NO. 23-1791

In The

United States Court Of Appeals

For The Fourth Circuit

LEE MARVIN HARRIS, SR.,

Plaintiff – Appellant,

v.

TOWN OF SOUTHERN PINES; OFFICER JASON PERRY, Sued in his individual capacity; OFFICER SEAN LOWREY, Sued in his individual capacity; OFFICER KYLE MARSH, Sued in his individual capacity; CHIEF OF POLICE ROBERT TEMME, Sued in his official and individual capacity,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO

BRIEF OF APPELLEES

Scott D. MacLatchie
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1791 Caption: Lee Harris, Sr. v. Town of Southern Pines, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Town of Southern Pines
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/Scott D. MacLatchie Date: August 16, 2023

Counsel for: Defendants/Appellees

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Jason Perry
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/Scott D. MacLatchie Date: August 16, 2023

Counsel for: Defendants/Appellees

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No. 23-1791 Caption: Lee Harris, Sr. v. Town of Southern Pines, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Sean Lowery
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/Scott D. MacLatchie Date: August 16, 2023

Counsel for: Defendants/Appellees

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Kyle Marsh
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/Scott D. MacLatchie Date: August 16, 2023

Counsel for: Defendants/Appellees

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Robert Temme
(name of party/amicus)

Robert Temme

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/Scott D. MacLatchie Date: August 16, 2023

Counsel for: Defendants/Appellees

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STATEMENT OF ISSUES

I. Whether the District Court properly granted summary judgment on Plaintiff's Fourth Amendment and state law claims for malicious prosecution because his arrest was supported by probable cause.

II. Whether the District Court properly granted summary judgment on Plaintiff's Fourth Amendment claim for fabrication of evidence because Defendants did not omit material exculpatory evidence from their testimony to the state and federal grand juries.

III. Whether the District Court properly determined that Defendants were entitled to qualified immunity and public official immunity.

IV. Whether the District Court properly granted summary judgment to Defendants on Plaintiff's *Monell* and failure to intervene claims.

STATEMENT OF CASE

In February of 2017, the Southern Pines Police Department ("SPPD") began an investigation into reports of an uptick in drug activity in Southern Pines and surrounding areas. JA125. Shortly after the investigation began, a series of suspects operating under the name "Dope Boy Clic" or "DBC" was identified. JA40. Officers identified Plaintiff's son, Lee Harris, Jr., and Robert McRae, as members of the DBC who were suspected of selling drugs. JA40–41. SPPD Officers Jason Perry ("Perry") and Sean Lowery ("Lowery") led the investigation known as "Operation Leader".

JA40, JA45. SPPD Lieutenant Kyle Marsh ("Marsh") of the Investigations Division oversaw its personnel including Perry and Lowery. JA50.

A. SPPD'S SURVEILLANCE EFFORTS IN "OPERATION LEADER"

As the 2017 investigation progressed, SPPD officers began conducting surveillance on members of the DBC and other individuals in and around Southern Pines. JA41. Through surveillance of Harris, Jr., Perry determined that he seemed to live at both his girlfriend's apartment and at Plaintiff's house, located at 803 N. Sycamore Street in Aberdeen. JA41. Officers surveilled Plaintiff's residence in person on several occasions, as they suspected Harris, Jr., was using Plaintiff's residence to store and move his drug supply, possibly with Plaintiff's knowledge or permission, and maybe even his participation. JA41. Officers also identified an abandoned house located at 811 W. New York Ave in Southern Pines (the "DBC drug house), where Harris, Jr., and other members of the DBC were known to actively sell drugs. JA41.

Although Plaintiff himself was not initially suspected of drug activity, officers started to suspect Plaintiff was involved when surveillance video recorded Plaintiff loitering outside the DBC drug house. JA41. In this recording, Plaintiff was standing in the street in front of the DBC drug house when he walked over to a vehicle which had pulled up and stopped, leaned into the passenger window, and then walked over to a known drug dealer standing in the street with him and handed over cash. JA41.

