# EXHIBIT C

No. 12-1460

IN THE
# Supreme Court of the United States

RYAN MCFADYEN, ET AL.,
*Petitioners,*
V.
CITY OF DURHAM, NORTH CAROLINA, ET AL.,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI


REGINALD B. GILLESPIE, JR.
WILSON & RATLEDGE, PLLC
4600 Marriott Drive, Ste. 400
Raleigh, NC 27612
Phone: 919.787.7711
*Attorney for Respondents The City of Durham, et al.*

MICHAEL A. VATIS
*Counsel of Record*
ROGER E. WARIN
MATTHEW J. HERRINGTON
LEAH M. QUADRINO
JILL C. MAGUIRE
STEPTOE & JOHNSON LLP
1114 Avenue of the Americas
New York, NY 10036
MVatis@steptoe.com
Phone: 212.506.3927
*Attorneys for Respondents The City of Durham, et al.*

## QUESTIONS PRESENTED

1. Should the Court issue a writ of certiorari to address an issue that was neither raised by Petitioners nor decided by either court below?

2. Is it unconstitutional to take DNA samples by swabbing a suspect's cheek and to examine and photograph his body pursuant to a court order based upon a finding of probable cause to believe a rape has been committed and reasonable suspicion to believe that the suspect committed the crime?

## Table of Contents

**Page**

TABLE OF CONTENTS—Continued

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued



**CONSTITUTIONAL PROVISIONS AND STATUTES**



**RULES**

TABLE OF AUTHORITIES—Continued

**BOOKS AND ARTICLES**

In The
Supreme Court of the United States

---

RYAN MCFADYEN, ET AL.,
*Petitioners,*
v.
CITY OF DURHAM, NORTH CAROLINA, ET AL.,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

---

# BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

---

Respondents the City of Durham, North Carolina; David Addison; Patrick Baker; Steven W. Chalmers; Beverly Council; Mark Gottlieb; Benjamin Himan; Ronald Hodge; Jeff Lamb; Michael Ripberger; and Lee Russ respectfully submit this brief in opposition to the petition of Ryan McFadyen, Matthew Wilson, and Breck Archer for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## STATEMENT OF THE CASE

Petitioners ask this Court to grant a writ of certiorari to review an issue that they did not raise in either the district court or the court of appeals, and which neither court decided. They also claim

that there is a conflict in the circuit courts on this issue, yet cite *not a single case* from another circuit (or, for that matter, a federal district court or a state court other than the North Carolina Supreme Court). For these reasons alone, the petition should be denied.

Moreover, North Carolina's statute authorizing a judge to issue a non-testimonial identification order (NTO) permitting the police to examine and photograph a suspect's body and swab his cheek to take a DNA sample is completely consistent with the decisions of this Court and with those of numerous state courts that have addressed this issue. This case therefore does not warrant certiorari.

**A. Background**

In March 2006, Durham police investigated the allegations of a young woman who claimed to have been raped at a party. The woman—Crystal Mangum—had been hired as a stripper by Duke lacrosse players to perform at a party in their house. Durham police investigated her rape allegations—meeting with witnesses and gathering evidence, including DNA and photographic evidence from the Petitioners.

State Prosecutor Michael Nifong became involved in the case and eventually sought indictments against three of Petitioners' *teammates*. Those indictments were later dismissed. None of the Petitioners, however, was ever arrested, charged, or indicted with any crime.

Nevertheless, Petitioners subsequently filed a 428-page complaint (exclusive of exhibits), asserting

41 federal and state claims against 50 defendants based on the conduct of the investigation.[1] More than half of the Petition is now devoted to recapitulating what Judge Wilkinson described as the "overwrought claims" in the complaint. Pet. App. 53a. But these allegations have nothing to do with the single question Petitioners present to this Court—whether the application of North Carolina's NTO statute in this case was unconstitutional.[2]

**B. North Carolina's NTO Statute**

North Carolina's NTO statute permits a court to issue a "nontestimonial identification order" at the request of a prosecutor. N.C. Gen. Stat. Ann. § 15A-271 (2011). "'[N]ontestimonial identification' means identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable

---

[1] In what can only be characterized as an understatement, the district court found that the Petitioners "exceeded all reasonable bounds with respect to the length of their Complaint and the breadth of claims and assertions contained therein," and that the Complaint contained "a mass of legally unsupportable claims and extraneous factual allegations." Pet. App. 345a-346a. On appeal, Judge Wilkinson also found that "there is something disquieting about the sweeping scope and number of claims brought by" Petitioners. Pet. App. 52a.

[2] Respondents do not concede that Petitioners' 14-page Background section accurately characterizes the allegations in the complaint. But it is unnecessary to respond to the misstatements in that section because nearly all of the factual allegations they recite are simply irrelevant to the issue they now present.

physical examination, handwriting exemplars, voice samples, photographs, and lineups or similar identification procedures requiring the presence of a suspect." *Id.* The statute authorizes a court to issue an NTO only if it finds:

> (1) That there is probable cause to believe that a felony offense, or a [certain] misdemeanor offense has been committed;
>
> (2) That there are reasonable grounds to suspect that the person named or described in the affidavit committed the offense; and
>
> (3) That the results of specific non-testimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense.

*Id.* § 15A-273 (2011).

If the court makes the requisite findings, it may issue an order requiring the person "to appear at a designated time and place and to submit to designated nontestimonial identification procedures." *Id.* § 15A-274 (2011).

The NTO statute contains important procedural protections. For instance, absent exigent circumstances, the order must be served at least 72 hours before the time designated for the examination. *Id.* The suspect may request a change

in the time or place of the examination. *Id.* § 15A-278(7) (2011).

Moreover, "[t]he extraction of any bodily fluid must be conducted by a qualified member of the health professions and the judge may require medical supervision for any other test ordered." *Id.* § 15A-279(a) (2011). In addition, "no unreasonable or unnecessary force may be used" in conducting the examination, and no suspect "may be detained longer than is reasonably necessary to conduct the specified nontestimonial identification procedures, and in no event for longer than six hours." *Id.* § 15A-279(b) & (c).

The suspect is also "entitled to have counsel present and must be advised prior to being subjected to any nontestimonial identification procedures of his right to have counsel present during any nontestimonial identification procedure and to the appointment of counsel if he cannot afford to retain counsel." *Id.* § 15A-279(d). In addition, the suspect may not be subjected to interrogation or asked to make any statement. *Id.* § 15A-278(6).

A copy of the exam results must be provided to the suspect as soon as they are available. *Id.* § 15A-282 (2011). The results must also be provided to the court within 90 days. *Id.* § 15A-280 (2011). If, at that time, probable cause does not exist to believe that the person committed the offense under investigation, that person can move the court to direct that the products and reports of the examination be destroyed, and the motion must be granted unless good cause is shown. *Id.*

### C. Disposition Below

On March 31, 2011, the district court granted in part and denied in part Respondents' motions to dismiss, and denied the City of Durham's motion for partial summary judgment on governmental immunity grounds. Pet. App. 339a.

On Respondents' interlocutory appeal, the Fourth Circuit, in an opinion authored by Judge Motz, unanimously dismissed the remaining federal and state common law claims against all Respondents. Pet. App. 51a-52a. However, the court found that it lacked appellate jurisdiction over the City's appeal of the district court's decision to permit state constitutional claims to proceed. Those state constitutional claims therefore remain pending against Respondents.

Judge Wilkinson wrote a concurring opinion to "underscore the overblown nature of this case," which he described as "on the far limbs of law and one destined, were it to succeed in whole, to spread damage in all directions." Pet. App. 52a.

Judge Gregory also wrote separately to express his view that the state common law claims against the individual Respondents were barred by the North Carolina doctrine of official immunity, since the complaints did not sufficiently allege malicious conduct on the part of Respondents. Pet. 67a.

## ARGUMENT

### A. The Issue Presented by the Petition Was Never Raised Below, and Was Not Decided by the District Court or the Court of Appeals

Petitioners ask this Court to grant certiorari to decide whether North Carolina's NTO statute is unconstitutional. They argue that their Fourth Amendment rights were violated because their DNA samples were taken by a cheek swab and their bodies were examined and photographed based on a court's finding that there was probable cause to believe a crime had been committed and "reasonable grounds to suspect" that Petitioners committed that crime. Petitioners assert that such identification procedures may not be employed consistent with the Constitution absent a finding that there was probable cause to believe that they committed the crime under investigation.

Petitioners never raised this argument below. In both the district court and the court of appeals, Petitioners argued that the statutory predicates for an NTO were not met in this case because, in their view, there was no probable cause to believe that Mangum had been raped or reasonable suspicion to believe that they committed the crime. They contended that two of the Respondents (investigators Mark Gottlieb and Benjamin Himan) had succeeded in persuading a judge to issue an NTO only because they supplied false or misleading information to him. But Petitioners *never* claimed that the statute was unconstitutional because it permitted an NTO to be issued on less than a full finding of probable cause.

Their briefs below make this plain beyond dispute.[3] In fact, *Petitioners expressly disclaimed the argument they now make*, telling the Fourth Circuit that "there is no need for the Court to resolve those questions at this stage." Brief of Appellees at 28 n.12, *McFadyen v. Baker*, 703 F.3d 636 (4th Cir. 2012) (No. 11-1458) (consolidated as *Evans v. Chalmers*) (Resp'ts App. at 107a).[4]

---

[3] *See* Brief of Appellees at 1-3, 6-55, *McFadyen v. Baker*, 703 F.3d 636 (4th Cir. 2012) (No. 11-1458) (consolidated as *Evans v. Chalmers*); Plaintiffs' Opposition to the City of Durham's Motion to Dismiss Plaintiffs' Amended Complaint at 1-21, *McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887 (M.D.N.C. 2011) (1:07-cv-953); Plaintiffs' Opposition to Defendant Himan's Motion to Dismiss Plaintiffs' Amended Complaint at 1-12, 22-24, *McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887 (M.D.N.C. 2011) (1:07-cv-953). The relevant sections of Petitioners' briefs are contained in an appendix to this brief at pages 80a-135a, 7a-37a, and 45a-63a, respectively. (Petitioners filed other briefs in the district court in response to other defendants' separate motions to dismiss, but those briefs either did not address this NTO issue or simply incorporated the arguments discussed in the briefs opposing the City of Durham's and Himan's motions to dismiss. Excerpts of those other briefs are therefore not contained in the appendix.)

[4] To quote this passage in the Petitioners' Fourth Circuit brief in full:

> The District Court noted that the NTO statute authorizes the searches and seizures it contemplates upon a showing of less than probable cause, and that the law is unsettled regarding whether the statute would be subject to a constitutional challenge on that basis, at least as applied in some circumstances. In this regard, the District Court rightly concluded that

(Continued . . .)

The district court and the Fourth Circuit both discussed the issue briefly because it had been raised in a *related* case, *Carrington v. Duke University*, No. 1:08-cv-00119-JAB-WWD (M.D.N.C. Mar. 31, 2011) (Dkt. 164) (mem.), brought by some of their teammates.[5] But neither court decided the issue.

---

> there is no need for the Court to resolve those questions at this stage because Plaintiffs allege that the affidavit Gottlieb and Himan submitted to cause the NTO to issue against Plaintiffs was intentionally and recklessly false and misleading.

*Id.* at 28 n.12 (Resp'ts App. at 107a).

[5] The court of appeals stated in a footnote that "[p]laintiffs" challenged the constitutionality of the NTO statute. Pet. App. 30a n.6. But this was clearly a reference to the plaintiffs in the related case of *Carrington v. City of Durham*, 703 F.3d 636 (4th Cir. 2012) (No. 11-1465) (consolidated as *Evans v. Chalmers*) which was consolidated with this case on appeal, as those plaintiff/appellees were the only ones who mentioned this issue. (These cases were also consolidated with a third case, *Evans v. Chalmers*, but that case did not raise any claims related to the NTO.)

The district court did not formally consolidate the cases, but it clearly considered them together. It issued its decisions in the cases simultaneously, and the opinions in *Carrington* and *McFadyen* contain large sections that are identical. The relevant section of the opinion in the *Carrington* case dealing with the NTO issue is repeated in the *McFadyen* opinion almost verbatim, even though only *Carrington* raised the constitutional issue. *Compare Carrington v. Duke Univ.*, No. 1:08-cv-00119-JAB-WWD, slip op. at 113-25 (M.D.N.C. Mar. 31, 2011) (Dkt. 164) (mem.) *with McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887, 924-30 (M.D.N.C. 2011). Thus, it seems the district court simply overlooked the fact that the issue was not

(Continued . . .)

The district court specifically said that it "need not resolve" this issue "because even if the procedure and scope of the NTO process would otherwise pass constitutional muster, here Plaintiffs have asserted a claim that the affidavit submitted in support of the NTO application was intentionally and recklessly false and misleading." Pet. App. 144a. It therefore found that Petitioners had adequately stated a Fourth Amendment claim even if the statute was constitutional, and said it would consider the constitutional arguments at the summary judgment stage. *Id.* at 145a and n.16.[6]

Similarly, the Fourth Circuit discussed the issue in a footnote but declined to decide it. It noted, as the district court did, that there was "uncertainty as to whether North Carolina courts would interpret the state NTO statute 'as authorizing a search and seizure . . . on less than a full showing of probable cause' and whether 'such an interpretation would render the state NTO statutes unconstitutional.'"

---

raised in *McFadyen*. One can closely scrutinize all of the briefs filed by Petitioners in the district court and still not find even a trace of an argument challenging the constitutionality of North Carolina's NTO statute. (No oral argument was held in the district court.) In any event, even if Petitioners had raised the issue below, the district court and the court of appeals both declined to decide it.

[6] The district court also found that the police officers were not entitled to qualified immunity on the NTO claim because, in the court's view, "no reasonable official could have believed that it was permissible to deliberately or recklessly create false or misleading evidence to present to a magistrate to effect a citizen's seizure." Pet. App. 145a.

Pet. App. 30a n.6. Given this uncertainty in the law, the court of appeals determined that, even if the statute were unconstitutional, the police officers would be protected by qualified immunity because the unconstitutionality of the law was not "clearly established." *Id.* The court therefore reversed the district court's denial of qualified immunity. But it did not decide whether the statute was unconstitutional.[7]

Because the constitutional question presented here was not raised below, let alone decided by the court of appeals (or the district court), the petition should be denied. *See United States v. United Foods, Inc.,* 533 U.S. 405, 417 (2001) (refusing to permit a petitioner "to assert new substantive arguments attacking . . . the judgment when those arguments were not pressed in the court whose opinion we are

---

[7] Petitioners repeatedly assert that the Fourth Circuit "held" that the Constitution does not require "'probable cause in the traditional sense for the collection of DNA evidence,' but rather requires 'only a minimum amount of objective justification,' and that 'a significantly lower standard than probable cause' is sufficient." Pet. 4 (citations omitted). *See also* Pet. 32. But Petitioners are blatantly quoting the court's opinion out of context. After declining to decide the constitutional question of whether a full showing of probable cause is required, the court went on to address Petitioners' actual argument on appeal—that the affidavits submitted in support of the NTO did not meet the *statutory* standards of probable cause to believe that a crime had been committed and reasonable grounds to suspect that the Petitioners committed the crime. It was only in that context that the court stated that the "reasonable grounds to suspect" standard was lower than probable cause. *See* Pet. App. 34a-36a.

reviewing, or at least passed upon by it"); *Pa. Dep't of Corrections v. Yeskey,* 524 U.S. 206, 212-13 (1998) ("'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'") (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)); *United States v. Williams,* 504 U.S. 36, 41 (1992) ("Our traditional rule . . . precludes a grant of certiorari . . . when 'the question presented was not pressed or passed upon below.'") (citation omitted); *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 260 (1987) (petition dismissed as improvidently granted where petitioner failed to preserve the issue before the courts below); *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("[The] petition for certiorari presented [a] question . . . not raised in the Court of Appeals and [thus] is not properly before us."). *See also* Stephen M. Shapiro, *Certiorari Practice: The Supreme Court's Shrinking Docket*, 24 Litig., No. 3, Spring 1998, at 25, 26 ("A disappointed litigant cannot raise a federal law issue for the first time in a petition for certiorari."); Eugene Gressman et al., *Supreme Court Practice* § 6.37(1)(3), at 506 (9th ed. 2007) (Failure to present the question to the court below is a "defect . . . usually fatal to the petition.").

### B. There Is No Circuit Split on the Issue Raised by Petitioners

Even if the issue presented here had been presented and decided below, this case does not merit certiorari. Petitioners assert that the Fourth Circuit's decision "creates a new conflict among the circuits where none existed previously." Pet. 24. *See also* Pet. 32. Yet, they do not cite a single case from

*any* federal court of appeals, let alone one contrary to the Fourth Circuit's decision below. Nor do they cite a single decision from a state court (other than North Carolina Supreme Court decisions addressing the NTO statute at issue here).

Petitioners' failure to cite *any* supporting authority is not surprising. State courts have repeatedly upheld NTO statutes like North Carolina's. *See, e.g., Bousman v. Iowa Dist. Ct.*, 630 N.W.2d 789, 797-98 (Iowa 2001) (NTO requiring oral swab could be based on "reasonable grounds"); *New Jersey v. Hall*, 461 A.2d 1155, 1159-62 (N.J. 1983) (investigative detention and identification procedures may be ordered based on less than probable cause when appropriate procedures are followed); *Colorado v. Madson*, 638 P.2d 18, 31-33 (Colo. 1981) (upholding constitutionality of NTO rule allowing orders for saliva, fingerprints, photographs, physical examination, and other nontestimonial identification evidence based on "reasonable grounds"); *Arizona v. Grijalva*, 533 P.2d 533, 534-37 (Ariz. 1975) (upholding constitutionality of NTO requiring hair samples, fingerprints, and photographs based on "reasonable cause"). *See also United States v. Meregildo*, 876 F. Supp. 2d 445, 450-52 (S.D.N.Y. 2012) (upholding grand jury subpoena requiring examination and photographing of arms, legs, and torso for tattoos and scars based on less than probable cause); *United States v. Ingram*, 797 F. Supp. 705, 717 (E.D. Ark. 1992) (to justify order for suspect to appear and provide hair samples, prosecution "will only need to show a reasonable suspicion, based upon specific and articulable facts and the inferences rationally drawn from those facts,

that (1) [the suspect] has committed a crime, and (2) that the taking of hair samples will provide evidence connecting him to the crime that he allegedly committed") (footnote omitted); 4 Wayne R. LaFave, *Search and Seizure* § 9.8(b), at 982-83 (5th ed. 2012) ("As for the grounds needed to justify stationhouse detention [for nontestimonial identification procedures], . . . [w]hat is not required . . . is full probable cause that the particular person to be detained committed the offense. Rather, a lesser degree of suspicion . . . will suffice.").

Moreover, the American Bar Association has published standards on DNA evidence that approve the use of NTO procedures like those used here. Under those standards, DNA may be collected from a suspect if there is "reasonable suspicion" that the suspect committed the crime, and probable cause that a serious crime has been committed. *See* American Bar Association, *ABA Standards for Criminal Justice*, *DNA Evidence*, Standard 16-2.3 at 3 (3d ed. 2007).

Thus, even if the Fourth Circuit had decided the issue presented here, it would not merit certiorari.

### C. North Carolina's NTO Statute Is Consistent with This Court's Precedents

Petitioners also contend that the Fourth Circuit's decision conflicts with the decisions of this Court. Once again, there *is* no Fourth Circuit decision on this issue. But even if the court of appeals had decided the issue in the way Petitioners claim, such a decision would be entirely consistent with this Court's precedents.

1. The Court has not ruled on the issue presented here, but it has repeatedly suggested that a full showing of probable cause to believe a suspect committed the crime may not be required to obtain the suspect's fingerprints. The Court first made this suggestion in *Davis v. Mississippi*, 394 U.S. 721 (1969). Although the Court there found that the police violated the Fourth Amendment by seizing 24 youths and detaining them at the police station to take their fingerprints, without probable cause or a warrant, it suggested that "the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest." *Id.* at 728. It also went out of its way to explain why such procedures might be constitutional:

> [B]ecause of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense. Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual,

> since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the "third degree." Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.

*Id.* at 727-28 (citation omitted).

Based on this suggestion in *Davis*, numerous states—including North Carolina—enacted NTO statutes designed to provide the sort of "narrowly circumscribed procedures" for obtaining various forms of identification evidence that this Court discussed, without requiring a full showing of probable cause. *See, e.g.* Alaska R. Crim. P. 16(c); Ariz. Rev. Stat. Ann. § 13-3905 (2010); Colo. R. Crim. P. 41.1; Idaho Code § 19-625 (2011); Iowa Code Ann. § 810.3-810.6 (2003); N.C. Gen. Stat. Ann. § 15A-271-282 (2011); Utah Code Ann. § 77-8-1 to 77-8-4 (2004); Vt. R. Crim. P. 41.1. *See also Hayes v. Florida*, 470 U.S. 811, 817 (1985) (noting that states enacted such statutes "in reliance on the suggestion in *Davis*").

Since *Davis*, the Court has thrice repeated its suggestion that such NTO statutes may satisfy the Fourth Amendment, at least in the case of fingerprinting. *See Dunaway v. New York*, 442 U.S. 200, 215 (1979) (noting that *Davis* held open the possibility that narrowly circumscribed procedures requiring suspect to appear for fingerprinting might be constitutional); *Hayes*, 470 U.S. at 817 ("We . . . do not abandon the suggestion in *Davis* and *Dunaway* that under circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting."); *Kaupp v. Texas*, 538 U.S. 626, 630 n.2 (2003) ("We have . . . left open the possibility that, 'under circumscribed procedures,' a court might validly authorize a seizure on less than probable cause when the object is fingerprinting.") (citation omitted).

