D. Md. Nov. 30, 2012) (*citing Beauchamp v. City of Noblesville, Indiana*, 320 F.3d 733, 743 (7th Cir. 2003) ("The complaint of a single witness or putative victim alone generally is sufficient to establish probable cause to arrest unless the complaint would lead a reasonable officer to be suspicious, in which case the officer has a further duty to investigate.")).

with [the Victim] on the adequacy . . . of the identification." *Id.* at 14.

To show a constitutional violation, Humbert must prove that an officer "deliberately or with a reckless disregard for the truth made material false statements in his affidavit, or omitted from that affidavit material facts with the intent to make, or with reckless disregard of whether they thereby made, the affidavit misleading." *Miller v. Prince George's Cnty., MD*, 475 F.3d 621, 626-31 (4th Cir. 2007) (*citing Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990) (internal quotations and citations omitted)). To establish "reckless disregard," the plaintiff may offer evidence to show that the officer was "high[ly]" aware that her statements in the warrant application were probably false or that she omitted information that she knew would negate probable cause. *Id.* at 627.

False statements or omissions are material if they were necessary to the judicial officer's determination of probable cause. *Evans v. Chalmers*, 703 F.3d 636, 650 (4th Cir. 2012) (*citing Franks*, 438 U.S. at 155-56, 98 S. Ct. 2674). To determine materiality, the court "corrects" the warrant by removing any inaccuracies and inserting recklessly omitted facts

and determines if the corrected warrant establishes probable cause. *Miller*, 475 F.3d at 628.

"[T]he Fourth Amendment right to be arrested only on probable cause is clearly established . . . ." *Smith v. Reddy*, 101 F.3d 351, 356 (4th Cir. 1996). Also, the law is "clearly established" that the Fourth Amendment prohibits officers from deliberately or recklessly making material omissions or misstatements in warrant applications if the warrant would otherwise lack probable cause. *Miller*, 475 F.3d at 632. "[A] reasonable officer cannot believe a warrant is supported by probable cause if the magistrate is misled by statements that the officer knows or should know are false." *Smith*, 101 F.3d at 355.

The police defendants' evidence shows that Detectives Smith and Griffin showed the Victim a photo line-up that included a picture of Humbert. ECF Nos. 74-2 at 9, 74-5 at 7. Viewing the evidence in the light most favorable to Humbert, the Victim selected Humbert's photo, told Smith and Griffin that it "might" depict her attacker, and then requested to see a physical and voice line-up of her suspected assailants. Pl. Ex. A at 2. She also indicated on the photo that she had identified Humbert as her attacker, but the officers "told [her] what to write." *Id.* These details were omitted from the warrant application, which

only stated that the Victim "positively identified" Humbert as her attacker.[38] *See* ECF No. 74-4 at 5.

A tentative identification of a suspect by a witness is generally insufficient standing alone to establish probable cause. *See, e.g., Williams v. City of New York*, 10-CV-2676 JG LB, 2012 WL 511533, at *4-*5 (E.D.N.Y. Feb. 15, 2012). However, the warrant application also established that Humbert was identified as a suspect based on a composite drawing produced by the Victim, which--depending on the degree of uncertainty in the identification and the degree of resemblance between Humbert and the composite--may be sufficient to establish probable cause in combination with a tentative identification. *See, e.g., Ramos v. Sedgwick Cnty. Sheriff's Dep't*, 785 F. Supp. 1457, 1458-63 (S.D. Fla. 1991) (finding that probable cause existed as a matter of law to arrest defendant when three officers stated that the defendant resembled the composite prepared by the

---

[38] Humbert also faults the police defendants for not investigating the suspects whom the Victim identified as "resembling" her attacker in the earlier photo line-up. *See* Pl. Oppos. at 19. However, the Victim declares that she told officers that she could not identify either man as her attacker and requested to see a physical line-up. *See* Pl. Ex. A at 2. Moreover, "a police officer's failure to pursue potential exculpatory evidence is not in itself sufficient to negate probable cause." *Smith v. Reddy*, 882 F. Supp. 497, 502 (D. Md. 1995) *aff'd*, 101 F.3d 351 (4th Cir. 1996) (*quoting Torchinsky v. Siwinski*, 942 F.2d 257, 264 (4th Cir. 1991) (internal quotations and punctuation omitted)); *see also United States v. Clenney*, 631 F.3d 658, 665 (4th Cir. 2011) ("[T]he protections of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), do not apply to warrant application proceedings.").

victim, and the victim "expressed some doubts" but identified the defendant as her attacker and asked to see him "face-to-face with a hat on"). Accordingly, there is a genuine dispute of material fact about whether a "corrected" warrant would have established probable cause to arrest Humbert.

Also, there is some evidence that, if details of the Victim's identification were omitted from the warrant application, those omissions were reckless. Detective Smith testified that the warrant application relied on the Victim's description of the crime and her medical examination, the composite sketch, and the positive identification to establish probable cause. *See* Pl. Ex. D at 54-55. She agreed with Humbert's counsel, however, that the only evidence "specific" to Humbert was the identification. *See id.* at 56. She also acknowledged that a tentative identification of a suspect--in the manner of the Victim's responses to two of the photos at the first photo line-up--would not be sufficient to establish probable cause without consideration of other evidence. *See id.* at 59-60. This evidence is sufficient to create a triable issue of fact of Detective Smith's knowledge that, depending on the degree of uncertainty in the Victim's identification,[39] inclusion

[39] The uncontested evidence establishes, however, that Detective Smith would not have believed that a request for a physical and voice line-up negated probable cause if the Victim had

of these details would negate probable cause. Because a reasonable officer would not believe that a warrant which contained deliberate or reckless material omissions was supported by probable cause, *see Miller*, 475 F.3d at 632, there is a genuine dispute of material fact about Detective Smith's entitlement to qualified immunity.

Further, Detective Griffin was present for the Victim's identification of Humbert, and, along with Sergeant Jones, contributed to the warrant application and likely discussed with Detective Smith whether a positive identification of Humbert occurred. *See* ECF Nos. 74-2 at 9, 74-5 at 7; Pl. Ex. D at 52-54. Accordingly, there is a triable issue of fact about whether Detective Griffin and Sergeant Jones participated in the reckless omission of details that would negate the warrant's probable cause. Detectives Smith and Griffin and Sergeant Jones will be denied summary judgment on count three.[40]

However, there is no evidence that Detectives Brassell or Merryman had any involvement with the decision to arrest Humbert

---

identified Humbert as her attacker by pointing at the picture and stating "that's him." *See* Pl. Ex. D at 50-51.

[40] Article 24 is construed *in pari materia* with the Fourteenth Amendment, *Barnes v. Montgomery Cnty., Md.*, 798 F. Supp. 2d 688, 700 (D. Md. 2011), and Article 26 is construed *in pari materia* with the Fourth Amendment, *Scott v. State*, 366 Md. 121, 139, 782 A.2d 862, 873 (2001). Accordingly, Detectives Smith and Griffin and Sergeant Jones will be denied summary judgment on count eleven.

or with the warrant application. They were not present for the Victim's identification of Humbert. ECF Nos. 74-2 at 9, 74-5 at 7. Detective Brassell only produced a composite sketch of Humbert--there is no evidence he had any other involvement with Humbert's case. *See, e.g.*, Pl. Ex. G at 13. Although Detective Merryman participated in the investigation, there is no evidence he knew the details of the Victim's identification of Humbert, and Detectives Griffin's and Smith's investigative notes state that the Victim unequivocally identified Humbert as her attacker. *See, e.g.*, ECF No. 74-3 at 4; Pl. Ex. F at 5. Because Humbert has not shown that Detectives Merryman or Brassell participated in any violation of his constitutional rights related to the probable cause determination, they are entitled to qualified immunity and will be granted summary judgment on count three.

2. Disclosure of Exculpatory Evidence

Humbert contends that the police defendants violated his constitutional rights by "willfully fail[ing] to produce exculpatory material."[41] Pl. Oppos. at 37, 40. The police

[41] Humbert accuses the police defendants of concealing several pieces of exculpatory evidence, including, *inter alia*, the Victim's statement that she did not know if her attacker was homeless and the fact that the Victim drew her own sketch. *See* Pl. Oppos. at 40. However, he offers no evidence that any of this allegedly exculpatory evidence was not disclosed to the State's Attorney's Office. The January Declaration--the only evidence to support Humbert's claim that exculpatory evidence

defendants argue that a police officer who withholds exculpatory evidence can only be liable under § 1983 when the failure to disclose violates the plaintiff's right to a fair trial, and Humbert never went to trial. ECF No. 74-1 at 7-8.

The Fourteenth Amendment prohibits states from depriving any person of his liberty without first affording him "due process of law" by means of a fair trial. U.S. Const. amend. XIV. To ensure procedural due process, *Brady v. Maryland*, 373 U.S. 83, 87 (1963) provides that "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." To prove a *Brady* violation, the accused must show that the evidence (1) is exculpatory or impeaching, (2) was suppressed by the Government, and (3) was material to his defense, i.e., he was prejudiced by the suppression. *See United States v. Moussaoui*, 591 F.3d 263, 285 (4th Cir. 2010).

Although *Brady* and its progeny do not address whether a police officer violates the Constitution by withholding evidence

---

was not disclosed--states only that investigators failed to disclose the DNA reports excluding Humbert as a DNA contributor and the Victim's uncertainties about the identity of her attacker. *See* Pl. Ex. B. Accordingly, to the extent that Humbert seeks to pursue count eight as to any other evidence--except the DNA results and the identification--summary judgment is granted to the police defendants on that claim.

acquired during the course of an investigation,[42] the Fourth Circuit has held that a police officer who withholds exculpatory information from a prosecutor *can* be liable under § 1983, *Goodwin v. Metts*, 885 F.2d 157, 162 (4th Cir. 1989), but only when the officer's failure to disclose "deprived the § 1983 plaintiff[] of [his] right to a fair trial," *Taylor v. Waters*, 81 F.3d 429, 436 n.5 (4th Cir. 1996). As Humbert was never tried on this rape charge, he has not stated a claim that the police defendants violated his Fourteenth Amendment rights by their alleged failure to disclose exculpatory evidence.[43] *See Taylor*, 81 F.3d at 436 & n.5; *Hockett v. Acosta*, 2:03CV00012, 2004 WL 1242757, at *3 (W.D. Va. June 3, 2004) (finding no Fourteenth Amendment violation when plaintiffs did not allege that any favorable evidence was unavailable at their criminal trial); *Windham v. Graham*, CIVA908CV1935PMDGCK, 2008 WL 3833789, at *7-*9 (D.S.C. Aug. 14, 2008) (pretrial detainee who alleged

---

[42] *Jean v. Collins*, 221 F.3d 656, 659 (4th Cir. 2000) (en banc) (Wilkinson, C.J., concurring in the judgment) (per curiam) (*citing United States v. Agurs*, 427 U.S. 97 (1976); *Giglio v. United States*, 405 U.S. 150 (1972); and *Brady*, 373 U.S. at 83).

[43] Further, to the extent that Humbert argues that police failure to disclose exculpatory evidence violated his Fourteenth Amendment rights because probable cause for his prosecution was lacking, his claims fail. In *Albright*, 510 U.S. at 269, 114 S. Ct. at 810, the Supreme Court held that there is no Fourteenth Amendment right to be free from prosecution on less than probable cause. *See Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000).

that police withheld favorable evidence had no cause of action under the Fourteenth Amendment because he had not yet been tried).[44]

The Fourth Amendment, rather than the Fourteenth Amendment, "define[s] the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial." *See Taylor*, 81 F.3d at 435-36 (*quoting Gerstein v. Pugh*, 420 U.S. 103, 125 n.27, 95 S. Ct. 854, 869 n.27, 43 L. Ed. 2d 54 (1975)); *Hockett*, 2004 WL 1242757, at *3 ("As to the pre-arrest suppression of evidence, it is established in this circuit that the 'Fourth Amendment provides all of the pretrial process that is constitutionally due to a criminal defendant in order to detain him prior to trial.'" (*quoting Brooks v. City of Winston-Salem, N.C.*, 85 F.3d 178, 184 (4th Cir. 1996)). Once probable cause has been determined by a neutral and detached magistrate, "the Fourth Amendment does not impose any further requirement of judicial oversight or reasonable investigation to render pretrial seizure reasonable." *See Taylor*, 81 F.3d at

---

[44] *See also Jean*, 221 F.3d at 659-60 (Police "failures to disclose" exculpatory evidence "do not implicate constitutional rights where no constitutional deprivation results therefrom. In this context, the constitutional deprivation must be defined as a deprivation of liberty without due process of law. In the absence of a cognizable injury, *such as a wrongful criminal conviction*, . . . no § 1983 remedy will lie.") (emphasis added) (Wilkinson, C.J., concurring in affirmance of judgment of district court by an equally divided en banc court).

436. Thus, an officer's failure to disclose exculpatory evidence after a suspect is arrested based on a determination of probable cause "does not render the continuing pretrial seizure of a criminal suspect unreasonable under the Fourth Amendment." *Id.* at 435-37 (holding that Fourth Amendment jurisprudence did not clearly render unconstitutional an officer's failure to disclose exculpatory evidence to the prosecution); *see also Bailey*, 19 F.3d at *6 (rejecting defendant's argument that officers have a *Brady*-like duty under the Fourth Amendment to disclose all exculpatory evidence when applying for a warrant).

Accordingly, Humbert has not established that the police defendants violated his clearly established Fourth Amendment rights by failing to disclose exculpatory evidence to the prosecution.[45] The police defendants are entitled to qualified

[45] Also, although there is evidence that Tan did not receive a copy of the DNA results until many months after the results were generated, *see* Pl. Ex. B at 1, the transcript of the arraignment shows that Tan knew the results on June 23, 2008--a little over a month from the date of Humbert's arrest and within a few weeks after the results were obtained. ECF Nos. 74-2 at 10, 74-5 at 8, 74-7 at 3; Pl. Ex. M. Further, Detectives Griffin and Smith testified that they believed prosecutors could request a copy of official DNA results from the crime lab directly. *See* Pl. Exs. D at 64-65, E at 14. Thus, there is no evidence that the police defendants deliberately failed to disclose exculpatory evidence to Tan, as there is uncontested evidence that Tan knew about the DNA reports many months before Humbert was released, and before Humbert was arraigned, and Detectives Smith and Griffin believed that Tan could obtain a copy of the report from the crime lab directly. *See* ECF No. 74-7 at 3.

immunity on count eight and will be granted summary judgment on this claim.

3. Failure to Investigate

In the complaint, Humbert asserts that the police defendants are liable under § 1983 for "deliberately and recklessly fail[ing] to investigate adequately" potentially exculpatory evidence. ECF No. 1 at 54-56. Although the police defendants moved for summary judgment on all claims, neither the police defendants nor Humbert specifically discusses the failure to investigate claim. *See* ECF No. 74-1 at 15, 25; Pl. Oppos.

Police officers may be liable under § 1983 for deliberate or reckless failures to investigate "readily available exculpatory evidence." *Savage v. Cnty. of Stafford, Va.*, 754 F. Supp. 2d 809, 815-16 (E.D. Va. 2010) *aff'd sub nom. Savage v. Sturdivant*, 488 F. App'x 766 (4th Cir. 2012) (*quoting Torchinsky*, 942 F.2d at 264); *Wheeler v. Anne Arundel Cnty.*, CIV. JFM-08-2361, 2009 WL 2922877, at *5 (D. Md. Sept. 8, 2009). However, negligent police failures to investigate do not violate the Fourteenth Amendment. *Wheeler*, 2009 WL 2922877, at *5.

The police defendants have asserted qualified immunity on all of Humbert's § 1983 claims, including the failure to investigate claim. *See* ECF No. 74-1 at 15. There is no evidence to suggest that any of the alleged failures to

investigate were deliberate or reckless.[46] As Humbert has the burden of establishing a constitutional violation when qualified immunity is asserted, *see Henry*, 501 F.3d at 377-78, the police defendants are entitled to qualified immunity on count nine and will be granted summary judgment on this claim.[47]

4. Supervisory Violations

Humbert also brings a separate claim against Sergeant Jones asserting that--in addition to liability for his personal participation in Humbert's malicious prosecution--he has supervisory liability because he failed to adequately "train, instruct, supervise, and discipline" his subordinates. *See* ECF No. 1 at 45-47. The police defendants contend only that there is no liability for supervisory violations, because there was probable cause to arrest Humbert. *See* ECF No. 74-1 at 14-15. Humbert does not discuss this claim specifically but argues there was no probable cause for his arrest. *See* Pl. Oppos. at 33-44.

---

[46] For example, Humbert contends that the police defendants "made no effort to investigate the Plaintiff's whereabouts at the time of the reported rape, despite the Plaintiff's repeated vehement statements that he was innocent and had an alibi." Pl. Oppos. at 22. However, Humbert has proffered no evidence that he told officers he had an alibi. *See, e.g.*, ECF No. 136-10 at 20.

[47] As Detective Merryman and Officer Brassell have been granted summary judgment on all of Humbert's § 1983 claims, they will be granted summary judgment on count eleven (violations of Articles 24 and 26). *See supra* note 40.

The doctrine of *respondeat superior* does not apply in § 1983 actions. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611 (1978). To establish Sergeant Jones's liability for supervisory acts, Humbert must show: (i) Sergeant Jones had "actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury;" (ii) Sergeant Jones's response to this knowledge "was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices;" and (iii) there was an affirmative causal link between the supervisor's inaction and the injury suffered by the plaintiff. *See Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994) (internal quotations omitted); *Slakan v. Porter*, 737 F.2d 368, 373 (4th Cir. 1984).

To establish a pervasive or unreasonable risk of harm, the plaintiff must produce "evidence that the conduct is widespread, or at least has been used on several different occasions and that the conduct engaged in by the subordinate poses an unreasonable risk of harm of constitutional injury." *Shaw*, 13 F.3d at 799. Ordinarily this burden cannot be satisfied by proof of a single incident or isolated incidents; instead, the plaintiff must show "continued inaction in the face of documented widespread abuses." *Id.* Supervisory liability

depends on a finding that the supervisor's subordinates violated the plaintiff's constitutional rights. *See, e.g., Jackson v. Wiley*, 352 F. Supp. 2d 666, 683 (E.D. Va. 2004) *aff'd*, 103 F. App'x 505 (4th Cir. 2004).

As discussed above, Sergeant Jones participated in conversations with his subordinates Detectives Smith and Griffin about the identification of Humbert and other facts to include in the warrant application for Humbert's arrest. *See supra* Section II.C.1.b. There is a triable issue of fact about whether this warrant was supported by probable cause and whether it contained material omissions of fact, which creates a genuine dispute as to Sergeant Jones's liability for malicious prosecution. *Id.* However, there is no evidence of "widespread abuses" in determining probable cause for arrest warrant applications by Sergeant Jones's subordinates. Humbert has only produced evidence of a single incident related to his own arrest warrant. *See, e.g., Willis v. Blevins*, 3:13CV278-HEH, 2013 WL 4430923, at *13 (E.D. Va. Aug. 16, 2013) (dismissing supervisory liability claim because the "Complaint references only one prior [unconstitutional] act by [the subordinate] of which [the supervisor] was or should have been aware"). Accordingly, Humbert has not produced evidence creating a genuine dispute of material fact that Sergeant Jones has supervisory liability for the deficiencies in the arrest warrant application, in addition

to his potential liability for his personal participation in obtaining the arrest warrant.[48] Sergeant Jones will be granted summary judgment on count two.

D. Common Law Claims

In addition to the § 1983 claims, Humbert also brings several common law tort claims against the defendants under Maryland law.[49]

1. Malicious Prosecution

The police defendants contend that they are entitled to summary judgment, because "malicious prosecution can only be asserted when there is a lack of probable cause," and Humbert "has produced no evidence that the Defendant[s] acted with malice or for any other purpose other than to bring him to justice." ECF No. 74-1 at 17. Humbert argues that the police

---

[48] *Cf. Randall v. Prince George's Cnty., Md.*, 302 F.3d 188, 206-07 (4th Cir. 2002) (vacating jury verdict of supervisory liability because there was "no evidence [the defendant] knew about any propensity for unlawful action by his subordinates [or] that he had an opportunity to prevent recurrences;" evidence only supported bystander liability because defendant knew "his fellow officers were committing constitutional violations" and did nothing).

[49] Maryland applies the rule of *lex loci delicti* to determine the law to apply in tort cases. *See, e.g., Philip Morris Inc. v. Angeletti*, 358 Md. 689, 750, 752 A.2d 200, 233 n.28 (2000). Under that rule, the court applies the law of the state "where the injury—the last event required to constitute the tort—occurred." *Lab. Corp. of America v. Hood*, 395 Md. 608, 615, 911 A.2d 841, 845 (2006). All the events in this suit occurred in Maryland. *See, e.g.*, ECF No. 74-2 at 1; Pl. Ex. C at 20. Accordingly, Maryland law governs Humbert's common law claims.

defendants lacked probable cause, and malice can be inferred from that lack. *See* Pl. Oppos. at 43.

Malicious prosecution is "the unlawful use of legal procedure to bring about a legal confinement." *Montgomery Ward*, 339 Md. at 724, 664 A.2d at 927. The elements of malicious prosecution in Maryland are: "(a) a criminal proceeding instituted or continued by the defendant against the plaintiff, (b) termination of the proceeding in favor of the accused,[50] (c) absence of probable cause for the proceeding, and (d) 'malice', or a primary purpose in instituting the proceeding other than that of bringing an offender to justice." *Id.* at 714, 664 A.2d at 922. A person who obtains an arrest warrant "thereby initiates legal process against the person to be arrested[,]" and may be liable for malicious prosecution. *See id.* at 724, 664 A.2d at 927. The malice required for malicious prosecution "may be inferred from the lack of probable cause." *DiPino v. Davis*, 354 Md. 18, 55, 729 A.2d at 374 (1999) (*citing id.* at 717, 664 A.2d at 924 ("[A] plaintiff who has generated sufficient evidence of lack of probable cause to send the case to the jury is also entitled to have the jury consider the issue of malice.")).

---

[50] Humbert has shown that he obtained a favorable termination of the proceedings, because the charges against him were *nol prossed*. *Hines v. French*, 157 Md. App. 536, 554, 852 A.2d 1047, 1057 (2004).

Because there is a genuine dispute of material fact about whether the arrest warrant was supported by probable cause, and Detectives Smith and Griffin and Sergeant Jones participated in obtaining the warrant, summary judgment will be denied on count eighteen as to these defendants. *See supra* Section II.C.1.b.