Petitioners assert (Pet. 24-28) that three of these cases *(Davis*, *Dunaway*, and *Hayes*) actually support their argument because the Court found that the seizures of the suspects in those cases violated the Fourth Amendment. But Petitioners miss the point of these cases entirely. None of them involved the sort of circumscribed procedures—including judicial authorization—that were employed here, which is precisely why the Court in each case took pains to make clear that the use of such procedures might have resulted in a different outcome. Moreover, all of them involved interrogation of the suspects, which the Court considered a critical distinction.

The facts of those cases show just how different they were from this case, and why their holdings are simply inapposite. In *Davis*, police, without judicial authorization, seized and detained petitioner and other youths at police headquarters for fingerprinting *and* questioning. 394 U.S. at 722. "[N]o attempt was made here to employ procedures which might comply with the requirements of the Fourth Amendment: the detention . . . was not authorized by a judicial officer; petitioner was unnecessarily required to undergo two fingerprinting sessions; and petitioner was not merely fingerprinted . . . but also subjected to interrogation." *Id.* at 728. It is for these reasons that the Court found that the detention of the defendant in that case was unconstitutional.

Similarly, in *Hayes*, police "forcibly remove[d]" a suspect from his home and transported him to the police station where, without his consent and without a warrant, they interrogated and fingerprinted him. *See* 470 U.S. at 813-16. Moreover, the Court emphasized that this detention occurred "without authorization by a judicial officer." *Id.* at 814. *See also id.* at 816 ("such seizures, at least where not under judicial supervision, are sufficiently like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause").

In *Dunaway*, the police "seized petitioner and transported him to the police station for interrogation." 442 U.S. at 216. "He was never informed that he was 'free to go'; indeed, he would have been physically restrained if he had refused to

accompany the officers or had tried to escape their custody." *Id.* at 212. No court authorized the detention. The Court said that this detention was "in important respects indistinguishable from a traditional arrest." *Id.* Significantly, *Dunaway* did not involve fingerprinting or any other identification procedure, but interrogation. Indeed, in reaching its holding, the Court emphasized "the *distinctions* between taking fingerprints and interrogation," indicating that the latter requires probable cause, while the former might not, at least when performed under the sorts of procedures outlined in *Davis*. *Id.* at 215 (emphasis added).

The identification procedures employed in this case pursuant to North Carolina's NTO statute are precisely the sort of "circumscribed procedures" that this Court suggested in *Davis, Dunaway*, *Hayes*, and *Kaupp* might pass constitutional muster. Indeed, the North Carolina procedures were *based* on this Court's suggestion in *Davis*.

Thus, as discussed above, North Carolina's NTO statute requires authorization by a court; the detention occurs at a designated time and place, which the suspect may request be changed; the duration of the detention is limited; the suspect may *not* be interrogated; no unnecessary or unreasonable force may be used; bodily fluid must be extracted by a medical professional; the suspect may have counsel present; and the results of the exam will normally be destroyed if probable cause is not established. Petitioners have made no claim that any of these protections was not afforded them here.

2. This case differs from the situations discussed in this Court's precedents only with respect to the specific identification procedure at issue. In those cases, the Court discussed fingerprinting. This case involves a swabbing of the cheek for DNA evidence and physical examination and photographing of Petitioners' bodies for evidence of injuries. But this distinction is immaterial. Just last Term, this Court stressed several times that taking a DNA sample is closely analogous to fingerprinting and photographing a suspect. *See Maryland v. King*, 133 S. Ct. 1958, 1976 (2013) ("the most direct historical analogue" to DNA testing "is the familiar practice of fingerprinting"); *id.* at 1972 ("[T]he only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides."); *id.* at 1976 ("The additional intrusion upon the arrestee's privacy beyond that associated with fingerprinting is not significant."); *id.* at 1980 ("taking and analyzing a cheek swab of the arrestee's DNA is like fingerprinting and photographing").

Like fingerprinting, a swab of a cheek, physical examination, and photographing "involve[] none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Davis*, 394 U.S. at 727. Nor can these procedures "be employed repeatedly to harass any individual, since the police need only one" DNA sample and one chance to examine a suspect's body. *Id.* Moreover, such examinations are "inherently more reliable and effective crime-solving tool[s] than eyewitness identifications or confessions and [are] not subject to such abuses as the improper line-up and the 'third

degree.'" *Id.* *See also* LaFave, *supra*, § 9.8(b), at 989-90 ("As for DNA sampling, it has been forcefully argued that such sampling should be deemed permissible under *Davis*. And surely this is true when the sample is acquired by swabbing the mouth for saliva."); *Bousman*, 630 N.W.2d 789 (Iowa 2001) ("we do not think that saliva sampling involves a significant intrusion into a person's bodily security") (citation omitted); *In re Nontestimonial Identification Order Directed to R.H.*, 762 A.2d 1239, 1244 (Vt. 2000) (exposing the inside of the mouth for a cheek swab "does not entail . . . embarrassment and social discomfort" and is unlike taking a blood sample because there is no piercing of the skin).

3. Petitioners next suggest that this Court's decisions in *Schmerber v. California*, 384 U.S. 757 (1966), *Cupp v. Murphy*, 412 U.S. 291 (1973), *Winston v. Lee*, 470 U.S. 753 (1985), and *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) indicate that "intrusive bodily searches for evidence in a criminal investigation require probable cause and a warrant (or exigent circumstances)." Pet. 28-29. But these cases did not involve the sort of narrowly "circumscribed procedures" discussed in *Davis*, *Dunaway*, *Hayes*, and *Kaupp*, so they are completely irrelevant.

Moreover, those cases involved much more intrusive procedures than those employed here. In *Schmerber* and *McNeely*, police forced a suspect to have a blood sample taken. As this Court said in *McNeely*, taking a blood sample "involve[s] a compelled physical intrusion beneath [the suspect's] skin and into his veins." 133 S. Ct. at 1558. The

Court described this as "an invasion of bodily integrity" that "implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Id.* (citation omitted).

In *Cupp,* police forcibly scraped underneath a suspect's fingernails to obtain evidence (including skin and blood cells). And *Winston* involved the surgical removal of a bullet lodged under a suspect's collarbone, which the Court said "implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime." 470 U.S. at 759. These procedures are clearly more intrusive than visually examining and photographing a suspect's body or swabbing his cheek for a DNA sample.

Indeed, in *Maryland v. King* (decided only a few weeks after *McNeely*), this Court emphasized just how different taking a cheek swab (also known as a "buccal swab") is from drawing blood:

> A buccal swab is a far more gentle process than a venipuncture to draw blood. It involves but a light touch on the inside of the cheek . . . and requires no surgical intrusions beneath the skin. The fact that an intrusion is negligible is of central relevance to determining reasonableness.

133 S. Ct. at 1969 (citations and internal quotation marks omitted). *See also id.* at 1967-68 ("Buccal cell collection involves wiping a small piece of filter paper or a cotton swab similar to a Q-tip against the inside

cheek of an individual's mouth to collect some skin cells. The procedure is quick and painless.") (citations and internal quotation marks omitted); *id. at* 1977 ("the intrusion of a cheek swab to obtain a DNA sample is a minimal one"); *id.* at 1979 ("a buccal swab involves [a] . . . brief and . . . minimal intrusion, . . . [a] gentle rub along the inside of the cheek [that] does not break the skin, and . . . involves virtually no risk, trauma, or pain") (internal quotation marks and citation omitted); *id.* at 1980 (cheek swab occasions only a "minor intrusion"); *In re Nontestimonial Identification Order Directed to R.H.,* 762 A.2d at 1244 ("We do not believe that taking a saliva sample by swabbing a pad on the inside of the mouth involves the same intrusiveness as drawing blood by piercing the skin with a needle.").

4. Finally, Petitioners contend that *King* actually supports their argument, because, in their view, "[b]oth the majority and dissenting opinions proceed from the same premise; that is, the Fourth Amendment would not tolerate a search to collect DNA if the justifying motive was the investigation of crime." Pet. 2. But neither the majority opinion nor the dissent said any such thing. The issue in *King* was whether *any* form of individualized suspicion was required in order to take an arrestee's DNA sample. The majority held that it was not, because the purpose of the sample was to identify the arrestee as part of a routine booking procedure, not to investigate whether he had committed crimes other than the one for which he was arrested. *See* 133 S. Ct. at 1970 ("Here, the search effected by the buccal swab of respondent falls within the category of cases this Court has analyzed by reference to the

proposition that the touchstone of the Fourth Amendment is reasonableness, not individualized suspicion.") (citation and internal quotation mark omitted). The dissenters, however, believed that the DNA was in fact taken for investigative purposes, and that individualized suspicion therefore was required. *See id.* at 1980 (Scalia, J., dissenting) ("It is obvious that no . . . noninvestigative motive exists in this case); *id.* ("Whenever this Court has allowed a suspicionless search, it has insisted upon a justifying motive apart from the investigation of crime.").

Neither the majority nor the dissenters in *King* addressed what standard of individualized suspicion must be met in order to take DNA samples as part of an investigation. And they certainly had no occasion to consider whether the Fourth Amendment would be satisfied by "narrowly circumscribed procedures" allowing the taking of DNA samples, as part of an investigation, based on reasonable suspicion that the suspect committed the crime rather than a full showing of probable cause.

In short, this Court has repeatedly stated that narrowly circumscribed procedures like those enacted by North Carolina and used in this case might be a constitutional method to obtain fingerprints, even without a full showing of probable cause. And just last Term, this Court found that taking DNA samples by swabbing a suspect's cheek is closely analogous to fingerprinting and photographing a suspect, and results in only a "negligible," "minimal," and "minor" intrusion. There is thus nothing in this Court's precedents that casts

a constitutional shadow on North Carolina's NTO statute or the use of it in this case.

### D. This Case Is an Especially Poor Vehicle to Resolve the Constitutional Question Raised by Petitioners

Aside from the fact that the constitutional question presented in the petition was never raised or decided below, additional considerations make this case an unsuitable one to resolve the issue.

First, no final judgment has been entered. The absence of a final judgment alone is a "sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.,* 389 U.S. 327, 328 (1967) (per curiam). "[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co.*, 240 U.S. at 258; *see also* Eugene Gressman et al., *supra* § 4.18, at 280-81. There are no such extraordinary circumstances here.

Second, as both courts below noted, there is "uncertainty as to whether North Carolina courts would interpret the state NTO statute as 'authorizing a search and seizure . . . on less than a full showing of probable cause.'" Pet. App. 30a n.6. *See also* Pet. App. 141a-142a. North Carolina courts could thus make it unnecessary to decide the constitutional issue presented here.

Third, Petitioners' own complaint actually concedes that, if there was probable cause to believe that a rape was committed (as the Fourth Circuit

found, Pet. App. 35a), there would necessarily be probable cause to believe Petitioners committed a crime because their presence at the lacrosse party would make them potential accomplices under North Carolina law. *See* C.A. App. 694 (para. 409) ("[U]nder NC law, the team members who were present at the party could be indicted and convicted on the same charges—as accomplices—based solely on an admission that they were present at the party. In North Carolina, the accomplices to a crime are punished no differently than its principals."). A decision by this Court that a full showing of probable cause is required would therefore have no effect on this case, and would thus be an advisory opinion, something that this Court is without power to render. *See, e.g.*, *Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975) ("The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy. [Thus,] a federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them. Its judgments must resolve a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.") (internal quotation marks and citations omitted). *See also Case of Hayburn*, 2 U.S. 408 (1792) (no justiciable controversy exists when party asks for advisory opinion).

Finally, even if this Court were to grant certiorari and reverse, the officers who applied for the NTO would still be entitled to qualified immunity, since it was not clearly established that DNA samples and

physical examination and photographs require a full showing of probable cause. For a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). Indeed, the Fourth Circuit has already said that the officers are entitled to immunity on this ground. Pet. App. 30a n.6.

## CONCLUSION

For the reasons discussed above, the petition for certiorari should be denied.

Respectfully submitted,

REGINALD B. GILLESPIE, JR.
WILSON & RATLEDGE, PLLC
4600 Marriott Drive,
Suite 400
Raleigh, NC 27612
Phone: 919.787.7711
*Attorney for Respondents*
*The City of Durham, et al.*

MICHAEL A. VATIS
*Counsel of Record*
ROGER E. WARIN
MATTHEW J. HERRINGTON
LEAH M. QUADRINO
JILL C. MAGUIRE
STEPTOE & JOHNSON LLP
1114 Avenue of the Americas
New York, NY 10036
MVatis@steptoe.com
Phone: 212.506.3927
*Attorneys for Respondents*
*The City of Durham, et al.*

OCTOBER 4, 2013

# APPENDIX

## Appendix Table of Contents

**Page**

**UNITED STATES DISTRICT COURT**
**FOR THE**
**MIDDLE DISTRICT OF NORTH CAROLINA**

RYAN McFADYEN, et al.,
Plaintiffs,

v.

DUKE UNIVERSITY, et al.,
Defendants.

Civil Action No. 1:07-cv-953

# PLAINTIFFS' OPPOSITION TO THE CITY OF DURHAM'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Dated: October 6, 2008

**EKSTRAND & EKSTRAND LLP**
Robert C. Ekstrand (NC Bar #26673)
Attn. Stefanie A. Sparks
811 Ninth Street, Suite 260
Durham, North Carolina 27705

*Counsel for Plaintiffs Ryan McFadyen, Matthew Wilson, and Breck Archer*

## TABLE OF CONTENTS

## STATEMENT OF THE CASE

The Amended Complaint describes a combination of actors and entities referred to as the Consortium. For thirteen months beginning in March 2006, the Consortium's ultimate objective was to railroad the Plaintiffs and their 44 teammates into convictions as either principles or accomplices to a horrific, violent crime they knew never happened. The allegations describe a willful, malicious, and calculating conspiracy of multiple dimensions. Acting individually and in concert, the City's employees, individually, in concert with others (some named as codefendants and others not), and pursuant to the City's policies, customs, and its final policymakers' directives, concealed exonerating evidence, manufactured inculpatory evidence, and stigmatized the Plaintiffs by subjecting them to public outrage, public condemnation, and infamy in the minds of millions of people. The City's policies, customs, and policymaker directives caused the Plaintiffs to be subjected to executive conduct that shocks the conscience. Maybe the most unsettling of all are those who knew of the wrongs conspired to be done to Plaintiffs, and had the power to prevent or aid in preventing them, and instead 'turned a blind eye' and did nothing.

## NATURE OF THE CASE

Plaintiffs filed this action on December 18, 2007 and amended that filing on April 17, 2008. Pursuant to a request from this Court regarding the location of the audio and video exhibits embedded within the First Amended Complaint ("AC"), Plaintiffs re-filed the AC on April 18, 2008 with those embedded

exhibits as separate documents. Except for the location of the exhibits, the two "First Amended Complaints" are identical. All Defendants filed Motions to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on July 2, 2008. This Memorandum is filed pursuant to the Court's Order of October 7, 2008 [Document #72], granting Plaintiffs' Motion for Leave to File Opposition Briefs [Document #71], and authorizing Plaintiffs to file their Responses on or before October 10, 2008.[1]

## STATEMENT OF THE FACTS

The CITY OF DURHAM (the "City") is a municipal corporation formed under the laws of the State of North Carolina. The City is believed to have waived its immunity from civil liability pursuant to N.C.G.S. § 160A-485 by, among other things, procuring a liability insurance policy or participating in a municipal risk-pooling scheme. The City of Durham operates the Durham Police Department, which shares law enforcement authority in the City of Durham with the Duke University Police Department, pursuant to a statutory grant of authority and an agreement between the City of Durham and Duke University. AC ¶ 58.

---

[1] Plaintiffs' Opposition Brief is filed in response to City of Durham's Motion to Dismiss [Document #61] and supporting Memorandum [Document #62]. The City of Durham's supporting brief is cited herein as "City Br." The individual supporting briefs of the City's co-defendants are cited herein as: "Gottlieb Br.," "City Super. Br.," "DNASI Br.," "SANE Br.," "Duke Univ. Br." "DUPD Br.," "Himan Br.," "SMAC Br.," "Hodge Br.," and "Wilson Br."

The City of Durham and its employees played a critical role in the grave miscarriage of justice that became known as the "Duke Lacrosse Rape Case." The allegations involving the City and its employees are detailed throughout Plaintiffs' Amended Complaint; however, the most significant allegations with respect to the City relate to its Zero-Tolerance for Duke Students Policy ("Zero-Tolerance"). The City is not alone in pursuing the policy, and Plaintiffs have pointed directly to their collaborator: Duke University itself. Pursuant to Duke-Durham Zero-Tolerance Policy, virtually every clearly established constitutional protection was lifted in police interactions with Duke Students. Specifically, Zero-Tolerance meant:

- Durham Police and Duke Police abused the power to enforce, disproportionately and unconstitutionally, the criminal laws against Duke Students. A.C. ¶¶ 111, 115.
- Duke students were charged and incarcerated for "alleged" criminal violations of the local ordinance called "Noise. Generally" or the open container ordinance banning open containers on sidewalks adjacent to homes which are not enforced against "permanent residents." AC ¶ 108.
- Police ignored the Warrant requirement if the home to be searched was leased by a Duke Student. AC ¶¶ 116-128.
- Police ignored the probable cause requirement for the seizure of any person if

the person to be seized was a Duke student. AC ¶ 113.

- Police fabrication of evidence (offered directly by police officers in courts of law to make baseless charges brought against Duke Students stick.) AC ¶175.
- The use of police power, generally, to intimidate, threaten, and coerce the out of state students into leaving the homes they leased in the Trinity Park neighborhood off of their University's East Campus. AC ¶¶ 113-15.
- Perhaps the Policy's most characteristic feature since its inception has been the Police Department's purposeful violation of the constitutional prohibition upon stigmatization in connection with any deprivation of rights, particularly a seizure or search, AC ¶¶ 120-21.

Zero-Tolerance was a moving force behind the conspiracy to convict the Plaintiffs that is documented in the Amended Complaint. And perhaps the most disturbing fact alleged in the Amended Complaint is the fact that, from the beginning of the "investigation," Duke and Durham had no evidence of a sexual assault save Mangum's recanted claim, and they certainly had clear proof that Plaintiffs and their team had nothing to do with one. A.C.§§VI- XL. They had nothing. AC ¶¶ 52, 57-68, 69-79. Recall Nifong's assessment of the evidence: "You know, we're f****d," (AC ¶ 593) or Himan's reaction to the decision to proceed to indictment in

April: "with what?" AC ¶816. And from that poisoned field nothing emerged but a parade of horrors:

- Fraudulent investigation: Durham Police oversaw an investigation that it should never have had in the first place: the allegations of rape occurring at 610 N. Buchanan. AC § XVIII (discussion on jurisdiction). Durham Sergeant Mark D. Gottlieb seized control of this case as soon as he could, not surprising given his particular interest and history of abusing Duke Students. AC ¶ 171. The investigation was a sham, laden with conspiracies. Defendant knew all of this and "turned a blind eye;" this failure to intervene ratified all of the bad acts. AC §IV(F).
- Retaliation – Public Stigmatization: Defendant engaged in numerous egregious acts of retaliation for Plaintiffs' exercise of constitutional rights, including searches and seizures based on lies and fabricated allegations. AC § XIV(C). Defendant did not do all of this quietly either, but rather launched a national media campaign resulting in the vilification of Plaintiffs and enduring public stigmatization.
- Multiple conspiracies: Defendant was a primary actor in several conspiracies throughout this case, the most outstanding include: the NTID order, the search warrant abuse, the Photo ID sham, the DNA Cover-Up, the SANE fabrications. See

> AC §§ XIII-XXV, XXIX-XXX, XXXIV. Much of this was engineered through Joint-Command Meetings between Duke and Defendant. AC § XXVI.

This is not the way cities and universities react to patently false accusations, particularly when they are recanted as soon as the accuser is removed from the commitment proceedings in which she made them. The arrogance of the City's policymakers, leaders, administrators, police officers, and employees (and all of their counterparts at Duke) that played out over the course of thirteen months did not just appear on March 14, 2006. It was not the natural consequence of a false allegation made by a drug-addled woman who, at the time, was in the midst of an apparent psychotic break, in police custody, and in the process of being involuntarily committed. It was the product of a well-worn policy and custom of police to deprive "temporary residents" of their constitutional rights in all encounters with law enforcement. So ingrained was Zero Tolerance in the police apparatus that, six months into the "fiasco," when news reports unmistakably documented Sgt. Gottlieb's miserable record of deliberate, inhumane violations of Duke students' rights, the Durham Police Department's Internal Affairs Chief reflexively held a press conference to say that Sgt. Gottlieb was following *his* "orders." AC ¶ 181. This was true, he said, when Gottlieb raided "temporary residents" homes without a warrant, arrested and charged "temporary residents" students with no evidence of a crime, and maintained a record of arresting roughly seven "temporary residents" students for every "permanent resident." AC § IV.

## QUESTIONS PRESENTED

The questions presented by the City's Motion to Dismiss are:

- Have the Plaintiffs stated a Fourth Amendment violation actionable under 42 U.S.C. § 1983?
- Have the Plaintiffs stated a § 1983 claim for violations of constitutionally protected property rights created by a state-created entitlement statute?
- Have the Plaintiffs stated § 1983 stigma-plus claim?
- Does the absence of a charge, prosecution, or conviction bar Plaintiffs' §1983 claim for conspiracy to convict, where it is alleged that multiple conspirators engaged in overt acts that deprived Plaintiffs of constitutional rights?
- Is the right not to speak protected by the First Amendment from state action that includes fabricating an affidavit to secure orders authorizing seizures and searches of Plaintiffs?
- Is the right to be free from state-sponsored coercion designed to force the waiver of an asserted constitutional right protected by the First Amendment and Fourteenth Amendments?
- Whether Plaintiffs adequately state a claim under the Privileges and Immunities Clauses of Article IV and the Fourteenth

Amendment, when Plaintiffs *do* allege that officers treated the Plaintiff who is a North Carolina citizen differently from those who are not?