However, as discussed above, there is no evidence that Detectives Brassell or Merryman had any involvement with the decision to arrest Humbert or with the warrant application. *See id.* They will be awarded summary judgment on count eighteen.

2. False Arrest and Imprisonment

The police defendants contend that "the Defendants had the legal authority to arrest the Plaintiff." ECF No. 74-1 at 16. Humbert argues that "there existed no legal justification to arrest" him. Pl. Oppos. at 42.

In Maryland, the torts of false arrest and imprisonment have the same elements: "'a deprivation of the liberty of another without [the defendant's] consent and without legal justification.'" *Montgomery Ward*, 339 Md. at 720-21, 664 A.2d at 925-26 (*quoting Great Atl. & Pac. Tea Co. v. Paul*, 256 Md. 643, 654, 261 A.2d 731, 738 (1970)); *Green v. Brooks*, 125 Md. App. 349, 366, 725 A.2d 596, 605 (1999). The law of arrest determines whether there was legal justification for the deprivation. *Montgomery Ward*, 339 Md. at 721, 664 A.2d at 926. Ordinarily, there is no cause of action for false arrest or

imprisonment when "the sole basis for the tort action is an arrest made by a police officer pursuant to a warrant which appears on its face to be valid."[51] *Id.* at 720-21, 723, 664 A.2d at 925, 927 ("[T]he false imprisonment tort does not lie against either the instigator or the arresting officer where the plaintiff is not detained by the instigator and is arrested by a police officer pursuant to a facially valid warrant."). Instead, a defendant may pursue a cause of action for malicious prosecution against the person who "falsely procur[ed his] arrest through wrongfully obtaining a [facially valid] warrant." *Id.* at 724, 664 A.2d at 927.

Here, Humbert was not arrested by the police defendants, and he concedes that the arrest warrant was facially valid. Pl. Oppos. at 33; ECF No. 74-4 at 1. Accordingly, the police defendants will be awarded summary judgment on count thirteen.

3. Battery

The police defendants assert that they have no liability for battery, because, as police officers, they "are permitted to utilize what would otherwise be a battery in the course of a lawful arrest." ECF No. 74-1 at 25. Humbert argues that, although "there is no allegation that any officers used any

[51] Further, only the arresting officer may be liable for false arrest. *Green*, 125 Md. App. at 370-71, 725 A.2d at 607 ("[T]he common law tort of false arrest contemplates that the defendant, through threats or actions, must create a present restraint of liberty." (internal quotations omitted)).

physical force beyond handcuffing him," they can still be liable for battery "in the absence of probable cause to arrest him." *See* Pl. Oppos. at 48.

Under Maryland law, battery is defined as "an offensive, non-consensual touching–the unlawful application of force to the person of another."[52] *Katsenelenbogen v. Katsenelenbogen*, 365 Md. 122, 775 A.2d 1249, 1255 n.1 (2001) (internal quotations omitted). Humbert "concedes" that the only force underlying his battery claim was the force used to arrest him. *See* Pl. Oppos. at 48. Because Humbert was arrested by Officer Larry Smith--who is not a defendant in this case--his battery claim against the police defendants fails. *See* ECF No. 74-4 at 1. The police defendants will be granted summary judgment on count twelve.

4. Abuse of Process

The police defendants contend that they are entitled to judgment on this claim, because Humbert "has produced no evidence that the Defendants utilized the criminal judicial

---

[52] In false arrest and imprisonment cases, in which there is no claim of excessive force, "[i]f the plaintiffs' arrests constituted a false imprisonment, then the physical force used in effectuating the arrests would give rise to a cause of action for assault and battery." *Ashton v. Brown*, 339 Md. 70, 119, 660 A.2d 447, 471 n.24 (1995). However, if the arrests were not tortious, the plaintiff's battery claim fails. *Id.*; *Hines*, 157 Md. App. at 551, 852 A.2d at 1055 ("False imprisonment, false arrest, and assault and battery can only occur when there is no legal authority or justification for the arresting officer's actions." (internal quotations omitted)).

process in any manner that would be considered irregular or unwarranted." ECF No. 74-1 at 18. Humbert argues that the arrest warrant application inaccurately described the Victim's identification of Humbert as "positive," and he was arrested on less than probable cause. *See* Pl. Oppos. at 44.

Abuse of process is concerned with "the improper use of the process in a manner not contemplated by law, after process has been issued."[53] *Palmer Ford, Inc. v. Wood*, 298 Md. 484, 513, 471 A.2d 297, 312 (1984). To prove liability for abuse of process under Maryland law, the plaintiff must establish that: (1) "the defendant wilfully used process after it has issued in a manner not contemplated by law;" (2) "the defendant acted to satisfy an ulterior motive;" and (3) "damages resulted from the defendant's perverted use of process." *One Thousand Fleet Ltd. P'ship v. Guerriero*, 346 Md. 29, 38, 694 A.2d 952, 956 (1997). A bad or improper motive to obtain the process is insufficient; instead, "[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process is required." *See id.*[54] For example, if the defendant used

---

[53] In contrast, malicious use of process and malicious prosecution provides a remedy when a person "maliciously caus[es] criminal or civil process to issue for its ostensible purpose, but without probable cause." *Keys v. Chrysler Credit Corp.*, 303 Md. 397, 411, 494 A.2d 200, 207 (1985).

[54] *See also Palmer Ford*, 298 Md. at 512-13, 471 A.2d at 311 ("[T]he gist of the wrong is to be found in the uses to which

"criminal prosecution as a coercive tactic in the collection of a debt," the defendant may be liable for abuse of process. *See Palmer Ford*, 298 Md. at 513, 471 A.2d at 312.

There is no evidence that the police defendants misused Humbert's arrest warrant to achieve some collateral objective after it was issued. Instead, the evidence shows that the warrant was issued, Humbert was arrested, and charges against him were investigated and prosecuted until his release. *See, e.g.*, ECF No. 74-2. Although Humbert has offered evidence that the "*issuance* of the process" was improper, this evidence alone does not support a cause of action for abuse of process. *See One Thousand Fleet*, 346 Md. at 40, 694 A.2d at 957 (*citing Keys*, 303 Md. at 411, 494 A.2d at 207); *Savage v. Mayor & City Council of Salisbury*, CIV. CCB-08-3200, 2010 WL 3038953, at *6 (D. Md. July 30, 2010) (denying abuse of process claim arising out of allegedly false arrest, because the defendant did not produce "any evidence as to how the officers used process after it was issued for an illegitimate purpose"). The police defendants will be granted summary judgment on count fourteen.

---

the party procuring the process attempts to put it. If he is content to use the particular machinery of the law for the immediate purpose for which it was intended, he is not ordinarily liable, notwithstanding a vicious or vindictive motive. But the moment he attempts to attain some collateral objective, outside the scope of the operation of the process employed, a tort has been consummated.") (internal quotations omitted).

5. IIED

The police defendants contend that Humbert "has failed to establish facts which meet the 'high burden' embodied in the four elements of [IIED]." ECF No. 74-1 at 19. Humbert asserts that the police defendants turned him "into a pariah[,] arrested him without any probable cause[,]" and withheld "exonerating DNA evidence" from the prosecutor, which resulted in his "solitary confinement for fifteen months."[55] Pl. Oppos. at 45.

To state a claim for IIED, the complaint must show that the defendant intentionally or recklessly engaged in conduct that was extreme and outrageous, and the wrongful conduct caused the plaintiff severe emotional distress. *Batson v. Shiflett*, 325 Md. 684, 733, 602 A.2d 1191, 1216 (1992). The conduct must be "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at 734, 602 A.2d at 1216.[56] In response to that conduct, "the plaintiff [must] show

---

[55] As discussed above, the evidence shows that Tan--the prosecutor in this case--was aware of the DNA results almost immediately after they were generated. *See supra* note 45.

[56] For example, a doctor knowingly exposed a nurse to an incurable sexually transmitted disease without warning her, a psychologist treating a patient for marital problems had sex with the client's wife, and an insurer forced a claimant to undergo a psychiatric examination for the sole purpose of harassing her and forcing her to abandon her claim or commit suicide. *Batson*, 325 Md. at 734, 602 A.2d at 1216 (*citing Figueiredo-Torres v. Nickel*, 321 Md. 642, 584 A.2d 69 (1991);

that he suffered "a severely disabling emotional response." *Harris v. Jones*, 281 Md. 560, 570, 380 A.2d 611, 616 (1977). Each element "must be satisfied completely before a cause of action will lie." *Hamilton v. Ford Motor Credit Co.*, 66 Md. App. 46, 502 A.2d 1057, 1063 (Md. Ct. Spec. App. 1986).

Even assuming the police defendants' conduct was "extreme and outrageous," Humbert has offered no evidence of a "disabling emotional response" as a result of that conduct. Accordingly, "he has not established an essential element of the tort, and his claim fails." *Williams v. Prince George's Cnty., MD*, 157 F. Supp. 2d 596, 605 (D. Md. 2001) (denying IIED claim when plaintiff failed to offer proof of a disabling emotional response).

6. Negligence and Negligent Failure to Warn

The police defendants contend that they are entitled to immunity on Humbert's negligence claims, because Humbert failed to produce evidence that they acted with "actual malice." *See* ECF No. 74-1 at 23. Humbert contends that the police defendants were improperly motivated to solve the Victim's rape case, acted without legal justification in arresting Humbert, and had "an

---

B.N. v. K.K., 312 Md. 135, 538 A.2d 1175 (1988); *Young v. Hartford Accident & Indemnity*, 303 Md. 182, 492 A.2d 1270 (1985)).

animus toward furnishing exculpatory evidence." *See* Pl. Oppos. at 47.

"Negligence is 'any conduct, except conduct recklessly disregardful of an interest of others, which falls below the standard established by law for protection of others against unreasonable risk of harm.'" *Mayor & City Council of Baltimore v. Hart*, 395 Md. 394, 410, 910 A.2d 463, 472 (2006) (*quoting Holler v. Lowery*, 175 Md. 149, 157, 200 A. 353, 357 (1938)). In Maryland, a public official is immune from tort liability in negligence if: "(1) he or she [is] a *public official;* and (2) his or her tortious conduct . . . occurred while performing *discretionary* acts in furtherance of official duties;[57] and (3) the acts [were] done without malice." *Williams v. Mayor & City Council of Baltimore*, 359 Md. 101, 140-41, 753 A.2d 41, 62 (2000) (emphasis in original). In this context, malice means "actual malice," *Shoemaker v. Smith*, 353 Md. 143, 163, 725 A.2d 549, 560 (1999), which is intentional conduct "without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff," *Thacker v. City of Hyattsville*,

---

[57] "[A]ctions of police officers within the scope of their law enforcement function are quintessential discretionary acts." *Williams v. Prince George's Cnty.*, 112 Md. App. 526, 550, 685 A.2d 884, 896 (1996) (*citing Robinson v. Bd. of County Comm'rs*, 262 Md. 342, 346-47, 278 A.2d 71 (1971)).

135 Md. App. 268, 762 A.2d 172, 189 (Md. Ct. Spec. App. 2000). Although actual malice may not be inferred from a lack of probable cause alone, it may "be inferred from an arrest that was so lacking in probable cause and legal justification as to render [the defendant officers'] stated belief in its existence unreasonable and lacking in credibility." *McDaniel v. Arnold*, 898 F. Supp. 2d 809, 850 (D. Md. 2012) (*citing Thacker*, 135 Md. App. at 308, 762 A.2d at 193-94).

There is a triable issue of fact on the existence of probable cause to arrest Humbert, and on the reasonableness of Detectives Smith's and Griffin's and Sergeant Jones's beliefs that probable cause existed. *See supra* Section II.C.1.b. Accordingly, there is a triable issue of fact on whether these officers are entitled to qualified public immunity on Humbert's negligence claims, and they will be denied summary judgment on counts fifteen and sixteen.[58]

[58] As there is no evidence Detective Merryman or Officer Brassell had any involvement with the decision to arrest Humbert or the drafting of the warrant application, or failed to disclose exculpatory evidence, they will be granted summary judgment on counts fifteen and sixteen. *See supra* Section II.C.1.b, notes 41, 45.

III. Conclusion

For the reasons stated above, the police defendants' motion for summary judgment will be granted in part and denied in part, and the police defendants' motion to strike will be denied.

3/25/14
Date

William D. Quarles, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND, NORTHERN DIVISION

MARLOW HUMBERT,	*	
Plaintiff,	*	
v.		CIVIL NO.: WDQ-11-0440
CHRISTOPHE JONES, *et al.*,	*	
Defendants.	*	

* * * * * * * * * * * * *

MEMORANDUM OPINION

Marlow Humbert sued Christophe Jones, Caprice Smith, and Dominick Griffin (the "police defendants") for constitutional violations under 42 U.S.C. § 1983 and state law claims. ECF No. 1. A jury trial was held from April 14, 2015 to April 20, 2015. Pending are (1) legal issues reserved for post-trial determination,[1] (2) the police defendants' motions for judgment as a matter of law, or in the alternative, for a new trial and remittitur, and to strike Humbert's opposition, and (3) Humbert's motion for attorneys' fees. In light of the jury's findings about the Victim's identification of Humbert, his resemblance to the composite sketch, and the absence of actual malice, among others, the Court will determine that the police

[1] They are: (1) whether the police defendants are entitled to qualified immunity on the federal malicious prosecution claim, and (2) whether Humbert has shown a lack of probable cause as required for his Maryland malicious prosecution claim.

defendants have federal qualified immunity and are entitled to judgment as a matter of law on the state law claims; thus, judgment will be entered for the police defendants on all counts. Additionally, the police defendants' motion to strike will be denied, and Humbert's motion for attorneys' fees will be denied as moot.

I. Background[2]

This case arises from the April 30, 2008 rape of a woman[3] in her home in Baltimore's Charles Village neighborhood, Humbert's arrest and pre-trial detention on rape charges, and his release--15 months later--when the assigned prosecutor, former Assistant State's Attorney Joakim Tam, chose to *nolle prosequi* the case.

According to trial testimony, on April 30, 2008, Griffin and Jones went to the Victim's home shortly after several police officers had arrived. Rough Trial Tr., Vol. II, 10:7-11. The

---

[2] The facts are from the parties' trial exhibits, the rough transcript of trial testimony, and the jury's factual findings. For the police defendants' motion for judgment as a matter of law, the Court will "review the entire record, disregarding all evidence favorable to [the police defendants] that the jury [wa]s not required to believe." *Trademark Props., Inc. v. A & E Television Networks*, 422 F. App'x 199, 201 (4th Cir.2011) (internal quotation marks omitted). For the motion for new trial, the Court "may weigh the evidence and consider the credibility of witnesses." *King v. McMillan*, 594 F.3d 301, 314 (4th Cir. 2010).

[3] Although the woman is referred to by name in the parties' submissions, because she is not a party to the lawsuit the Court will refer to her as the "Victim."

Victim recalled describing her attacker as 5'7", African-American, late 30s to early 40s, and fairly well-spoken. *Id.*, Vol. II, 10:16-21.[4] After taking her statement, Jones and Griffin transported the Victim and her friend--Kirsten Pickup--to a hospital for a physical examination. *Id.*, Vol. II, 10:25-11:9.[5] She was then taken to the police station to provide a recorded statement. *Id.*, Vol. II, 11:20-23.

On May 1, 2008, Griffin transported the Victim and Pickup to the police station to meet with Officer Michael Brassell, a sketch artist. *Id.*, Vol. IV, 86:23-25, 87:14-16.[6] The Victim testified that she was unhappy with the generic sketch initially produced by Brassell, so she worked with him to redraw parts of it so that it looked as close to her attacker as possible. *Id.*,

---

[4] Griffin recalled the Victim's description as 5'7" to 5'9", African American, medium build, 180 pounds, in his late 30s to 40s. Rough Trial Tr., Vol. II, 96:18-21. The Victim's recorded statement, which she testified was roughly the same as her statement at the scene, described her attacker as in his 30s, "probably 5'7"", medium build, clean cut, short hair, and no facial hair. Def. Trial Ex. 17 at 6-9; Rough Trial Tr. Vol. II, 11:24-12:3.

[5] Griffin testified that he alone transported the Victim and Pickup to the hospital. *Id.*, Vol. II, 87:9-12. Griffin testified that after the examination, he drove the Victim and Pickup to the station for her recorded statement. *Id.*, Vol. II, 87:18-25.

[6] The Victim testified that she had drawn her own sketch the night before completing the composite, but that it was unused because the police composite had to be done by a police sketch artist. *Id.*, Vol. II, 13:5-7.

Vol. II, 13:14-24, 45:13-22, 49:3-9. In particular, the Victim drew the attacker's nose, which she had described as one of his distinctive features. *Id.*, Vol. II, 49:10-15. The Victim testified that she had been satisfied with the final composite sketch,[7] and recognized it as the composite sketch on the wanted flyer. *Id.*, Vol. II, 50:2-12.[8]

The Victim further testified that Jones and Griffin were present while she worked with Brassell, and, at some time, Jones had shown her a photograph of a man on his cellphone. *Id.*, Vol. II, 13:23-24, 14:2-10.[9] Griffin testified that he had been assisting officers to canvass the area while the Victim worked with the sketch artist. *Id.*, Vol. IV, 87:6-8. Jones testified that he did not believe he had been present while the Victim worked with the sketch artist; instead, he recalled visiting a

---

[7] Griffin testified that the composite sketch was consistent with the Victim's description and Humbert's photograph. *Id.*, Vol. II, 98:7-11. Smith testified that she believes the composite sketch looks like Humbert. *Id.*, Vol. I, 151:2-12.

[8] The Victim previously swore that "[t]he features of my assailant from my sketch *and* my communications with the sketch artist were not incorporated into the composite sketch." *See* Pl. Trial Ex. 1 ¶ 5. At trial, she testified that Brassell worked with her for some time to complete the sketch, had been receptive to her changes, and that she had assisted him in the process, by, for example, drawing the nose. Rough Trial Tr., Vol. II, 48:5-49:12.

[9] The Victim could not recall if Jones had shown her the photograph while she was completing the sketch or after it had been completed. *Id.*, Vol. II, 14:7-9.

nearby school to review surveillance video. *Id.*, Vol. I, 78:6-19. Jones testified that he did not recall showing the Victim a photograph on his cellphone. *Id.*, Vol. I, 77:19-78:4. Investigative notes state that on May 1, 2008, the Victim had completed a composite sketch and that Jones and Griffin had reviewed surveillance video, but did not state when each event occurred. *See* Def. Trial Ex. 28.[10]

The composite sketch was reproduced on flyers and distributed in the area near the Victim's home. Rough Trial Tr., Vol. I, 152:6-10; Vol. II, 89:2-7.[11] Smith testified that an officer stopped Humbert near the Victim's home and identified him as a suspect based on the Victim's physical description of her attacker and the composite sketch. *Id.*, Vol. I, 150:1-16; Vol. IV, 35:8-13.[12] The officer photographed Humbert; the

---

[10] The Victim testified that Jones and Griffin drove her and Pickup home after she had completed the composite sketch. *Id.*, Vol. II, 15:10-11. During the ride, Pickup mentioned having a get-together that evening. *Id.*, Vol. II, 15:13-14. Pickup contacted the Victim that evening and told her that Jones had asked for an invitation to the get-together. *Id.*, Vol. II, 15:20-16:6. Jones testified that he did not recall meeting Pickup and denied contacting her. *Id.*, Vol. I: 84:7-25:2.

[11] *See also* Def. Trial Ex.'s 5, 6 (wanted flyers depicting composite sketch).

[12] Humbert testified that on May 7, 2008, an officer stopped him on Maryland Avenue, between 23rd Street and Charles Street, asked some questions, and asked if he could take Humbert's photograph, to which Humbert consented. Rough Trial Tr., Vol. III, 4:19-23, 20:13-16. The Victim's attack occurred at 2213 Saint Paul Place, *id.*, Vol. II, 45:9-14, which is about two

picture was included in a photo book of possible suspects to show the Victim. *Id.*, Vol. I, 150:16-19.

On May 8, 2008, Jones contacted the Victim about viewing photographs of potential suspects. *Id.*, Vol. II, 20:11-16.[13] About 20 minutes after the telephone call, Smith and Griffin arrived at the Victim's home and showed her photographs compiled from several leads--including Humbert's--and recently released offenders. *Id.*, Vol. I, 147:11-17, 149:18-25.[14]

Smith testified that the Victim pointed at Humbert's photograph, stated "that's him" several times, and became

---

blocks from where Humbert had been stopped, *see* Def. Trial Ex's 38, 40 (maps indicating the location of the attack and where Humbert had been stopped). Humbert further testified that when stopped, he was around 5'5" tall, 180 pounds, with short hair, and no facial hair. *Id.*, Vol. III 20:20-21:6. Humbert agreed that he was fairly well-spoken. *Id.*, Vol. III 21:6-11.

[13] This was the third time officers showed the Victim photographs of potential suspects. On the first occasion, the Victim told officers that the quality of the photographs made it difficult to determine skin tone, and to identify someone, she would need to see suspects in a lineup and hear their voices. *Id.*, Vol. II, 18:4-16. However, as to one of the photographs, the Victim wrote that the person "could be the suspect because his facial features match those of her attacker." Def. Ex. 7 (the Victim's statement and signature on form attached to photo array, which had also been signed by Smith and Griffin). On the second occasion, the Victim expressed the same concern that she was unable to identify anyone without a physical lineup or hearing suspects' voices. Rough Trial Tr., Vol. II, 19:3-13.

[14] Jones waited in the car while Smith and Griffin met with the Victim. *Id.*, Vol. II, 148:7-9.

visibly upset. *Id.*, Vol. I, 154:1-8.[15] The Victim, at Smith's request, finished reviewing the photos and then returned to Humbert's photograph, stating "that's him." *Id.*, Vol. I, 154:4-6. Smith testified that she told the Victim to write, in her own words, who the person was; the Victim wrote "that's him" on the back of the photograph. *Id.*, Vol. I, 154:10-13. Smith did not recall the Victim saying that she needed to see a physical lineup or hear Humbert's voice to make a positive identification. *Id.*, Vol. I, 154:15-18.

Griffin testified that the Victim pushed the photo book away from her when she turned to the page with Humbert's photograph, stated "that's him," and started crying. *Id.*, Vol. IV, 96:2-11. The Victim wrote "that's him" on the back of the photograph and signed her name. *Id.*, Vol. IV, 97:10-15. Griffin did not recall the Victim saying that she wanted to see a physical lineup or hear Humbert's voice, or indicating doubt about the identification. *Id.*, Vol. IV, 98:14-25. Jones testified that when Smith and Griffin returned to the car, they told him that the Victim had positively identified Humbert and had become emotional when she saw his photograph. *Id.*, Vol. I, 86:11-24.

---

[15] Smith's investigative notes also state that the Victim had stated "that's him" several times, pointed at the photograph, "became visibly shaken," and "put [her] hands over [her] eyes." Def. Trial Ex. 25.

The Victim testified that she became very upset when she turned to the second person in the book because he looked like the person in Jones's cellphone picture, and looked like the person who had raped her. *Id.*, Vol. II, 21:3-12. She did not deny stating "that's him," and testified that Smith told her to write "that's him" on the back of Humbert's photograph. *Id.*, Vol. II, 21:13-23, 61:3-5. She acknowledged signing her name above Humbert's photograph and on the back of the photograph. *Id.*, Vol. II, 58:20-59:11; *see also* Def. Trial Ex. 9 at 5 (the Victim's signature above Humbert's photograph), at 6 (the Victim's handwritten statement--"that's him"--and signature, and Smith and Griffin's signatures, on the back of Humbert's photograph).[16]

The Victim further testified that she asked Smith and Griffin what would happen next, and told them that she needed to see Humbert in a lineup before she would be completely sure about her identification. *Id.*, Vol. II, 59:16-19. Neither Smith nor Griffin stated that they would provide a physical

[16] The Victim also testified that about a year before trial, she had a strong emotional reaction when viewing Humbert's photograph because he resembled her attacker. *Id.*, Vol. II, 78:3-17.

lineup; rather, they told her that they were following procedure. *Id.*, Vol. II, 59:20-23.[17]

On May 9, 2008, Smith applied for an arrest warrant for Humbert. *Id.*, Vol. I, 158:21-159:5; Pl. Trial Ex. 5 (application for statement of charges and arrest warrant).[18] The warrant application summarized the Victim's description of the rape and noted that, during the investigation, "the victim completed a sketch of the suspect [that] was disseminated throughout the community." Pl. Trial Ex. 5. The application then stated that the sketch resulted in "[s]everal leads . . . one of which [led] to Marlow Humbert." *Id.* His photograph was then shown to the Victim, "along with several other similar photographs, when the victim positively identified him as her

---

[17] Jones testified that he did not recall the Victim asking to see Humbert in a lineup, but that his department did not have the facilities to do that. *Id.*, Vol. III, 111:7-15. Further, probable cause would have been required to pick up Humbert for a lineup or to provide a voice identification; thus, he would have been unable to pick up Humbert before the Victim's identification. *Id.*, Vol. III, 112:5-13.

[18] *See also* Def. Trial Ex. 26. Jones testified that he was unsure whether he had reviewed the arrest warrant application. Rough Trial Tr., Vol. I, 88:14-20. Smith testified that Jones probably would have reviewed the application but she could not recall if he had. *Id.*, Vol. I, 169:21-170:1. Griffin testified that he had known that the arrest warrant application was based on the Victim's positive identification of Humbert and that he matched the description of the attacker. *Id.*, Vol. II, 95:9-17, 96:7-23.

attacker." *Id.* Based on this application, a judge issued a warrant for Humbert's arrest. *Id.*

On May 10, 2008, Humbert was arrested. *Id.*, Vol. III, 3:14-23.[19] The Victim testified that she learned about Humbert's arrest from a friend. Rough Trial Tr., Vol. II, 22:21.[20] She then called Jones and expressed concern that she had not been informed, and that she could not identify her attacker without a physical lineup. *Id.*, Vol. II, 22:14-23:13.

The Victim attended Humbert's arraignment, but did not recognize him. *Id.*, Vol. II, 24:6-7, 20-21. She testified that she did not inform the prosecutor at the arraignment--or during subsequent conversations--that she had been unable to recognize Humbert. *Id.*, Vol. II, 71:23-25, 73:3-6, 76:2-7.

The Victim testified that a few days after the arraignment, she ran into Jones at a coffee shop; he told her they had the person who had attacked her and would obtain DNA[21] to prove it.

---

[19] Humbert testified that during his arrest, an officer showed him a picture and asked if that was Humbert; Humbert said that it was. *Id.*, Vol. III, 4:6-8. Humbert testified that the picture looked like a composite, but not an artist's rendering, and he was unsure whether it was a composite or a black and white photograph. *Id.*, Vol. III, 5:10-19.

[20] The Victim previously swore that she learned about the arrest from news reports. Pl. Trial Ex. 5 ¶ 10.

[21] The Victim testified that her attacker had told her that he was wearing a condom, but that she had not seen him put it on. Rough Trial Tr., Vol. II, 47:13-16, 81:15-16.

Id., Vol. II, 25:5-13. The Victim told him that she was unsure about the identification,[22] but would testify against him if they had DNA evidence. *Id.*, Vol. II, 25:14-18.[23] Over the next 14 months, the Victim told the prosecutor on several occasions that she would testify; however, when she learned there was no DNA evidence, she told the prosecutor that she would not testify. *Id.*, Vol. II, 28:4-12, 29:2-4. On July 30, 2009, Tan chose to *nolle prosequi* the case against Humbert, and Humbert was released. *See* Def. Trial Ex. 43 ¶ 11.[24]

On February 17, 2011, Humbert filed a 19-count complaint alleging constitutional violations under 42 U.S.C. § 1983[25] and

---

[22] The Victim testified that although she had indicated throughout the process that she could not make an identification without a physical lineup, she had the most interaction with Jones and had told him on several occasions that she could not make a positive identification. *Id.*, Vol. II, 25:12-24, 82:9-23.

[23] Jones testified that he did not recall seeing the Victim at a coffee shop. *Id.*, Vol. I, 90:12-16.

[24] Tan averred that Humbert's case had been postponed four times at requests of him and Humbert's public defender. Def. Trial Ex. 43 ¶ 10.

[25] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

42 U.S.C. § 1983 (2012).

state law claims against several police officers and others.[26] ECF No. 1.[27] On November 28, 2011, the Court dismissed counts

---

[26] Humbert sued: (1) Baltimore City police officers Chris Jones, Keith Merryman, Caprice Smith, Dominick Griffin, and Michael Brassell, in their individual and official capacities (together, the initial group of "police defendants"); (2) Martin O'Malley, individually and in his official capacity as Governor of the State of Maryland and former Mayor of the City of Baltimore; (3) the Mayor and City Council of Baltimore City; (4) Sheila Dixon, the former Mayor of Baltimore City, individually; (5) the Baltimore City Police Department (the "Police Department"); (6) Frederick Bealefeld, individually and in his official capacity as Police Commissioner of the Police Department; (7) Cinese Caldwell, individually and in her official capacity as a Baltimore City laboratory technician and police officer; and (8) Baltimore City police officers John and Jane Does 1-20s and Baltimore City police supervisors Richard and Jane Roes 1-20s, in their individual and official capacities. ECF No. 1 at 8-14.

[27] The following claims were asserted against the police defendants: (1) § 1983 claims for malicious prosecution (count three), suggestive identification procedures (count seven), failure to disclose exculpatory evidence and fabrication of inculpatory evidence (count eight), and false arrest and imprisonment (count ten), in violation of Humbert's Fourth and Fourteenth Amendment rights; (2) § 1983 claim for failure to investigate, in violation of Humbert's Fourteenth Amendment rights (count nine); (3) violations of Articles 24 and 26 of Maryland's Declaration of Rights (count eleven); (4) battery (count twelve); (5) false arrest and imprisonment (count thirteen); (6) abuse of process (count fourteen); (7) negligence (count fifteen); (8) negligent failure to warn (count sixteen); (9) malicious prosecution (count eighteen); and (10) intentional infliction of emotional distress ("IIED") (count nineteen). ECF No. 1 at 45-47, 50-68, 70-74. Humbert asserted three counts of violations of 42 U.S.C. § 1985 against all defendants (counts four through six). *Id.* at 47-50. Humbert also brought a § 1983 claim against the Police Department, O'Malley, Bealefeld, Dixon, Jones, Richard, and Jane Roes for supervisory misconduct in violation of his Fourth and Fourteenth Amendment rights (count two). *Id.* at 44-45.

four to six for failure to state a claim. ECF Nos. 35-36.[28] On March 27, 2012, the Court granted the defendants' motion to bifurcate the case and stay discovery on all claims except those asserted against the police defendants. ECF Nos. 52-53. On March 25, 2014, the Court granted the police defendants' motion for summary judgment on all claims against Brassell and Merryman, and granted summary judgment on counts two, seven, eight, nine, ten, twelve, thirteen, fourteen, and nineteen for Smith, Jones, and Griffin--the remaining police defendants. ECF Nos. 138-39.[29] The Court denied the police defendants' motion for summary judgment on counts three, eleven, fifteen, sixteen, and eighteen, in part, because there were triable issues of fact about whether the police defendants were entitled to qualified immunity on the § 1983 malicious prosecution and Maryland negligence claims. ECF No. 138 at 33 & n.40, 53.

From April 14-20, 2015, the parties tried counts three (§ 1983 malicious prosecution), eleven (Articles 24 and 26 of

---

[28] The Court also dismissed all claims against O'Malley in his official and individual capacity, and dismissed all claims against Caldwell. ECF No. 36.

[29] Humbert also brought a § 1983 claim against Jones for supervisory misconduct in violation of his Fourth and Fourteenth Amendment rights (count two). The Court granted Jones summary judgment on that count. ECF No. 138 at 43.

Maryland's Declaration of Rights),[30] fifteen (negligence),[31] and eighteen (Maryland malicious prosecution), and the police defendants' qualified immunity defense.

On April 20, 2015, the jury returned a verdict for Humbert against all three police defendants on the § 1983 malicious prosecution claim and the negligence claim.[32] The jury also made factual findings relevant to the pending legal issues.[33]

---

[30] Because Article 24 of the Declaration of Rights is similar to the Fourteenth Amendment of the United States Constitution and Article 26 is similar to the Fourth Amendment of the United States Constitution, Humbert proposed--and the police defendants did not oppose--submitting the issues together on the verdict sheet. *See* ECF No. 189 at 4.

[31] Humbert abandoned count sixteen (negligent failure to warn) at trial when he failed to provide authority for the claim; thus, it was not submitted to the jury, and judgment will be entered for the police defendants on that count.

[32] On the § 1983 claim, the jury awarded (1) $400,000 in compensatory damages and $750,000 in punitive damages against Jones, (2) $300,000 in compensatory damages and $500,000 in punitive damages against Smith, and (3) $100,000 in compensatory damages and $250,000 in punitive damages against Griffin. On the negligence claim, the jury awarded $10 in nominal damages against each defendant.

[33] Because material factual disputes prevented a ruling at the summary judgment stage on whether the police defendants were entitled to qualified immunity on the § 1983 malicious prosecution claim, those issues must be resolved by the Court based on the jury's factual findings. *See, e.g., Willingham v. Crooke*, 412 F.3d 553, 560 (4th Cir. 2005). Further, Under Maryland law of malicious prosecution, jurors do not decide whether Humbert has shown the requisite absence of probable cause (that is a legal question); instead, they decide the facts that would underlie that determination. *See, e.g., Montgomery Ward v. Wilson*, 339 Md. 701, 716, 664 A.2d 916, 923 (1995);

For each defendant, the jury found[34] that Humbert *had not* proven that:[35]

A. A reasonable officer, in [the police defendant's] place, would not have believed that he closely matched the description of the attacker given by the victim.

B. A reasonable officer, in [the police defendant's] place, would not have believed that he closely resembled the composite sketch completed by the victim.

C. When he was stopped by an officer he was not within blocks of the location where the victim's assault took place.

D. The address given to the officer when he was stopped was less than two miles away from the location where he was stopped.

E. [The police defendant] reasonably believed that when he was stopped by an officer he was not wearing a stocking cap made from a woman's stocking.

F. His record did not indicate that he was 5'7".

G. His record did not indicate that he weighed 180 pounds.

Palmer Ford, Inc. v. Wood, 298 Md. 484, 507, 471 A.2d 297, 309 (1984).

[34] The jury was instructed to apply a "preponderance of the evidence standard" to its findings.

[35] When qualified immunity is asserted, the plaintiff bears the burden of showing that a constitutional violation occurred. *Henry v. Purnell*, 501 F.3d 374, 377 (4th Cir. 2007); *Richter v. Maryland*, 590 F. Supp. 2d 730, 739 (D. Md. 2008) *aff'd sub nom. Richter v. Beatty*, 417 F. App'x 308 (4th Cir. 2011). Under Maryland law of malicious prosecution, the plaintiff bears the burden of proving that criminal proceedings were instigated without probable cause. *Mart of Waldorf, Inc. v. Alban*, 29 Md. App. 602, 605, 349 A.2d 685, 687 (1976).

H. When he was stopped by an officer he did not have a short haircut.

I. Upon seeing his photo in the photo book, the victim did not have a strong emotional reaction.

J. Upon seeing his photo in the photo book, the victim did not jab at the photo.

K. Upon seeing his photo in the photo book, the victim did not say "that's him" without prompting.

L. Upon seeing his photo in the photo book, the victim did not attempt to push it away from herself.

M. Upon seeing his photo in the photo book, the victim did not sign her name above his picture.

N. Upon seeing his photo in the photo book, the victim did not sign her name on the back of his picture.

O. Upon seeing his photo in the photo book, the victim did not write "that's him" on the back of his picture.

P. The victim was threatened, promised something, or otherwise coerced into writing "that's him" on the back of his picture.

Verdict Sheets, I:A-P. For each defendant, the jury found that Humbert *had* proven that:

Q. The victim stated to [the police defendant] before Mr. Humbert's arrest that she could not positively identify him as her attacker.

R. The victim told [the police defendant] after Mr. Humbert was arrested that she could not positively identify him as her attacker.

Verdict Sheets, I:Q-R. Additionally, the jury found that none of the police defendants had acted with actual malice. Verdict Sheets, VII:A.

On April 23, 2015, the Court entered a briefing schedule on all post-trial matters and stated that judgment would be entered thereafter. ECF No. 202.[36] On May 8, 2015, the police defendants moved for judgment as a matter of law, or in the alternative, for a new trial and remittitur. ECF No. 203.[37] That day, Humbert briefed post-trial legal issues, and moved for attorneys' fees. ECF Nos. 204, 205.[38] On May 11, 2015, Humbert submitted exhibits in connection with his briefing of post-trial legal issues. ECF No. 206.

On May 22, 2015, the police defendants opposed Humbert's brief about post-trial legal issues. ECF No. 209. That day, the police defendants, without "waiv[ing] any objection or opposition" to Humbert's motion for attorneys' fees, "join[ed]

---

[36] *See Hill v. McKinley, et al.*, Case No. 98-CV-30102 (S.D. Iowa June 15, 2001) (ruling on all post-trial matters and entering judgment), *aff'd in part, rev'd in part*, 311 F.3d 899 (8th Cir. 2002). The Court ordered post-trial motions and briefing on the issues of qualified immunity and the probable cause determination the Court had to make under Maryland law to be filed by May 8, 2015. ECF No. 202 at 1. Responses were due on May 22, 2015, and replies were due on May 29, 2015. *Id.*

[37] The police defendants incorporated their arguments for judgment as a matter of law into their briefing of post-trial legal issues. ECF No. 203 at 28.

[38] Humbert "currently estimates that his claim [for attorneys' fees] . . . will be under a million dollars," but the "amount is likely to increase if the fee petition is extensively litigated and/or the [police defendants] appeal the Judgment." ECF No. 205 at 4. Humbert seeks an award of attorneys' fees as a prevailing party and a briefing schedule for evidentiary submissions. *Id.*

in what [was] essentially a motion to stay" Humbert's motion for attorneys' fees, and consented to Humbert's motion for leave to file evidentiary support. ECF No. 208.

On May 25, 2015--three days after the responsive filing deadline--Humbert filed a "notice of filing of lengthy exhibit," which stated that his response only existed in paper format and would be served on the police defendants within 24 hours of filing the notice. ECF No. 210. On May 26, 2015, Humbert opposed the police defendants' motion for judgment as a matter of law, or in the alternative, for a new trial and remittitur. ECF No. 211.

On May 28, 2015, the police defendants moved to strike Humbert's opposition. ECF No. 212. That day, Humbert requested an extension of time for the police defendants to reply to his opposition, ECF No. 213; however, Humbert has not otherwise responded to the motion.[39] Without resolving the motion to strike, the Court granted the parties until June 1, 2015, to file any replies. ECF No. 214.

On June 1, 2015, Humbert replied to the police defendants' opposition to his brief about post-trial legal issues, ECF No.

[39] Humbert's response was due June 15, 2015; as of today's date, he has not responded.

215,[40] and the police defendants replied to Humbert's opposition to their motion for judgment as a matter of law, ECF No. 216.[41]

II. Analysis

A. Motion to Strike

Federal Rule of Civil Procedure 6(b)(1) provides that "[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time . . . on motion[42] made after the time has expired if the party failed to act because of excusable neglect." To determine if the delay is excusable neglect, the court "consider[s] all relevant circumstances, including the danger of prejudice to the non-moving party, the

---

[40] The docket entry states that Humbert's filing is a reply to the police defendants' opposition to his brief *and* his motion for attorneys' fees and the police defendants' motion to strike. *See* ECF No. 215 (docket entry). However, Humbert's reply does not address his motion for attorneys' fees, nor does it respond to the police defendants' motion to strike.

[41] On June 4, 2015, Humbert attempted to file a surreply in connection with the police defendants' motion for judgment as a matter of law, which was flagged as requiring leave of the Court. *See* ECF Nos. 218, 220; *see also* Local Rule 105.2(a)(D. Md. 2014)("Unless otherwise ordered by the Court, surreply memoranda are not permitted to be filed."); *Khoury v. Meserve*, 268 F. Supp. 2d 600, 605 (D. Md. 2003), *aff'd*, 85 F. App'x 960 (4th Cir. 2004). Humbert never sought leave of the Court to file the surreply; thus, it will not be considered.

[42] The Court will construe the tardy opposition and the notice of filing of lengthy exhibit as a motion for an extension of time to file the opposition. *See, e.g., Harty v. Commercial Net Lease LP Ltd.*, 5:09-CV-495-D, 2011 WL 807522, at *1 (E.D.N.C. Mar. 1, 2011) (construing "the filing of the [untimely] amended complaint and the notice of late filing as a motion for extension of time to file the amended complaint").

length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *See Perry-Bey v. City of Norfolk, Va.*, 679 F. Supp. 2d 655, 658-59 (E.D. Va. 2010) (*quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993)). The reason for the delay is the most important factor. *See Thompson v. E.I. DuPont de Nemours & Co., Inc.*, 76 F.3d 530, 534 (4th Cir. 1996). "'Excusable neglect' is not easily demonstrated," it should be found "only in the '*extraordinary cases* where injustice would otherwise result.'" *Id.* (emphasis in original). The party seeking the extension has the burden of demonstrating excusable neglect. *Id.*

The police defendants moved to strike Humbert's opposition because it was untimely and failed to adhere to several local formatting rules. ECF No. 212 at 1. As noted above, Humbert has not opposed the motion; however, his request for an extension of time for the police defendants' reply states that he had been unable to upload his response to the Court's electronic filing system and, thus, had emailed his response to defense counsel around noon on Tuesday, May 26, 2015. ECF No. 213 at 1.

This Court previously denied the police defendants' motion to strike Humbert's untimely opposition to their summary judgment motion. *See* ECF No. 139. There, Humbert had been unable to upload the opposition through the Court's electronic filing system, presumably because of its size. ECF No. 124 at 2. The Court received Humbert's opposition six days after the filing deadline. ECF Nos. 138 at 18; 121. In denying the motion, the Court found that Humbert had demonstrated excusable neglect because there was no indication that Humbert's counsel knew in advance that he might have technical difficulties uploading the filing, and had acted promptly to correct the problem by mailing paper copies of the filing to defense counsel and the Court. ECF No. 138 at 18-19.

Accordingly, Humbert cannot argue--and indeed he has not--that his counsel lacked notice about potential problems uploading files. Moreover, his notice of filing of lengthy exhibit[43] was filed three days after the filing deadline. Nonetheless, the Court does not want to punish Humbert for his

[43] Notices of filing of lengthy documents or exhibits are typically required when filings exceed the electronic filing system's 30 megabyte capacity, which usually occurs when filings are well over 100 pages. *See* United States District Court for the Distric of Maryland Document Filing System, https://ecf.mdd.circ4.dcn/cgi-bin/ShowIndex.pl. Humbert's opposition was 44 pages and did not include exhibits; thus, it is unclear whether size of the file prevented Humbert's counsel from uploading it.

counsel's lack of diligence. Defense counsel and the Court received Humbert's opposition on Tuesday, May 26, 2015, which--because of a holiday weekend--is the same day it would have been received had Humbert's counsel timely filed the notice of filing of lengthy exhibit. The extension of time for filing their reply mitigated any prejudice to the police defendants, and there is no indication of bad faith.

As to formatting, Local Rule 102(b) requires that court documents "shall not exceed 8 1/2" x 11", with a top margin of at least 1 1/2" and left-hand margin of 1" and a right-hand margin of 1/2". Lines of text shall be double-spaced except for quotations and footnotes. Pages shall be numbered at the bottom of every page after the first page." Humbert's opposition appears to lack virtually any top or bottom margin and page numbers, and is not double-spaced. *See* ECF No. 211. Although at 44 pages it is less than the 50-page maximum stated in Local Rule 105.3, presumably that is because of Humbert's counsel's failure to use appropriate margins or double-space the text. Additionally, Humbert's opposition lacks the table-of-contents required by Local Rule 105.4 for documents longer than 25 pages.

Nonetheless, the Court declines to grant the police defendants' motion on the basis of Local Rule violations. *See Oxford House, Inc. v. City of Raleigh*, No. 5:98-CV-113-BO(2), 1999 WL 1940013, at *2 (E.D.N.C. Jan. 26, 1999)(declining to

sanction parties for failing to comply with Local Rules). Humbert's later filings are somewhat more compliant. *See* ECF No. 215. However, Humbert's counsel is advised to familiarize himself with this Court's Local Rules to avoid the future possibility of sanctions detrimental to his client. The police defendants' motion to strike will be denied.