- Whether the alleged policy of "Zero Tolerance" for "temporary residents" is a moving force behind the deprivations Plaintiffs allege, including the conspiracy to convict 47 "temporary residents" for a sexual assault that the City's policymakers directed and agreed with Duke University policymakers to pursue when they knew no sexual assault occurred, such that the City may be held liable under *Monell v. Dep't of Social Servs. of N.Y.,* 463 U.S. 658 (1978);
- Whether the City of Durham may be held liable for acts of an interim District Attorney to whom the City's policymakers delegated their policymaking authority over the investigation of Mangum's bogus claims?
- Whether "Race" means "any race" or some undefined subset of races?
- Whether "fomenting racial animus" applies to § 1985 claims in the same way it applies to its companion statutes in the Civil Rights laws?
- Have Plaintiffs stated actionable state law claims against the City?

## ARGUMENT

### I. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim may be granted "only in very limited circumstances." *Rogers v. Jefferson-Pilot Life Ins. Co.,* 883 F.2d 324, 325 (4th Cir. 1989). In examining a Rule 12(b)(6) motion, "the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Salami v. Monroe*, No. 1:07CV621, 2008 WL 2981553, at *5 (M.D.N.C. Aug. 1, 2008) (quoting *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993)). Though the complaint is not required to encompass detailed factual allegations, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (quotations and alterations in original) (quoting *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007)). The complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* (quoting *Twombly*, 127 S.Ct. at 1965). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* (quoting *Twombly*, 127 S.Ct. at 1969).

Further, where Plaintiffs have asserted a civil rights action, the Court "must be especially solicitous of the wrongs alleged and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged." *Veney v. Wyche,* 293 F.3d 726, 730

(4th Cir. 2002) (internal quotations omitted). With these standards in mind, this Memorandum will identify the factual basis in the Amended Complaint for the causes of action asserted against the City and respond to their arguments for dismissal.

## II. THE AMENDED COMPLAINT STATES ACTIONABLE CLAIMS UNDER FEDERAL LAW AGAINST THE CITY.

### A. The Amended Complaint States Actionable Section 1983 Claims Against the City.

The First through Fifteenth Causes of Action allege violations of 42 U.S.C. § 1983 (the "§ 1983 Claims"). At this early stage, the Court must determine whether each of these Causes of Action alleges facts sufficient to state the elements of Plaintiffs' § 1983 claims against the City.[2] *See Green v. Maroules*, 211 F.App'x 159, 161 (4th Cir. 2006). Based on statute's text, the Supreme Court held that a Section 1983 claim requires only two essential allegations:

---

[2] Section 1983 provides:

> [E]very 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 in an action at law, suit in equity, or other proceeding for redress[.] 42 U.S.C. § 1983 (2000).

> By the plain terms of section 1983, two–and only two–allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who deprives them of that right acted under color of state or territorial law.

*Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Section 1983 does not itself create or establish substantive rights; it provides "a remedy" where a plaintiff demonstrates a violation of a right protected by the federal Constitution, or by a federal statute other than §1983. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979). Analytically, however, it may be more useful to understand a Section 1983 action as having four elements of proof: (1) a violation of rights protected by the federal Constitution or created by federal statute or regulation (2) proximately caused (3) by the conduct of a "person" (4) who acted "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia." 42 U.S.C. § 1983 (2000). *See*, *e.g.*, *Martinez v. California*, 404 U.S. 277 (1980). In addition, where a plaintiff -as here- seeks to hold a municipality liable, under § 1983, there is a fifth element: that the violation of plaintiff's federal right was attributable to the enforcement of a municipal policy or practice. *Monell v. Dep't of Social Servs. of N.Y.,* 463 U.S. 658 (1978).

The Amended Complaint alleges claims of three types against the City. First, the Plaintiffs § 1983 claims against the City for deprivations of federal rights, including the First, Fourth, and Fourteenth. These are the *Monell* claims, arising out of official conduct, policy, and custom attributable either to the City or its policymaking officials. Next, Plaintiffs allege civil rights conspiracy claims under 42 U.S.C. §§ 1983, 1985, and 1986. They are brought against the City, either by naming the City directly or indirectly by naming its employees or agents in their official capacities. The City is the real party of interest in these causes of action. Third, Plaintiffs state several official capacity claims against the City under North Carolina Law. Here, we respond to the City's arguments for the dismissal of Plaintiffs municipal liability claims and summarize, briefly, the other claims which the City has named.

**1. The Amended Complaint States Actionable Section 1983 Claims for Searches and Seizures in Violation of the Fourth Amendment.**

The First and Second Causes of Action state § 1983 Claims against Gottlieb, Himan, and others for unreasonable searches and seizures in violation of Fourth and Fourteenth Amendments. AC ¶¶ 904-17, 918-28. Plaintiffs identify two discrete searches and seizures: (1) the Non-Testimonial Identification ("NTID Order") (the First Cause of Action), *id.* ¶ 907, and (2) the Search Warrant for Ryan McFadyen's dorm room (the "McFadyen Warrant") (the Second Cause of Action) *id.* ¶ 920. The McFadyen Search

Affidavit adds only one new allegation; the two Affidavits are nearly identical. Below, Plaintiffs apply the *Franks* "correcting" analysis to these two affidavits to make the showing required at this early stage to demonstrate that the fabrications and omissions were necessary to the judicial determination of probable cause.

**a. The *Franks* Correcting Process Applied**

**PART I**

**NTID ORDER**

**PROBABLE CAUSE TO BELIEVE A FELONY WAS COMMITTED**

**AFFIDAVIT: On 3/14/06 at 1:22am, Durham City Police Officers were called to the Kroger on Hillsborough Road. The victim, a 27 year old black female, reported to the officers that she had been raped and sexually assaulted at 610 North Buchanan Blvd.**

This statement fabricates and omits material facts known to the affiant:

- First, Mangum did not "report to the officers" at Kroger that she was assaulted at all; she nodded in response to a question during her involuntary commitment proceedings after she learned her children may be taken away from her. AC ¶ 382.
- Second, within the first 48 hours after her initial false accusation, Mangum was questioned by at least 8 different medical providers and 3 Durham Police Officers,

and, in those interviews, (a) Mangum recanted when questioned by Sgt. Shelton, A.C. ¶ 262; (b) in the 11 renditions of the story, Mangum never gave the same story twice, varying even on the question of where she came from-Raleigh or Durham; and (c) the only consistent element of Mangum's account was that Pittman had stolen her money, her purse, her ID, and her phone. AC ¶¶ 221, 271, 328.

- Third, that the call was for a "10-56" (code meaning "intoxicated pedestrian"); it was placed not by Mangum but by a Kroger security guard, Angel Altmon; and Altmon reported that Mangum was "an intoxicated lady, in someone else's car," and "the lady won't get out of the car." AC ¶¶ 225-27, Exh. 9. Third, that the Kroger security guard's opinion was that there "Ain't no way" Mangum had been sexually assaulted, based on her observations.
- Fourth, the reason Kim Pittman took Mangum to the Kroger was to seek the protection and aid of a security guard she knew would be there; Pittman feared for her own safety because Mangum's behavior in the car was bizarre and threatening; that Mangum told Pittman, "go ahead, put marks on me"; and that Pittman claimed Mangum was "talking crazy." AC ¶ 382.
- Fifth, when police approached Mangum in Pittman's car, Mangum "feigned unconsciousness," then fought being

removed from the car by holding onto the parking brake, which required Sgt. Shelton to apply a "bent-wrist come-along." AC ¶ 233.

- Sixth, the entire protracted period Mangum was in the Kroger parking lot, she did not say or suggest to any officer there that she had been assaulted; Mangum gave no indication nor any reason to believe that Mangum had been sexually assaulted; and Durham PD has dispatch audio of the responding officer saying "she's breathing, appears to be fine, not in distress, just passed out drunk." AC ¶¶ 40-47, Exh. 10.
- Seventh, that Mangum's behavior became so bizarre and dangerous that she met the standards for involuntary commitment; that Sgt. Shelton believed she needed immediate psychiatric care; and that Mangum was transported to Durham Center Access, where she refused to cooperate. AC ¶ 243.
- Eighth, that Nurse Wright asked Mangum a series of questions to which she did not respond, but after Mangum overheard an officer on the radio direct someone to Mangum's house to check on her children and to call DSS if no one is supervising them, Mangum nodded (yes) to Nurse Wright's question, "Were you raped?" AC ¶¶ 225-238; id. § VIII ("Mangum Nods 'Rape'").

**AFFIDAVIT: After a few minutes, the males watching them began to get excited and aggressive.**

This statement fabricates and omits material facts:

- Police knew from Himan's interview of Pittman on March 22, 2006, that Mangum's behavior was bizarre and the young men present quickly became "uncomfortable and/or disinterested." AC ¶ 202.

**AFFIDAVIT: "One male stated to the women "I'm gonna shove this up you" while holding a broom stick up in the air so they could see it.**

This statement fabricates and omits material facts known to the affiant:

- Gottlieb and Himan learned of 'the broomstick exchange' from the March 16th interviews of Evans, Flannery, and Zash. None of them said that anyone did that. What was said was far different, and it was Pittman's first excuse for ending the evening before Mangum's behavior got any more bizarre. Gottlieb and Himan twisted the voluntarily given statements into a complete fabrication. AC ¶¶ 421-422.

**AFFIDAVIT: The victim and her fellow dancer decided to leave because they were concerned for their safety. After the two women exited the residence and got into a vehicle, they were approached by one of the suspects. He**

**apologized and requested they go back inside and continue to dance.**

This statement fabricates and omits material facts known to the affiant:

- Pictures reveal Mangum following the dance trying to get back into the house. She had been locked out by the boys for *their own safety*. She is just standing still, smiling. There is no indication of fear for her safety. AC ¶¶ 397.
- Mangum's cell phone records reveal that, at that time, she called her agency, Centerfold. Mangum was looking for more work elsewhere. AC ¶¶ 204, 206-207.

**AFFIDAVIT: The victim arrived at the residence and joined the other female dancer around 11:30pm on 3/13/2006.**

This statement omits facts known to the affiant:

- Mangum (1) *was dropped off* at the residence around 11:40pm, (2) she was 40 minutes late, (3) that she was staggering when she arrived, and (4) appeared to have come from another event. AC ¶ 197.

**AFFIDAVIT: Shortly after going back into the dwelling the two women were separated. Two males, Adam and Matt pulled the victim into the bathroom.**

This statement fabricates and omits material facts:

- Kim Pittman told Inv. Himan in a telephone interview that Mangum's accusation was a "crock." AC ¶ 385.
- Even after Pittman was forced to add an addendum to her written statement, Pittman described Mangum as going back into the house to make more money—Pittman does not say that she went back into the house with her and that they were separated. AC ¶¶ 385-386.
- The names Adam and Matt were never give during her 11 renditions. AC ¶ 322.[3]

**AFFIDAVIT: The victim stated she tried to leave, but the three males (Adam, Brett, and Matt) forcefully held her legs and arms and raped and sexually assaulted her anally, vaginally, and orally. The victim stated she was hit, kicked, and strangled during the assault. Medical records and interviews that were obtained by a subpoena revealed the victim had signs, symptoms, and injuries consistent with being raped and sexually assaulted vaginally and anally.**

This statement fabricates and omits material facts known to the affiant:

- There was no swelling, edema, cuts or abrasions (even microscopic) of the anus or

[3] Note, Defendants Levicy's account with the names included is alleged to be a fabrication made to harmonize a "contemporaneous" account with this affidavit).

the exterior pelvic region. No cuts, abrasions, or abnormalities on or around Mangum's vagina or anus were observed or documented with the highmagnification coloposcope. AC ¶ 308.

- Doctors and nurses concluded that Mangum was making false claims of pain because their tests revealed no associated symptoms of pain at all. AC ¶ 325.
- The only documented injuries in the SAER were injuries to Mangum's knees and ankles. However, digitally time-stamped photos taken during the dance show the exact same injuries were already present on her knees and ankles before she arrived at 610 N. Buchanan. AC ¶ 326.
- Mangum denied receiving any physical blows by the hand, AC ¶ 308, and in the many 'Systems Examinations' that were done by DUMC doctors and nurses on the morning of March 14, 2006 (and the UNC doctors and nurses the next day), all concluded that Mangum's head, back, neck, chest, breast, nose, throat, mouth, abdomen, and upper and lower extremities were 'normal,' and Mangum was consistently noted to be in 'no obvious discomfort,' even when she was scoring her pain as '10 out of 10.' AC ¶ 309.

**AFFIDAVIT: The victim reported that she was sexually assaulted for an approximate 30 minute time period by the three males.**

This statement fabricates and omits material facts known to the affiant:

- During her initial 11 renditions of the night, Mangum claimed that 1, 20, and 5 men raped her. A.C. ¶ 321. Mangum was treated and evaluated at Duke University Medical Center Emergency Room shortly after the attack took place. Mangum was not treated, merely kept for observation.
- Long after she arrived, DUMC staff initiated a Sexual Assault Examination (SAE), which was abandoned in the middle of the first exam. No pelvic exam was conducted. No rectal exam was conducted. No forensic toxicology tests were ordered. No forensic blood drawn was taken.
- The medical staff, Durham police officers and Duke police officers who interacted with her believed she was lying. AC ¶¶ 302-06.

**AFFIDAVIT: She claimed she was clawing at one of the suspect's arms in an attempt to breathe while being strangled.**

This statement fabricates a material fact known to the affiant:

- Mangum did not make this claim in any of the multiple, varying accounts that she gave police officers and medical providers on March 14th, 15th, or 16th, or in her written statement on April 6th. AC ¶ 424.

**AFFIDAVIT: The victim's make up bag, cell phone, and identification were also located inside the residence totaling $160.00 consistent with the victim claiming $400.00 cash in all twenty dollar bills was taken from her purse immediately after the rape.**

- $160.00 is not consistent with $400.00, and she also claimed the amount "stolen" was $2,000.00. Further, Mangum also claimed that her money (1) was stolen, (2) was not stolen, (3) was stolen by "Nikki," (4) stolen by one of several of "the attackers," (5) was deposited into a nearby ATM account, and (6) left in the back seat of Officer Barfield's patrol car. AC ¶ 321.

**AFFIDAVIT: A Forensic Sexual Assault Nurse (SANE) and Physician conducted the examination. Medical records and interviews that were obtained by a subpoena revealed the victim had signs, symptoms, and injuries consistent with being raped and sexually assaulted vaginally and anally. Furthermore, the SANE nurse stated the injuries and her behavior were consistent with a traumatic experience.**

This statement fabricates and omits material facts known to the affiant:

- Levicy was a "SANE-in-Training" and was not qualified or competent to conduct an SAE under accreditation standards or DUHS's internal policies.

- No qualified SANE conducted the exam; a resident, Dr. Julie Manly did.
- Levicy was also not competent to collect or interpret forensic medical evidence. Levicy agreed with Gottlieb and Himan to back up their use of her "observations" in Mangum's SAE, in court as an "expert" if necessary. AC ¶ 301. By signing the SAER and failing to clearly document those facts on the SAER, Levicy deliberately falsified a forensic medical record in order to aid Himan and Gottlieb's attempt to obtain search and seizure orders by defrauding the Court. AC ¶ 299.
- Fourth-year resident Julie Manly found no injury to Mangum's pelvic region whatsoever, including the vaginal walls, cervix, rectum, or anus. The only notation Manly made was 'diffuse edema of the vaginal walls.' Diffuse edema is not an injury; it is a symptom. It is caused by many things. Further diffuse edema cannot be clinically identified to a reasonable degree of medical certainty without a baseline reference for comparison (e.g., a prior observation of the vaginal walls at a time when they were not edemic). AC ¶ 306.

**AFFIDAVIT: In a non-custodial interview with Daniel Flannery, resident of 610 N. Buchanan and Duke Lacrosse Team Captain; Mr. Flannery admitted using an alias to make the**

**reservation to have the dancers attend the Lacrosse Team Party.**

This statement fabricates and omits material facts known to the affiant:

- During Police questioning on March 16th, Dan Flannery, told police that, when he called the agency, he gave the name Dan Flanagan. No witness ever said that Dan identified himself as Adam, rather everyone was calling him Dan. AC ¶ 432.

**AFFIDAVIT: The victim and her fellow dancer decided to leave because they were concerned for their safety. After the two women exited the residence and got into a vehicle, they were approached by one of the suspects. He apologized and requested they go back inside and continue to dance.**

- Jason Bissey, a neighbor, told police that he saw Mangum staggering around the side of the house, heading toward the back yard saying she was looking for her shoe. AC ¶¶ 387-90. Kim Pittman told police she was afraid of Mangum. AC ¶ 199.

**AFFIDAVIT: During a search warrant at 610 N. Buchanan on 3-16-2006 the victim's four red polished fingernails were recovered inside the residence consistent to her version of the attack.**

- This statement omits the fact that other unpainted fingernails and nail polishing and painting accessories were found in the bathroom, inside Mangum's purse, and on

a computer component, which were seized by police in the search of 610 N. Buchanan. AC ¶ 425.

**PART II**

**NTID ORDER**

**"REASONABLE GROUNDS" TO BELIEVE THAT McFADYEN, WILSON, OR ARCHER COMMITTED ANY FELONY LISTED**

**AFFIDAVIT: All of the parties named in this application with the exception of the last five were named by the three residents of 610 N. Buchanan as being present at the party. Due to the fact that the residents of 610 N. Buchanan stated that all the attendees were their fellow Duke Lacrosse Team Members and that there were so many attendees, all of the white male Duke Lacrosse Team Members were listed since they were all aware of the party and could have been present.**

This statement raises the most glaring omission of those which should have been included in this section of the Gottlieb-Himan Affidavit:

- On March 16, 2006, Crystal Mangum—herself—ruled out McFadyen, Wilson, and Archer as possible suspects. On that day, Clayton, Himan, and Gottlieb showed Mangum each of their pictures, and Mangum did not recognize any of them. AC ¶¶ 383-84.
- By March 21, 2006, additional photo identification procedures coupled with

Mangum's "general descriptions" of her "attackers" ruled out every other person at whom the NTID Order was directed. The failure to advise the judge of this fact is sufficient—standing alone—to hold Gottlieb and Himan liable for the harms caused by their abuse of it. AC ¶¶ 92-100.

- In the year 2006, a reasonable officer in Gottlieb's, Clayton's, and Himan's position would know—even to a moral certainty—that what they were doing violated clearly established law. Further, a reasonable officer would also know that leaking the NTID Order they obtained by fraud to the press to ignite a media firestorm and to publicly vilify Plaintiffs not only violates clearly established law, but is also arbitrary and evinces corrupt, malicious, depraved, and evil motives that shock the conscience.
- The AC alleges additional fabrications and omissions, and this could continue on; however, the foregoing allegations from the AC sufficiently allege that the Affidavits were designed to mislead, egregiously so.

**AFFIDAVIT: Numerous persons who attended this party are seniors at Duke University and have permanent addresses outside of the State of North Carolina, making it difficult if not impossible to collect the DNA evidence in the future when necessary.**

The Court may take judicial notice that this statement is false, and, if not, the Affidavit establishes its falsity. AC ¶ 757.

**AFFIDAVIT: She stated one male identified himself as Adam, but everyone as the party told her they were members of the Duke Baseball and Track Team to hide the true identity of their sports affiliation—Duke Lacrosse Team Members. In a noncustodial interview with Daniel Flannery, resident of 610 N. Buchanan and Duke Lacrosse Team Captain; Mr. Flannery admitted using an alias to make the reservation to have the dancers attend the Lacrosse Team Party.**

Both Gottlieb and Himan were involved in the search of 610 N. Buchanan, and, it was obvious that no one who lived there sought to conceal their team or school affiliation. To the contrary, the walls were covered with 'Duke Lacrosse' posters, banners, and other insignia. AC ¶ 436. Further, Dan Flannery had already voluntarily provided a DNA sample, pubic hair sample and everything else the police asked of him. AC ¶ 432; Kim Pittman refers to Dan in her statement and yet makes no reference to any alias. AC ¶ 385.

**b. The McFadyen Warrant Affidavit**

The only additional "fact" asserted in the Affidavit for the McFadyen Warrant was text claimed to be excerpted from an email provided by an "anonymous source". *See* Gottlieb Br. Exh. 3 at 94. Because the Affidavit stated that the source of the text allegedly extracted from an email was from an

"anonymous source" the Affidavit needed to contain some indicia of the anonymous source's reliability to be considered in the probable cause determination. *Florida v. J.L.,* 529 U.S. 266, 269-70 (2000). Six years prior to the McFadyen Search Warrant, the United States Supreme Court issued a unanimous decision holding that an anonymous tip claiming that a juvenile standing on an identified street corner unlawfully possessed a gun was not sufficient to satisfy the reasonable suspicion standard required to justify the brief *Terry* stop of the individual when police found him standing on the corner. *Id.* at 279. The Court held that the anonymous tip, standing alone, lacked sufficient indicia of the anonymous informant's reliability. *See id.* ("[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity,'" (internal citations omitted) (quoting *Alabama v. White,* 496 U.S. 325, 329 (1990)).