B. Judgment as a Matter of Law

As a general rule, "a court should not 'disturb a jury verdict unless without weighing the evidence or assessing witness credibility, it concludes that reasonable people could have returned a verdict only for the moving party.'" *Willis v. Youngblood*, 384 F. Supp. 2d 883, 886 (D. Md. 2005) (*quoting Randall v. Prince George's County, Md.*, 302 F.3d 188, 201 (4th Cir. 2002)). "If a reasonable jury could reach only one conclusion based on the evidence or if the verdict in favor of the nonmoving party would necessarily be based upon speculation and conjecture, judgment as a matter of law must be entered." *Id.* (*citing Myrick v. Prime Ins. Syndicate, Inc.*, 395 F.3d 485, 489 (4th Cir. 2005)). In reviewing such a motion, a court "must view the evidence in the light most favorable to the Plaintiff, and the Plaintiff receives the benefit of all inferences." *Id.*

However, when--as here--material factual disputes prevent a ruling on qualified immunity at the summary judgment stage, "the district court should submit factual questions to the jury and

reserve for itself the legal question of whether the defendant is entitled to qualified immunity on the facts found by the jury." *Willingham v. Crooke*, 412 F.3d 553, 560 (4th Cir. 2005) ("[A] genuine question of material fact regarding [w]hether the conduct allegedly violative of the right actually occurred ... must be reserved for trial.")(first alteration added)(internal quotation marks and citation omitted); *see also Gregg v. Ham*, 678 F.3d 333, 339 (4th Cir. 2012); *ACLU of Maryland v. Wicomico County*, 999 F.2d 780, 784 (4th Cir. 1993) (when "the defendant's entitlement to immunity turns on a factual dispute, that dispute is resolved by the jury at trial").[44]

---

[44] Accordingly, Humbert's argument that the doctrine of the law of the case precludes the Court's post-trial resolution of qualified immunity is unavailing. *See* ECF No. 204 at 17. In any event, the law of the case doctrine--which is discretionary --is inapplicable when later proceedings produce additional evidence. *See TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009)(*citing United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999))); *see also Equal Rights Ctr. v. Equity Residential*, 798 F. Supp. 2d 707, 721 (D. Md. 2011)(denial of motion to dismiss may only be dispositive as law of the case when a later motion presents the same facts); *MacGill v. Johns Hopkins Univ.*, No. R-81-2127, 1983 WL 30330, at *3 (D. Md. Apr. 14, 1983)("[I]t is generally held that an initial denial of summary judgment does not foreclose, as the law of the case, a subsequent grant of summary judgment on an amplified record.").

Further, Humbert repeatedly asserts that the jury questions do not apply to the federal malicious prosecution claim. *See, e.g.*, ECF No. 215 at 36. Although it is true that the jury decides whether the substantive elements of Humbert's § 1983 malicious prosecution claim have been met, *see Green v. Zendrian*, 916 F. Supp. 493, 499-500 (D. Md. 1996), the Court decides whether the police defendants are immune from liability on that claim; as noted, resolution of that legal question

Further, under Maryland law of malicious prosecution, jurors do not decide whether probable cause was absent (that is a legal question); instead, they decide the facts that would underlie the probable cause determination that the Court must make. *See Montgomery Ward v. Wilson*, 339 Md. 701, 716, 664 A.2d 916, 923 (1995); *Palmer Ford, Inc. v. Wood*, 298 Md. 484, 507, 471 A.2d 297, 309 (1984); *see also Johnson v. Baltimore City Police Dep't*, No. CIV. WDQ-12-0646, 2014 WL 4476586, at *6 (D. Md. Sept. 9, 2014)("What facts are sufficient to show want of probable cause in any case, is, of course, a question of law for the court; but whether such facts are proved by the evidence is a question for the jury.")(*quoting Kennedy v. Crouch*, 191 Md. 580, 62 A.2d 582, 587 (Md. 1948)).

---

depends on the jury's factual findings, even when the determinations overlap, *see Willingham*, 412 F.3d at 560. Thus, the Court will address the issue of qualified immunity before addressing the police defendants' arguments for judgment as a matter of law--which involves reviewing the entire record. *See Ramos v. Sedgwick Cnty. Sheriff's Dep't*, 785 F. Supp. 1457, 1463 (S.D. Fla. 1991)("[T]he qualified immunity doctrine was meant to create immunity from suit rather than as a mere defense to liability.").

Additionally, the Court is unimpressed with Humbert's repeated attempts to conflate this case with recent events in Baltimore following the death of Freddie Gray, or his suggestion that judgment for the police defendants might "reignite[]" protests. *See* ECF Nos. 204 at 22, 215 at 3. The Court will, as it must, apply the law to the facts as found by the jury and the evidence adduced at trial to resolve the pending issues.

1. Federal Qualified Immunity

Government officials performing discretionary functions are shielded from liability for civil damages under § 1983 when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009) (internal quotation marks and citation omitted) (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982)). Qualified immunity "protects law enforcement officers from 'bad guesses in gray areas' and ensures that they are liable only 'for transgressing bright lines.'" *Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998) *aff'd*, 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999) (*quoting Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992)). Thus, it "gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law. This accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 228-29, 112 S. Ct. 534, 537, 116 L. Ed. 2d 589 (1991)(internal quotation marks and citation omitted).

To determine if defendants are entitled to qualified immunity, the Court must decide: (1) whether the facts demonstrate a violation of a constitutional right; and (2)

whether the right at issue was "clearly established" at the time of the alleged misconduct. *Pearson*, 555 U.S. at 232, 129 S. Ct. at 815-16.

A constitutional right is clearly established "when its contours are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 313 (4th Cir. 2006) (*citing Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515, 153 L. Ed. 2d 666 (2002) (internal quotations and punctuation omitted)). "[T]he Fourth Amendment right to be arrested only on probable cause is clearly established . . . ." *Smith v. Reddy*, 101 F.3d 351, 356 (4th Cir. 1996). Also, the law is "clearly established" that the Fourth Amendment prohibits officers from deliberately or recklessly making material omissions or misstatements in warrant applications if the warrant would otherwise lack probable cause. *Miller v. Prince George's Cnty., MD*, 475 F.3d 621, 632 (4th Cir. 2007). "[A] reasonable officer cannot believe a warrant is supported by probable cause if the magistrate is misled by statements that the officer knows or should know are false." *Smith*, 101 F.3d at 355.

Here, the warrant application stated that Humbert was identified as a suspect based on a composite drawing produced by the Victim and her "positive[] identif[ication]" of Humbert as

her attacker. Pl. Trial Ex. 5; Def. Trial Ex. 26. Evidence adduced at trial--considered in the light most favorable to Humbert--indicated that Humbert had been stopped on the basis of his resemblance to the composite sketch,[45] the Victim had been shown his picture while or after completing the composite sketch,[46] stated "that's him" and became upset when shown his picture, wrote "that's him" on the back of the picture, signed the picture, and told Smith and Griffin--and later Jones--that to be sure about her identification she needed to see Humbert in a physical lineup and his voice. Against that backdrop, the jury found that the Victim had told the police defendants that she could not positively identify Humbert before--and after--his arrest. Verdict Sheets, I:Q-R. However, the jury also found that Humbert had not shown that the Victim did not emotionally

---

[45] Humbert did not introduce evidence demonstrating that he had been stopped on any other basis, for example, by subpoenaing the officer who stopped and photographed him. Moreover, Smith and Griffin testified that they thought Humbert resembled the sketch. Rough Trial Tr., Vol I, 151:2-12, Vol. II, 98:7-11.

[46] Because the Victim was unsure when Jones showed her the cellphone picture, the Court will not infer that Jones showed her the picture before the sketch had been completed. Indeed, there is no evidence that Humbert had been a suspect until he was stopped on the basis of his resemblance to the composite sketch. However, even if the Court inferred that Jones had shown the Victim the picture while she completed the sketch, there is no evidence that the sketch was based on anything other than the Victim's recollection of her attacker. *See, e.g.*, Rough Trial Tr., Vol. II, 49:3-12 (Victim's testimony that she assisted Brassel with the sketch, and drew parts of it, because she wanted it to look as close as possible to her attacker).

react to his photograph, point at it, attempt to push it away, sign her name above and on the back of his photograph, or write "that's him" on the back of the photograph. *Id.*, I:I-J, L-O. The jury also found that Humbert had not shown that the Victim had been prompted to say "that's him," or was threatened, promised something, or coerced into writing "that's him" on the back of the photograph. *Id.*, I:K,P.[47]

False statements or omissions are material if they were necessary to the judicial officer's determination of probable cause. *Evans v. Chalmers*, 703 F.3d 636, 650 (4th Cir. 2012) (*citing Franks*, 438 U.S. at 155-56, 98 S. Ct. 2674).[48] To determine materiality, the court "corrects" the warrant by removing any inaccuracies and inserting recklessly omitted facts and determines if the corrected warrant establishes probable cause. *Miller*, 475 F.3d at 628. Thus, the Court must decide whether a warrant application that correctly represented the Victim's identification established probable cause.[49] *See Bolick*

---

[47] The jury further found that Humbert had not shown that a reasonable officer would not have believed that he closely resembled the composite sketch produced by the Victim. Verdict Sheets, I:B.

[48] *See also United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990)("Omitted information that is potentially relevant but not dispositive is not [material].").

[49] For the purpose of evaluating whether a "corrected" warrant establishes probable cause, the Court will rely on the jury's findings about the composite sketch and the circumstances

v. Rhodes, No. 4:11-CV-02924-RBH, 2013 WL 1205214, at *3-4 (D.S.C. Mar. 25, 2013)(evaluating whether corrected affidavit containing six omitted statements established probable cause). If it does, the false statement or omission is not material, and the police defendants are entitled to qualified immunity.

Preliminarily, the police defendants assert that they are entitled to qualified immunity because they had, "at the very least, *arguable probable cause*." ECF No. 203 at 28 (emphasis added). Lower courts in the Fourth Circuit and elsewhere have applied "arguable probable cause" as the standard for determining whether officers are immune from liability, distinguishing it from "actual" probable cause. *See, e.g., Lea v. Kirby*, 171 F. Supp. 2d 579, 583-84 (M.D.N.C. 2001) *aff'd in part, dismissed in part*, 39 F. App'x 901 (4th Cir. 2002).[50] The Fourth Circuit Court of Appeals has not used the phrase "arguable probable cause"; however, the Fourth Circuit has stated that qualified immunity "is not contingent upon whether

---

surrounding the Victim's identification, as they relate to the statements made in the arrest warrant application. Additional findings may be relevant to the probable cause determination under Maryland law, or whether the police defendants are entitled to judgment as a matter of law on the § 1983 malicious prosecution claim.

[50] *See also Ramos*, 785 F. Supp. at 1459 (*quoting Gorra v. Hanson*, 880 F.2d 95, 97 (8th Cir. 1989)); *Plaster v. Boswell*, No. CIV. 6:05CV00006, 2007 WL 3231533, at *6 (W.D. Va. Oct. 30, 2007); *Moore v. Cease*, No. 703-CV-144 FL 1, 2005 WL 5322794, at *13 (E.D.N.C. July 5, 2005).

probable cause actually existed." *White v. Downs*, 112 F.3d 512 (4th Cir. 1997)(*citing Hunter v. Bryant*, 502 U.S. 224, 226-27, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991)). The Court reasoned that law enforcement officials will make the occasional mistake in judgment," and should "not be denied qualified immunity for making a mistake, so long as that mistake is reasonable given the circumstances." *Id.*(citations omitted). However, because probable cause is viewed through the lens of objective reasonableness,[51] for the purpose of this inquiry the Court will apply the familiar standard.[52]

"Probable cause to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *United States v. Dickey-Bey*, 393 F.3d 449, 453 (4th Cir. 2004) (*quoting Michigan v. DeFillipo*, 443 U.S. 31, 37, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979) (internal quotations omitted)); *see also United States v. Sowards*, 690 F.3d 583, 588 (4th Cir. 2012)

---

[51] *See, e.g., Wilson v. Kittoe*, 337 F.3d 392, 398 (4th Cir. 2003).

[52] *See Yattoni v. Oakbrook Terrace*, 801 F. Supp. 140, 146 (N.D. Ill. 1992) aff'd, 14 F.3d 605 (7th Cir. 1993)(declining to "explore whatever subtle distinctions (if any at all) may exist between probable cause as grounds for immunity and probable cause as a substantive defense").

(totality-of-the-circumstances test applies to determine where there was probable cause for an arrest).

To determine if there was probable cause to arrest, the Court considers only "facts and circumstances known to the officer at the time of the arrest." *Wilson*, 3378 F.3d at 398 (internal quotations and punctuation omitted). Probable cause does "not require officials to possess an airtight case before taking action," and officers "must be given leeway to draw reasonable conclusions" from information. *Taylor v. Farmer*, 13 F.3d 117, 121-22 (4th Cir. 1993). Probable cause requires more than "bare suspicion," but "less than evidence necessary to convict." *Pleasants v. Town of Louisa*, 524 F. App'x 891, 897 (4th Cir. 2013) (internal quotations omitted).

The police defendants argue that the composite sketch and the Victim's identification established probable cause, and her subsequent statement that she could not positively identify Humbert without a physical lineup did not negate probable cause. ECF No. 203 at 10-11, 14-27.[53] Humbert argues that whether he

[53] The police defendants also argue that the police defendants were entitled to rely on the Victim's statement "that's him" because it was an "excited utterance." ECF No. 203 at 19-22. Although it is true that--as a matter of evidentiary law--excited utterances are deemed reliable, and, thus, admissible as an exception to the rule against hearsay, *see* Fed. R. Evid. 803(2), Humbert has not disputed the admissibility of the Victim's statement (though he argues--in a conclusionary fashion--that the police defendants "had reason to believe the Victim was unreliable"). ECF No. 204 at 19. In any event, the

matched the sketch is "moot against the backdrop of the Victim's testimony that the sketch artist was not incorporating her input into her rendering and was instead drawing a generic looking African American," and the Victim testified that she had been shown a photograph of Humbert before completing the sketch. ECF Nos. 204 at 23; 215 at 35; *see also* ECF No. 211 at 27. Humbert further argues that the only reason the Victim expressed emotion when she viewed Humbert's photograph, jabbed at it, pushed it away, and said "that's him," was because Humbert's photograph looked like the person in Jones's cellphone picture. ECF Nos. 204 at 23; 211 at 29-30, 33.[54]

The police defendants counter that Humbert's arguments ignore the jury's findings. ECF No. 209 at 15. Humbert asserts that he has not ignored the jury's findings, but rather the

---

cases cited by the police defendants in connection with the reliability of the Victim's statement are inapposite as they do not address probable cause.

[54] Humbert initially argued that the jury had found that the Victim was induced into writing "'that's him' when [Jones] showed her the picture of a man that looked like [him.]" ECF No. 204 at 23. Although it is unclear, presumably by "when," Humbert means "because." However, the jury made no explicit findings about whether Jones had shown the Victim a photograph on his cellphone; further, the jury *did not* find that the Victim had been coerced to write "that's him" or prompted to say "that's him." Verdict Sheets, I:K,P. Upon request by the police defendants, the Court clarified the jury's finding on that issue, *see* ECF No. 207 (sealed); Humbert has amended his position on that finding, *see* ECF No. 211 at 16.

police defendants "just [do not] like the substance of the testimony adduced at trial." ECF No. 215 at 35-37.

As noted above, for the purpose of resolving qualified immunity, the Court must rely on the jury's answers to the questions on the Verdict Sheet. *See Willingham*, 412 F.3d at 560; *ACLU of Maryland*, 999 F.2d at 784. Nonetheless, Humbert's characterization of the record merits brief comment.

First, the Victim testified at trial that the sketch artist *had* incorporated her input--in fact, she drew the nose, one of her attacker's distinctive features--and was satisfied with the final sketch. *See* Rough Trial Tr., Vol. II, 13:14-24, 45:13-22, 49:3-5, 50:2-12.[55] Second, the Victim testified that she could not recall if Jones had shown her the cellphone picture while she was completing the sketch *or after* it had been completed. *Id.*, Vol. II, 14:7-9. Finally, the Victim testified that she became upset when she saw Humbert's photograph because he looked like Jones's cellphone picture *and* because he looked like the

[55] Although she previously averred that her comments had not been incorporated into the composite sketch, *see* Pl. Trial Ex. 1, the jury was free to credit the Victim's trial testimony over her prior sworn statement. However, it is unclear whether the jury relied on the Victim's testimony, the police defendants' testimony, or their own assessment of the likeness between the sketch (submitted as Def. Trial Ex's 5 and 6) and Humbert to find that Humbert had not shown that a reasonable officer would not have believed that Humbert did not resemble the sketch.

person who had raped her. *Id.*, Vol. II, 21:3-12.[56] Crucially, however, there is no evidence that the Victim communicated the apparent partial source of her distress to Smith or Griffin. "Courts evaluate probable cause not on the facts as an omniscient observer would perceive them but on the facts as they would have appeared to a reasonable person in the position of the arresting officer-seeing what he [or she] saw, hearing what he [or she] heard." *Kelley v. Myler*, 149 F.3d 641, 646 (7th Cir. 1998)(internal quotation marks and citation omitted).

As to the merits, the identification of a suspect from a composite sketch "makes a finding of probable cause more likely than not"; in conjunction with a tentative identification, probable cause may be established. *Ramos v. Sedgwick Cnty. Sheriff's Dep't*, 785 F. Supp. 1457, 1460, 1463 (S.D. Fla. 1991). In *Ramos*, one of several cases relied on by the police defendants, three officers stated that the defendant resembled the composite prepared by the victim, and although the victim "expressed some doubts" she identified the defendant as her attacker and asked to see him "face-to-face with a hat on," 785 F. Supp. at 1458-63. In holding the officers immune from liability, the Court stated that the victim's

---

[56] About five years after the Victim learned that there was no DNA evidence implicating Humbert as her attacker and his charges had been dropped, the Victim still had a strong emotional reaction when viewing Humbert's photograph because he resembled her attacker. Rough Trial Tr., Vol. II, 78:3-17.

> request to see the Plaintiff face-to-face with a hat on does not undermine the identification. When coupled with [the officers'] positive identification of [the] Plaintiff . . . from the composite identikit created by the rape victim . . . , the fact that [the victim] picked Plaintiff's picture out of a good photo spread and signed it, we believe, is sufficient to clearly warrant a finding of probable cause.

Id. at 1461.

Humbert distinguishes *Ramos* on the basis that the Victim told the police defendants "in no uncertain terms that . . . . she could not identify anyone." ECF No. 211 at 29. However, the Victim's identification was not so unequivocal. Whereas in *Ramos* the victim testified that she had told the officers that "this might be him, [but] I'm not sure," F. Supp. at 1461, here, the evidence demonstrates--and Humbert has not disproven--that the Victim told Smith and Griffin "that [is] him," had a strong emotional reaction to Humbert's photograph, jabbed at it and tried to push it away from herself, wrote "that's him" on the back of his picture, and signed it--albeit with the caveat that she was not certain absent a physical lineup and hearing his voice. In connection with the jury's finding that Humbert has not shown that he did not resemble the composite sketch, *Ramos* favors a finding of probable cause.

The police defendants also rely on several cases in which courts found that probable cause had been established by an affirmative identification notwithstanding circumstances

relevant to--but not completely destroying--probable cause. For example, in *Yattoni v. Oakbrook Terrace*, 801 F. Supp. 140, 146 (N.D. Ill. 1992) *aff'd*, 14 F.3d 605 (7th Cir. 1993), a robbery victim identified the plaintiff in two photospreads--"tentatively the first time, but without doubt or hesitation the second time." *Id.* During the first identification, the victim stated

> there was another guy that I was unsure of that maybe had some of the same, a few characteristics the same and I wasn't really a hundred percent sure. But I questioned it a little bit, but I had picked out [the plaintiff] more. I said this [picture of {the plaintiff}] looks like it but there's a little question that it was someone else.

Id. at 143. The victim "complained that the black-and-white photos left her unable to judge hair color or skin tone," and agreed to view a color photospread. *Id.* The Court found that probable cause had been established by the second affirmative identification, notwithstanding the victim's earlier tentative identification, that the plaintiff was the only person represented in each photospread, the victim's stress during the robbery, her changing descriptions of the robber, and differences between the plaintiff and a composite sketch. *Id.* at 146-48. The Court reasoned that when a victim "points to a picture and cries, 'That's the one!', the 'reasonable and prudent' person . . . will naturally tend to believe that the person so identified is guilty." *Id.* at 146.

In *Phillips v. Allen*, 743 F. Supp. 2d 931, 953 (N.D. Ill. 2010), another case relied on by the police defendants, the victim of an armed robbery and shooting testified that she overheard a conversation between a police officer and an acquaintance indicating that the plaintiff was suspected of attacking her. *Id.* at 938. Later that day, the victim viewed several photosheets. *Id.* She initially identified one person as her attacker, then upon seeing the plaintiff's picture, stated "that's him." *Id.* at 939. When the officer asked if she was positive, she said "yes." *Id.* *Phillips* found that probable cause had been established by the victim's identification even if she had overheard the acquaintance give the officer the plaintiff's name. *Id.* at 943.

Yattoni and *Phillips* are minimally persuasive. Although the Victim in this case stated "that's him," thus approximating the "that's the one!" cried out in *Yattoni*, the jury found that she had qualified her statement; thus, this case is more like the tentative identification (though it is not as tentative) that preceded the affirmative identification establishing probable cause in *Yattoni*. Unlike the *Phillips* victim who stated that she was "positive" about her identification, the Victim here was not positive. Neither *Yattoni* nor *Phillips* addressed whether additional factors--such as an emotional

reaction and resemblance to a composite sketch--bolster probable cause in connection with a tentative identification.

Braxton v. State, 123 Md. App. 599, 720 A.2d 27, 35, 50 (1998), which involved a search and seizure warrant based on a victim's identification, is more persuasive. In *Braxton*, then Maryland Court of Special Appeals Judge Ellen L. Hollander[57] applied *Franks*[58] to affirm the trial court's denial of a motion to suppress the warrant on the basis of material misrepresentations about the strength of the identification. *Id.* at 616, 646, 720 A.2d at 35, 50. There, the trial court characterized as "a question of semantics" an officer's characterization of a victim's statement as a "positive[] identifi[cation]" when the victim actually stated that "this is the individual. Looks very close to the guy that robbed me." *Id.* at 617, 720 A.2d at 35-36 (alteration omitted). Although critical of the officer's choice of words, the trial court held that an affidavit accurately representing the victim's statement would have established probable cause. *Id.* at 618, 720 A.2d at 36. In affirming the warrant, Judge Hollander agreed that "this dispute was largely a matter of semantics." *Id.* at 646, 720

---

[57] Judge Hollander is now a U.S. District Judge for the District of Maryland.

[58] The standard stated in *Franks* for evaluating motions to suppress also defines the scope of qualified immunity. *See*, e.g., *Evans*, 703 F.3d at 650; *Smith v. Reddy*, 882 F. Supp. 497, 499 (D. Md. 1995), *aff'd*, 101 F.3d 351 (4th Cir. 1996).

A.2d at 50. The degree of certainty in *Braxton* is similar to that of the Victim's here.

There are few cases addressing the unique circumstances present here: an arguably strong, affirmative identification of a suspect followed by a desire to see the suspect in a physical lineup and to hear his voice to be completely sure. As one court has recognized, however, "[w]hile absolute certainty of an identification is ideal, it is unnecessary during the investigative stage." *United States v. Waxman*, 572 F. Supp. 1136, 1140-42 (E.D. Pa. 1983) *aff'd*, 745 F.2d 49 (3d Cir. 1984)(characterizing as "positive" and "certain" identifications made by two witnesses, even though one witness was only "85 percent" sure the defendant's photograph depicted the person who committed the crime, and the other witness stated that the defendant's photograph resembled the suspect, but that two other pictures of the defendant did not; "for all he knew, the other two pictures could be of someone else").

Thus, considering the totality of the facts and circumstances known to the police defendants when the arrest warrant application was sworn, a "corrected" warrant stating Humbert's resemblance to the composite sketch, the Victim's strong emotional reaction to Humbert's photograph, including jabbing at it and attempting to push it away from herself, her signature above and on the back of Humbert's photograph, her

unprompted written statement "that's him," and her oral statement "that's him," taken together with her statement that she needed a physical lineup or to hear his voice to be completely sure, would have established probable cause. *See Yattoni*, 801 F. Supp. at 146 ("Probable cause is . . . "less than a rule of more-likely-than-not, but how much less depends on the circumstances"--that is, on the factual and practical considerations of everyday life on which reasonable and prudent [people], not legal technicians, act.")(internal citations and quotation marks omitted). Accordingly, the omissions in the arrest warrant application were neither material nor reckless.

That it may be a close call does not prevent a finding of qualified immunity. *See Martin v. Mendoza*, 230 F.Supp.2d 665, 671 (D. Md. 2002) ("[E]ven if it is assumed that the existence of probable cause to arrest for disorderly conduct is a 'close call' on the present record, this is exactly the point of the qualified immunity defense. To deny [the defendant] the benefit of the qualified immunity defense, I would have to be persuaded that no reasonably competent officer could have concluded that probable cause existed . . . ."). "Qualified immunity is lost only if 'the warrant application is [or would be] so lacking in indicia of probable cause as to render official belief in its existence unreasonable.'" *Smith*, 101 F.3d at 356 (*quoting*

Malley v. Briggs, 475 U.S. 335, 344-45, 106 S. Ct. 1092, 1098 (1986)).[59]

That the jury found that the Victim told the police defendants after Humbert's arrest that she could not positively identify him does not change the outcome. An officer's failure to disclose exculpatory evidence after a suspect is arrested based on a determination of probable cause "does not render the continuing pretrial seizure of a criminal suspect unreasonable under the Fourth Amendment." *See Taylor v. Waters*, 81 F.3d 429, 435-37 (4th Cir. 1996) (Fourth Amendment jurisprudence did not clearly render unconstitutional an officer's failure to disclose exculpatory evidence to the prosecution; "[i]nstead, other constitutional guarantees contained in the Bill of Rights--such as the right to a speedy trial--protect the accused");[60] *see also*

---

[59] The jury's finding that none of the defendants had acted with actual malice in connection with Humbert's negligence claim--which they were instructed may "be inferred from an arrest that was so lacking in probable cause and legal justification as to render [the defendant officers'] stated belief in its existence unreasonable and lacking in credibility"--buttresses the Court's conclusion. *See McDaniel v. Arnold*, 898 F. Supp. 2d 809, 850 (D. Md. 2012); Verdict Sheets VII:A. That permissible inference is strikingly similar to the standard for qualified immunity on the federal malicious prosecution claim. *See Smith*, 101 F.3d at 356.

[60] The Fourth Circuit has held that a police officer who withholds exculpatory information from a prosecutor can be liable for a due process violation under § 1983 *only when* the officer's failure to disclose "deprived the § 1983 plaintiff[ ] of [his] right to a fair trial," *Taylor*, 81 F.3d at 436 n. 5;

Scott ex rel. Davis v. Parr, No. CIV.A. 5:04CV00054, 2005 WL 711967, at *3-*4 (W.D. Va. Mar. 29, 2005)(granting summary judgment for defendant police officer on plaintiff's § 1983 unlawful arrest claim when the officer initiated criminal proceedings against the plaintiff based on witness identifications, but later learned--and failed to inform the prosecutor--that the witnesses could no longer affirmatively identity the plaintiff and none of the actual perpetrators had implicated the plaintiff, because "the court must only consider the facts and circumstances known to the [defendant] at the time of the arrest"). Accordingly, the police defendants are entitled to qualified immunity on the federal malicious prosecution claim, and judgment will be entered in their favor on count three.[61]

2. Maryland Malicious Prosecution

Malicious prosecution is "the unlawful use of legal procedure to bring about a legal confinement." *Montgomery Ward v. Wilson*, 339 Md. 701, 724, 664 A.2d 916, 927 (1995). The elements of malicious prosecution in Maryland are: "(a) a

---

Goodwin v. Metts, 885 F.2d 157, 162 (4th Cir. 1989). Here, Humbert was never tried for the Victim's rape.

[61] Thus, the jury's award of compensatory and punitive damages will be stricken. Because the Court has resolved this claim in the police defendants' favor, it need not address the police defendants' alternative motion for a remittitur, and Humbert's motion for attorneys' fees will be denied as moot as he is not a prevailing party, *see* 42 U.S.C. § 1988 (2012).

criminal proceeding instituted or continued by the defendant against the plaintiff, (b) termination of the proceeding in favor of the accused, (c) absence of probable cause for the proceeding, and (d) 'malice', or a primary purpose in instituting the proceeding other than that of bringing an offender to justice." *Id.* at 714, 664 A.2d at 922. A person who obtains an arrest warrant "thereby initiates legal process against the person to be arrested[,]" and may be liable for malicious prosecution. *See id.* at 724, 664 A.2d at 927.

In Maryland, probable cause "is a nontechnical conception of a reasonable ground for belief of guilt." *DiPino v. Davis*, 354 Md. 18, 32, 729 A.2d 354, 361 (1999)(*quoting Collins v. State*, 322 Md. 675, 679, 589 A.2d 479, 481 (1991)); *see also Okwa v. Harper*, 360 Md. 161, 183-84, 757 A.2d 118, 130 (2000)("Probable cause, as the term suggests, is a concept based on probability."). It is determined "in terms of facts and circumstances 'sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense.'" *DiPino*, 354 Md. at 32, 729 A.2d at 361 (*quoting Gerstein v. Pugh*, 420 U.S. 103, 111, 95 S.Ct. 854, 862, 43 L.Ed.2d 54, 64 (1975)).

In addition to the evidence discussed above,[62] evidence adduced at trial--considered in the light most favorable to Humbert--indicated that Humbert had been stopped near the Victim's home, and at the time he weighed 180 pounds, was around 5'5" tall, had short hair, and was well-spoken. Against that backdrop, the jury found that Humbert had not shown that (1) he did not have a short haircut or had been within blocks of where the Victim's attack took place when he was stopped and photographed by the officer, and (2) his record did not indicate that he was 5'7" or weighed 180 pounds at the time.

Probable cause exists when a suspect resembles a composite sketch or a witness's description and is found shortly after the crime in the same area. *See, e.g., Chambers v. Maroney*, 399 U.S. 42, 46-47, 90 S. Ct. 1975, 1978-1979, 26 L.Ed.2d 419 (1970) (police had "ample" probable cause to arrest suspects whose clothing and car matched a witness's description); *Shriner v. Wainwright*, 715 F.2d 1452, 1454 (11th Cir. 1983)(finding probable cause when officer testified that the plaintiff bore a "striking resemblance" to the composite and plaintiff was stopped "one day after the two crimes in the same county"). Further, as discussed above, identification of a suspect based on a composite sketch may establish probable cause in connection with a tentative identification. *See Ramos*. 785 F. Supp. at

[62] *See supra* Section II.B.1.

1460, 1463. Thus, in addition to finding that a corrected warrant would have established probable cause, the Court also finds that the police defendants had probable cause to arrest Humbert; thus, judgment will be entered in their favor as to count eighteen.[63]

3. Negligence

The police defendants argue they are entitled to judgment on the negligence claim because the jury found that none of the defendants had acted with actual malice. ECF No. 203 at 30. Humbert argues that for his "negligence [claim] to stand, there would have to be a finding of 'malice[,]'" thus, "the jury's finding of 'actual malice' is immaterial." ECF No. 211 at 38.

"Negligence is 'any conduct, except conduct recklessly disregardful of an interest of others, which falls below the standard established by law for protection of others against

---

[63] For the same reasons, the Court finds that the police defendants are also entitled to judgment as a matter of law on the federal malicious prosecution claim. *See Pinder v. Knorowski*, 660 F. Supp. 2d 726, 735-36 (E.D. Va. 2009)(to establish a § 1983 malicious prosecution claim, the plaintiff must show that "he was seized without probable cause and that he obtained a favorable termination of the proceedings against him"); *see also Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000)(a "malicious prosecution claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure")(*citing Brooks v. City of Winston-Salem*, 85 F.3d 178 (4th Cir. 1996)). Because the Maryland Declaration of Rights is interpreted together with the United States Constitution, judgment will also be entered for the police defendants on count eleven (violations of Articles 24 and 26 of the Maryland Declaration of Rights).

unreasonable risk of harm.'" *Mayor & City Council of Baltimore v. Hart*, 395 Md. 394, 410, 910 A.2d 463, 472 (2006) (*quoting Holler v. Lowery*, 175 Md. 149, 157, 200 A. 353, 357 (1938)). In Maryland, however, a public official is immune from tort liability in negligence if: "(1) he or she [is] a *public official;* and (2) his or her tortious conduct . . . occurred while performing *discretionary* acts in furtherance of official duties;[64] and (3) the acts [were] done without malice." *Williams v. Mayor & City Council of Baltimore*, 359 Md. 101, 140-41, 753 A.2d 41, 62 (2000) (emphasis in original).

In this context, malice means "actual malice," *Shoemaker v. Smith*, 353 Md. 143, 163, 725 A.2d 549, 560 (1999), which is intentional conduct "without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff," *Thacker v. City of Hyattsville*, 135 Md. App. 268, 762 A.2d 172, 189 (Md. Ct. Spec. App. 2000). Although actual malice may not be inferred from a lack of probable cause alone, it may "be inferred from an arrest that was so lacking in probable cause and legal justification as to render [the defendant officers']

---

[64] "[A]ctions of police officers within the scope of their law enforcement function are quintessential discretionary acts." *Williams v. Prince George's Cnty.*, 112 Md. App. 526, 550, 685 A.2d 884, 896 (1996) (*citing Robinson v. Bd. of County Comm'rs*, 262 Md. 342, 346-47, 278 A.2d 71 (1971)).

stated belief in its existence unreasonable and lacking in credibility." *McDaniel v. Arnold*, 898 F. Supp. 2d 809, 850 (D. Md. 2012) (*citing Thacker*, 135 Md. App. at 308, 762 A.2d at 193-94).

Although the jury found that the police defendants had breached a duty of care owed to Humbert, proximately causing him injury, the jury further found that none of the police defendants had acted with actual malice. *See* Verdict Sheets VI-VII. As discussed above, "malice" in this context means "actual malice." *Shoemaker*, 353 Md. at 163, 725 A.2d at 560. Thus, Humbert' argument is unavailing;[65] the police defendants are entitled to judgment as a matter of law as to count fifteen.[66]

III. Conclusion

For the reasons stated above, judgment will be entered for the police defendants on all counts, the police defendants'

---

[65] Further, the definition of actual malice (conduct "without legal justification or excuse, but with an evil or hostile motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff") given to the jury had been proposed by Humbert. *Compare* Verdict Sheets, VII.I, *with* ECF No. 181 at 12.

[66] The jurors awarded Humbert $10 in nominal damages against each defendant on the negligence claim. However, the Verdict Sheets instructed the jury that damages may only be awarded if they answered "yes" to the question on actual malice. *See* Verdict Sheets, VIII.1-2. Thus, the jury should not have awarded nominal damages; it will be stricken. Accordingly, the Court need not address the police defendants' alternative motion for a new trial.

motion to strike will be denied, and Humbert's motion for attorneys' fees will be denied as moot.

6/22/15
Date

William D. Quarles, Jr.
United States District Judge

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1768

MARLOW HUMBERT,

Plaintiff – Appellant,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY; SHEILA DIXON, former Mayor of the City of Baltimore, in her individual capacity; BALTIMORE CITY POLICE DEPARTMENT; FREDERICK BEALEFELD, Police Commissioner Individually and as Police Commissioner, Baltimore City Police Department; MICHAEL BRASSELL, Police Officer Individually and as Police Officer, Baltimore City Police Department; CHRIS JONES, Detective Sergeant Individually and as Police Officer, Baltimore City Police Department; CAPRICE SMITH, Detective Individually and as Police Officer, Baltimore City Police Department; DOMINICK GRIFFIN, Detective Individually and as Police Officer, Baltimore City Police Department; JOHN AND JANE DOES 1-20, Individually and as currently unknown Police Officers, Baltimore City Police Department; RICHARD AND JANE ROES 1-20, Individually and as currently unknown Baltimore City Police Department Supervisors,

Defendants – Appellees,

and

MARTIN O'MALLEY, Individually and as Governor of the State of Maryland and former Mayor of the City of Baltimore; KEITH MERRYMAN, Detective Individually and as Police Officer, Baltimore City Police Department; CINESE CALDWELL, Laboratory Technician individually and as Police Officer, Baltimore City Police Department,

Defendants.

No. 15-2461

MARLOW HUMBERT,

Plaintiff – Appellant,

v.

BALTIMORE CITY POLICE DEPARTMENT; FREDERICK BEALEFELD, Police Commissioner Individually and as Police Commissioner, Baltimore City Police Department; SHEILA DIXON, former Mayor of the City of Baltimore, in her individual capacity; MAYOR AND CITY COUNCIL OF BALTIMORE CITY; CHRIS JONES, Detective Sergeant Individually and as Police Officer, Baltimore City Police Department; CAPRICE SMITH, Detective Individually and as Police Officer, Baltimore City Police Department; DOMINICK GRIFFIN, Detective Individually and as Police Officer, Baltimore City Police Department,

Defendants – Appellees,

and

MICHAEL BRASSELL, Police Officer Individually and as Police Officer, Baltimore City Police Department; CINESE CALDWELL, Laboratory Technician individually and as Police Officer, Baltimore City Police Department; JOHN AND JANE DOES, Individually and as currently unknown Police Officers, Baltimore City Police Department; KEITH MERRYMAN, Detective Individually and as Police Officer, Baltimore City Police Department; MARTIN O'MALLEY, Individually and as Governor of the State of Maryland and former Mayor of the City of Baltimore; RICHARD AND JANE ROES 1-20,

Defendants.

Appeals from the United States District Court for the District of Maryland, at Baltimore. William D. Quarles, Jr., District Judge. (1:11-cv-00440-WDQ)

Argued: January 25, 2017 Decided: August 7, 2017

Amended: August 22, 2017

Before GREGORY, Chief Judge, and THACKER and HARRIS, Circuit Judges.

Reversed in part, vacated in part, and remanded with instructions by published opinion. Chief Judge Gregory wrote the opinion, in which Judge Thacker and Judge Harris joined.

ARGUED: Charles Henry Edwards, IV, LAW OFFICE OF BARRY GLAZER, LLP, Baltimore, Maryland, for Appellant. Suzanne Sangree, BALTIMORE CITY DEPARTMENT OF LAW, Baltimore, Maryland, for Appellees. **ON BRIEF:** George Nilson, City Solicitor, Kara Lynch, Assistant Solicitor, Colin Glynn, Assistant Solicitor, BALTIMORE CITY DEPARTMENT OF LAW, Baltimore, Maryland, for Appellees.

GREGORY, Chief Judge:

For over a year, Appellant Marlow Humbert languished in pretrial solitary confinement, charged with committing a heinous act of sexual assault. The questionable investigatory strategies of Baltimore City Police Department ("BPD") officers led to Humbert's unlawful arrest. Afterwards, the officers failed to inform the State's Attorney that the victim could not positively identify Humbert and that DNA reports excluded him as a suspect. Once the prosecutor obtained this information, he dropped the charges and Humbert was finally freed. Humbert then initiated a suit against the officers who caused his arrest and the government officials he believed sanctioned the deprivation of his liberty.

A jury determined that the officers violated Humbert's constitutional rights and awarded him $2.3 million in compensatory and punitive damages. The district court, however, struck the damages award, concluding that the officers were entitled to qualified immunity because they had probable cause to arrest Humbert. On appeal, Humbert maintains that the district court erred in its probable cause analysis by misinterpreting the evidence and misapplying the law. As explained below, we reverse the district court's judgment and remand with instructions to reinstate the jury verdict.

I.

We begin with a summary of the relevant evidence presented at trial, viewed in the light most favorable to Humbert. *Buckley v. Mukasey*, 538 F.3d 306, 321 (4th Cir. 2008).

On April 29, 2008, a woman (the "victim") was raped in her home in the Charles Village neighborhood of Baltimore, Maryland. When Detective Dominic Griffin and Sergeant Chris Jones arrived at the scene, the victim described her attacker as a 5'7", African-American male in his late 30s to early 40s who was fairly well-spoken. The victim testified that Jones repeatedly asked whether the assailant was homeless, but Jones testified that he did not recall asking this question. Griffin then transported the victim to the hospital for a physical exam, during which her clothing was collected and physical evidence was retrieved from her body.

When she returned home, the victim, an experienced and well-trained artist, sketched the assailant attempting to capture his "very distinct features." J.A. 508. Her sketch was discarded, however, because BPD procedure required that an officer complete the composite sketch. The next day, the victim met with an officer to generate the composite, but it looked generic and she attempted to redraw portions of it. The victim testified that at some point either during or after completing the sketch, Jones showed her a photo on his cellphone of a man he identified as her attacker. Jones testified that he did not show "anybody a photo of anything," J.A. 622, but later stated that if he had shown her a photo, "it would have been to tell her what features to have drawn on the composite," J.A. 654. The officers created a "wanted" poster using the composite sketch and the victim's physical description of the assailant and disseminated it throughout the community and to every police district in the city. They then began to receive tips regarding people who resembled the sketch and description.

On May 5, 2008, Detective Caprice Smith showed the victim both a photo array of six individuals and a photobook with about forty-five black-and-white and color printouts of potential suspects, but the victim did not identify anyone. The victim informed Smith that the photos were of poor quality and distorted and that she could not identify a person of color using a black-and-white printout. On May 7, 2008—eight days after the attack—an officer stopped Humbert a couple of blocks from the victim's home and took a picture of him because he resembled the wanted poster. Humbert also informed the officer that he was homeless.

The following evening, Jones, Smith, and Griffin drove to the victim's home to show her another photobook, which included Humbert's picture. Upon seeing Humbert's photo—the second in the book—the victim became very emotional and started crying. She jabbed the photo, said "that's him," and attempted to push the photobook away. J.A. 470. The victim testified that Humbert had some facial features similar to her attacker, which triggered her emotional response, and Humbert's photo looked like the picture Jones showed her several days prior. The victim wrote "that's him" on the back of the photo and signed her name. She then informed Smith and Griffin that she could not positively identify Humbert as her assailant because she needed to see him in a physical lineup and hear his voice. The officers assured her that they were following BPD procedure and left her home.[1]

[1] The officers testified that BPD procedure did not permit the use of physical or voice lineups. There is, however, no evidence that this was ever communicated to the victim.

Six hours later, after making two attempts to locate Humbert at outdated addresses, the officers generated a second "wanted" flyer indicating that Humbert was wanted for rape and disseminated it to various BPD districts. Smith also applied for an arrest warrant stating that the victim positively identified Humbert as her attacker.[2] Finding probable cause to support the application, a court commissioner issued the arrest warrant. In the early morning of May 10, 2008, while Humbert was at work, an officer approached him with the wanted flyer and asked whether he was the man on the flyer. Humbert initially said yes, then saw the word "rape" and said, "that's not me." J.A. 570. The officer arrested Humbert and transported him to a police station. Humbert was later transferred to a single cell where he remained for nearly fifteen months.

Upon learning of Humbert's arrest, the victim contacted Jones to tell him that she could not positively identify Humbert as her attacker. When she went to Humbert's arraignment on June 23, 2008, she did not recognize Humbert. The victim again informed Jones that she was not positive whether Humbert was her attacker, but because Jones assured her that the officers had DNA evidence, she agreed to testify against him. The victim later met with Assistant State's Attorney Joakim Tan to discuss the case, and during her monthly conversations with Tan, she agreed to testify so long as there was DNA evidence.

[2] Smith, the officer who drafted the warrant application, testified that Griffin provided her with input for the application and Jones reviewed it before she submitted it to the court commissioner.

Throughout Humbert's extensive detention, the officers requested several DNA samples and received reports excluding him as the source of DNA found on the victim and her clothing. They received the first report on June 2, 2008, and the last report on December 15, 2008. Though the officers testified that prosecutors generally obtain DNA reports directly from the crime lab, they stated that if they had the reports, they should have given them to Tan. In fact, on May 12, 2008—two days after Humbert's arrest—Tan sent the officers a memorandum requesting that any and all information received by the BPD in connection with Humbert's case be immediately delivered to his office. On June 23, 2008, at Humbert's arraignment, Tan informed the court that he heard, but had not confirmed, that Humbert's DNA did not match any found on the victim. Tan declared that he needed the DNA reports for confirmation, but he did not receive them until May 11, 2009. Tan then informed the victim that there was no DNA evidence connecting Humbert to her attack, and he learned for the first time that the victim could not identify Humbert and she refused to testify. On July 30, 2009, Tan entered a *nolle prosequi* as to Humbert's charges, and Humbert was finally released about fifteen months after his arrest.

II.

On February 17, 2011, Humbert initiated this action against officers Jones, Smith, and Griffin (hereinafter, the "Officers"), and several other state and local officials, alleging various violations of state law and the Fourth and Fourteenth Amendments to the

United States Constitution under 42 U.S.C. § 1983.[3] As relevant to this appeal, Humbert asserted against the Officers claims for malicious prosecution under § 1983 and for violations of Articles 24 and 26 of Maryland's Declaration of Rights. Humbert alleged, among other things, that the Officers improperly influenced the victim to identify him as her attacker and that they arrested him without probable cause by submitting a materially false arrest warrant application. Humbert further alleged that, after his arrest, the Officers obtained DNA reports excluding him as the attacker, but intentionally failed to furnish the reports to Tan or inform Tan of the victim's inability to positively identify him until the eve of his criminal trial.