Like the anonymous tip in *J.L.,* Gottlieb and Himan's Search Warrant Affidavit contained no factual material whatsoever relating to the reliability of the "anonymous" source of the disembodied text. *See id.* In addition, Gottlieb and Himan's "anonymous source" had taken affirmative steps to ensure there would be no way for police to discover his identity. Himan, in sworn testimony, later admitted that the other officers tried to identify the anonymous source through an inquiry with the source's email account provider (Google); however, Google advised them that Gottlieb's anonymous e-

mailer created the email account used to send the 'tip' without providing Google any of his or her identifying information. The source's deliberate effort to prevent police from discovering his or her identity is devastating to the e-mailer's reliability. *Cf. J.L.,* 529 U.S. at 276 ("If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip."). Gottlieb omitted that material fact from the Search Warrant Affidavit also. Gottlieb Br. Exh. 2.

Information from an anonymous source, be it the location of a young man with a gun or disembodied text alleged to have been sent from a person's email account, is presumptively unreliable, even as a basis for a minimally intrusive *Terry* stop on the street. *J.L.,* 529 U.S. at 270. Therefore, standing alone, as it must in the *corrected* Affidavit, Gottlieb's disembodied email text would not have justified even a *Terry* stop of Ryan McFadyen under the Supreme Court's cases. *See, e.g., J.L.,* 529 U.S. 266. It goes without saying that "reasonable suspicion" is a far cry from probable cause, and probable cause is what Gottlieb was required to establish in his Affidavit for a Warrant to Search Ryan McFadyen's dorm room. The corrected affidavit offers no indicia of the reliability of the e-mailer. The disembodied e-mail text is, therefore, unreliable as a matter of law, *see J.L.,* 529 U.S. at 271-73, and it could not be used to support the probable cause determination at the time Gottlieb applied for the McFadyen Search Warrant. Gottlieb and Himan may not use it in this forum. No reasonable officer would believe that supplementing the corrected affidavit with the disembodied text of an email sent by an unknown and unknowable

"anonymous source" would establish probable cause. *See generally J.L,* 529 U.S. 266, and the cases cited therein; *Illinois v. Gates,* 462 U.S. 213, 239 (1983); *United States v. Tate,* 524 F.3d 449, 457 (4th Cir. 2008) (officer's affidavit "provided no details regarding the source or context" of information, and, as such, the information could not support issuance of a search warrant); *United States v. Wilhelm,* 80 F.3d 116, 119-21 (4th Cir. 1996) (officer's search warrant affidavit failed to establish "anonymous" caller's reliability where caller provided information that almost anyone who "occasionally watches the evening news" could have given, reversing conviction based on fruits of the search).

**1) Insufficient Nexus Between Place to be Searched and Things to Be Seized**

Furthermore, the Affidavit fails to establish any nexus between the place to be searched (a dorm room on Duke's Main Campus) and the crimes the Affidavit alleges (rape, sexual offense, kidnapping at 610 N. Buchanan Blvd. and a "conspiracy to commit murder" (via the internet)). *See* Gottlieb Br. Exh. 2. Gottlieb submitted the McFadyen Search Warrant two weeks after the alleged "conspiracy to commit murder" was to be consummated, and included no evidence tending to show that there was a conspiracy to commit murder. Id. The "information" was therefore fatally stale at the time Gottlieb included it in the Affidavit. *See, e.g., United States v. Mohn,* No. 1:05CR319-1, 2006 WL 156878 *8 (M.D.N.C. Jan. 20, 2006) (quoting *United States v. Gonzales,* 399 F.3d

1225, 1230 (10th Cir. 2005)). It is also unlikely that any evidence of such a conspiracy would exist in McFadyen's dorm room two weeks later. AC ¶ 605. Finally, there is no evidence of an "agreement" of any kind. The AC alleges that Gottlieb could not include any reply to the email suggesting agreement because either, (1) he did not have them, or (2) he had them and knew they provided the context that gave the lie to any suggestion of a "conspiracy" to do anything (lawful or unlawful). *See id.* ¶¶ 598-99, 603. Informing all of those allegations is another, very important one: the AC's disquieting allegation that Gottlieb and Himan made the McFadyen Search Warrant Affidavit was within hours after Nifong advised them that they were "f***ed"—his vulgar assessment of their circumstances in light of what Gottlieb and Himan had just told him about the state of the evidence, the lies that were told in the NTID, and the national firestorm it had ignited. *See id.* ¶¶ 591-93, 598-99, 600, 610.

**2) Gottlieb Knew No Evidence of a Crime Would Be Found in McFadyen's Dorm Room**

In addition, the AC alleges ample proof that Gottlieb and his co-conspirators knew the disembodied email text was not evidence of any crime. For example, Gottlieb did not seek a warrant to search the room or home of the young man who replied, "I'll bring the Phil Collins." *See* AC ¶¶ 603, 608. Upon the release of the Affidavit, the police department advised Ryan's counsel that Ryan was free to go to his home in New Jersey because the

police department had no plans on arresting him for the conspiracy to commit murder. *Id.* ¶ 701. Finally, many of the "things to be seized" were already in the police department's possession, including, for example the "dancer's white shoe." *Id.* ¶ 606; Gottlieb Br. Exh. 2 at 7.

Taken together, these allegations are sufficient to establish an actionable §1983 Claim against Sgt. M.D. Gottlieb for causing the Plaintiffs to be subjected to NTID procedures without probable cause to believe that the felonies alleged had been committed, or "reasonable grounds" to believe that Plaintiffs committed them. They are also sufficient to state an actionable § 1983 claim against Sgt. M.D. Gottlieb for causing Ryan McFadyen to be subjected to searches and seizures of his home, papers and effects without probable cause to believe a crime had been committed or probable cause to believe that evidence of any such crime would be found in his dorm room two weeks hence. Gottlieb's motion to dismiss these causes of action must be denied.

* * *

**UNITED STATES DISTRICT COURT**
**FOR THE**
**MIDDLE DISTRICT OF NORTH CAROLINA**

RYAN McFADYEN, et al.,
Plaintiffs,

v.

DUKE UNIVERSITY, et al.,
Defendants.

Civil Action No. 1:07-cv-953

**PLAINTIFFS' OPPOSITION TO DEFENDANT HIMAN'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**

Dated: October 10, 2008

**EKSTRAND & EKSTRAND LLP**
Robert C. Ekstrand (NC Bar #26673)
Attn. Stefanie A. Sparks
811 Ninth Street, Suite 260
Durham, North Carolina 27705

*Counsel for Plaintiffs Ryan McFadyen, Matthew Wilson, and Breck Archer*

## TABLE OF CONTENTS

## STATEMENT OF THE CASE

The Amended Complaint describes a combination of actors and entities referred to as the Consortium. For thirteen months beginning in March 2006, the Consortium's ultimate objective was to railroad the Plaintiffs and their 44 teammates into convictions as either principles or accomplices to a horrific, violent crime they knew never happened. The allegations describe a willful, malicious, and calculating conspiracy of multiple dimensions. Acting individually and in concert, Defendants concealed exonerating evidence, manufactured inculpatory evidence, and stigmatized the Plaintiffs by subjecting them to public outrage, public condemnation, and infamy in the minds of millions of people. Defendants' conduct shocks the conscience. Perhaps the most unsettling allegation of all is that those who knew of the wrongs conspired to be done to Plaintiffs, and had the power to prevent or aid in preventing them. Instead, they 'turned a blind eye' and did nothing.

## NATURE OF THE PROCEEDINGS

Plaintiffs filed this action on December 18, 2007 and amended that filing on April 17, 2008. Pursuant to a request from this Court regarding the location of the audio and video exhibits embedded within the First Amended Complaint ("AC"), Plaintiffs re-filed the AC on April 18, 2008 with those embedded exhibits as separate documents. Except for the location of the exhibits, the two "First Amended Complaints" are identical. All Defendants filed Motions to Dismiss pursuant to Fed. R. Civ. P. 12(b) (6) on July 2, 2008.

This Memorandum is filed pursuant to the Court's Order of October 7, 2008 [Document #72], granting Plaintiffs' Motion for Leave to File Opposition Briefs [Document #71], and authorizing Plaintiffs to file their Responses on or before October 10, 2008.[1]

## STATEMENT OF THE FACTS

Benjamin W. Himan has testified that when he was assigned to the case that spawned this lawsuit, he had never seen a DNA report in his life. AC ¶ 346. Himan has since resigned from the Durham Police Department. At all times relevant to this action, Himan was employed by the City as a property crimes investigator. Of the five property crimes investigators in District Two, Himan was, in his own words, "at the bottom of the list" in terms of seniority, experience, training and skill. Gottlieb personally assigned Himan as "lead investigator" in this case. Himan had just become an investigator when Mangum's false allegations were made. AC ¶ 63.

Himan, perhaps more so than any other person besides Investigator Mark Gottlieb and District Attorney Michael Nifong, had the greatest opportunity to end the conspiracy to convict. Himan

[1] Plaintiffs' Opposition Brief is filed in response to Himan's Motion to Dismiss [Document #51] and supporting Memorandum [Document #52]. Himan's supporting brief is cited herein as "Himan Br." Himan's co-defendants' supporting briefs are cited herein as: "City Br.," "Gottlieb Br.," "City Super. Br.," "DNASI Br.," "SANE Br.," "Duke Univ. Br." "DUPD Br.," "SMAC Br.," "Hodge Br.," and "Wilson Br."

was present at almost every critical meeting and juncture, including the Special Prosecutors' interviews of Mangum. Himan has testified that it was only at this last meeting that he finally became convinced Mangum was lying. AC ¶ 401. By this time, it was too late, the damage was already done – in large part, by Himan.

## QUESTIONS PRESENTED

1. Have the Plaintiffs stated actionable claims against Defendant Himan under 42 U.S.C. § 1983? (§§ II.A.(1)-(8))

2. Is Defendant Himan Entitled to Qualified Immunity for Plaintiffs' §1983 Claims? (§§ III.A.1-8)

3. Have the Plaintiffs stated actionable claims against Defendant Himan for Conspiracy under 42 U.S.C. § 1983, 42 U.S.C. § 1985, 42 U.S.C. § 1986? (§IV.A.-C.).

4. Have the Plaintiffs stated actionable claims against Defendant Himan under State Law? (§V.A.–H.).

## ARGUMENT

### I. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim may be granted "only in very limited circumstances." *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324,

325 (4th Cir. 1989). In examining a Rule 12(b)(6) motion, "the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Salami v. Monroe*, No. 1:07CV621, 2008 WL 2981553, at *5 (M.D.N.C. Aug. 1, 2008) (quoting *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993)). Though the complaint is not required to encompass detailed factual allegations, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (quotations and alterations in original) (quoting *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007)). The complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* (quoting *Twombly*, 127 S.Ct. at 1965). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* (quoting *Twombly*, 127 S.Ct. at 1969). Further, where Plaintiffs have asserted a civil rights action, the Court "must be especially solicitous of the wrongs alleged and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged." *Veney v. Wyche,* 293 F.3d 726, 730 (4th Cir. 2002) (internal quotations omitted). With these standards in mind, this Memorandum will identify the factual basis in the Amended Complaint ("AC") for the causes of action asserted against Defendant Himan and respond to his arguments for dismissal.

## II. THE AMENDED COMPLAINT STATES ACTIONABLE CLAIMS UNDER FEDERAL LAW AGAINST DEFENDANT HIMAN.

### A. The Amended Complaint States Actionable Section 1983 Claims Against Defendant Himan.

The Amended Complaint's first fifteen Causes of Action allege violations of 42 U.S.C. § 1983 (the "§ 1983 Claims"). At this early stage, the Court must determine whether each of these Causes of Action alleges facts sufficient to satisfy the elements of § 1983.[1] *See Green v. Maroules*, 211 F.App'x 159, 161 (4th Cir. 2006). Based on statute's text, the Supreme Court held that a Section 1983 claim requires only two essential allegations:

> By the plain terms of Section 1983, two–and only two–allegations are required in order to state a cause of action under that statute. First, the plaintiff must

---

[1] Section 1983 provides:

> [E]very 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 in an action at law, suit in equity, or other proceeding for redress[.]

42 U.S.C. § 1983 (2000).

> allege that some person has deprived him of a federal right. Second, he must allege that the person who deprives them of that right acted under color of state or territorial law.

*Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *accord West v. Atkins*, 487 U.S. 42 (1988).

Section 1983 does not itself create or establish substantive rights. Instead, § 1983 provides "a remedy" where a plaintiff demonstrates a violation of a right protected by the federal Constitution, or by a federal statute other than § 1983. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979). The Amended Complaint adequately alleges a factual basis for every element of a § 1983 claim against Defendant Himan. The Amended Complaint alleges that (1) Defendant Himan is a "person" for purposes of § 1983, AC ¶¶ 905, 919, 930, 942, 969, 979, 993, 1003, 1021, 1148; (2) who, while acting under color of state law, *id* . ¶¶ 905, 919, 930, 942, 969-70, 979, 993, 1003, 1021, 1149; (3) proximately caused *id.* ¶¶ 916, 927-28, 939, 952, 976, 984, 1000, 1006, 1022- 23, 1154; (4) the deprivation of Plaintiffs' federal rights, *id.* ¶¶ 916, 927-28, 934, 939, 952, 976, 984, 1000, 1006, 1022-23, 1154. The elements and the supporting allegations detailed across more than 400 pages of the Amended Complaint are more than sufficient to state § 1983 claims against Himan. *See, e.g., Gomez v. Toledo,* 446 U.S. 635, 640 (1980).

Himan concedes that the Amended Complaint sufficiently alleges he is a "person" for purposes of § 1983, and, at all relevant times, was acting under color of state law. Of the § 1983 claims asserted

against Himan, he argues that only the First Cause of Action, arising out of his procurement of the NTID Order, should be dismissed on the merits of the violation alleged. Himan Br. at 13-21. Himan makes no argument as to the merits of the remaining § 1983 claims asserted against him; he argues only that they should be dismissed on the grounds that qualified immunity shields him from liability because the rights alleged were not "clearly established" at the time of the violation. Himan Br. at 21-33. His arguments fail because he misstates the law governing the issuance of NTID Orders. He also fails to acknowledge the facts alleged in the AC showing all of the material allegations in the Affidavits that support the claim that the NTID and Warrant were fabrications, and he also fails to acknowledge all of the material omissions alleged in the AC, and the rights alleged in all of the § 1983 claims asserted in the Amended Complaint that were clearly established at the time he violated them.

**1. The First and Second Causes of Action State Actionable Section 1983 Claims for Subjecting Plaintiffs to Searches and Seizures Without Probable Cause or Reasonable Suspicion in Violation of the Fourth and Fourteenth Amendments.**

The First and Second Causes of Action state § 1983 Claims against Himan and others for unreasonable searches and seizures in violation of Fourth and Fourteenth Amendments. AC ¶¶ 904-17, 918-28. The First Cause of Action identifies the

search and seizure caused by the issuance of the Non-Testimonial Identification ("NTID Order"). The Second Cause of Action identifies the search and seizure caused by Himan's Affidavit to procure a Search Warrant for Ryan McFadyen's dorm room. The Amended Complaint alleges that Himan procured the judicial authorization for both the NTID Order and the McFadyen Warrant through Affidavits in which Himan intentionally or with reckless disregard for the truth made false statements and made numerous omissions that were material to the judicial determination. *Id.* ¶¶ 415-44. With respect to the NTID Affidavit, taking the Plaintiffs' allegations as true, the Amended Complaint establishes that *every statement* in the NTID Affidavit was deliberately fabricated, *id.* ¶¶ 416-18, and, further, that Himan deliberately omitted from the NTID Affidavit all of the overwhelming evidence of innocence that was known to Himan, Nifong, Gottlieb, Levicy, and Arico at the time, *id.* ¶¶ 223-37, 262-311, 321-31, 382-85. The Amended Complaint documents Himan's omissions and fabrications, as well as Himan's knowledge of them, in rich detail. *See id.* ¶¶ 385, 414-435, 570-75. Himan, Gottlieb, and the SANE Defendants are incorrect when they contend that the only allegations of fabrication are contained in the section of the AC detailing the origins of the *most sensational* fabrications. With respect to the McFadyen Search Warrant, the only additional material included in the Affidavit used to procure it (i.e., disembodied text that an anonymous e-mailer claimed was sent by Ryan McFadyen's Duke e-mail account) was unreliable as a matter of law, and, therefore, could

not be considered in the judicial determination of probable cause. *See Illinois v. Gates*, 462 U.S. 213, 239 (1983).

Himan makes no argument for dismissal on the merits of Plaintiffs' Second Cause of Action, which alleges an unconstitutional search and seizure of Ryan McFadyen's room without probable cause in violation of the Fourth Amendment, but because the affidavits supporting the NTID and the warrant for the search of the room are materially the same, the arguments will be applicable to both causes for the purposes of incorporated briefs. *See generally* Himan Br. 1-43. He argues that the First Cause of Action should be dismissed because, he contends, (1) Plaintiffs "concede" that probable cause existed for the NTID Order; (2) his fabrications were not necessary to the finding of probable cause; (3) "inconsistencies in the accuser's statements" do not defeat probable cause; (4) the Amended Complaint fails to meet the heightened pleading requirements of Fed. R. Civ. P. 9(c); and (5) Plaintiffs are asserting a non-existent "right to be free from criminal investigation." Himan Br. at 13-21. The first, third, and fifth arguments fail because they misrepresent Plaintiffs' allegations; the fourth fails because it misapplies the law; and the second argument fails because it misrepresents the law and the allegations.

**a. Plaintiffs Do Not "Concede" There Was Probable Cause for the NTID or Search Warrant**

Himan argues that his deliberate fabrications and omissions were not necessary to the finding of probable cause for two reasons. First, he contends

that the Amended Complaint "concedes" that the fabrications were not necessary to the finding of probable cause. Himan Br. at 16. Of course, the Amended Complaint does not "concede" probable cause existed for the 610 N. Buchanan Search Warrant. In fact, the very paragraph that Himan cites to support his remarkable contention, AC ¶ 418, states that the new "fabricated allegations in the NTID order added a sinister dimension to *the already fabricated account of the evening in the [610 N. Buchanan] search warrant affidavit*." AC ¶ 418 (emphasis added). The point made in the Amended Complaint is not that probable cause already existed for the 610 N. Buchanan Warrant; the point is that Himan and his co-conspirators had already fabricated and omitted enough material facts to mislead a judicial official into believing (wrongly) that probable cause existed. Plaintiffs allege that the purpose of the additional fabrications and omissions was to maliciously vilify the plaintiffs in the eyes of millions of people, and foment racial animus against them. AC ¶¶ 414, 597-601. Therefore, Himan's contention fails because it misrepresents Plaintiffs' allegations. The Amended Complaint may not be dismissed based upon "concessions" that Plaintiffs have not made.

**b. Himan's Fabrications and Omissions were Necessary to the Judicial Determination of Probable Cause**

Next, Himan argues that the First Cause of Action should be dismissed because, he contends, the NTID Order only required "reasonable grounds" and

after correcting for the alleged fabrications, the Affidavit still establishes "reasonable grounds." Himan Br. at 14-16 (citing *State v. Pearson*, 566 S.E.2d 50, 54 (N.C. 2002)). However, Himan misstates the law. The "reasonable grounds" standard applies only to the quantum of evidence that is required with respect to the person to be subjected to the NTID Order. *State v. Pearson*, 556 S.E.2d at 54; N.C. GEN. STAT. § 15A-282 (2008) (the sworn affidavit must show that "… there are reasonable grounds to suspect that the person named or described in the affidavit committed the offense[.]"). Himan skips a step. His Brief does not mention once that the NTID statute requires, at step one, a showing of probable cause to believe that a felony has been committed. *See id.* (quoting § 15A-282 (the sworn affidavit must show "(1) [t]hat there is *probable cause* to believe that a felony offense ... has been committed[.]" (emphasis added))). This is also why Himan's analogy to *Torchinsky v. Siwinsky* 942 F. 2d 257 (4th Cir. 1990), must fail: in *Torchinsky*, while the victim changed his story it was obvious a crime had been committed and that he had been assaulted, in the instant case there was no proof of an assault outside of Mangum's own statements. AC ¶¶ 293-309.

The NTID Affidavit—after correcting the fabrications and omissions—does not establish probable cause to believe that a felony had been committed or "reasonable grounds" to believe that Plaintiffs committed it. The McFadyen Search Warrant Affidavit fails—after correction—to establish probable cause to believe that a crime had been committed or that the items to be seized would

be found in the place to be searched. The fabrications and omissions were therefore necessary to the judicial determination that that the Affidavits contained a sufficient factual basis for both the NTID Order and the McFadyen Search Warrant.

**c. Eliminating the Fabrications and Adding Material Omissions Defeats Probable Cause**

Himan contends that, even if the alleged fabrications are struck from the affidavit, what remains is sufficient to establish the constitutionally required factual basis for the NTID Order issued to all Plaintiffs and the Search Warrant for McFadyen's dorm room. Himan Br. at 14-20. Himan is wrong for several reasons. First, as is shown in Pls. Opp. City Br., § II.A.(1), after eliminating all of the fabrications, essentially no allegations remain. Second, Himan's argument completely fails to account for the second dimension of the *Franks* correction analysis: material omissions. Third, Himan misapplies the *Franks* analysis by examining the effect of each fabrication and each omission in isolation, one fabricated or omitted fact at a time, and concluding that each, in isolation, is not "necessary" to the required judicial finding because it does not defeat probable cause. The *Franks* correction analysis is, of course, quite different.

Pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), the Court undertakes a "correction" analysis. First, the Court "corrects" the fabrications by striking the false statements from the affidavit. *Franks,* 438 U.S. at 155-56. If the remaining

allegations do not establish probable cause, the Plaintiff has stated a claim. If the remaining allegations are still sufficient after correcting the fabrications, the Court then "corrects" the affidavit by inserting the material omissions. The Fourth Circuit considers an omission to be a false statement for purposes of the *Franks* correction analysis when it is "*designed to mislead* " or "made '*in reckless disregard of whether [it] would mislead.'* " *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008) (alterations in original) (quoting *United States v. Cokley*, 899 F.2d 297, 300 (4th Cir. 1990)).

Eliminating the fabrications from the NTID Affidavit and the McFadyen Search Warrant Affidavit defeats probable cause; and, if it did not, inserting the omissions in the second step plainly does. Himan argues that probable cause or reasonable grounds still remain after correction, but Himan reaches this conclusion by cherry-picking and recasting Plaintiffs' allegations. He only finds one material omission in the pages and pages of alleged facts that Himan knew and deliberately omitted from the NTID and McFadyen Search Warrant Affidavits. Himan Br. at 19 ("inconsistencies in the accuser's statements" do not defeat probable cause). To demonstrate the extent to which Himan and his co-conspirators deliberately designed the Affidavits to mislead, Plaintiffs apply the *Franks* analysis to the NTID and McFadyen Search Warrant Affidavits in responding to the City's motion and incorporate that analysis here. *See* Pls. Opp. (City), §II.A.(1).

Himan makes no argument for dismissal of the Second Cause of Action on the merits. He does,

however, generally plead qualified immunity as a defense to all of Plaintiffs' § 1983 claims. To the extent that it is necessary to define the contours of the right Plaintiffs allege was violated in the Second Cause of Action, Plaintiffs incorporate by reference the discussion the Second Cause of Action in Plaintiffs' Opposition to City of Durham's Motion to Dismiss. *See* Pls. Opp. Br. (City), §II.A.1. In Section II of this Memorandum, Plaintiffs establish that, as to Himan, the Fourth Amendment right alleged to have been violated in the Second Cause of Action was "clearly established" at the time Himan violated it.

**d. Rule 9(b) Does Not Impose a Heightened Pleading Standard Upon Plaintiffs' First (or Second) Cause of Action**

Himan suggests that the heightened pleading standard of Rule 9(b) applies to Plaintiffs' allegations of "essentially fraudulent behavior" and that Plaintiffs have failed to meet this heightened pleading rule. Himan Br. at 21. Rule 9(b) does not impose heightened pleading requirements on Plaintiffs' *Franks* claim. The Supreme Court has rejected a heightened pleading requirement for § 1983 municipal liability claims, and, in doing so, left little room to doubt that the holding applied equally to § 1983 individual and official capacity claims. *Leatherman v. Tarrant County Intelligence & Coordination Unit*, 507 U.S. 163 (1993). The *Leatherman* Court reasoned that a heightened pleading standard is simply "impossible to square . . . with the liberal system of 'notice pleading' set up" by

the plain language of Rule 8, as well as the Court's ruling in *Conley v. Gibson*, 355 U.S. 41 (1957), that Rule 8 "meant what it said." *Leatherman*, 507 U.S. at 168; *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (Court rejected heightened pleading rule for Title VII and ADEA claims). The Court pointed out that, although Rule 9 of the Federal Rules of Civil Procedure imposes a particularity requirement for claims of fraud or mistake, the Federal Rules do not contain any special pleading requirement for complaints alleging § 1983 liability. *Leatherman*, 507 U.S. at 168.

Notwithstanding the absence of § 1983 claims from Rule 9(b)'s list of claims for which a plaintiff must allege "with particularity the circumstances" constituting the actionable conduct, even if Himan was correct that Rule 9(b) applies to Plaintiffs' claims based upon his fraudulent affidavits, the Amended Complaint alleges the specific facts that Rule 9(b) requires for claims for fraud. *See Franks* Analysis in Pls. Opp. City Br., II.A.(1) (documenting the fraud by demonstrating each averment in Himan's pleading is false, and detailing the list of material facts Himan and his co-conspirators omitted). To the extent that Himan's argument for additional specificity is based upon his assertion of qualified immunity defense, Himan is free to move for a more definite statement pursuant to Fed. R. Civ. P. 12(e).

#### e. Plaintiffs never asserted "a right to be free of investigation."

Next, Himan, in unison with his co-defendants, argues that all of Plaintiffs' § 1983 claims should be dismissed because, he contends, Plaintiffs are "essentially" complaining that they have been investigated, and that "there is no constitutional right to be free of investigation." Himan Br. at 21-24. Nowhere in all the pages of the Amended Complaint do Plaintiffs allege that they have "a constitutional right to be free of investigation." The argument fails because its premise is a fabrication.

* * *

## III. HIMAN IS NOT ENTITLED TO QUALIFIED IMMUNITY.

### A. The Qualified Immunity Standard

Qualified immunity does not apply to conduct that violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A right is "clearly established" if a reasonable official would have been on fair notice that the conduct at issue was unconstitutional at the time he engaged in the conduct. *Hope v. Pelzer,* 536 U.S. 730, 739 (2002). The inquiry is an objective one; it does not depend on "the subjective beliefs of the particular officer at the scene, but instead on what a hypothetical, reasonable officer would have thought in those circumstances." *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004) (quoting *Wilson v.*

*Kittoe,* 337 F.3d 392, 402 (4th Cir. 2003)). A constitutional right is "clearly established" for qualified immunity purposes when either (1) it has been established by closely analogous case law; *see, id.,* or (2) "when the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional[.]" *Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002) (internal citations omitted). A Defendant may not avail himself of qualified immunity by ignoring the detailed facts alleged in the Complaint or recasting them into broad general propositions. *Saucier v. Katz,* 533 U.S. 194, 201 (2001). The inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition ..." *Id.* at 201. Therefore, to determine whether Defendants have qualified immunity at this preliminary stage the Court must first describe the Himan's alleged conduct in the specific context of the circumstantial detail alleged in the Amended Complaint and in the light most favorable to the plaintiff, and then ask if pre-existing law made the unlawfulness of Himan's conduct apparent. *See, e.g., W.E.T. v. Mitchell,* No. 1:06CV487, 2008 WL 151282, * 4 (M.D.N.C. Jan. 10, 2008).

### 1. Himan Does Not Have Qualified Immunity for Fabricating Affidavits That Cause NTID Orders and Search Warrants to Issue Without Probable Cause.

The Amended Complaint documents the extensive evidence known to Himan that Mangum's claims were demonstrably false, and that Plaintiffs were innocent. The Amended Complaint catalogues this evidence across dozens of pages. AC ¶¶ 262-71, 291-96, 321-31, 363-81, 382-85. Further, the Amended Complaint documents the evidence known to Himan that, if there was any plausible basis to believe that Mangum had been sexually assaulted, the Plaintiffs were no longer possible suspects. *Id.* ¶¶ 363- 81. All of the evidence detailed in those pages of Mangum's fraud and Plaintiffs' innocence existed prior to the time Himan, Gottlieb, Nifong, Levicy, and others conspired to fabricate the NTID Affidavit. Himan knew he had no evidence at the time, and admitted that he still did not have any weeks later: when told he would have to present indictments in the case, Himan asked "with what?" *Id.* ¶ 816. On the day that Himan submitted the fabricated McFadyen Warrant application, his co-conspirator, Mike Nifong told Himan, "you know, we're f***ed." *Id.* ¶ 593. Himan claims that these facts are alleged in order to establish a new "right to be free from criminal investigation." *See, e.g.,* Himan Br. at 22. That is not the right Plaintiffs assert. In the First and Second Causes of Action, Plaintiffs establish a violation of their right to be free from searches and seizures without probable cause. AC ¶¶ 907-14, 920-27. That right includes the right to be free from

searches and seizures authorized by warrants and other legal process procured through fabricated officer affidavits, which was established at least as early as 1978, in *Franks*, 438 U.S. 154 (1978). A "reasonable officer" would know that fabricating an affidavit by making false statements and material omissions designed to mislead a judicial official into believing probable cause and reasonable grounds exist violates clearly established rights.

* * *

**NO. 11-1458(L); 11-1460**

In The
**U**nited **S**tates **C**ourt of **A**ppeals
For The Fourth Circuit

**RYAN McFADYEN; MATTHEW WILSON; BRECK ARCHER,**
***Plaintiffs – Appellees,***
**v.**
**PATRICK BAKER; STEVEN CHALMERS; RONALD HODGE; LEE RUSS; BEVERLY COUNCIL; JEFF LAMB; MICHAEL RIPBERGER;**
***Defendants – Appellants.***

**RYAN McFADYEN; MATTHEW WILSON; BRECK ARCHER,**
***Plaintiffs – Appellees,***
**v.**
**THE CITY OF DURHAM, NORTH CAROLINA; DAVID ADDISON; MARK GOTTLIEB; BENJAMIN HIMAN,**
***Defendants – Appellants.***

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT DURHAM**
**(Hon. James A. Beaty, Jr., CJ)**

***CORRECTED***
**BRIEF OF APPELLEES**

**Counsel for Appellees:**

**Robert C. Ekstrand**
**Ekstrand & Ekstrand, LLP**
**811 Ninth Street, Suite 260**
**Durham, NC 27705**
**(919) 416-4590**

**Stefanie A. Sparks**
**Ekstrand & Ekstrand, LLP**
**811 Ninth Street, Suite 260**
**Durham, NC 27705**
**(919) 416-4590**

*** * ***

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**CONSTITUTIONAL PROVISIONS**

**STATUTES**

**RULES**



**OTHER**

## JURISDICTIONAL STATEMENT

Plaintiffs agree with Defendants'[1] statement of the District Court's jurisdiction and this Court's appellate jurisdiction with the exception of Defendants' attempt to invoke this Court's jurisdiction over Plaintiffs' direct claims under the North Carolina Constitution. By definition, these claims are not subject to any immunity at all, and taking pendant jurisdiction over Plaintiffs' state constitutional claims would be premature because the claims do not even arise until Plaintiffs' state law remedies can be deemed "inadequate" to compensate Plaintiffs for the constitutional violations they allege. Further, Plaintiffs' state constitutional claims are not inextricably intertwined with Plaintiffs other state law claims (indeed, they are largely exclusive of each other). Therefore, Plaintiffs respectfully request that this Court decline the Defendants' invitation to exercise its pendent jurisdiction over Plaintiffs' state constitutional claims, thereby confining the scope of this interlocutory appeal to its true purpose: to review the sufficiency of claims for which immunities are available.

## SUMMARY OF THE ARGUMENT

This is an interlocutory appeal asserting only one "substantial" right: the City Defendants' immunities.

---

[1] "Appellants" is interchangeably used with "Defendants" to refer to Defendants-Appellants. Plaintiffs-Appellees are primarily referred to as "Plaintiffs."

The only question before the Court is whether Plaintiffs allege facts showing "more than a sheer possibility" that the City Defendants are not immune from this suit. They are not. Plaintiffs allegations recount one of the most chilling episodes of police and prosecutorial misconduct in recent memory, all the more so because the City Defendants who are now before this Court leveraged the national and international media to cast Plaintiffs as "a bunch of hooligans" and "racist rapists" who committed a horrifying, racially motivated gang rape of a young, African-American single mother and then closed ranks in a "stone wall of silence." But, all along, as the Special Prosecutors concluded in their report on the "reinvestigation" of the alleged sexual assault, there was "no credible evidence" that any assault took place in that house on that night.

As the District Court explained, Plaintiffs' Second Amended Complaint alleges "significant abuses of power" and "there can be no question that the Constitution is violated when government officials deliberately fabricate evidence and use that evidence against a citizen, in this case by allegedly making false and misleading representations and creating false and misleading evidence in order to obtain an NTO against all of the lacrosse team members and obtain a search warrant." JA 1279 (Mem. Op. 222.) The Court noted that, "if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit." *Id.* (citing *Washington v. Wilmore*, 407 F.3d 274, 285 (4th Cir. 2005)(Shedd, J. concurring)).

Because the rights these Defendants violated are all "fundamental" to our system of justice and long since clearly established before the conduct Plaintiffs allege, none of the City Defendants have qualified immunity. Moreover, it appears that the only way the City Defendants have found to present a cogent case for immunity is to recast Plaintiffs' allegations and fabricate their own. For example, Defendants claim that Plaintiffs allege that medical evidence corroborated Mangum's claims, but the Complaint alleges the opposite: *no medical evidence* corroborated the alleged sexual assault. Plaintiffs go on to allege that, to solve that "problem," Gottlieb, Himan, and Levicy agreed to fabricate medical evidence to corroborate sworn affidavits that Himan and Gottlieb fabricated to mislead judicial officials into issuing a non-testimonial order directed to the entire men's lacrosse team and a search warrant directed to Ryan McFadyen.

Thus, Plaintiffs' argument involves considerable correction of Defendants' recasting of the Complaint, and identifying the "facts" that Defendants invented out of whole cloth. While the Court should not tolerate this conduct, it is difficult to conceive of a plausible argument for immunity on the facts Plaintiffs allege. Faced with the facts Plaintiffs allege, Defendants could either abandon the appeal or argue from facts Plaintiffs do not allege. Defendants chose the latter, and, for that reason, their immunity claims fail at the threshold.

* * *

## DISCUSSION OF THE ISSUES

### I. GOTTLIEB AND HIMAN HAVE NO IMMUNITY FOR FABRICATING FALSE AND MISLEADING AFFIDAVITS TO CAUSE PLAINTIFFS TO BE SUBJECTED TO SEARCHES AND SEIZURES WITHOUT PROBABLE CAUSE.

Plaintiffs' First and Second Causes of Action state 42 U.S.C. § 1983 Claims against Gottlieb, Himan, and the City of Durham, for unreasonable searches and seizures in violation of Fourth Amendment. JA 851-56 (SAC ¶¶ 904-17, 918-28.)[2] Plaintiffs identify two discrete Fourth Amendment searches and seizures: (1) the Non-Testimonial Identification Order ("NTO"), addressed in Plaintiffs' First Cause of Action, JA 851-53 (SAC ¶¶ 904-17), and (2) the Search Warrant for Ryan McFadyen's residence, which is addressed in Plaintiffs' Second Cause of Action. JA 854-56 (SAC ¶¶ 918-28). Plaintiffs discuss their Second Cause of Action in Discussion§ II.

The NTO compelled Plaintiffs to surrender themselves to the Durham Police and submit to swabbings of their mouths, the extraction of DNA samples, "mug shot" photographing of their face, and to disrobe for purposes of close physical inspection of

---

[2] The Second Amended Complaint (Dkt. No. 136) is referred to as the "Complaint" or "SAC" and within citations as "SAC."

their bodies. Plaintiffs allege that Gottlieb and Himan, in concert with other defendants, intentionally fabricated false and inflammatory affidavits in order to mislead a judicial official into incorrectly believing that probable cause existed to issue the NTO and search warrant where there was none and to stigmatize Plaintiffs in the eyes of millions. JA 695-704, 752-59 (SAC ¶¶ 414-44, 591-616). The Complaint alleges specific facts showing that every material fact asserted in Gottlieb and Himan's Affidavit supporting the NTO and search warrant was known to them to be false, and that they omitted facts known to them that were highly were material to the determination of probable cause. Finally, Plaintiffs allege that as a result of Gottlieb and Himan's fabricated affidavits, Plaintiffs were subjected to searches and seizures without probable cause in violation of their clearly established Fourth Amendment rights.

### A. THERE WAS NO PROBABLE CAUSE TO BELIEVE A FELONY OCCURRED

The NTO statute[3] requires, at step one, a showing of probable cause to believe that a felony has been

[3] Pursuant to N.C. Gen. Stat. § 15A-274 (2011) the affidavit must establish "[t]hat there is 'probable cause' to believe that a felony offense … has been committed[,] that there are 'reasonable grounds' to suspect that the person named or described in the affidavit committed the offense[,] and that the results of specific non-testimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense." N.C. Gen. Stat. § 15A-273 (2011).

committed. It is here that Himan and Gottlieb's arguments begin to unravel, particularly with respect to their reliance on *Torchinsky v. Siwinsky*, 942 F.2d 257 (4th Cir. 1990). In *Torchinsky*, while the victim changed some of the details of the events over several statements, there was no question that a crime had been committed: the victim bore the injuries of a brutal assault.

But in this case, it was just as clear that *no crime was committed* and there was no credible evidence to the contrary. *See* JA 659-64 (SAC ¶¶ 293-309.) No witness, no DNA, no medical evidence corroborated Himan and Gottlieb's claim that Mangum was raped. *See* JA 651-64, 684-90, 766-69, 817-19 (SAC ¶¶ 262-309, 382-85, 387-401, 641-46, 800-04.) And Mangum did not make minor changes to her story. She made sweeping revisions of the key events. The Special Prosecutors concluded that, based on meetings with Mangum, when "recounting the events of that night [she] changed her story on so many important issues as to give the impression that she was improvising as the interviews progressed, even when she was faced with irrefutable evidence that what she was saying was not credible. … [She] attempted to avoid the contradictions by changing her story, contradicting previous stories or alleging the evidence had been fabricated."[4] The Special Prosecutors also concluded that "[t]his was apparently the first time these questions of inconsistencies had been asked

[4] *See also* N.C. Att'y General's Office, Summary of Conclusions at 16 (April, 2007), *available at* http://www.ncdoj.gov/Files/News/SummaryConclusions.aspx.

formally" and "[w]hile prosecutors acknowledge that rape and sexual assault victims often have some inconsistencies in their account of a traumatic event, in this case, the inconsistencies were so significant and so contrary to the evidence that the State had **no credible evidence that an attack occurred in that house that night**."[5]

Probable cause includes facts known to officers that tend to negate probable cause, and the facts Plaintiffs allege negate any possibility of probable cause. Examples include Mangum's nod to Nurse Wright's question, "Were you raped?" after Mangum overheard an officer on the radio direct someone to Mangum's house to check on her children and to call DSS if no one was supervising them, JA 647-49 (SAC ¶¶ 243-54); Mangum's recantation of her false allegation, JA 651-52 (SAC ¶¶ 262-65); Officer Gwen Sutton's interview of Mangum, JA 652-53 (SAC ¶¶ 266-71); Investigator Jones' interview of Mangum, JA 658-59 (SAC ¶¶ 291-92); the clinical and medical evidence collected at Duke University Medical Center ("DUMC"), JA 659-65 (SAC ¶¶ 293-311); Mangum's visit to UNC Hospital seeking prescription pain medications, JA 665-67 (SAC ¶¶ 312-20); the body of evidence amassed in the first 48 hours showing that no crime occurred, JA 667-71 (SAC ¶¶ 321-32); Gottlieb and Himan's first interview of Mangum on March 16, 2006 and the March 16th and March 21st photo identification procedures, JA 679-86 (SAC ¶¶ 362-81, 383-84); the

[5] *Id.* at 17, 21.

second dancer's description of Mangum's claim as a "crock," JA 121 (SAC ¶ 385); and the fabricated NTO and Search Warrant Affidavit JA 695-704 (SAC ¶¶ 414-44.)

In response to these detailed allegations, Appellants' "probable cause" argument improperly relies on facts that Plaintiffs do not allege (and which Defendants could never prove). For example, first, the Appellants' assert that Mangum made "repeated claims that she had been raped" and recast Plaintiffs' claims as asserting "that police should have immediately dismissed Mangum's claims because her claims were not consistent." (Appellants' Br. 24; *see also id.* at 10.) In the first instance, Plaintiffs do not allege that Mangum "claimed" she was raped in any sense of the word. Rather, Plaintiffs allege that Mangum merely "nodded, yes" when it was suggested to her that she might have been assaulted. JA 647-49 (SAC ¶¶ 243-54.) At the time of the "nod," Mangum was being involuntarily committed, and had just overheard police radio communications dispatching officers to proceed to her house to "check on the children," to take custody of them if they were alone without supervision, and to contact the Department of Social Services, all of which, Mangum knew, would likely cause her to lose custody of her children. JA 647 (SAC ¶¶ 243-44.) And Defendants argument ignores the fact that, to the extent that Mangum ever made the same claim twice, she knew the claim was a lie, and with good reason, JA 651-53, 671 (SAC ¶¶ 262-71, 329-32.) (Sgt. Shelton, the officer in charge of the investigation on March 13, 2006, interviewed Mangum after she "nodded, yes" and unequivocally concluded that Mangum was

"lying." Additionally, Officer Gwen Sutton, who interviewed Mangum after Shelton also concluded that Mangum was lying and declared her report was unfounded). The Appellants also do not account for the dozens of pages of facts detailing Mangum's multiple contradicting accounts of the evening and the wild variation among them. *See, e.g.,* JA 667-71 (SAC ¶¶ 321-30)(providing summary of contradicting accounts). Furthermore, while the Appellants conceded that Mangum's claims were not always consistent and that at one time she told a police officer that she had not been raped, they state that "both before and after that, she repeatedly claimed—over the course of several months—that she had been raped at the party. (Appellants' Br. 10.) The citations the Appellants refer to involve the time period from March 14, 2006 to March 21, 2006 – not several months.[6] *See id.*

---

[6] The inconsistencies in Mangum's version of the events "several months" later are evidence of the efforts by Defendants to fabricate false evidence to close gaps in the case and conceal the proof of innocence, and otherwise frame Plaintiffs and their teammates as principals and/or accomplices in the crimes charges by the Grand Jury's indictments. Examples of this are Gottlieb's transparent fabrication of notes of Mangum's description of her attackers that contradict Himan's contemporaneous handwritten notes and Wilson's interview of Mangum in which he brought pictures of the defendants in the criminal case in anticipation of a hearing on their motion to suppress Mangum's identification of them, and to create a new timeline of events with Mangum that Gottlieb, and Himan (incorrectly) believed avoided the timeline of irrefutable digital evidence that proved that the crime could not have occurred. JA 928 (SAC ¶ 1150(K).)