After the district court denied the Officers' motion for summary judgment as to these claims, the parties proceeded to trial.[4] The jury returned verdict sheets with several factual findings.

The jury found that Humbert *had not* proven that:

> A. …[A] reasonable officer, in [the Officers'] place, would not have believed that he closely matched the description of the attacker given by the victim.
>
> B. …[A] reasonable officer, in [the Officers'] place, would not have believed that he closely resembled the composite sketch completed by the victim.

[3] Humbert also sued the Mayor and City Council of Baltimore City, BPD, former Police Commissioner Frederick H. Bealefeld, and former Mayor Sheila Dixon (collectively, the "Municipal Appellees"). The district court dismissed many of Humbert's claims, bifurcated this case, and stayed discovery as to the Municipal Appellees until the remaining claims against the Officers were resolved.

[4] The district court granted the motion in part as to other officers and granted summary judgment as to some of Humbert's claims not at issue in this appeal.

C. …[W]hen he was stopped by an officer he was not within blocks of the location where the victim's assault took place.

D. …[His last known] address given to the officer when he was stopped was less than two miles away from the location where he was stopped.

E. …[The Officers] reasonably believed that when [Humbert] was stopped by an officer he was not wearing a stocking cap made from a woman's stocking.

F. …[H]is record did not indicate that he was 5'7".

G. …[H]is record did not indicate that he weighed 180 pounds.

H. …[W]hen he was stopped by an officer he did not have a short haircut.

I. …[U]pon seeing his photo in the photo book, the victim did not have a strong emotional reaction.

J. …[U]pon seeing his photo in the photo book, the victim did not jab at the photo.

K. …[U]pon seeing his photo in the photo book, the victim did not say "that's him" without prompting.

L. …[U]pon seeing his photo in the photo book, the victim did not attempt to push it away from herself.

M. …[U]pon seeing his photo in the photo book, the victim did not sign her name above his picture.

N. …[U]pon seeing his photo in the photo book, the victim did not sign her name on the back of his picture.

O. …[U]pon seeing his photo in the photo book, the victim did not write "that's him" on the back of his picture.

P. …[T]he victim was threatened, promised something, or otherwise coerced into writing "that's him" on the back of his picture.

J.A. 210–13, 219–21, 227–29.

The jury further found that Humbert *had* proven that:

> Q. …[T]he victim stated to [the Officers] before Mr. Humbert's arrest that she could not positively identify him as her attacker.
>
> R. …[T]he victim told [the Officers] after Mr. Humbert was arrested that she could not positively identify him as her attacker.

J.A. 213, 221, 229.

Additionally, the jury found that a reasonable officer in the Officers' positions would not have believed that Humbert was responsible for the rape before issuing the arrest warrant. The jury ultimately determined that the Officers were liable for malicious prosecution under § 1983 and awarded Humbert $2.3 million in compensatory and punitive damages.[5] The district court, however, reserved for itself the legal question of whether the officers were otherwise entitled to qualified immunity.

After the trial, the Officers filed a motion for judgment as a matter of law or, in the alternative, for a new trial and remittitur. The district court concluded that the Officers had probable cause to arrest Humbert and were entitled to qualified immunity. The court thereby granted the motion, struck the jury award of damages, and found no need to address the motion for a new trial. Humbert timely appealed the court's disposition of his constitutional claims. The Municipal Appellees subsequently filed a motion for judgment as a matter of law, which the district court granted. The court concluded that because the Officers did not commit a constitutional violation, the § 1983 claims asserted against the

[5] The district court instructed the jury that its findings as to the federal claim would apply to the state constitutional claim. J.A. 215, 223, 231.

Municipal Appellees could not survive.[6] Humbert timely appealed this judgment, and we consolidated the appeals.

III.

We review de novo the district court's grant of a post-trial motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). *Sloas v. CSX Transp., Inc.*, 616 F.3d 380, 392 (4th Cir. 2010). This Court views the evidence adduced at trial "in the light most favorable to [Humbert], the nonmoving party, and draw[s] all reasonable inferences in [his] favor." *Buckley*, 538 F.3d at 321. As to qualified immunity, we may reverse the district court only if "the evidence favoring the [plaintiff] is . . . legally sufficient to overcome the defense." *Durham v. Jones*, 737 F.3d 291, 298 (4th Cir. 2013) (quoting *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011)). We may not make credibility determinations or weigh the evidence, but we

> must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.

Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 151 (2000) (quoting 9A Wright & Miller, *Federal Practice and Procedure* § 2529, at 300 (2d ed. 1995)).

[6] The court also noted that only a negligent supervision claim remained against Bealefeld. After disposing of all the federal claims in the case, the court declined to exercise supplemental jurisdiction over this state law claim and dismissed it.

IV.

Humbert argues that the district court erred in determining that there was probable cause to support his seizure and that the Officers were entitled to qualified immunity. Qualified immunity shields government officials from liability in a § 1983 suit as long as their conduct has not violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To determine whether an officer is entitled to qualified immunity, the court must examine (1) whether the facts illustrate that the officer violated the plaintiff's constitutional right to be free from unreasonable seizures, and (2) whether the right was clearly established at the time of the alleged event such that "a reasonable officer would have understood that his conduct violated the asserted right." *Miller v. Prince George's County*, 475 F.3d 621, 627 (4th Cir. 2007) (quoting *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001)). The answer to both questions must be in the affirmative to defeat the officer's entitlement to immunity. *Id.*

A.

First, viewing the evidence and the jury's factual findings in the light most favorable to Humbert, we must determine whether they demonstrate that the Officers' conduct amounted to malicious prosecution under § 1983. "[A]llegations that an arrest made pursuant to a warrant was not supported by probable cause, or claims seeking damages for the period after legal process issued"—e.g., post-indictment or arraignment—are considered a § 1983 malicious prosecution claim. *Brooks v. City of Winston-Salem*, 85 F.3d 178, 182 (4th Cir. 1996). Such a claim "is properly understood

as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort." *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012) (quoting *Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000)). To succeed, a plaintiff must show that "the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in [the] plaintiff's favor." *Id.*

The jury found that the Officers caused Humbert to be seized and criminally prosecuted, *see* J.A. 214, 222, 230, and it is undisputed that the prosecutor entered a *nolle prosequi*. Our analysis will therefore focus on the existence of probable cause to institute and maintain the criminal proceedings against Humbert.

1.

Humbert contends that, though he was arrested pursuant to a warrant, his arrest was unsupported by probable cause because it resulted from a materially false warrant application. "'[P]robable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed . . . an offense." *Cahaly v. Larosa*, 796 F.3d 399, 407 (4th Cir. 2015) (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)). Probable cause is "an objective standard of probability that reasonable and prudent persons apply in everyday life," *United States v. Gray*, 137 F.3d 765, 769 (4th Cir. 1998), and determined by a "totality-of-the-circumstances" approach, *Illinois v. Gates*, 462 U.S. 213, 230 (1983). "While

probable cause requires more than bare suspicion, it requires less than that evidence necessary to convict." *Gray*, 137 F.3d at 769 (internal quotation marks omitted).

A party challenging the veracity of a warrant application must show that the officer(s) deliberately or with a "reckless disregard for the truth" made material false statements in the warrant application, *Franks v. Delaware*, 438 U.S. 154, 171 (1978), or omitted from that application "material facts with the intent to make, or with reckless disregard of whether they thereby made, the [application] misleading," *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990) (citation omitted). Reckless disregard can be evidenced by an officer acting "with a high degree of awareness of [a statement's] probable falsity," meaning that "when viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported." *Miller*, 475 F.3d at 627 (quoting *Wilson v. Russo*, 212 F.3d 781, 788 (3d Cir. 2000)). Omissions are made with reckless disregard when the evidence demonstrates that a police officer "failed to inform the judicial officer of facts [he] knew would negate probable cause." *Id.* (quoting *Beauchamp v. City of Noblesville, Inc.*, 320 F.3d 733, 743 (7th Cir. 2003)).

Moreover, a plaintiff must demonstrate that the false statement or omission is material, "that is, 'necessary to the [neutral and disinterested magistrate's] finding of probable cause.'" *Id.* at 628 (quoting *Franks*, 438 U.S. at 156). To determine materiality, the Court must "excise the offending inaccuracies and insert the facts recklessly omitted, and then determine whether or not the corrected warrant affidavit would establish probable cause." *Id.* (quoting *Wilson*, 212 F.3d at 789).

Here, the warrant application included the victim's description of the assault and stated that:

> [a]n investigation was conducted, during which the victim completed a sketch of the suspect. It was disseminated throughout the community. Several leads were produced, one of which [led] to Marlow Humbert . . . . On May 8, 2008, his photograph was shown to the victim along with several other similar photographs, when the victim positively identified him as her attacker. Efforts were made to locate him with negative results.

J.A. 306. Humbert argues that (1) the statement that "the victim positively identified him as her attacker" is false and (2) a "corrected" warrant application excising the statement would not establish probable cause. The Officers contend that the statement is not false and a corrected warrant would merely amend the statement by adding the following: "but [the victim] stated that she felt she needed to see [Humbert] in person in a lineup and hear his voice." Appellees' Br. 29. The Officers explain that the victim's strong reaction to Humbert's photo and saying "that's him" constituted a positive identification, and that her subsequent reservations about his identity as her attacker did not diminish its veracity.

The jury's factual findings and the evidence adduced at trial clearly support Humbert's contention that the statement is false. Despite finding that the victim had a strong emotional reaction when she viewed Humbert's photo, said and wrote "that's him," and signed her name on his photo, the jury unequivocally found that the victim informed the Officers that she could not positively identify Humbert as her attacker. *See* J.A. 213, 221, 229. Additionally, trial testimony demonstrates that the victim reacted strongly to Humbert's photo and said "that's him" in part because Jones showed her a picture of man who "looked very much like" Humbert several days prior and plainly

stated that he was her attacker. J.A. 524. Though Jones testified to the contrary, the procedural posture of this case requires that we credit the victim's testimony in Humbert's favor and disregard Jones's contradicted testimony as the jury was not required to believe it. *See Reeves*, 530 U.S. at 301. Trial testimony also shows that Jones repeatedly asked the victim whether her attacker was homeless and that Humbert was homeless at the time he was stopped. Drawing all reasonable inferences in Humbert's favor, the evidence indicates that Jones may have shown the victim Humbert's photo because he presumed that Humbert was the assailant, and his actions affected her ability to identify Humbert as her attacker. And the victim's subsequent statements that she could not positively identify Humbert without seeing him in person and hearing his voice due to the poor quality of the photos in the photobook further belied the Officers' assertion that she positively identified Humbert. This evidence undoubtedly undercut the Officer's ability to rely on the victim's initial reaction to Humbert's photo as a positive identification.

Viewing the evidence in the light most favorable to Humbert, we therefore conclude that the statement that the victim positively identified Humbert as her attacker was false and the Officers had an obvious reason to doubt its accuracy before including it in the warrant application. As such, the inclusion of this false statement amounts to at least recklessness.

Regarding materiality, the parties dispute how the corrected warrant application should be composed. Humbert argues that the entire false statement should be removed, whereas the Officers assert that the statement should remain and we should also include

the victim's need to see Humbert in a lineup and hear his voice. Adopting the Officers' version of the corrected warrant would require that we base our probable cause determination on a plainly false statement and ignore Jones's suggestive conduct and the victim's inability to identify Humbert. Instead, we will excise the false statement that the victim positively identified Humbert and a corrected warrant would include: (1) a description of the assault, (2) that an investigation was conducted in which an officer showed Humbert's photo to the victim and identified him as the attacker, (3) that a composite sketch was drawn and distributed throughout the area, (4) that Humbert was one of several leads produced, (5) that the victim initially responded emotionally to Humbert's picture in a photobook and said "that's him," (6) that the victim then stated that she could not positively identify Humbert without seeing him in person and hearing his voice, and (7) that the Officers were unable to locate him.

Taking this information in the light most favorable to Humbert, the corrected warrant application would not have established probable cause to arrest Humbert. It is clear that the probable cause supporting the Officers' application was based primarily, if not entirely, on the false assertion that the victim positively identified Humbert. *See Torchinsky v. Siwinski*, 942 F.2d 257, 262 (4th Cir. 1991) ("It is surely reasonable for a police officer to base his belief in probable cause on a victim's reliable identification of his attacker."). The Officers contend that the victim's initial response to Humbert's photo in the photobook constitutes the identification. But had the application shown that Jones partially caused the victim's initial response by displaying Humbert's photo at the beginning of the investigation and identifying him as the attacker and shown that the

victim was ultimately unable to positively identify Humbert, that identification—the sole basis of probable cause—would have been negated. Thus the Officers' failure to mention these facts was reckless. Even more, the corrected warrant would have requested that the court commissioner issue a warrant for Humbert's arrest merely because he was one of several people who resembled a composite sketch, and in spite of Jones's suggestive conduct and the victim's inability to identify Humbert. Such a warrant would not have provided probable cause, "in light of all the evidence," to arrest Humbert. *Miller*, 475 F.3d at 629 (quoting *Pierce v. Gilchrist*, 359 F.3d 1279, 1293 (10th Cir. 2004)).

The Officers unconvincingly assert that courts have found that resemblance to a physical description or composite sketch is enough to establish probable cause for an arrest. *See, e.g.*, *Chambers v. Maroney*, 399 U.S. 42, 46 (1975); *Pasiewicz v. Lake Cty. Forest Pres. Dist.*, 270 F.3d 520, 524 (7th Cir. 2001); *Shriner v. Wainwright*, 715 F.2d 1452, 1454 (11th Cir. 1983); *United States v. Diggs*, 522 F.2d 1310, 1314 (D.C. Cir. 1975). But the Officers ignore that, in those cases, the probable cause findings were based on much more than mere resemblance. For instance, in *Shriner v. Wainwright*, the Eleventh Circuit found that an officer had probable cause to stop and arrest Shriner for committing two robberies because he bore a "striking resemblance" to a physical description and composite sketches of the suspect provided by three witnesses, *and* because he was found a day after the crimes were committed in the same county. 715 F.2d at 1454. The court reasoned that, when combined "[w]ith such a temporal and geographic proximity, a description by witnesses of a suspect may provide a sufficient basis for arresting an individual who closely resembles the description." *Id.* Similarly, in

Pasiewicz v. Lake County Forest Preserve District, the Seventh Circuit found probable cause to arrest Pasiewicz for indecent exposure because he bore a "fair resemblance" to physical descriptions given by two witnesses, and because one witness saw Pasiewicz the day after the incident and identified him as the suspect. 270 F.3d at 524. The court reasoned that "there was no indication that the [witnesses] were lying, or that their information otherwise was not credible or accurate." *Id.* Contrary to the Officers' view, the courts considered the plaintiffs' resemblance to physical descriptions and sketches as they examined the totality of the circumstances presented.

The circumstances presented in the corrected application would not "warrant a prudent person, or one of reasonable caution, in the believing, in the circumstances shown," that Humbert attacked the victim. *Cahaly*, 796 F.3d at 407. While true that Humbert, as well as several others, resembled a composite sketch, the corrected application also demonstrates that the Officers improperly impacted the investigation and the victim's reaction to Humbert's photo in the photobook. The Officers fail to cite to any cases where the courts were confronted with such troubling evidence. The corrected application further shows that the victim informed the Officers that she could *not* identify Humbert as her attacker, in stark contrast to the witness in *Pasiewicz*. The corrected application does not include any additional information to overcome this evidence that so clearly undermines probable cause. No judicial officer employing the totality-of-the-circumstances approach would have issued the warrant simply because Humbert resembled a sketch.

Because the facts and circumstances presented by the corrected application are not sufficient in themselves to warrant a person of reasonable caution in the belief that Humbert committed the offense stated in the application, we conclude that the false statement and omitted facts are material. We are aware that "[a]n investigation need not be perfect, but an officer who intentionally or recklessly puts lies before a magistrate, or hides facts from him, violates the Constitution unless the untainted facts themselves provide probable cause." *Miller*, 475 F.3d at 630–31. Here, the untainted facts do not provide probable cause. Thus the warrant was invalid and could not support Humbert's seizure.

2.

We must next consider whether probable cause otherwise existed to arrest Humbert and initiate criminal proceedings against him. Despite our determination that the warrant was invalid, Humbert's seizure may nevertheless be justified if the arresting officer "had adequate knowledge independent of the warrant to constitute probable cause." *United States v. White*, 342 F.2d 379, 381 (4th Cir. 1965); *see Robinson v. City of South Charleston*, 662 F. App'x 216, 221 (4th Cir. Oct. 24, 2016) (unpublished) ("[P]robable cause is sufficient to justify a public arrest under the Fourth Amendment, regardless of the validity of the arrest warrants obtained by the officers or any deficiencies in the affidavits supporting them."). Because Humbert's malicious prosecution claim is based on the Fourth Amendment's right to be free from unreasonable seizure, our inquiry is not limited to the validity of the warrant application; Humbert must show that the *legal process* instituted against him was without probable

cause. *See Graves v. Mahoning County*, 821 F.3d 772, 775 (6th Cir. 2016) (stating that a plaintiff "may not prevail merely by showing that they were arrested with a defective warrant; they must show that they were *unreasonably seized*"); *see also Owens v. Balt. City State's Attorneys Office*, 767 F.3d 379, 390 (4th Cir. 2014) ("Malicious prosecution redresses injuries a plaintiff sustains as a result of a defendant's improper initiation or maintenance of formal proceedings against him.").

The district court concluded that the Officers had probable cause to arrest Humbert because the jury found that Humbert closely matched the victim's physical description of her assailant, he closely resembled the composite sketch, he was stopped by an officer "shortly" after the assault took place within blocks of the victim's home, and the victim "tentatively" identified him. J.A. 278. The district court, however, mischaracterized much of the jury's findings and the evidence adduced at trial.

Trial testimony indicates that Humbert closely matched a generic physical description—a 5'7", African-American male in his late 30s to early 40s who was fairly well-spoken—and a generic looking composite sketch of an African-American male. Humbert was also stopped *eight days* after the assault in the Charles Village neighborhood, near his homeless shelter and a couple of miles away from where his family members resided. These facts cannot reasonably support the probable cause needed for his arrest. *See Smith v. Munday*, 848 F.3d 248, 254 (4th Cir. 2017) (concluding that officer's knowledge that plaintiff "had previously been convicted for selling drugs . . . , that she was a black woman, and that she was 'near' the site of the drug sale because her home address was eleven miles away" was not enough to establish

probable cause to arrest her for possession and distribution of a controlled substance). Courts have typically found reasonable suspicion to stop or probable cause to arrest an individual who closely resembles a description or composite sketch when that resemblance is combined with *both* geographic and temporal proximity. *See, e.g.*, *Chambers*, 399 U.S. at 44 (finding probable cause to arrest suspects found *within an hour* of crime in vehicle matching a distinctive description about two miles from crime scene); *United States v. Quinn*, 812 F.3d 694, 698 (8th Cir. 2016) (finding that officer's location of suspect *within an hour* of crime and several blocks from crime scene, combined with matching a description, only supported a finding of reasonable suspicion); *United States v. Goodrich*, 450 F.3d 552, 562 (3d Cir. 2006) (finding reasonable suspicion to support stop of vehicle that matched a specific description and was found at the scene of a theft *in progress*); *Shriner*, 715 F.2d at 1454 (stating that resemblance to composite sketches and descriptions may provide probable cause for arrest of suspect when combined with finding him *one day* after two crimes were committed in the same county). These cases support a seizure occurring within only a few hours of the crime. Humbert's presence in Charles Village eight days later is not sufficiently proximate in time to warrant his arrest, as emphasized by the fact that he was not arrested based on his resemblance to the composite when initially stopped. If these facts could support probable cause, then officers would have probable cause to arrest "any local resident[] who fit the generic description of the day," so long as they were found walking in their own neighborhood more than a week after the commission of a crime. *Munday*, 848 F.3d at 254. "Such

scant evidence barely meets the threshold of 'mere suspicion,' let alone the threshold of probable cause." *Id.*

Moreover, the Officers can find no solace in the victim's so-called tentative identification, as the evidence demonstrates that the Officers improperly influenced the investigation from its inception. Jones asked the victim multiple times whether her assailant was homeless, and it is undisputed that Humbert was homeless at the time he was stopped. Jones also showed the victim Humbert's picture and identified him as her attacker a day after the assault occurred, either during or after she completed the composite sketch and only a few days before she saw his photo in the photobook. Again, drawing all reasonable inferences in Humbert's favor, the evidence indicates that Jones inappropriately affected the victim's ability to complete the composite sketch and identify her attacker. Such suggestive acts unquestionably nullified the Officers' ability to rely on the victim's initial reaction to Humbert's photo. And although the district court left these disturbing facts out of its probable cause inquiry, the jury credited this testimony when it found in favor of Humbert despite its numerous factual findings against him. Indeed, the jury awarded Humbert over $1 million in compensatory and punitive damages against Jones alone. Further, the victim's reaction was negated when she stated that she could not positively identify Humbert without seeing him in person and hearing his voice because of the poor quality of the photos in the photobook. The Officers make much of the victim's artistic background and that she saw her assailant's face moments before she was attacked, presumably to establish the victim's keen sense of

detail. Yet, even so, the victim explicitly and repeatedly informed the Officers that she could not identify Humbert as her attacker.

All of these facts taken together are not "sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown," that Humbert engaged in criminal activity. *Cahaly,* 796 F.3d at 407. Much like with the corrected warrant application, we simply cannot see how, under the circumstances of this case, the Officers could have reasonably concluded that they had probable cause to arrest Humbert. At most, the circumstances would have given the Officers only reasonable suspicion to investigate Humbert further. We therefore conclude that Humbert's arrest was not supported by probable cause.

Similarly, the legal process instituted against Humbert and his resulting pretrial detention were unsupported by probable cause. The evidence shows that the court commissioner made his probable cause determination by relying on a materially false and misleading warrant application. And during Humbert's fifteen-month detention, the Officers never obtained any evidence of his criminality before or after his arraignment. To the contrary, the victim continuously informed them that she could not identify Humbert. What is more, the Officers received reports excluding Humbert as a source of the DNA found on the victim and her clothing—the first report on June 2, 2008, and the last report on December 15, 2008. Yet, they did not give the reports to Assistant State's Attorney Tan until May 11, 2009, despite receiving a memorandum from Tan a year earlier on May 12, 2008, expressly demanding that any and all information received by the BPD in connection with the case be *immediately* delivered to his office. Drawing all

inferences in Humbert's favor, the Officers failed to promptly give the reports to Tan because the victim only agreed to testify against Humbert based on their assurances that DNA evidence supported Humbert's guilt. Further, they never notified Tan of the victim's inability to identify Humbert. It was only after Tan received the reports that he learned from the victim herself that she could not identify Humbert and she refused to testify. Because the Officers withheld such substantial information from Tan, he maintained the criminal proceedings against Humbert without any proper basis. To be sure, once Tan finally possessed this information, he entered a *nolle prosequi*. Viewing these facts in the light most favorable to Humbert, his criminal proceedings and pretrial detention also violated his Fourth Amendment rights. Put differently, the Officers caused legal process to be instituted and maintained against him without probable cause to believe that he committed a crime. *See Manuel v. City of Joliet*, ——U.S. ——, 137 S. Ct. 911, 918 (2017) (holding that pretrial detention resulting from legal process unsupported by probable cause violates the Fourth Amendment).

We therefore conclude that the evidence reasonably supports the jury's verdict in favor of Humbert's § 1983 malicious prosecution claim.[7]

[7] The standard used for analyzing Fourth Amendment claims is the same as that used for claims under Articles 24 and 26 of the Maryland Declaration of Rights. *See Henry v. Purnell*, 652 F.3d 524, 536 (4th Cir. 2011) (stating that the standards are the same); *see also Williams v. Prince George's County*, 685 A.2d 884, 895 (Md. Ct. Spec. App. 1996). As such, our probable cause determination applies to Humbert's state constitutional claims, for which the district court granted judgment in favor of the Officers. Thus our holding that the Officers violated Humbert's Fourth Amendment rights requires that we reverse the district court on this claim.

B.

Because we have determined that the Officers lacked probable cause to seize Humbert, we must next examine whether instituting criminal process against him violated a clearly established rule. The Officers argue that a reasonable person in the Officers' positions would not have known that his or her actions violated a clearly established right.

Certainly, the Fourth Amendment right to be seized only on probable cause was clearly established at the time of the events at issue here. *Brooks*, 85 F.3d at 183. The law made clear that arresting and initiating legal process against a person without probable cause amounts to a seizure in violation of the Fourth Amendment. *Lambert*, 223 F.3d at 261–62; *Brooks*, 85 F.3d at 183. Additionally, it was clearly established "that the Constitution did not permit a police officer deliberately, or with reckless disregard for the truth, to make material misrepresentations or omissions to seek a warrant that would otherwise be without probable cause." *Miller*, 475 F.3d at 631–32 (collecting cases). The objective standard for qualified immunity accommodates the allegation of falsity or material omissions "because a reasonable officer cannot believe a warrant is supported by probable cause if the magistrate is misled by [stated or omitted facts] that the officer knows or should know are false [or would negate probable cause]." *Smith v. Reddy*, 101 F.3d 351, 355 (4th Cir. 1996).

Though the law was clearly established, the Officers argue that they acted reasonably by relying on the victim's strong reaction to Humbert's photo and saying "that's him" to constitute a positive identification. For this proposition, the Officers cite

to *Reddy*, in which we noted that "[t]he reasonableness of [the officer's] conduct does not turn on whether probable cause was, in fact, present. When an officer acts pursuant to a warrant, the pertinent question is whether the officer could have reasonably thought there was probable cause to seek the warrant." *Id.* at 356. The plaintiff contended that it was unreasonable for the officer to seek the warrant because the officer should have doubted the reliability of the witnesses' statements. *Id.* The Court found that the officer acted reasonably because the witnesses' statements were consistent with other evidence implicating the plaintiff and confirmed by disinterested observers. *Id.*

Here, however, the Officers had no reasonable basis to believe probable cause existed to seek the warrant or initiate criminal proceedings against Humbert based on the victim's initial reaction to Humbert's photo. As stated above, the victim reacted emotionally to seeing Humbert's photo because his photo looked like the one Jones showed her the day after her attack and Jones indicated that he was her assailant. No reasonable officer could have believed that the Fourth Amendment permitted Jones's conduct. And any reasonable officer in the Officers' positions would have doubted the reliability of the victim's initial response to Humbert's photo and attributed it, at least in part, to Jones's actions. The Officers' irrational reliance is further underscored by the victim's subsequent statement that she could not positively identify Humbert. Under these circumstances, the Officers could not have reasonably believed that probable cause existed to seek a warrant for Humbert's arrest.

We therefore conclude that the Officers are not entitled to qualified immunity. Accordingly, we reverse the district court's qualified immunity determination and

remand to the district court with instructions to reinstate the jury's verdict as to this claim.

V.

Lastly, because the district court wrongly held that the Officers' conduct did not amount to a constitutional violation, the court never confronted whether the Municipal Appellees violated Humbert's Fourth Amendment rights. We therefore vacate the court's grant of judgment as a matter of law to the Municipal Appellees and remand for further proceedings consistent with this opinion.[8]

VI.

For the foregoing reasons, the district court's judgments are

REVERSED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS.

[8] Humbert also argues that the district court erred by failing to resolve the Officers' alternative motion for a new trial. The court however found no reason to address the motion because it entered judgment in the Officers' favor. We conclude that the district court did not abuse its discretion by essentially denying the motion as moot. *See Konkel v. Bob Evans Farms Inc.*, 165 F.3d 275, 279 (4th Cir. 1999) (stating that we review denial of motion for new trial under Rule 50(b) for abuse of discretion).

FILED: September 5, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1768 (L)
(1:11-cv-00440-WDQ)

MARLOW HUMBERT

Plaintiff - Appellant

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY; SHEILA DIXON, former Mayor of the City of Baltimore, in her individual capacity; BALTIMORE CITY POLICE DEPARTMENT; FREDERICK BEALEFELD, Police Commissioner Individually and as Police Commissioner, Baltimore City Police Department; MICHAEL BRASSELL, Police Officer Individually and as Police Officer, Baltimore City Police Department; CHRIS JONES, Detective Sergeant Individually and as Police Officer, Baltimore City Police Department; CAPRICE SMITH, Detective Individually and as Police Officer, Baltimore City Police Department; DOMINICK GRIFFIN, Detective Individually and as Police Officer, Baltimore City Police Department; JOHN AND JANE DOES 1-20, Individually and as currently unknown Police Officers, Baltimore City Police Department; RICHARD AND JANE ROES 1-20, Individually and as currently unknown Baltimore City Police Department Supervisors

Defendants - Appellees

and

MARTIN O'MALLEY, Individually and as Governor of the State of Maryland and former Mayor of the City of Baltimore; KEITH MERRYMAN, Detective Individually and as Police Officer, Baltimore City Police Department; CINESE

CALDWELL, Laboratory Technician individually and as Police Officer, Baltimore City Police Department

Defendants

No. 15-2461
(1:11-cv-00440-WDQ)

MARLOW HUMBERT

Plaintiff - Appellant

v.

BALTIMORE CITY POLICE DEPARTMENT; FREDERICK BEALEFELD, Police Commissioner Individually and as Police Commissioner, Baltimore City Police Department; SHEILA DIXON, former Mayor of the City of Baltimore, in her individual capacity; MAYOR AND CITY COUNCIL OF BALTIMORE CITY; CHRIS JONES, Detective Sergeant Individually and as Police Officer, Baltimore City Police Department; CAPRICE SMITH, Detective Individually and as Police Officer, Baltimore City Police Department; DOMINICK GRIFFIN, Detective Individually and as Police Officer, Baltimore City Police Department

Defendants - Appellees

and

MICHAEL BRASSELL, Police Officer Individually and as Police Officer, Baltimore City Police Department; CINESE CALDWELL, Laboratory Technician individually and as Police Officer, Baltimore City Police Department; JOHN AND JANE DOES, Individually and as currently unknown Police Officers, Baltimore City Police Department; KEITH MERRYMAN, Detective Individually and as Police Officer, Baltimore City Police Department; MARTIN O'MALLEY,

Individually and as Governor of the State of Maryland and former Mayor of the City of Baltimore; RICHARD AND JANE ROES 1-20

Defendants

ORDER

The court denies the petition for rehearing and rehearing en banc of Chris Jones. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Thacker and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND, NORTHERN DIVISION

MARLOW HUMBERT, *

Plaintiff, *

v. * CIVIL NO.: WDQ-11-0440

CHRISTOPHE JONES, *
et al., *

Defendants. *

* * * * * * * * * * * * *

VERDICT SHEET

CHRISTOPHE JONES

Unless otherwise stated, the following questions require the plaintiff to prove certain things by a preponderance of the evidence. To establish something by a preponderance of the evidence means to prove that it is more likely true than not true.

I. Marlow Humbert must show that Christophe Jones violated a clearly established constitutional right.

1. The Fourth Amendment right to be arrested only on probable cause is clearly established.

2. It is clearly established that the Fourth Amendment prohibits officers from deliberately or recklessly making material omissions or misstatements in arrest warrant applications if the warrant would otherwise lack probable cause.

3. A police officer acts recklessly when he or she is highly aware that his or her statements in the warrant application are probably false or when he or she omits information that he or she knows would show that there is no probable cause.

Under Maryland law of malicious prosecution, Marlow Humbert must show that he was criminally prosecuted without probable cause. Your answers to the following questions will aid the Court's determination of those legal questions.

QUESTIONS:

A. Has Marlow Humbert proven that a reasonable officer, in Christophe Jones's place, would not have believed that he closely matched the description of her attacker given by the victim?

NO
Yes or No

B. Has Marlow Humbert proven that a reasonable officer, in Christophe Jones's place, would not have believed that he closely resembled the composite sketch completed by the victim?

NO
Yes or No

C. Has Marlow Humbert proven that when he was stopped by an officer he was not within blocks of the location where the victim's assault took place?

NO
Yes or No

D. Has Marlow Humbert proven that the address given to the officer when he was stopped was less than two miles away from the location where he was stopped?

NO
Yes or No

E. Has Marlow Humbert proven that Christophe Jones reasonably believed that when he was stopped by an officer he was not wearing a stocking cap made from a woman's stocking?

NO
Yes or No

F. Has Marlow Humbert proven that his record did not indicate that he was 5'7"?

NO
Yes or No

G. Has Marlow Humbert proven that his record did not indicate that he weighed 180 pounds?

NO
Yes or No

H. Has Marlow Humbert proven that when he was stopped by an officer he did not have a short haircut?

NO
Yes or No

I. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not have a strong emotional reaction?

NO
Yes or No

J. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not jab at the photo?

NO
Yes or No

K. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not say "that's him" without prompting?

NO
Yes or No

L. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not attempt to push it away from herself?

NO
Yes or No

M. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not sign her name above his picture?

NO
Yes or No

N. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not sign her name on the back of his picture?

NO
Yes or No

O. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not write "that's him" on the back of his picture?

NO
Yes or No

P. Has Marlow Humbert proven that the victim was threatened, promised something, or otherwise coerced into writing "that's him" on the back of his picture?

NO
Yes or No

Q. Has Marlow Humbert proven that the victim stated to Christophe Jones before Mr. Humbert's arrest, that she could not positively identify him as her attacker?

YES
Yes or No

R. Has Marlow Humbert proven that the victim told Christophe Jones after Mr. Humbert was arrested that she could not positively identify him as her attacker?

YES
Yes or No

II. Federal 42 USC § 1983 Claim

QUESTIONS:

A. Under federal law, the jury determines whether Marlow Humbert was criminally prosecuted without probable cause. Has Marlow Humbert proven that, based on the totality of the circumstances known when the arrest warrant was issued, a reasonable officer in Christophe Jones's place would not have believed that Mr. Humbert was responsible for the rape of the victim?

YES
Yes or No

B. Has Marlow Humbert proven that Christophe Jones caused him to be criminally prosecuted?

YES
Yes or No

III. Federal Damages

QUESTIONS:

A. What amount, if any, do you award Marlow Humbert against Christophe Jones for compensatory or nominal damages on the federal claim for malicious prosecution?

$ 400,000

B. What amount, if any, of punitive damages do you award Marlow Humbert against Christophe Jones?

$ 750,000

C. Total Damages Awarded: $ $1,150,000

IV. Your answers to Questions II.A and II.B above will serve as your answers to the elements of the claim under the Maryland Constitution.

V. Maryland Malicious Prosecution Claim

A. The first element of this claim--whether Marlow Humbert was criminally prosecuted without probable cause--will be decided by the Court based on your answers to the questions in Part I. The remaining elements of this claim--whether Marlow Humbert has proven that Christophe Jones acted with malice and caused him to be criminally prosecuted--are covered in other parts of this verdict sheet.

VI. Maryland Negligence Claim

QUESTIONS:

A. Has Marlow Humbert proven a breach of a duty of care that Christophe Jones owed to him?

YES
Yes or No

If you answer "yes" to Question A:

B. Has Marlow Humbert proven that Christophe Jones's negligence caused his injury?

YES
Yes or No

VII. Christophe Jones is liable under Maryland law if his acts were done with actual malice.

1. Actual malice means intentional conduct without legal justification or excuse, but with an evil or hostile motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff.

2. Actual malice may not be inferred from a lack of probable cause alone. It may be inferred from an arrest warrant that was so lacking in probable cause and legal justification as to render the defendant's stated belief in its existence unreasonable and not believable.

QUESTION:

A. Do you find that Christophe Jones acted with actual malice?

NO

Yes or No

VIII. Negligence Damages

1. If you answered "yes" to Questions VI.A, VI.B, and VII.A, you may award Marlow Humbert compensatory damages against Christophe Jones.

2. If you find that Marlow Humbert has failed to prove by a preponderance of the evidence that he suffered actual damages, you may instead award nominal damages.

3. If you award compensatory damages, and find that Marlow Humbert has proven by clear and convincing evidence that Christophe Jones acted with actual malice, you may award punitive damages. You may not award punitive damages if you award nominal damages.

QUESTIONS:

A. What damages, if any, do you award for the following:

Non-Economic Damages	$_____
Punitive Damages	$_____
Nominal Damages	$ 10.00
Total Damages	$_____

4/20/15
Date

SIGNATURE REDACTED
Jury Foreperson

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND, NORTHERN DIVISION

MARLOW HUMBERT,	*	
Plaintiff,	*	
v.	*	CIVIL NO.: WDQ-11-0440
CHRISTOPHE JONES, *et al.*,	*	
Defendants.	*	

* * * * * * * * * * * * *

VERDICT SHEET

CAPRICE SMITH

Unless otherwise stated, the following questions require the plaintiff to prove certain things by a preponderance of the evidence. To establish something by a preponderance of the evidence means to prove that it is more likely true than not true.

I. Marlow Humbert must show that Caprice Smith violated a clearly established constitutional right.

1. The Fourth Amendment right to be arrested only on probable cause is clearly established.

2. It is clearly established that the Fourth Amendment prohibits officers from deliberately or recklessly making material omissions or misstatements in arrest warrant applications if the warrant would otherwise lack probable cause.

3. A police officer acts recklessly when he or she is highly aware that his or her statements in the warrant application are probably false or when he or she omits information that he or she knows would show that there is no probable cause.

Under Maryland law of malicious prosecution, Marlow Humbert must show that he was criminally prosecuted without probable cause. Your answers to the following questions will aid the Court's determination of those legal questions.

QUESTIONS:

A. Has Marlow Humbert proven that a reasonable officer, in Caprice Smith's place, would not have believed that he closely matched the description of her attacker given by the victim?

NO
Yes or No

B. Has Marlow Humbert proven that a reasonable officer, in Caprice Smith's place, would not have believed that he closely resembled the composite sketch completed by the victim?

NO
Yes or No

C. Has Marlow Humbert proven that when he was stopped by an officer he was not within blocks of the location where the victim's assault took place?

NO
Yes or No

D. Has Marlow Humbert proven that the address given to the officer when he was stopped was less than two miles away from the location where he was stopped?

NO
Yes or No

E. Has Marlow Humbert proven that Caprice Smith reasonably believed that when he was stopped by an officer he was not wearing a stocking cap made from a woman's stocking?

NO
Yes or No

F. Has Marlow Humbert proven that his record did not indicate that he was 5'7"?

NO
Yes or No

G. Has Marlow Humbert proven that his record did not indicate that he weighed 180 pounds?

NO
Yes or No

H. Has Marlow Humbert proven that when he was stopped by an officer he did not have a short haircut?

NO
Yes or No

I. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not have a strong emotional reaction?

NO
Yes or No

J. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not jab at the photo?

NO
Yes or No

K. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not say "that's him" without prompting?

NO
Yes or No

L. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not attempt to push it away from herself?

NO
Yes or No

M. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not sign her name above his picture?

NO
Yes or No

N. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not sign her name on the back of his picture?

NO
Yes or No

O. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not write "that's him" on the back of his picture?

NO
Yes or No

P. Has Marlow Humbert proven that the victim was threatened, promised something, or otherwise coerced into writing "that's him" on the back of his picture?

NO
Yes or No

Q. Has Marlow Humbert proven that the victim stated to Caprice Smith before Mr. Humbert's arrest, that she could not positively identify him as her attacker?

YES
Yes or No

R. Has Marlow Humbert proven that the victim told Caprice Smith after Mr. Humbert was arrested that she could not positively identify him as her attacker?

YES
Yes or No

II. Federal 42 USC § 1983 Claim

QUESTIONS:

A. Under federal law, the jury determines whether Marlow Humbert was criminally prosecuted without probable cause. Has Marlow Humbert proven that, based on the totality of the circumstances known when the arrest warrant was issued, a reasonable officer in Caprice Smith's place would not have believed that Mr. Humbert was responsible for the rape of the victim?

YES
Yes or No

B. Has Marlow Humbert proven that Caprice Smith caused him to be criminally prosecuted?

YES
Yes or No

III. Federal Damages

QUESTIONS:

A. What amount, if any, do you award Marlow Humbert against Caprice Smith for compensatory or nominal damages on the federal claim for malicious prosecution?

$ 300,000

B. What amount, if any, of punitive damages do you award Marlow Humbert against Caprice Smith?

$ 500,000

C. Total Damages Awarded: $ 800,000

IV. Your answers to Questions II.A and II.B above will serve as your answers to the elements of the claim under the Maryland Constitution.

V. Maryland Malicious Prosecution Claim

A. The first element of this claim--whether Marlow Humbert was criminally prosecuted without probable cause--will be decided by the Court based on your answers to the questions in Part I. The remaining elements of this claim--whether Marlow Humbert has proven that Caprice Smith acted with malice and caused him to be criminally prosecuted--are covered in other parts of this verdict sheet.

VI. Maryland Negligence Claim

QUESTIONS:

A. Has Marlow Humbert proven a breach of a duty of care that Caprice Smith owed to him?

YES
Yes or No

If you answer "yes" to Question A:

B. Has Marlow Humbert proven that Caprice Smith's negligence caused his injury?

YES
Yes or No

VII. Caprice Smith is liable under Maryland law if his acts were done with actual malice.

1. Actual malice means intentional conduct without legal justification or excuse, but with an evil or hostile motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff.

2. Actual malice may not be inferred from a lack of probable cause alone. It may be inferred from an arrest warrant that was so lacking in probable cause and legal justification as to render the defendant's stated belief in its existence unreasonable and not believable.

QUESTION:

A. Do you find that Caprice Smith acted with actual malice?

NO
Yes or No

VIII. Negligence Damages

1. If you answered "yes" to Questions VI.A, VI.B, and VII.A, you may award Marlow Humbert compensatory damages against Caprice Smith.

2. If you find that Marlow Humbert has failed to prove by a preponderance of the evidence that he suffered actual damages, you may instead award nominal damages.

3. If you award compensatory damages, and find that Marlow Humbert has proven by clear and convincing evidence that Caprice Smith acted with actual malice, you may award punitive damages. You may not award punitive damages if you award nominal damages.

QUESTIONS:

A. What damages, if any, do you award for the following:

Non-Economic Damages	$_____
Punitive Damages	$_____
Nominal Damages	$ 10.00
Total Damages	$_____

4/20/15
Date

SIGNATURE REDACTED
Jury Foreperson

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND, NORTHERN DIVISION

MARLOW HUMBERT,

Plaintiff,

v. CIVIL NO.: WDQ-11-0440

CHRISTOPHE JONES, *et al.*,

Defendants.

* * * * * * * * * * * * *

VERDICT SHEET

DOMINICK GRIFFIN

Unless otherwise stated, the following questions require the plaintiff to prove certain things by a preponderance of the evidence. To establish something by a preponderance of the evidence means to prove that it is more likely true than not true.

I. Marlow Humbert must show that Dominick Griffin violated a clearly established constitutional right.

1. The Fourth Amendment right to be arrested only on probable cause is clearly established.

2. It is clearly established that the Fourth Amendment prohibits officers from deliberately or recklessly making material omissions or misstatements in arrest warrant applications if the warrant would otherwise lack probable cause.

3. A police officer acts recklessly when he or she is highly aware that his or her statements in the warrant application are probably false or when he or she omits information that he or she knows would show that there is no probable cause.

Under Maryland law of malicious prosecution, Marlow Humbert must show that he was criminally prosecuted without probable cause. Your answers to the following questions will aid the Court's determination of those legal questions.

QUESTIONS:

A. Has Marlow Humbert proven that a reasonable officer, in Dominick Griffin's place, would not have believed that he closely matched the description of her attacker given by the victim?

NO
Yes or No

B. Has Marlow Humbert proven that a reasonable officer, in Dominick Griffin's place, would not have believed that he closely resembled the composite sketch completed by the victim?

NO
Yes or No

C. Has Marlow Humbert proven that when he was stopped by an officer he was not within blocks of the location where the victim's assault took place?

NO
Yes or No

D. Has Marlow Humbert proven that the address given to the officer when he was stopped was less than two miles away from the location where he was stopped?

NO
Yes or No

E. Has Marlow Humbert proven that Dominick Griffin reasonably believed that when he was stopped by an officer he was not wearing a stocking cap made from a woman's stocking?

NO
Yes or No

F. Has Marlow Humbert proven that his record did not indicate that he was 5'7"?

NO
Yes or No

G. Has Marlow Humbert proven that his record did not indicate that he weighed 180 pounds?

NO
Yes or No

H. Has Marlow Humbert proven that when he was stopped by an officer he did not have a short haircut?

NO
Yes or No

I. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not have a strong emotional reaction?

NO
Yes or No

J. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not jab at the photo?

NO
Yes or No

K. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not say "that's him" without prompting?

NO
Yes or No

L. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not attempt to push it away from herself?

NO
Yes or No

M. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not sign her name above his picture?

NO
Yes or No

N. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not sign her name on the back of his picture?

NO
Yes or No

O. Has Marlow Humbert proven that upon seeing his photo in the photo book, the victim did not write "that's him" on the back of his picture?