Contrary to Defendants assertions, Plaintiffs are not relying on mere inconsistency in Mangum's accounts of her "drunkenness" or "drug use." (Appellants' Br. 24-25.) Plaintiffs allege that during the time period when Mangum nodded "yes," Mangum was exhibiting signs of psychosis that mimicked the symptomology of schizophrenia. JA 649-50 (SAC ¶¶ 256-58.) Mangum's "nod," was born of duress, and, not coincidentally, she recanted it as soon as the involuntary commitment proceedings were terminated and the duress was removed. JA 651-52 (SAC ¶¶ 262-63.) Once ensconced in the hospital's protections afforded to anyone presenting for a Sexual Assault Examination, Mangum abandoned any notion of "rape" in exchange for complaints of intolerable - yet unverifiable - pain and her only plausibly consistent accusations were that no condoms were used; the party was a "bachelor party;" and she wanted her property back. JA 659-63, 670 (SAC ¶ ¶ 291-306, 327.) These were the only complaints that Mangum "repeated" in any sense of the word and among these complaints, there were still variations. JA 670 (SAC ¶¶ 327.)

Next, the Appellants assert that Plaintiffs do not even hint that investigators were aware that "Mangum would have had to lie about being raped." (Appellants' Br. 25.) Plaintiffs do more than merely hint, they clearly articulate such reason or motive throughout their Complaint. For example, Plaintiffs allege Mangum's false claim of rape was the product of duress caused by the threatened loss of her children in the involuntary commitment proceeding that was already underway . . and that Mangum overheard the police radio exchange ordering a patrol

unit to Mangum's house to see if her children were alone; the suggestive questioning that prompted Mangum's halfhearted false claim of rape; the specious circumstances surrounding it; and Mangum's troubled psychiatric history revealed at the Durham Center Access, including Mangum's previous involuntary commitments." Plaintiffs also allege that Defendants agreed to conceal the evidence of the events at the Durham Center Access on March 14th, knowing their obvious relevance to Mangum's credibility." JA 650 (SAC ¶¶ 257-589); *see also* JA 671 (SAC ¶¶ 329-32.) Furthermore, Plaintiffs allege that Mangum's healthcare providers concluded that Mangum was a clinically unreliable reporter of her own experience, particularly her experience of pain and what was causing it. JA 668 (SAC ¶ 321(B).) Besides feigning unconsciousness in her interactions with the police, JA 644 (SAC ¶¶ 232-33), Mangum historically feigned symptoms of pain in order to obtain prescription narcotics so frequently that the clinic she regularly presented to with somatic complaints placed a starting recommendation in her chart not prescribing her any form of narcotic. JA 664, 666, 668, 370 (SAC ¶¶ 309, 315(C)-(D), 321(C), 325).

Plaintiffs' allegations also point to several "reasons" why Mangum would acquiesce in the suggestion of rape. For example, one "reason" was Mangum's expectation that, by nodding "yes," she would improve the likelihood that she would have access to the prescription medications to which she was addicted, and another "reason" was Mangum's well-documented clinical history of breaks with reality and other psychoses. JA 666-69, 763 (SAC ¶¶

315(A)-(D), 321, 631(F)-(G).) Thus, contrary to Defendants' conclusory assertions, Plaintiffs allege ample facts showing Mangum's "motives" and "reasons" for nodding "yes" to the suggestion of rape, she would improve the likelihood she would have access to the prescription medications to which she was addicted, and another reason was Plaintiffs allege ample facts showing Mangum's "motives" and "reasons" for nodding "yes" to the suggestion of rape, and Plaintiffs' allegations make it perfectly clear that Defendants were well aware of her "motives" and "reasons" to lie. JA 650, 665-67 (SAC § X.A ("New Hospital, New Story, New Motive"), ¶¶ 257-58, 312-20); *see also* JA 671 (SAC ¶¶ 329-32.)

Inexplicably the Appellants contend that Plaintiffs "acknowledge" that Nurse Levicy's reports provided "corroborating medical evidence" of Mangum's rape claim. (Appellants' Br. 25.) Plaintiffs allege precisely the opposite. JA at 662-64 (SAC ¶¶ 302-09.) The Appellants do not cite to any allegation suggesting that Plaintiffs "acknowledge" any such fact. (*See* Appellants' Br. 25-26.) Rather, they cite "facts," the fabricated allegations that Himan and Gottlieb concocted in their NTO Affidavit, which Plaintiffs clearly allege were fabricated by Himan and Gottlieb to cause the NTO to issue, (Appellants' Br. 25 n.11); JA 695-704 (SAC ¶¶ 414-44), and again to obtain the search warrant for McFadyen's room. JA 855 (SAC ¶¶ 924-25). Defendants also ignore Plaintiffs' detailed allegations establishing that the same claim was false and that no medical evidence supported Mangum's rape claim. *See, e.g.,* JA 660-61, 663-64, 670, 814 (SAC ¶¶ 294-96, 306, 308-09, 324-26, 791-92.) Defendants also disregard the factual

allegations documenting Levicy, Himan, and Gottlieb's agreement to fabricate medical evidence to bolster Gottlieb and Himan's false claims, JA 813, 852 (SAC ¶ ¶ 786-89, 913); and the facts showing that, after agreeing to conceal and fabricate medical evidence, Levicy and others, in fact, did manufacture medical evidence to provide false corroboration of those claims. JA 811-816, 852 (SAC ¶ ¶ 785-99, 913); *see also* JA 661-64 (SAC ¶ ¶ 302-09).

In fact, Plaintiffs allege that Levicy made material changes to her Sexual Assault Examination Report ("SAER") to "fix" the SAER's inconsistencies with forensic evidence that later emerged, to prop up Mangum's false accusation and to cover up Himan and Gottlieb's fabrication of probable cause. JA 811-16 (SAC ¶¶ 785-97.) Plaintiffs also assert that Levicy acted in furtherance of the conspiracy right up to the very last day that Durham Police controlled the investigation, (JA 811-16 (SAC ¶¶ 785-98)), and, when the Attorney General took control of the case, Levicy claimed – for the first time – that the "medical evidence" contradicted Mangum's rape claim. JA 816 (SAC ¶¶ 798-99). Defendants either confuse the factual allegations about Levicy's role in this case with the factual allegations in *Carrington v. Duke Univ.* or the Appellants have chosen to grossly misrepresent Plaintiffs' factual allegations, and as such, mislead the Court.[7]

---

[7] *Cf. McFadyen, et al. v. Duke Univ., et al.*, No. 1:07-cv-953, JA at 807-08, 811-16 (SAC ¶¶ 779, 785-97 )(M.D.N.C. Dec. 2007) (Dkt. No. 136) (asserting that Levicy, Gottlieb, and Himan understood, agreed, and colluded to solve the physical

(Continued . . .)

The Appellants contend that while Plaintiffs "criticize investigators' reliance on Levicy's statements, they do not dispute that investigators did so rely." (Appellants' Br. 25-26.) Plaintiffs do not dispute the fact that investigators relied on Levicy's statements because Plaintiffs contend that Levicy, Himan, Gottlieb, Nifong, and Wilson (among other Defendants) understood, agreed, conspired, and colluded to testify to forensic medical evidence that was not observed and did not exist. JA 813, 877, 929, 940-41 (SAC ¶¶ 788-89, 996, 1150(I), 1191, 1193.) Additionally, it was agreed upon that Levicy would not provide significant portions of the SAER until April 5, 2006, weeks after the initial March 21, 2006 subpoena and production to Gottlieb. JA 811-16, 852, 870, 945 (SAC ¶¶ 785-97, 913, 970, 1207). During this time interval in between March 21st and April 5th, Levicy would fabricate false and misleading forensic medical evidence in order to either support and lend credibility to Himan and Gottlieb's sensationalized version of Mangum's accounts (or lack thereof) which they falsified throughout factual

---

evidence problem of the case by manufacturing consistency and fabricating proof of trauma, where none, in fact, existed); with *Carrington v. Duke Univ.*, No. 1:08-cv-119, 68 (M.D.N.C. Feb. 21, 2008) (Dkt. No. 145) (alleging that: "[w]ithout Levicy's false and misleading statements to the Duke Investigators... the false rape charges would never have become public. If the Durham Police had been advised truthfully by Levicy that the physical and medical evidence was inconsistent with Mangum's multiple, ever-changing, conflicting stories, then the rape investigation, which had been dropped by Durham Police Investigator B.S. Jones, would not have been revived and pursued").

sections of the NTO Affidavit, intentionally conform to the pending results of the DNA evidence, retroactively conform testimony to the most recent national public statements made by Nifong regarding the proof of "trauma," where none, in fact, existed, or fix the latest inconsistency with Mangum's evolving story. JA 807-16 (SAC ¶¶ 782-83, 785, 779-80, 786-97.) Plaintiffs do not object to the reliance by investigators on Levicy's statements because Plaintiffs emphatically underscore throughout their Complaint, the conspiratorial and colluding nature of Levicy and the investigators' relationship. *See, e.g.,* JA 811-16, 852, 870, 945 (SAC ¶ ¶ 785-97, 913, 970, 1207.)

In their Brief, the Appellants also challenge the fact that although "Plaintiffs allege that Levicy's statements were false, they do not allege that any Durham officials lied about Levicy's account." (Appellants' Br. 26 n. 12) Again, Plaintiffs do not allege that Durham officials lied about Levicy's account because Durham officials and Levicy understood the other to be deliberately proffering false testimony, either through reports, notes, identification procedures, or other means as a part of their collective design to fill the chasms in Mangum's case and/or restore Mangum's glaring credibility problems. JA 776-79, 814-16, 852 (SAC ¶¶ 666-75, 791-97, 913.) As a result of this concerted conduct and knowingly and intentionally disregarding the truth, Plaintiffs were seized and searched in violation of their Fourth and Fourteenth Amendment rights. JA 853, 855 (SAC ¶¶ 914, 927.) This Court has said it perfectly, "[a]n investigation need not be perfect, but an officer who intentionally or recklessly

flat out lies before a magistrate, or hides facts from him violates the Constitution unless the untainted facts themselves provide probable cause." *Miller v. Prince George's County*, 475 F.3d 621, 627 (4th Cir. 2007); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183-84 (4th Cir. 1996).

The Appellants also claim that Plaintiffs allege that Mangum complained of being "in pain," but they mislead by omitting the facts Plaintiffs allege documenting that Mangum's treating physicians concluded that Mangum's reports of pain were also lies. (Appellant' Br. 26); JA 652-53, 659-64, 666-67 (SAC ¶¶ 66-69, 293-309, 315-19.) (alleging that medical records include reports of tests conducted by physicians the revealed that Mangum's reports of pain were plainly false). In the same sentence, Appellants claim that "the medical evidence was consistent" Mangum's claim to have been raped and "without any apparent motive to fabricate a story, investigators had probable cause to believe that Mangum was raped." (Appellants' Br. 26.) First, Plaintiffs' could not be clearer in their Complaint and their specific allegations regarding the absence of any medical evidence supporting Mangum's allegation of rape or for that matter, any medical evidence even consistent with Mangum's complaints to medical staff. *See, e.g.,* JA 662-64, 670, 813-14, 816 (SAC ¶¶ 302-09, 324-26, 789, 792, 799)(alleging the lack of any medical evidence to support or even consistent with Mangum's claim of rape); JA 652-53, 659-64, 666-67 (SAC ¶¶ 66-69, 293-309, 315-19)(alleging reports of pan were false). Plaintiffs also allege a specific "reason or motive" for Mangum to lie about her pain: a long history of abusing prescription

narcotics. JA 665-66 (SAC ¶¶ 312-16.) Plaintiffs allege that Mangum's medical chart was rife with documentation of her prescription drug abuse, and even warned Mangum's treating physicians of her propensity to feign severe pain to obtain prescription narcotics. JA 666-68 (SAC ¶¶ 315, 321(B)-(C).)[8]

Even more telling is Appellants' "other evidence" suggesting that "an incident involving Mangum had occurred at the party." (Appellants' Br. 26.) Appellants' rely upon the fact that "a 911 call was placed in the vicinity of 610 N. Buchanan at approximately the same time Mangum claimed to have been raped." *Id.* However, 911 records reveal and the Complaint alleges that at the time the call referenced was placed - 12:53:17 AM – and completed – 12:54:12 AM – Mangum was in the car on the way to Kroger with Pittman. JA 640, 643 (SAC ¶¶ 217, 223-24.) Pittman immediately admitted to having placed the call and this fact was consistently verified throughout the initial days of the investigation and prior to Himan and Gottlieb swearing out the NTO

[8] The City also makes the unremarkable "connection" that Mangum claimed she was robbed of $400, and that police found "a pile of twenty dollar bills … inside the residence totaling $160." (Appellants' Br. 27.) This is not the stuff of probable cause. Even if it were, Plaintiffs do not allege that Mangum claimed the money was stolen "immediately after she was raped." JA 669 (SAC ¶ 104); *see infra* p.48. In fact, this is another one of the fabrications with which Himan and Gottlieb laced their probable cause affidavits, and Plaintiffs allege facts showing that this was another of their reckless falsehoods. (*See* Appellants' Br. 25) (quoting Gottlieb's NTO Affidavit (not Plaintiffs' allegations)).

Affidavit. JA 745-56 (SAC ¶¶ 572, 574(A)-(D).) If Mangum was being raped at that time as Defendants allege, then the rape would have had to have occurred in the car with Pittman. A reasonable and objective officer would recognize this inherent conflict and lack of probable cause.

### B. THERE WERE NO REASONABLE GROUNDS TO BELIEVE MCFADYEN, WILSON, OR ARCHER COMMITTED THE OFFENSES NAMED IN THE NTO.

Himan and Gottlieb misstate the second element of the proof required before an NTO may issue under the Constitution or under North Carolina statutes. N.C. Gen. Stat. § 15A-273.[9] Instead of correctly reciting the requirement that the affidavit contain reasonable grounds to believe the person named in the affidavit "committed" the felony, Defendants recast the requirement as the lesser showing that the person named in the affidavit was merely

---

[9] A non-testimonial order sworn affidavit must establish that:

(1) [t]hat there is probable cause to believe that a felony offense … has been committed;

(2) [t]hat there are reasonable grounds to suspect that the person named or described in the affidavit committed the offense; and

(3) [t]hat the results … will be of material aid in determining whether the person named in the affidavit committed the offense.

N.C. Gen. Stat. § 15A-273.

"involved." (*Cf.* Appellants' Br. 27-28 ("reasonable grounds to suspect that Plaintiffs were involved" (emphasis added) *with* N.C. Gen. Stat. § 15A-273(2) ("reasonable grounds to suspect that the person named or described in the affidavit committed the offense" (emphasis supplied)). Neither the Constitution nor N.C. Gen. Stat § 15A-242 (2011) tolerates the City's slight of hand, nor should this Court.

### C. THE RESULTS OF THE NTO DID PROVE THAT NO CRIME OCCURRED AT 610 N. BUCHANAN, AND DEFENDANTS CONSPIRED TO CONCEAL IT.

Defendants gloss over the uncomfortable fact that the DNA tests and photo identification procedures conducted with the fruits of the NTO (Plaintiffs' DNA and photographs) proved that Plaintiffs and their teammates could not have committed the violent 30-minute gang rape that Himan and Gottlieb fabricated in their Affidavit. They also ignore the fact that Himan and Gottlieb assiduously concealed those results from their subsequent application for a warrant to search Ryan McFadyen's residence and vehicle. Defendants also ignore the statute that compelled them to deliver a report of the results of all tests conducted with the fruits of the NTO "as soon as the results were available." N.C. Gen. Stat. § 15A-282 (2011).

### D. DEFENDANTS' CONDUCT EVINCED A RECKLESS DISREGARD FOR THE TRUTH AND A DELIBERATE

**INDIFFERENCE TO PLAINTIFFS' RIGHTS**

Defendants contend that Plaintiffs "do not plausibly suggest that Gottlieb and Himan acted deliberately or with reckless disregard for the truth" in preparing their Affidavit in support of the NTO. (Appellants' Br. 28-30.) To support this assertion, Defendants contend that Plaintiffs identify four false statements in the NTO Affidavit. (*See* Appellants' Br. 28-37.) But Plaintiffs allege facts showing that *every material fact* Gottlieb and Himan asserted in their NTO Affidavit was false. And to show that Gottlieb and Himan fabricated the NTO affidavit "deliberately or with reckless disregard for the truth," Plaintiffs allege scores of specific facts showing that Gottlieb and Himan personally knew that every material fact in their NTO Affidavit was false. For example, in addition to the four material facts that Gottlieb and Himan concede they fabricated, Plaintiffs allege facts showing that Himan and Gottlieb fabricated many, many others, and omitted still more material facts from the affidavits the submitted to support the NTO and search warrant. *See* discussion *infra* § III.

Plaintiffs also allege facts showing that Gottlieb and Himan had personal knowledge of the material facts they deliberately omitted from the affidavit. For example, Gottlieb and Himan knew that Mangum eliminated Plaintiffs as plausible suspects when she did not recognize any of them in the photo identification procedures conducted before they penned their NTO and search warrant affidavits. JA 680-86, 702-04 (SAC ¶¶ 363-84, 441-44) (Photo ID

procedures eliminated Plaintiffs as plausible suspects; Mangum was presented with clear, recent photos of McFadyen, Wilson, and Archer and did not recognize any of them; and Mangum's physical description of the "attackers" eliminated McFadyen, Wilson, and Archer). These omissions were highly material to the determination of whether "reasonable grounds" existed to suspect that McFadyen, Wilson, or Archer committed the sexual offenses described in their affidavits. *See* N.C. Gen. Stat. § 15A-273.

Defendants' repeated claim that there was "corroborating medical evidence" provided by Tara Levicy does not suffer for a lack of gall. Plaintiffs allege exactly the opposite. As the District Court explained, "Plaintiffs' allege that she shared the goal of violating Plaintiffs' constitutional rights, and that she agreed with Nifong, Gottlieb, and Himan to provide the false evidence to them as part of this agreement." JA 1117 (Mem. Op. 60)(March 31, 2011). The District Court identified Plaintiff 's contention that "Levicy participated in the NTO process and in the subsequent "cover-up" of the constitutional violations in the NTO proceeding." JA 1116 (Mem. Op. 59). For example, the Court notes that:

> Plaintiffs allege that Levicy had several meetings and interviews with Gottlieb, Himan, and Nifong, and that during those meetings she "repeatedly proffered false testimony that was clearly designed to fill the chasms of Mangum's case and/or restore Mangum's glaring credibility problems," and that this included altering forms

> and evidence as needed to fit the investigators' case. (JA 808-16 (SAC ¶¶ 780-798, *see* ¶ 799).) Based on those meetings, Plaintiffs allege that Levicy "agreed to act in concert with Nifong, Gottlieb, and Himan by falsifying Mangum's SAER to harmonize it with the fabricated [NTO] Affidavit, and, subsequently, further falsified the SAER to harmonize it with Mangum's written statement and evidence they hoped would emerge from the DNA testing." (JA 852 (SAC ¶ 913).) **Plaintiffs set out specific allegations that Levicy produced falsified medical records and proffered false testimony to corroborate the information in the NTO application.**

JA 1116 (Mem. Op. 59) (emphasis and parenthetical notations supplied). Plaintiffs allege dozens of facts showing that no medical evidence corroborated the fabricated allegations in Himan and Gottlieb's Affidavits, and documenting Levicy's fabrication of medical evidence to fit the false allegations that Himan and Gottlieb made in their Affidavits and to conceal the evidence of their material omissions. *See, e.g.,* JA 659-664, 667-71, 807-08, 811-16, 852, 855,

927 (SAC ¶ ¶ 293-309, 321-30, 779, 785-99, 913, 924-26, 1150(I), 1150(K).)[10]

Defendants repeatedly cite to this Court's decision in *Unus v. Kane*, 565 F.3d 103 (4th Cir. 2010). But *Unus* is hardly instructive in this case. As this Court explained, the plaintiffs in *Unus* attacked a statement made in of a search warrant affidavit in which the affiant "did not make a factual misrepresentation, *he made no factual representation at all*." *Unus v. Kane*, 565 F.3d at 124 (emphasis added).

Next, Defendants' recycle the false assertion that Plaintiffs somehow "concede [that] there was probable cause to search [610 N. Buchanan]." (Appellants' Br. 38.) For support, Defendants cite ¶ 415 of the Complaint, and hope that the Court will take their word for it because ¶ 415 does not allege that there was probable cause to search 610 N. Buchanan. JA 696 (SAC ¶ 415.) To the contrary, beginning with ¶ 415, in a section entitled "The Fabricated NTO Affidavit," the Complaint alleges:

> **1. The Fabricated NTO Affidavit**
>
> 415. Immediately after Gottlieb and Himan were advised that team

[10] Respectfully, Defendants' false claim that Plaintiffs allege that Himan and Gottlieb's Affidavits were supported by "corroborating medical evidence" merits some response from this Court, particularly in light of the fact that Plaintiffs' briefing below and the District Court's Order documented the allegations showing that the characterization of Defendant's allegations is patently false.

members postponed the mass interrogation, Gottlieb and Himan retaliated against them by drafting an entirely new Affidavit to request an NTID Order. There was no need to revise the Affidavit as a practical matter. The existing Probable Cause Affidavit was sufficient to obtain a Search Warrant for 610 N. Buchanan. To obtain an NTID Order, the only modification required was an allegation that each individual on the team was present at the party (an allegation they could not truthfully make).