NO
Yes or No

P. Has Marlow Humbert proven that the victim was threatened, promised something, or otherwise coerced into writing "that's him" on the back of his picture?

NO
Yes or No

Q. Has Marlow Humbert proven that the victim stated to Dominick Griffin before Mr. Humbert's arrest, that she could not positively identify him as her attacker?

YES
Yes or No

R. Has Marlow Humbert proven that the victim told Dominick Griffin after Mr. Humbert was arrested that she could not positively identify him as her attacker?

YES
Yes or No

II. Federal 42 USC § 1983 Claim

QUESTIONS:

A. Under federal law, the jury determines whether Marlow Humbert was criminally prosecuted without probable cause. Has Marlow Humbert proven that, based on the totality of the circumstances known when the arrest warrant was issued, a reasonable officer in Dominick Griffin's place would not have believed that Mr. Humbert was responsible for the rape of the victim?

Yes
Yes or No

B. Has Marlow Humbert proven that Dominick Griffin caused him to be criminally prosecuted?

Yes
Yes or No

III. Federal Damages

QUESTIONS:

A. What amount, if any, do you award Marlow Humbert against Dominick Griffin for compensatory or nominal damages on the federal claim for malicious prosecution?

$ 100,000

B. What amount, if any, of punitive damages do you award Marlow Humbert against Dominick Griffin?

$ 250,000

C. Total Damages Awarded: $ 350,000

IV. Your answers to Questions II.A and II.B above will serve as your answers to the elements of the claim under the Maryland Constitution.

V. Maryland Malicious Prosecution Claim

A. The first element of this claim--whether Marlow Humbert was criminally prosecuted without probable cause--will be decided by the Court based on your answers to the questions in Part I. The remaining elements of this claim--whether Marlow Humbert has proven that Dominick Griffin acted with malice and caused him to be criminally prosecuted--are covered in other parts of this verdict sheet.

VI. Maryland Negligence Claim

QUESTIONS:

A. Has Marlow Humbert proven a breach of a duty of care that Dominick Griffin owed to him?

YES
Yes or No

If you answer "yes" to Question A:

B. Has Marlow Humbert proven that Dominick Griffin's negligence caused his injury?

YES
Yes or No

VII. Dominick Griffin is liable under Maryland law if his acts were done with actual malice.

1. Actual malice means intentional conduct without legal justification or excuse, but with an evil or hostile motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff.

2. Actual malice may not be inferred from a lack of probable cause alone. It may be inferred from an arrest warrant that was so lacking in probable cause and legal justification as to render the defendant's stated belief in its existence unreasonable and not believable.

QUESTION:

A. Do you find that Dominick Griffin acted with actual malice?

NO

Yes or No

VIII. Negligence Damages

1. If you answered "yes" to Questions VI.A, VI.B, and VII.A, you may award Marlow Humbert compensatory damages against Dominick Griffin.

2. If you find that Marlow Humbert has failed to prove by a preponderance of the evidence that he suffered actual damages, you may instead award nominal damages.

3. If you award compensatory damages, and find that Marlow Humbert has proven by clear and convincing evidence that Dominick Griffin acted with actual malice, you may award punitive damages. You may not award punitive damages if you award nominal damages.

QUESTIONS:

A. What damages, if any, do you award for the following:

Non-Economic Damages	$_____
Punitive Damages	$_____
Nominal Damages	$ 10.00
Total Damages	$_____

4/20/15
Date

SIGNATURE REDACTED
Jury Foreperson

IN THE CIRCUIT COURT FOR
BALTIMORE CITY, MARYLAND

STATE OF MARYLAND,

vs. CASE NOS: 108151019-021

MARLOW HUMBERT,

Defendant.

_____/

OFFICIAL TRANSCRIPT OF PROCEEDINGS
(HEARING)

Baltimore City, Maryland
June 23, 2008

BEFORE: HONORABLE SYLVESTER COX, Judge

APPEARANCES:

ON BEHALF OF THE STATE OF MARYLAND:

JOAKIM TAN, Esquire

ON BEHALF OF DEFENDANT:

MICHAEL COOPER, Esquire

Proceedings Transcribed by: Regina Moran

HUNT REPORTING COMPANY
Court Reporting and Litigation Support
Serving Maryland, Washington, and Virginia
410-766-HUNT (4868)
1-800-950-DEPO (3376)

T A B L E O F C O N T E N T S

-oOo-

P R O C E E D I N G S

(10:33 a.m.)

MR. TAN: Good morning, Your Honor.

THE COURT: Yes, sir.

MR. TAN: Joakim Tan for the State. Calling State v. Marlow Humbert, Case Nos. 108151019 - 021.

THE COURT: Thank you.

MR. COOPER: Your Honor, Michael Cooper on behalf of Mr. Humbert, who is approaching.

THE COURT: Thank you.

MR. COOPER: I think -- can we approach just one moment?

THE COURT: Yes.

(Whereupon, Counsel approached the bench, and the following occurred:)

MR. COOPER: You said that there may be another case with this guy?

MR. TAN: Yeah. What I heard, but I haven't confirmed it yet is that his DNA did not match -- I mean, they didn't recover any DNA from the victim in this case but his DNA matched another pending rape case. So he's probably a serial. And there might be other cases.

THE COURT: There might be others coming

through.

MR. COOPER: And if -- with such a sentence as that, I've got to figure out what's, you know, what's real and what's not. So, that's all I wanted to say.

THE COURT: All right.

MR. COOPER: Okay.

(Whereupon, Counsel returned to the trial tables, and the following occurred in open court:)

THE COURT: How are we proceeding Counsel?

MR. COOPER: Your Honor, our plea is not guilty. We're waiving any further reading of the indictment and we seek trial by jury.

MR. TAN: I think, Your Honor, that --

THE COURT: Count 1?

MR. TAN: Count 1 needs to be read.

THE COURT: Where's Tracy. Get Tracy in here to read this count.

THE CLERK: Which case is it?

THE COURT: This is --

MR. TAN: Humbert.

THE COURT: Humbert, Count 1. It has to be read.

THE CLERK: Okay. Under indictment no.

108151019, Mr. Marlow Humbert, the State of Maryland charges you as follows: The date of the offense is April 29, 2008. The location 2213 St. Paul Street. The complainant is Desire Jewel (phonetic).

Jurors of the State of Maryland for the body of the City of Baltimore during (indiscernible) aforsaid Defendant (indiscernible) city heretofore on or about the date of the offense set forth above and the location set forth above. The City of Baltimore, State of Maryland unlawfully (indiscernible) rape in the first degree upon the aforesaid complainant in violation of Criminal Law Article Section 3-303 of Annotated Code of Maryland against the peace, government and dignity of the state.

What is your plea, not guilty or guilty?

MR. COOPER: Not guilty.

THE CLERK: Election of trial by court or jury?

MR. COOPER: Jury.

THE CLERK: Trial date?

MR. COOPER: We were looking at September 12th?

THE CLERK: September 12th, Part 45 at

9:30.

THE COURT: Thank you.

MR. TAN: Thank you, sir.

THE COURT: Thank you.

THE CLERK: Mr. Humbert.

(At 10:38:30 a.m. court proceedings were concluded.)

-oOo-

CERTIFICATE OF TRANSCRIBER

HUNT REPORTING COMPANY
Court Reporting and Litigation Support
Serving Maryland, Washington, and Virginia
410-766-HUNT (4868)
1-800-950-DEPO (3376)

I hereby certify that the testimony given in the above-entitled matter was transcribed by me, and that said transcript is a true record, to the best of my ability, of said testimony.

That I am neither a relative to nor an employee of any attorney or party herewith, and that I have no interest in the outcome of this case.

This ____ day of December, 2012.

Geoffrey Hunt

_____

HUNT REPORTING COMPANY
Court Reporting and Litigation Support
Serving Maryland, Washington, and Virginia
410-766-HUNT (4868)
1-800-950-DEPO (3376)

9:30.

THE COURT: Thank you.

MR. TAN: Thank you, sir.

THE COURT: Thank you.

THE CLERK: Mr. Humbert.

(At 10:38:30 a.m. court proceedings were concluded.)

-oOo-

CERTIFICATE OF TRANSCRIBER

I hereby certify that the testimony given in the above-entitled matter was transcribed by me, and that said transcript is a true record, to the best of my ability, of said testimony.

That I am neither a relative to nor an employee of any attorney or party herewith, and that I have no interest in the outcome of this case.

This 19 day of December, 2012.

Geoffrey Hunt

HUNT REPORTING COMPANY
Court Reporting and Litigation Support
Serving Maryland, Washington, and Virginia
410-766-HUNT (4868)
1-800-950-DEPO (3376)

suspect or a defendant is not guilty, a prosecutor shouldn't continue the case for other investigations. However, if a prosecutor has other information that comes out that might not be as helpful, other information that comes out that goes towards a potential suspect's or defendant's guilt is something that goes into the calculus of the mind of the prosecutor.

We have the State's Attorney of Baltimore right now lobbying for bills to have a potential suspect or a defendant's prior criminal record for sexual assaults be part of what comes into evidence. It's part of the calculus that goes into the mind of a prosecutor.

I absolutely agree that, if a prosecutor --

THE COURT: No. I understand overall --

MR. BALL: Yeah.

THE COURT: -- it being a reason not to close the books on a person who may be of interest in several other crimes, but why don't you close the book in the one where you know he didn't do it?

MR. BALL: Well, the question, or the argument I'd make, Your Honor, is this isn't a case where the prosecutor at any point said, "I know this person didn't do it." If a prosecutor knows a person didn't do it, then the prosecutor does have the responsibility to close that specific case, even if there are other investigations that are open.

THE COURT: Didn't the DNA results sort of establish that he was not?

MR. BALL: And the prosecutor knew that the DNA results came back as Mr. Humbert not being a contributor three weeks after the DNA results came back and kept the case open for an additional twelve months. If that's the case, then the prosecutor should be the person -- obviously there is other issues there, but, if the prosecutor knows that information and keeps it open for other reasons -- namely, in this case, the identification by a victim -- then that -- then a prosecutor does have reason to keep a case open.

If the DNA in a case was the be all and end all and the DNA itself proved definitively that someone wasn't responsible for a crime, then absolutely that prosecutor would have a responsibility to dismiss the case at that point, even if there were other investigations that may be open; however, this case isn't a case in which the DNA was dispositive on guilt, or even dispositive on whether the prosecutor chose to continue the action.

THE COURT: Okay. You get the last word.

MR. EDWARDS: Your Honor, if I may, I believe that the DNA is very important in this case. You know, obviously someone doesn't leave DNA everywhere, but they virtually leave DNA everywhere. That -- Tan, the assistant prosecutor, or the assistant State's attorney, asked these police officers on

numerous occasions for these reports, and they didn't furnish them, which I think is extremely important, but it is true that someone could not leave DNA, I guess, and he was relying on the fact that the police officers had said that Ms. Doe had made a positive identification in this matter.

So that in conjunction with the DNA reports, I think that was what he was saying that he wasn't -- he wouldn't have continued it, and, had the police been upfront and honest with him or furnished the reports, we wouldn't be here today, but the contention that he thought that Mr. Humbert was a serial, I think it needs to be noted that that came -- obviously came directly from the investigators, who thought that he was a serial. I don't think that Tan came up with that wisdom by himself. I think that that was the wisdom of the police officers, and I'm calling it wisdom sort of jokingly, but I think that, you know, I don't think he's the one who originated that theory.

Thank you.

THE COURT: Anything else I ought to know before I go take care of some personal matters?

MR. BALL: No, Your Honor. I have a very brief preliminary --

THE COURT: Sure.

MR. BALL: The case needs to be recaptioned. Right now, it's captioned --

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

MARLOW HUMBERT	*	
	*	Civil Action
Plaintiff,	*	No.: 1:11-cv-00440-WDQ
v.	*	
MARTIN O' MALLEY, *et al.*	*	
Defendants.	*	

* * * * * * * * * * * *

AFFIDAVIT OF JOAKIM TAN

1. I, Joakim Tan, certify that I am over 18 years of age, and competent to testify.

2. I was formerly employed as an Assistant State's Attorney for Baltimore City's Sex Offense Unit. In this capacity, I prosecuted offenders of sexual crimes.

3. In May 2008, I was assigned to prosecute Case No. 108151019, State of Maryland v. Marlow Humbert, in Baltimore City Circuit Court.

4. I was responsible for this case from before the indictment until the case was eventually nolle prosequi.

5. Mr. Humbert was charged with the rape of [redacted] which allegedly occurred on April 29, 2008. Mr. Humbert was indicted on counts of (1) rape in the first degree, (2) rape in the second degree, (3) third degree sex offense, (4) fourth degree sex offense, (5) assault in the first degree, and (6) assault in the second degree by the grand jury.

6. [redacted] expressed certainty that Mr. Humbert was her attacker at Mr. Humbert's arraignment.

7. I was at some point made aware that a DNA sample was taken from Mr. Humbert and that DNA was excluded as a contributor on [redacted] I do not remember the date I became aware of this information.

8. Given the nature of the case, a rape that allegedly occurred with a condom, the lack of matching DNA may not be dispositive of a lack of probable cause as long as [redacted] was still able to testify with certainty of Mr. Humbert's identity.

9. In August of 2008, [redacted] moved to Wyoming.

10. The case was postponed four times, on September 11, 2008, November 17, 2008, December 17, 2008, and February 23, 2009. These postponements were filed by both myself and Mr. Humbert's Public Defender for various reasons including my unavailability due to myself being in trial, presentation and analysis of new evidence provided in discovery, no courts available for trial, and the need to have a retired judge specially assigned to the case for a date certain in order to arrange a flight and accommodations for the victim while she testified.

11. On July 30, 2009, I chose to nolle prosequi the case against Mr. Humbert.

12. I entered a nolle prosequi because I learned from the victim that she was not sure she could identify Mr. Humbert as the person who raped her. That together with the lack of witnesses and DNA analysis that excluded Mr. Humbert as a contributor created reasonable doubt in my mind. As a prosecutor, I have to prove a case beyond a reasonable doubt. If I cannot I am obliged to request to have the case dismissed or refrain from indicting it.

I DO SOLEMNLY DECLARE AND AFFIRM under the penalties of perjury and upon personal knowledge that the contents of the foregoing Affidavit are true.

10/25/12
Date

Joakim Tan
Affiant

Shell 5/8/04 7:20 pm 2


DHC
F351
Dodge F311
That's Him

DEFENDANT'S EXHIBIT NO. 3
CASE NO. 1:11-CV-00440-WDQ
IDENTIFICATION:
ADMITTED:

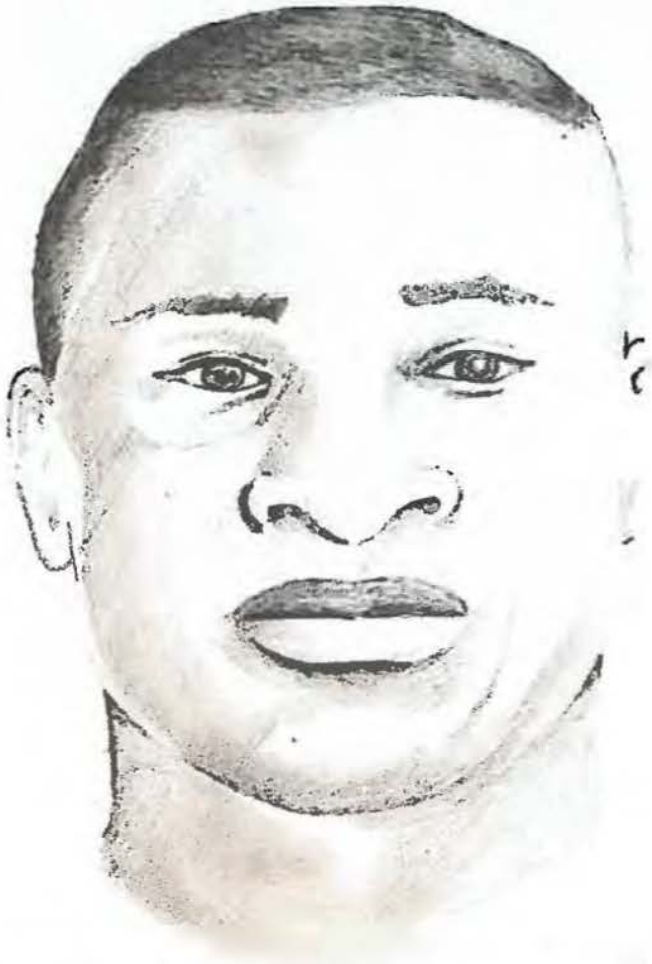
Sex Offense Unit
242 W. 29th St
Baltimore MD 21211
(410) 396-2076

Detective Division
Special Investigation Section
CC# 085D16086
08S0148

BALTIMORE POLICE DEPARTMENT

WANTED

Incident: Rape-1st Degree



On 4/30/2008, at approximately 5:15 p.m., a woman was sexually assaulted in the 2200 block of St Paul Street by the above depicted individual. The suspect followed the victim to her home, accosted her as she entered the home and sexually assaulted her. The suspect is described as: M/B, early to mid 30's, 5'7"-5'9" , medium build, short hair, clean cut, fairly well spoken, blue T- shirt (with some sort of logo possibly pink in color) black cotton gloves, white face mask and tennis shoes, Armed With a Black Handgun.

Q. Now, you were looking at a document that counsel showed you -- I think it was one you thought an attorney had prepared. You said, based on looking at it, apparently you did both check the lab and go to the -- I'm sorry -- check the lab school video and go to the sketch artist.

Do you know if that document is even accurate?

A. I do not.

Q. Do you know who prepared that document?

A. I do not.

Q. All right. So you still don't believe that you transported Ms. Doe?

A. I don't. I don't remember that.

Q. Okay. And, when you were being asked about the book of 45 photos, you started to say the key thing about the photos is, and then counsel stopped you. Do you remember -- do you remember that?

A. Yes.

Q. Would you finish that answer.

A. Ultimately your goal is to not be overly prejudicial, or really prejudicial in any way, so you wouldn't want to show a single photo and say, "Is this the guy?" The average person would think that that's who you want them to pick.

At some point, through the history of the agency, they went with six, and then photo books were okay. There are different agencies that say eight, but the -- ultimately the

goal is not to prejudice the person. It's to show them something so that they have no idea -- I'm sorry -- it's to show them something so they have no idea who you're looking for them to identify.

Q. And I think it's been established no identification -- positive identification was made from the first book?

A. That's correct.

Q. So, if duplicates -- duplicates being in the first book, did that in any way compromise this investigation?

A. No.

Q. All right. And I'm going to go through the second book, Defense Exhibit 9.

MR. EDWARDS: Objection, Your Honor. Can we approach?

THE COURT: Sure. Come up.

(Whereupon, the following discussion occurred at the bench.)

THE COURT: Yes?

MR. EDWARDS: I don't know how he could testify that having multiple people back to back -- I mean, you saw it. I don't know how he could testify that that didn't compromise the investigation.

THE COURT: He said it was his belief. I don't really get to judge people's beliefs.

MR. EDWARDS: I understand that, but you -- you

know --

THE COURT: You can make that argument to the jury, because, again, you have a basis for argument. Most lawyers understand that a trial is the price you pay to make a closing argument.

MR. EDWARDS: I understand that, Your Honor, but what I'm saying is that I think that he's saying that -- it just --

THE COURT: I can't do anything about that. I don't have any power to do anything about that. Yes, you have his belief. If it's inconsistent, make him pay the price at closing argument.

MR. CHOMA: There is a separate issue.

THE REPORTER: I need to hear you.

MR. CHOMA: I'm sorry. He's about to show him the second photo book. That's beyond the scope of cross.

THE COURT: No, it's not.

MR. CHOMA: The second photo book?

THE COURT: Yes. You talked about photo books. He gets to ask about another photo book. They asked. Not beyond the scope. Anything else while we're up here?

MR. MARSHALL: That's it.

MR. EDWARDS: No.

THE COURT: Thank you. Step back.

(Whereupon, the bench conference was concluded.)

BY MR. MARSHALL:

Q. I'm going to go through the second photo book, and, just so you know where I'm going, Lieutenant Jones, I'm going to ask as we go through if you see any duplicates in the second photo book, the one where --

THE COURT: And you'll do this quickly because of the hour.

Q. The one where the victim made an identification.

MR. EDWARDS: Objection, Your Honor. He's testifying.

THE COURT: Overruled.

(Counsel displaying photographs.)

BY MR. MARSHALL:

Q. Did you see any duplicates in Book 2, Defendants' Exhibit 9?

A. No, I didn't.

MR. MARSHALL: No further questions.

THE COURT: Recross?

RECROSS-EXAMINATION

BY MR. EDWARDS:

Q. I believe you stated a few minutes ago that you don't want to show someone just one guy, because then you'll know that someone wants to select them, correct?

A. Correct.

Q. And isn't that exactly what Ms. Doe testified that you

did -- showed her the picture of one guy?
A. That's what she said.
Q. And the probable effect of that, based on your testimony, is that she would know who you wanted her to select; is that correct?
A. Say that again.
Q. The probable effect of you showing her one person's photo would be that she knew who you wanted her to select; is that correct?
A. The probable effect of that --
Q. Yes or no?
A. No, I don't agree with that. I'm trying to explain to you why I don't agree with it. No, I don't agree with that.
Q. Is that not what you just testified to?
A. Can I give you more than a "yes" or "no" answer?

THE COURT: If you need to.

THE WITNESS: So, Your Honor, if -- if that, in fact, was true, it would have been telling her the features that she should describe to the sketch artist.

Is that the same thing that you're saying? It wouldn't have been telling her who to pick out. It would have been telling her -- she was there to do a composite. So it would have been to tell her what features to have drawn on the composite.

BY MR. EDWARDS:

Q. It doesn't -- does it matter, Detective, whether or not you were trying to signal to her what to draw on the composite, or what to select, or who to select if you did show her a photograph?

MR. MARSHALL: Objection.

THE WITNESS: I didn't.

MR. MARSHALL: He didn't. Okay.

BY MR. EDWARDS:

Q. If you showed her a photograph, is it your testimony that it wouldn't have contaminated her moving forward?

MR. MARSHALL: Objection.

THE COURT: Sustained.

MR. EDWARDS: I have no further questions, Your Honor.

THE COURT: Thank you.

(Witness excused from the stand.)

THE COURT: Members of the jury, we've reached the end of our third trial day. Please remember: Do not discuss the case among yourselves or let anyone talk to you about the case. Don't receive or send electronic communications about the case. This includes texting, e-mailing, blogging, posting information on social network Websites, or using any other electronic communications to discuss or mention the case. Avoid outside information from the Internet or other sources. Don't seek information about any aspect of the case, including