416. Instead, for the NTID Order Application, Gottlieb and Himan added an array of new, fabricated allegations to the original search warrant Affidavit. The new allegations were designed to ignite public outrage at the Plaintiffs.

417. The new scandalous allegations were attributed to Mangum, but Mangum did not provide them …

418. Gottlieb's fabricated allegations in the NTO affidavit added a sinister dimension to the ***already fabricated account of the evening in the Search Warrant Affidavit***. Among them was, for example, the allegation that the women were sexually threatened with a broomstick, the accuser lost several fingernails in the violent struggle, and

> the team members used each other's names to disguise their "true identity" and to avoid identification. These facts were demonstrably false, and they did not come from Mangum or any witness. Upon information and belief, they came from Gottlieb's brain.

Thus, ¶ 415 does not "concede" that there was probable cause to search 610 N. Buchanan, and the subsequent allegations allege exactly the opposite, ¶¶ 415-418, and then refer to the Affidavit Gottlieb and Himan concocted to obtain the 610 Search Warrant as "the ***already fabricated account*** of the evening in the [610 N. Buchanan] search warrant affidavit." (emphasis added). By alleging that the search warrant affidavit was "already fabricated," Plaintiffs mean exactly what they say: The search warrant Affidavit was fabricated. Gottlieb and Himan's probable cause argument is therefore just as baseless as their false assertion that Plaintiffs' allege that there was "corroborating medical evidence" to support the Affidavit's claim that Mangum was violently raped. Not unlike the Affidavit itself, Defendants argument proceeds by cherry-picking and recasting the unambiguous facts alleged in the complaint and fabricating entirely new facts of their own making. Having no basis in the facts, Defendants attempt to convince this Court by misleading it. And, contrary to Defendants' contention, it was not "error" for the District Court to reject the tactic. Misrepresenting Plaintiffs' allegations cannot save Defendants from liability for

misleading magistrates into authorizing searches and seizures without probable cause.

Defendants argue that the District Court declined to engage in "the parsing of Plaintiffs' Complaint," and that "this was error." (Appellants' Br. 37.) But Defendants are confused. When the District Court referred to Defendants' "extensive parsing *of pieces* of the Second Amended Complaint," the District Court was politely describing (and rejecting) Defendants' persistent cherry picking recasting of Plaintiffs' allegations. The District Court rejected Defendants contentions in connection with the existence of probable cause because they relied on facts that Plaintiffs do not allege. JA 1111 (Mem. Op. 54) ("the analysis suggested by Defendants requires factual analysis beyond the allegations in the Second Amended Complaint"). Because it was bound to accept the truth of Plaintiffs' allegations and all reasonable inferences they permit, the District Court refused to consider the "extensive factual contentions" that Defendants conjured up to rebut Plaintiffs' allegations. As the District Court explained:

> Defendants raise extensive factual contentions, with factual comparison charts, to dispute these allegations and to demonstrate that probable cause existed even if the allegedly false statements are removed and the material omissions are included. This analysis includes … contentions by Himan as to what information he provided to Nifong, and contentions by

> Gottlieb and the City as to what information Mangum provided to Gottlieb and Himan during her interviews. **However, the analysis suggested by Defendants requires factual analysis beyond the allegations in the Second Amended Complaint, and … any consideration of Defendants' factual contentions in response, is more appropriate at summary judgment after an opportunity for discovery, when the factual record is before the Court for consideration.** At this stage in the case, the Court simply concludes that where officers deliberately or recklessly supply false or misleading information to a magistrate judge to support a warrant application, as alleged in the present case, the officers may be liable under § 1983 for violation of an individual's Fourth Amendment rights, if their actions result in the seizure of an individual without probable cause.

JA 1111-12 (Mem. Op. 54-55.) Thus, the District Court rejected Defendants' probable cause argument, not because Plaintiffs' allegations are voluminous or because the Court declined to wade through them. To the contrary, the District Court analyzed the allegations in great detail, concluded that they establish an obvious Fourth Amendment violation, and rejected Defendants' arguments to the contrary

because they were based on facts Plaintiffs do not allege.[11]

### E. DEFENDANTS ARE NOT IMMUNE FROM PLAINTIFFS' FIRST CAUSE OF ACTION BECAUSE THEY VIOLATED RIGHTS THAT WERE CLEARLY ESTABLISHED BY MARCH OF 2006.

When officers deliberately or recklessly provide false or misleading information to a magistrate judge to support a warrant application, the officers may be held liable under 42 U.S.C. § 1983 for violation of an individual's Fourth Amendment rights, if the officers' actions result in the seizure of the individual without probable cause.[12] Plaintiffs explicitly allege in their Complaint that Himan (the Affiant for the NTO) and Gottlieb deliberately and recklessly provided false

---

[11] Plaintiffs note that the "facts" Defendants conjure up to rebut Plaintiffs' allegations are demonstrably false, and Plaintiffs look forward to presenting proof of that to the jury (assuming Defendants do not abandon them in the evidentiary phase of this case).

[12] The District Court noted that the NTO statute authorizes the searches and seizures it contemplates upon a showing of less than probable cause, and that the law is unsettled regarding whether the statute would be subject to a constitutional challenge on that basis, at least as applied in some circumstances. In this regard, the District Court rightly concluded that there is no need for the Court to resolve those questions at this stage because Plaintiffs allege that the affidavit Gottlieb and Himan submitted to cause the NTO to issue against Plaintiffs was intentionally and recklessly false and misleading. JA 1108-11 (Mem. Op. 51-54.)

and misleading information in support of the application for the NTO. JA 695-704, 851-53 (SAC § XVI, ¶¶ 904-17.) Furthermore, Plaintiffs' rights were clearly established and no reasonable police officer could have believed that it was acceptable to deliberately or recklessly fabricate and present false or misleading evidence to a judge to effect Plaintiffs' seizure. *See Miller v. Prince George's County,* 475 F.3d at 631-32 ([T]he Supreme Court has long held that a police officer violates the Fourth Amendment if, in order to obtain a warrant, he deliberately or 'with reckless disregard for the truth' makes material false statements or omits material facts … No reasonable police officer … could believe that the Fourth Amendment permitted such conduct." (internal citations omitted)); *Brooks v. City of Winston-Salem*, 85 F.3d at 183-84.

Himan and Gottlieb contend that, even if they violated Plaintiffs' constitutional rights by manufacturing probable cause where no probable cause existed by making false statements and omitting material facts from their NTO Affidavit, they are nonetheless entitled to qualified immunity, because, they contend, an objective law enforcement officer could reasonably have believed that probable cause existed. (Appellants' Br. § I(b), 39-41.) To support their contention, Himan and Gottlieb rely on *Malley v. Briggs*, 475 U.S. 335 (1986). (Appellants' Br. 40-41.) They complain that the District Court's analysis was "inconsistent with *Malley*" because the District Court somehow evaluated Himan and Gottlieb's "subjective beliefs or intentions" in its qualified immunity analysis. (Appellants' Br. 41.) But they fail to explain how the District Court based

its ruling on "Plaintiffs' mens rea allegations" or Himan and Gottlieb's subjective beliefs. Nor could they: The District Court expressly noted that, under *Malley*, "in the context of a search or seizure conducted pursuant to a warrant, qualified immunity is analogous to the 'good faith' exception to the exclusionary rule applied in criminal cases under *United States v. Leon* … ." JA 1112 (Mem. Op. n.17) (citing *Malley*, 475 U.S. at 344-45).

In connection with Gottlieb and Himan's claim of qualified immunity, the District Court first held that "at the time of the alleged conduct, it was clearly established that an officer's fabrication of evidence before a magistrate judge to effect a search and seizure of a citizen without probable cause would violate that citizen's constitutional rights." JA 1112 (Mem. Op. 55.) The Court went on to analyze Himan's and Gottlieb's specific conduct in connection with their fabricated affidavits and concluded that the allegations showed each of them "knowing[ly] or reckless[ly] present[ed] false or misleading evidence that effected a seizure and search of Plaintiffs … without probable cause." *Id.* The Court concluded that there is "no question" that such conduct violated clearly established rights, and "no reasonable official could have believed that it was permissible to deliberately or recklessly create false or misleading evidence to present to a magistrate to effect a citizen's seizure." *Id.* (citing *Miller*, 475 F.3d at 631-32 ("[T]he Supreme Court has long held that a police officer violates the Fourth Amendment if, in order to obtain a warrant, he deliberately or 'with reckless disregard for the truth' makes material false statements or omits material facts. ... No reasonable

police officer ... could believe that the Fourth Amendment permitted such conduct"); *Brooks*, 85 F.3d at 183-84).

The District Court also concluded that "Plaintiffs have adequately alleged a seizure and a search of their person implicating their rights under the Fourth Amendment." JA 1108 (Mem. Op. 51) (citing *United States v. Dionisio*, 410 U.S. 1, 8 (1973) (noting that "the obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels - the 'seizure' of the 'person' necessary to bring him into contact with government agents... and the subsequent search for and seizure of the evidence")). In addition to the Fourth Amendment "seizure" involved in being compelled to appear at the police station, the District Court concluded that Plaintiffs have raised a Fourth Amendment challenge to the "search" Plaintiffs allege, which required them to submit to DNA sampling and "mug shot" photographing, and to disrobe for close physical examination which invaded a "reasonable expectation of privacy" and went beyond what "a person knowingly exposes to the public." *Katz v. United States*, 389 U.S. 347, 351 (1967). Defendants make no argument to the contrary on these points.

The alleged constitutional violations were "clearly established" at the time Himan and Gottlieb fabricated their NTO Affidavit. As the District Court explained, "there is no question that these rights were clearly established, and no reasonable official could have believed that it was permissible to deliberately or recklessly create false or misleading

evidence to present to a magistrate to effect a citizen's seizure." JA 1112 (Mem. Op. 55) (citing *Miller*, 475 F.3d at 631-32 ("[T]he Supreme Court has long held that a police officer violates the Fourth Amendment if, in order to obtain a warrant, he deliberately or 'with reckless disregard for the truth' makes material false statements or omits material facts.... No reasonable police officer... could believe that the Fourth Amendment permitted such conduct." (internal citations omitted)); *Brooks,* 85 F.3d at 183-84).

## II. THE SEARCH OF RYAN MCFADYEN'S HOME AND VEHICLE VIOLATED HIS CLEARLY ESTABLISHED FEDERAL RIGHTS.

Plaintiffs' Second Cause of Action asserts a Fourth Amendment violation against Gottlieb, Himan, and the City for an unreasonable search and seizure of Plaintiff McFadyen's home and vehicle. This search and seizure was effected pursuant to a search warrant based upon the same affidavit Gottlieb and Himan fabricated to manufacture probable cause for the NTO. They added only one new "fact" to their search warrant affidavit -- text that they claimed was in an email from Ryan McFadyen, which their affidavit asserts was provided by an "anonymous source." JA 81. But their affidavit does not articulate any facts relating to the reliability of the source, the text could not be considered in the determination of probable cause. *Florida v. J.L.*, 529 U.S. 266, 269-70 (2000). And there is no question that, after the Supreme Court's 2000 decision in *J.L.*, no reasonable officer would

believe that information from an anonymous source could be considered in determining probable cause without providing any information bearing on the source's reliability. *See id*. Thus, after striking the email from Gottlieb and Himan's search warrant affidavit, what remains is the same fabricated NTO Affidavit that no reasonable officer would believe to be tolerated by the Fourth Amendment. *See* discussion *infra* § III.

Furthermore, the Affidavit fails to establish any nexus between the place to be searched (a dorm room on Duke's Main Campus) and the offenses named in the affidavit (rape, sexual offense, kidnapping, and "conspiracy to commit murder). JA 77-81. Gottlieb and Himan applied for the search warrant two weeks after the alleged "conspiracy to commit murder" was to be consummated. *Id*. Thus, even if the disembodied text could have been considered (which it could not) any probative value the email may have had was fatally stale when Gottlieb and Himan injected it into their affidavit. *See* JA 756 (SAC ¶ 605); *see also, e.g.*, *United States v. Mohn*, No. 1:05CR319-1, 2006 WL 156878 *8 (M.D.N.C. Jan. 20, 2006) (quoting *United States v. Gonzales*, 399 F.3d 1225, 1230 (10th Cir. 2005)). Perhaps most telling of all, however, is the disquieting fact that Gottlieb and Himan prepared the Search Warrant Affidavit hours after Nifong declared, "were f***ed" in response to their report of the investigation, the overwhelming evidence that no rape occurred, and the absence of any credible evidence to the contrary. JA 752-57 (SAC ¶¶ 591-93, 598-99, 600, 610.)

Based on the fabrications and material omissions that doom the search warrant, the District Court held that "where officers deliberately or recklessly supply false or misleading information to a magistrate to support a warrant application, as in the present case, the officers may be liable under § 1983 for violation of an individual's Fourth Amendment rights if their conduct results in a search without probable cause." JA 1121-22 (Mem. Op. 64-65); *Miller*, 475 F.3d at 631-32 ("The Supreme Court has long held that a police officer violates the Fourth Amendment if, in order to obtain a warrant, he deliberately or 'with reckless disregard for the truth' makes material false statements or omits material facts.... No reasonable police officer... could believe that the Fourth Amendment permitted such conduct."); *Brooks*, 85 F.3d at 183-84.

Here, too, the District Court analyzed the allegations detailing Gottlieb and Himan's specific participation in causing the unconstitutional search of McFadyen's residence and vehicle. JA 1122 (Mem. Op. 65.) Plaintiffs' allege scores of facts evincing Gottlieb and Himan's participation in causing the warrant to issue without probable cause. *See. e.g.,* JA 752-57 (SAC ¶¶ 591-610.) Based on those specific allegations, the Court concluded "that Gottlieb and Himan were directly involved in the intentional or reckless fabrication of evidence that was submitted to obtain the search warrant that resulted in the search of McFadyen's dorm room," and, as such, "Plaintiffs have alleged plausible Fourth Amendment claims as set out in Count 2, based on allegations of deliberate or reckless submission of false and misleading evidence." JA 1122 (Mem. Op. 65.) The

District Court correctly concluded that Himan and Gottlieb were not entitled to qualified immunity because those rights were clearly established at the time they recycled their fabricated affidavit to obtain a warrant to search Ryan McFadyen's residence and vehicle, JA 1122 (Mem. Op. 65) and "no reasonable official would have believed that it was permissible to deliberately or recklessly create false or misleading evidence to present to a magistrate in order to obtain a search warrant." *Id.*

Here, again, Appellee's assert that "the district court declined to engage" in the Franks analysis, and that *Iqbal* required the District Court to do so. But that is not what the District Court "declined" to do. The District Court declined to consider Defendant's parsing and recasting of Plaintiffs allegations or any "facts" that Plaintiffs do not allege but which Defendants conjured up to rebut Plaintiffs' allegations. JA 1121 (Mem. Op. 64.) Here again, because Appellants misrepresent the District Court's analysis, it is appropriate to report to the Court what the District Court actually wrote:

> In response, Defendants raise many of the same contentions raised with respect to Count 1, including the extensive factual contentions, and exhibits, to dispute these allegations and to demonstrate that probable cause existed even if the allegedly false statements are removed and the material omissions are included. Defendants' discussion includes analysis of the contents of an e-mail,

> disputes regarding the source of that e-mail, and additional factual discussion regarding the allegations that were repeated from the NTO affidavit. However, as discussed with respect to Count 1, **the analysis suggested by Defendants requires factual analysis beyond the allegations in the Second Amended Complaint**, and the cases cited by the Defendants in support of this analysis involve summary judgment determinations, not determinations on a motion to dismiss. Therefore, the Court finds that this type of analysis is more appropriate at summary judgment after an opportunity for discovery, when the factual record is before the Court for consideration. *Id.* (emphasis supplied).

Therefore, the District Court concluded that at this stage in the case, the Court simply concludes that where officers deliberately or recklessly supply false or misleading information to a magistrate to support a warrant application, as alleged in the present case, the officers may be liable under § 1983 for violation of an individual's Fourth Amendment rights, if their actions result in a search without probable cause. *Id.* Appellants argument recasts the foregoing conclusions by asserting that "the district court declined to engage in the requisite *Franks* analysis, finding that 'this type of analysis is more appropriate at summary judgment after an opportunity for discovery, when the factual record is

before the Court for consideration.'" (Appellants' Br. 42-43). The assertion does not suffer for a lack of gall: It is obvious that the District Court did not "decline to engage in the *Franks* analysis," but, instead, declined to engage in a "factual analysis beyond the allegations in the Second Amended Complaint." JA 1121 (Mem. Op. 64.) In other words, the District Court declined to accept as true Defendants' parsing and recasting of Plaintiffs' allegations or the purported "facts" Defendants assert to rebut the facts Plaintiffs allege. That is precisely what Rule 12 requires, and to do otherwise would stand the rule on its head.

## III. THE FRANKS ANALYSIS

Gottlieb and Himan suggest that the analysis in *Franks v. Delaware*, 438 U.S. 154 (1978) will not show the want of probable cause and that Plaintiffs do not allege facts to undermine the affidavit's allegations. (Appellants' Br. 21-49.) Gottlieb and Himan do not undertake a *Franks* analysis on their own. Below, Plaintiffs analyze Gottlieb and Himan's affidavits pursuant to the analysis set forth in *Franks* by applying the specific facts Plaintiffs allege to the affidavits that Gottlieb and Himan fabricated. The analysis demonstrates that the corrected affidavits supporting the NTO and search warrant do not establish probable cause (or reasonable grounds, reasonable suspicion, or any lesser quantum of proof).

Pursuant to *Franks*, 438 U.S. 154 (1978), the Court undertakes a "correction" analysis, whereby the Court "corrects" the affidavit first by striking the false statements from the affidavit. *Franks*, 438 U.S.

at 155-56. If the remaining allegations do not establish probable cause, the Plaintiff has stated a claim. *Id*. If the remaining allegations would establish probable cause, the court must consider any material omissions, which this Court explained is any false statement that is "designed to mislead" or "made 'in reckless disregard of whether [it] would mislead.'" *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008) (alterations in original) (quoting *United States v. Colkley*, 899 F.2d 297, 300-301 (4th Cir. 1990)). After "correcting" Gottlieb and Himan's affidavits pursuant to Plaintiffs' allegations, it is plainly obvious that "there is more than a sheer possibility" that the NTO and search warrant lacked probable cause and Gottlieb and Himan's fabrications and omissions were necessary to the judicial determination that probable cause existed.

### A. PLAINTIFFS ALLEGE MORE THAN A "SHEER POSSIBILITY" THAT THERE WAS NO PROBABLE CAUSE TO BELIEVE A FELONY WAS COMMITTED

Gottlieb and Himan's false statements and material omissions begin in earnest with their opening passage. There, they assert:

> **On 3/14/06 at 1:22am, Durham City Police Officers were called to the Kroger on Hillsborough Road. The victim, a 27 year old black female, reported to the officers that she had been raped and sexually assaulted at 610 North Buchanan Blvd.** JA 57.

Plaintiffs allegations are consistent with the first sentence and the recitation of Mangum's age and race, but, beyond that, Plaintiffs' allegations show that Gottlieb and Himan knew that the remainder of allegations in this opening passage were false and they deliberately omitted many facts relating to what Mangum "reported" that were highly relevant to the probable cause determination. For example:

First, Mangum did not "report[] to the officers at Kroger that she had been raped" or assaulted at 610 N. Buchanan or anywhere else. She did not even remember where she had been, much less the address. Rather, she feigned unconsciousness in an effort to evade arrest. JA 644 (SAC ¶¶ 232-33.) Later, while Mangum was being involuntarily committed and moments after she overheard police radio communications indicating that she was likely to lose custody of her children, Mangum nodded in response to a nurse who asked if she had been assaulted. JA 647-51, 668, 684, 354 (SAC § VIII ("Mangum Nods Rape"), ¶¶ 251, 321(G), 382(C), 1137(D).) And once the duress of her imminent arrest, involuntary commitment, and loss custody was removed, Mangum recanted. JA 647-48, 651 (SAC ¶¶ 243-52, 262-63.)

Second, within the first 48 hours after her initial false accusation, Mangum was questioned by at least 8 different medical providers and 3 Durham Police Officers. In the first interview, Mangum recanted. JA 651-52, 684, 763 (SAC § IX.A, ¶¶ 263, 382(D), 631(G).) Subsequently, Mangum gave 11 different accounts of the events of the evening, and never gave the same story twice. JA 658-59, 668, 670 (SAC ¶¶

291-92, 321(E), 328.) Her accounts varied on virtually every conceivable point, even as to the municipality she came from (Raleigh or Durham). JA 668 (SAC ¶ 321(E).) Mangum's only consistent repeated claims were that no condoms were used; the party was a "bachelor party"; she had an account with police officers; and she wanted her property back. JA 659-63, 670 (SAC ¶¶ 291-306, 327.)

Third, Mangum did not call the police. Rather, the security guard on duty at Kroger, Angel Altmon, placed the call. And Altmon did not call to report a suspected sexual assault; she reported that Mangum, who she described as "an intoxicated lady is in someone else's car," and "won't get out of the car." JA 643-44 (SAC ¶¶ 225-27, Ex. 9) (audio exhibit). When Altmon was asked whether there was any indication that Mangum had been sexually assaulted, she simply replied "Ain't no way." JA 646-47 (SAC ¶¶ 239-42, Ex. 11) (audio exhibit).

Fourth, Kim Pittman was not at the Kroger to report a sexual assault, Kim Pittman pulled over there to obtain assistance in removing Mangum from her car, which Mangum would not do voluntarily. If there was any safety concern in the parking lot at Kroger, it was Kim Pittman's concern for her own safety which arose from Mangum's bizarre behavior that began in the house and continued throughout the short drive from 610 N. Buchanan to the Kroger. Among other things, Pittman reported that Mangum was "talking crazy," repeatedly telling Pittman, "go ahead, put marks on me, that's what I want." JA 643, 644, 684-85 (SAC ¶¶ 223, 231, 382(A).)

Fifth, when police approached Mangum in Pittman's car, Mangum "feigned unconsciousness." JA 644 (SAC ¶¶ 232-33.) When police tried to remove her from the car, Mangum sprang to life and resisted their efforts by holding onto the parking brake, which required Sgt. Shelton to apply a "bent-wrist come-along" to remove her. After Sgt. Shelton finally extracted Mangum from the car, she resumed feigning unconsciousness. JA 644 (SAC ¶ 233.)

Sixth, the entire protracted period Mangum was in the Kroger parking lot, she did not say or suggest to anyone that she had been assaulted (sexually or otherwise). In fact, recorded dispatch communications show that, after Durham Police finally got Mangum out of Pittman's car and into police custody in the back of one of the officer's vehicles, the dispatcher asks if she should call for an ambulance. The Durham Police officer transporting her in his vehicle responds, "no," and reports to dispatch that "she's breathing, appears to be fine, not in distress, just passed out drunk." JA 644-45 (SAC ¶¶ 228, 234-36, Ex. 10) (audio exhibit).

Seventh, Mangum's behavior was so bizarre throughout her interactions with Durham Police that Sgt. Shelton believed she needed immediate psychiatric care and met the standards for involuntary commitment; and directed officers to transport her to Durham Center Access and initiate the procedures to have Mangum involuntarily committed. JA 645-48 (SAC ¶¶ 237, 245-47.)

Eighth, while Mangum was being involuntarily committed at Durham Center Access, the admitting nurse asked Mangum a series of questions to which

she did not respond. JA 648 (SAC ¶ 247.) Then Mangum overheard an officer on the radio request that units be dispatched to Mangum's house to "check on her children" and directing those officers to contact DSS if the officers found that no adult was supervising them. Only then did Mangum begin to respond, nodding in response to the nurse's question, "Were you raped?" JA 647-51 NC (SAC § VIII ("Mangum Nods 'Rape'"), ¶¶ 243-54.)

Thus, Gottlieb and Himan's opening passage is bleeding with false statements and material omissions that require several pages for Plaintiffs to merely recite. While this is more than sufficient to overcome Gottlieb and Himan's objections for purposes of Fed. R. Civ. P. 12(b)(6), Plaintiffs will go on (as Appellants insist they must) in the name of *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009).

Next, the Affidavit asserts that:

> **The victim arrived at the residence and joined the other female dancer around 11:30pm on 3/13/2006.** JA 57.

While Plaintiffs allege that Mangum arrived at the residence and joined Pittman, and that Pittman was already there when Mangum arrived, Plaintiffs allegations show that the remainder of the statement is false and that Gottlieb and Himan omit several material facts relating to Mangum's arrival at the residence. Among other things, the Affidavit omits the fact that Mangum arrived 40 minutes late (at around 11:40 p.m.); she was dropped off and her driver drove off as soon as she left the car and never returned; Mangum was not dressed in street clothes,

did not bring street clothes, and there were other indications that Mangum had been transported directly from a previous engagement; and she was incoherent and staggering when she arrived. JA 637 (SAC ¶ 197.)

Next, the Affidavit asserts that:

> **After a few minutes, the males watching them began to get excited and aggressive.** JA 57.

This statement is false and the Gottlieb and Himan both knew it to be false. Kim Pittman explained to Himan on March 20, 2006 that she had heard of Mangum's claims and called Mangum's claims "a crock." JA 686 (SAC ¶ 385.) On March 22, 2006, Kim provided a more detailed written statement, leaving no room in her timeline for the sexual assault to have occurred. *Id.* Because Mangum's behavior was so bizarre and because she was so incoherent, the young men watching quickly became uncomfortable or disinterested, and, as a result, the "dance" ended a few minutes after it began. JA 638 (SAC ¶ 202.)

Next, the Affidavit asserts that:

> **One male stated to the women "I'm gonna shove this up you" while holding a broom stick up in the air so they could see it. The victim and her fellow dancer decided to leave because they were concerned for their safety.** JA 57.

Apart from the fact that Kim Pittman decided to leave soon after the three-minute performance

mercifully ended, this statement is false and Gottlieb and Himan knew it to be false. Gottlieb and Himan knew that no one at the party said anything even approaching what they allege or anything threatening in any way. They also knew that Pittman used an off color joke to end the dance minutes after it started, not due to any safety concern, but instead because she was aware that there was no interest in the performance among those in attendance and she was aware that Mangum's behavior was becoming increasingly bizarre. JA 638 (SAC ¶¶ 201-02.) Gottlieb and Himan both knew that neither woman was ever concerned for her safety, and that no one in attendance threatened either of the women in any way. JA 696-97 (SAC ¶¶ 418-22.)

Next, the Affidavit asserts that:

> **After the two women exited the residence and got into a vehicle, they were approached by one of the suspects. He apologized and requested they go back inside and continue to dance.** JA 57.

The allegation is false in that Pittman and Mangum did not exit the residence and get into a vehicle together. Rather, Gottlieb and Himan knew that Pittman left the residence and got into her vehicle. Before she could leave, however, one of the residents asked her to wait for Mangum, who was locked out of the house and variously trying to get in through the back door and staggering around the back yard and repeating to no one in particular that she was "a cop." JA 639 (SAC ¶ 208.) Pittman reported most, if

not all, of this to Himan on March 22, 2006, and these facts are corroborated by time stamped pictures showing Mangum, outside of the locked back door, holding the screen door open, trying to get back into the house, just standing there, and smiling. JA 638-39, 689-90 (SAC ¶¶ 206-10, 397-98.) There is no indication whatsoever that she had any concern for her safety. *See id.*

Indeed, the only "safety concern" expressed to Gottlieb and Himan was Kim Pittman's report to them that she was afraid of Mangum, particularly after Mangum fought with Pittman in the car and told Pittman to "go ahead, put marks on me, that's what I want." JA 684 (SAC ¶ 382(A).) Police also knew that, shortly after she arrived at 610 N. Buchanan, Mangum was calling her agency looking for more work elsewhere. JA 638 (SAC ¶ 204.) Gottlieb and Himan also knew that, consistent with these facts, the next door neighbor, Jason Bissey, reported to police that he saw Mangum staggering along the side of the house, heading toward the back yard saying she was looking for her shoe. JA 638, 687 (SAC ¶¶ 205, 388.)

Next, the Affidavit asserts that:

> **Shortly after going back into the dwelling the two women were separated. Two males, Adam and Matt pulled the victim into the bathroom.** JA 57.

This statement is false and Gottlieb and Himan knew it to be false. Kim Pittman told Inv. Himan in a telephone interview that she never went back into

the house, that she was with Mangum the whole time, and that Mangum's accusation was a "crock." JA 686 (SAC ¶ 385). No one – not Pittman or Mangum -- ever reported that either of them ever got back into the house after they left. Pittman did not try to re-enter the house, and, although Mangum did try, she was locked out. JA 638-39, 689 (SAC ¶¶ 205-09, 397.) And in all of Mangum's 11 varied accounts of what occurred at 610 N. Buchanan, she never once says that Adam or Matt were names used by anyone in the residence while she was there. JA 659 (SAC ¶ 292.)

Next, the Affidavit asserts that:

> **The victim stated she tried to leave, but the three males (Adam, Brett, and Matt) forcefully held her legs and arms and raped and sexually assaulted her anally, vaginally, and orally. The victim stated she was hit, kicked, and strangled during the assault. Medical records and interviews that were obtained by a subpoena revealed the victim had signs, symptoms, and injuries consistent with being raped and sexually assaulted vaginally and anally.** JA 57.

This statement fabricates and omits facts known to the affiant that were highly material to the probable cause determination:

There was no swelling, edema, cuts or abrasions (even microscopic) of the anus or the exterior pelvic

region. JA 664 (SAC ¶ 308(B).) No cuts, abrasions, or any other abnormalities were observed or documented even with the high-magnification coloposcope. JA 664 (SAC ¶ 308(D).) Doctors and nurses concluded that Mangum was making false claims of pain because their tests revealed no associated symptoms of pain at all. JA 659-60, 664, 670, 814 (SAC ¶¶ 293-96, 309, 325, 792.) The only documented injuries in the SAER were injuries to Mangum's knees and ankles. However, digitally time-stamped photos taken during the dance show the exact same injuries were already present on her knees and ankles before she arrived at 610 N. Buchanan. JA 663-64, 670 (SAC ¶¶ 307, 326.)

Moreover, Mangum denied receiving any physical blows by the hand, (JA 664 (SAC ¶ 308(A))), and in the many 'Systems Examinations' that were done by DUMC doctors and nurses on the morning of March 14, 2006 (and the UNC doctors and nurses the next day), all concluded that Mangum's head, back, neck, chest, breast, nose, throat, mouth, abdomen, and upper and lower extremities were *normal*, and Mangum was consistently noted to be in 'no obvious discomfort,' even when she was scoring her pain as '10 out of 10.' JA 659-62, 664-68 (SAC ¶¶ 293-94, 296, *see* ¶¶ 304, 309, 312-21(C)).

Next, the Affidavit asserts that:

> **The victim reported that she was sexually assaulted for an approximate 30 minute time period by the three males.** JA 57.

This statement is false and omits the related and highly material fact that, between March 13 and March 15, 2006, Mangum "reported" 11 different versions of the events of the evening in question. JA 659, 670 (SAC ¶¶ 292, 328.) In some versions, she was assaulted, in others she was not. And among the renditions of the events in which she did assert that she was assaulted, the number of attackers involved varied wildly, from 1 to 5 to 20 attackers. JA 645, 651, 659, 668 (SAC ¶¶ 234, 262-63, 292, 321(I).) Gottlieb and Himan also omitted the related material fact that Kim Pittman told them she had been with Mangum throughout the brief period they were there and Pittman was therefore certain that any allegation that Mangum was raped or sexually assaulted was "a crock." JA 686 (SAC ¶ 385.)

Next, the Affidavit asserts that:

> **During a search warrant at 610 N. Buchanan on 3-16-2006 the victim's four red polished fingernails were recovered inside the residence consistent to her version of the attack. She claimed she was clawing at one of the suspect's arms in an attempt to breathe while being strangled. During that time the nails broke off.** JA 57.

Himan and Gottlieb knew that these allegations were false, and they omitted facts that were highly material to the probable cause determination. Mangum never claimed that she had been strangled, that she clawed at anyone's arm for any reason, or that her nails broke off in a struggle or for any other

reason. JA 698 (SAC ¶ 424.) On March 14th, 15th, and 16th, Mangum gave at least 11 different accounts of what occurred at 610 N. Buchanan while she was there, and not once did Mangum make any of these claims, nor did she make them in her written statement on April 6th. *Id.* And there is more.

Not only do Himan and Gottlieb make this false, incendiary allegation, they also omit from the affidavit the highly material facts that the "polished fingernails" that Gottlieb and Himan found had obviously never been applied to anyone's fingertips; that they also found unpainted fingernails, nail polish, and nail application accessories together with the pre-painted fingernails that had never been applied, JA 698 (SAC ¶¶ 425-26); that unpainted nails were also found inside Mangum's make up bag, which Gottlieb and Himan seized in their search of 610 N. Buchanan Blvd. on March 16, 2006, JA 698-99 (SAC ¶¶ 425-27); that Gottlieb and Himan failed to collect the fingernails during the execution of the search warrant; and that this allegation does not appear in the affidavit they presented to obtain the warrant to search 610 N. Buchanan.

Next, the Affidavit asserts that:

> **The victim's make up bag, cell phone, and identification were also located inside the residence totaling $160.00 consistent with the victim claiming $400.00 cash in all twenty dollar bills was taken from her purse immediately after the rape.** JA 57.

While the presence of $160.00 in a home is perhaps theoretically consistent with having a claim that Mangum left $400.00 there three days prior, it seems highly likely that one would find $160.00 in any home that is shared by three adults. But, here, too, Gottlieb and Himan omit the material facts that Mangum also claimed that the money was not stolen; that $2,000.00 was "stolen;" that Kim Pittman ("Nikki") stole it; that the money was deposited in a nearby ATM as required by the escort agency; and that she left the money in the back seat of Officer Barfield's patrol car. JA 669 (SAC ¶¶ 321(K)-(L).)

Next, the Affidavit asserts that:

> **Mangum was treated and evaluated at Duke University Medical Center Emergency Room shortly after the attack took place.** JA 57.

While it is true that Mangum was *transported* to DUMC, the statements that she was "treated and evaluated" there are false. Mangum was not treated for anything; she was merely kept for observation. *See* JA 660-61 (SAC ¶¶ 294-96.) And, while DUMC staff initiated a Sexual Assault Examination ("SAE") long after she arrived, the SAE was promptly abandoned. JA 662 (SAC ¶ 304.) No pelvic exam was conducted; no rectal exam was conducted; no forensic toxicology tests were ordered; no forensic blood draw was taken. JA 663 (SAC ¶ 305.) The medical staff, Durham Police officers, and Duke police officers who interacted with Mangum at DUMC concluded that she had not been sexually assaulted and that she was lying about her pain to obtain the prescription narcotics to which she was addicted. JA 652-53, 659-

64, 674-75, 712, 846 (SAC ¶¶ 265, 269, 293-309, 343, 472, 891.)

Next, the Affidavit asserts that:

> **A Forensic Sexual Assault Nurse (SANE) and Physician conducted the examination. Medical records and interviews that were obtained by a subpoena revealed the victim had signs, symptoms, and injuries consistent with being raped and sexually assaulted vaginally and anally. Furthermore, the SANE nurse stated the injuries and her behavior were consistent with a traumatic experience.** JA 57.

These statements are false and Gottlieb and Himan omit several facts that are highly material to probable cause. First, Levicy was a "SANE-in-Training;" she was not qualified or competent to conduct an SAE under accreditation standards or DUHS's internal policies. JA 661-62, 976 (SAC ¶¶ 299, 301, 1321); no qualified SANE conducted the exam, a resident, Dr. Julie Manly did, JA 661-63 (SAC ¶¶ 298, 302-06); Levicy was also not competent to collect or interpret forensic medical evidence; Levicy agreed with Gottlieb and Himan to back up their claims that she observed corroborating medical evidence in Mangum's SAE, in court as an "expert" if necessary. JA 661-62, 976-77 (SAC ¶¶ 299, 301, 1322); *see also* JA 246-51 (SAC ¶¶ 785-97).

By signing the SAER, failing to clearly document the foregoing facts on the SAER, Levicy deliberately

falsified a forensic medical record in order to aid Himan and Gottlieb's attempt to obtain search and seizure orders by defrauding the Court. JA 661, 811-16 (SAC ¶¶ 299, 785-99.) Fourth-year resident Julie Manly found no injury to Mangum's pelvic region whatsoever, including the vaginal walls, cervix, rectum, or anus. JA 663 (SAC ¶ 306.) The only notation Manly made was 'diffuse edema of the vaginal walls.' *Id.* But diffuse edema is not an injury; it is a symptom. *Id.* It is caused by many things. *Id.* Further diffuse edema cannot be clinically identified to a reasonable degree of medical certainty without a baseline reference for comparison that neither Levicy nor Manly had (*e.g.*, a prior observation of the vaginal walls at a time when they were not edemic). *Id.*

Next, the Affidavit asserts that:

> **In a non-custodial interview with Daniel Flannery, resident of 610 N. Buchanan and Duke Lacrosse Team Captain; Mr. Flannery admitted using an alias to make the reservation to have the dancers attend the Lacrosse Team Party.** JA 58.

This statement fabricates and omits material facts known to the affiant. During Police questioning on March 16th, Dan Flannery, told police that, when he called the agency, he gave the name Dan Flanagan. No witness ever said that Dan identified himself as Adam, rather everyone was calling him Dan. JA 701 (SAC ¶ 432.) The only aliases Mangum claimed were used on March 13th-14th, 2006, were Mangum's and

Pittman's aliases, "Precious" and "Nikki." Pittman identified herself with her real name when she encountered authorities; Mangum continued to refer to herself as "Precious" and also as "Honey" throughout the morning of the 14th. JA 652-53, 658, 669-70, 686-87 (SAC ¶¶ 268, 291, 323, 386.)

### B. PLAINTIFFS ALLEGE MORE THAN A "SHEER POSSIBILITY" THAT THERE WERE NO "REASONABLE GROUNDS" TO SUSPECT PLAINTIFFS COMMITTED THE CRIMES NAMED IN THE AFFIDAVITS

Gottlieb and Himan sought an NTO directed to all 46 white members of the Duke men's lacrosse team. Instead of asserting specific, articulable facts showing "reasonable grounds" to suspect that each one of the 46 young men committed the crimes identified in their affidavit, Gottlieb and Himan cut the Gordian Knot by the following witness statements:

> **All of the parties named in this application with the exception of the last five were named by the three residents of 610 N. Buchanan as being present at the party. Due to the fact that the residents of 610 N. Buchanan stated that all the attendees were their fellow Duke Lacrosse Team Members and that there were so many attendees, all of the white male Duke Lacrosse Team Members were listed since**

> **they were all aware of the party and could have been present.** JA 58.

Even if these statements were true (and they are not), they do not establish "reasonable grounds" to suspect that McFadyen, Wilson, or Archer committed rape, sexual offense, or kidnapping. Moreover, Gottlieb and Himan omit the fact that the three residents also stated that the party began in the late afternoon; thus, "being present at the party" at some point says nothing about whether they were still there over six hours later. But even more devastating to Gottlieb and Himan's claim of "reasonable grounds" to suspect that Plaintiffs committed the crimes they alleged is the highly material fact that they conducted a photo identification procedure with Mangum on March 16, 2006, (three days after the party) in which they presented Mangum with recent pictures of McFadyen, Wilson, and Archer and, as in response to each one, Mangum told them that *she did not recognize them at all.* JA 682, 685-86, 703 (SAC ¶¶ 372-73, 383-84, 441.) Gottlieb and Himan also omit the highly material fact that Mangum's physical descriptions of her "attackers" that eliminated McFadyen, Wilson, and Archer as plausible suspects. Indeed, the cumulative effect of the photo identification procedures and Mangum's description of her "attackers," Mangum eliminated every member of the lacrosse team as a plausible suspect. JA 679-86 (SAC ¶¶ 362-84.) It is beyond serious discussion that these facts – personally known to Gottlieb and Himan – were material to any judicial determination of whether there was

reasonable grounds to suspect Plaintiffs committed the sexual assault described in their affidavits.

Thus, Plaintiffs clearly allege specific facts sufficient to show "more than a sheer possibility" that Gottlieb and Himan presented affidavits to judicial officers in which they deliberately or recklessly fabricated evidence that was necessary to the finding of probable cause and from which they omitted material facts that they knew negated probable cause, and, as a foreseeable result, Plaintiffs were subjected to searches and seizures without probable cause. *See, e.g., Miller*, 475 F.3d at 630-31 ("an officer who intentionally or recklessly puts lies before a magistrate, or hides facts from him, violates the Constitution"); JA 679- 86, 702-04 (SAC ¶¶ 362-84, 439-44.) In the year 2006, a reasonable officer in Gottlieb's, Clayton's, and Himan's position would know—even to a moral certainty—that what they were doing violated clearly established law. Further, a reasonable officer would also know that leaking the NTO they obtained by fraud to the press to ignite a media firestorm and to publicly vilify Plaintiffs not only violates clearly established law, but is also arbitrary and evinces corrupt, malicious, depraved, and evil motives that shock the conscience. JA 695-96 (SAC ¶ 414.)

Next, Gottlieb and Himan assert that "everyone at the party told [Mangum] they were members of the Duke Baseball and Track Team to hide the true identity of their sports affiliation—Duke Lacrosse Team Members." They also assert that Daniel Flannery "admitted using an alias to make the reservation to have the dancers attend the Lacrosse

Team Party." But to the extent that these "facts" were material to whether there was probable cause or reasonable grounds to suspect that these Plaintiffs sexually assaulted Mangum, Gottlieb and Himan knew they were not only false but also implausible. Both Gottlieb and Himan spent considerable time inside of the residence and participated in the search of the residence on March 16, 2006. From that experience it would have been plainly obvious to any reasonable officer that residents did nothing to conceal their team or school affiliation. To the contrary, the walls inside the house were covered with 'Duke Lacrosse' posters, banners, and other lacrosse and Duke memorabilia that unmistakably indicated their team and school affiliation. JA 701-02 (SAC ¶¶ 435-38.) Gottlieb and Himan also knew that the only individuals using aliases at the party were Mangum and Pittman; and they knew that Plaintiffs and their teammates did not. JA 652-53, 658, 669-70, 686-87 (SAC ¶¶ 268, 291, 323, 386.)

Here, the litany is untenable Plaintiffs allege that the purpose of the additional fabrications and omissions was to maliciously vilify the plaintiffs in the eyes of millions of people, and foment animus against them within their community. JA 567, 695-96, 754-55 (SAC ¶¶ 2, 414, 597-601.) The NTO Affidavit—after correcting the fabrications and omissions—does not establish probable cause to believe that a felony had been committed or "reasonable grounds" to believe that Plaintiffs committed it.

* * *

Dated: September 21, 2011

* * *