On January 24, 25, and 31, 2018, Lowery conducted in-person surveillance from the wood line across from Plaintiff's residence with the following results. JA241–242.

i. <u>January 24, 2018, Surveillance</u>

By January 24, 2018, investigators believed that Harris, Jr. was using a storage unit in Aberdeen to keep and sell drugs. JA198. A GPS tracker on his vehicle documented his travels, which allowed Perry to track his stops and compare that with related information Perry learned from other parts of the investigation. JA265–303. That day, at 3:43 p.m., Harris, Jr., stopped at the storage unit—where he was believed to be storing narcotics and where narcotics were later recovered—and left at 3:50 p.m. JA194–205, JA226, JA280. Plaintiff omitted this fact from his narrative. Harris, Jr., arrived at Plaintiff's residence at 4:43 p.m. JA280–281. There, Lowery observed: "[Harris,] Jr. then goes to the rear of the home, out of sight and there for approximately 2 to 3 minutes." JA241. Harris, Jr., left the house at 5:00 p.m. and arrived at "T.H."—shorthand for target or trap house, the DBC drug house in this case—ten minutes later. JA281. At that timestamp, Perry added a notation, "drop dope @ stop sign – steps behind window – deal w GMC Terrain." JA281.

ii. <u>January 25, 2018, Surveillance</u>

On January 25, 2018, Harris, Jr., arrived at Plaintiff's home at 12:22 p.m. and left at 12:28 p.m. JA282. He retrieved an item from the front porch, went inside the home, and left an item on the porch when he exited. JA241. He then went to the front

right edge of the property and "plac[ed] or retriev[ed] something from underneath a tarped item located to the right of the enclosed trailer." JA241 (emphasis added). Harris, Jr., left Plaintiff's house and eventually arrived at "T.H." JA282. At that stop, Perry noted, "drop dope left side T.H." JA282.

iii. January 31, 2018, Surveillance

On January 31, 2018, Harris Jr. arrived at the storage unit at 12:54 p.m. and left at 1:04 p.m. JA284. From the storage unit, Harris, Jr., went to "T.H.", arriving at 1:13 p.m. JA284. At that event, Perry added to his timeline, "drop dope – left of house, steps, behind." JA284. Plaintiff omitted these details from his narrative.

Harris, Jr., was at Plaintiff's residence from 3:09 p.m. to 3:17 p.m. JA285. During that time, he went to the right side of the home near the trailer. "He then approache[d] a vehicle covered with a blue tarp on it. He [was] over at this vehicle approximately 2 to 3 minutes." JA242 (emphasis added). After leaving Plaintiff's residence, Harris, Jr. made two stops and returned to "T.H." at 3:54 p.m. JA285.

Based on these facts, Plaintiff represented that Lowery "observe[d Plaintiff's] son place and/or take narcotics from the Cadillac" on Plaintiff's property and failed to disclose that fact to the magistrate, grand juries, and prosecutors. The record clearly shows that Plaintiff's representation is pure speculation. JA124, JA170, JA176, JA184, JA187–188, JA241–242. Plaintiff's Exhibit 20, titled, "Photo of Car Under Cover," shows that the Cadillac in question was covered, but not by a "blue

tarp". The tarp described by Lowery covered another item in the yard. JA Vol. II, Digital Exhibits, Ex. 20. At his deposition, Lowery consistently denied that he ever identified a Cadillac or saw the Cadillac where drugs were later found under a "tarp." JA170. Additionally, Lowery never observed Harris, Jr., handling narcotics on Plaintiff's property. JA241–242. Similarly, Perry's notes documenting Harris, Jr.'s travels do not support this conclusory allegation. Perry's references to narcotics, "dope", are not at times when Harris, Jr., was at Plaintiff's property. JA265–300. Moreover, Perry never told Lowery that the drugs were found in the vehicle identified in his wooded surveillance, and Lowery did not reach this conclusion on his own. JA184. Thus, Plaintiff's assertions are not supported by the record.

B. FEBRUARY 20, 2018 SEARCH OF PLAINTIFF'S PROPERTY

Officers from multiple agencies, including SPPD, continued the investigation which culminated in simultaneously executing search warrants on multiple target locations on February 20, 2018. JA41, JA46. The warrant for Plaintiff's property covered a search of the residence and all vehicles located on the property. JA41.

Plaintiff was the sole occupant when Marsh, Perry, and other SPPD and Aberdeen officers arrived at his property. JA41–42. Another officer initially detained Plaintiff as the search began, but Perry eventually took over his detention. JA42. Perry led Plaintiff outside to be interviewed and *Mirandized* Plaintiff before asking any questions, though he was not under arrest at that time. JA42. Plaintiff

told Perry that his son had not brought anything to his property and had not been home in months. JA42, JA138. Numerous firearms were found inside the home, in Plaintiff's bedroom and in a room used by his son. JA42, JA52–53.

SPPD Officer Kevin Dean's K9, Mary, performed a residence and vehicle sniff to locate illegal narcotics. JA51. Mary alerted to the odor of narcotics at the door of a Cadillac parked on the side of Plaintiff's residence under a gray cover. JA51. Officer Dean then pulled the cover off the Cadillac. JA51. Through the window of the vehicle, he immediately saw what appeared to be bags containing narcotics on the floorboard and behind the armrest and informed Marsh of his observations. JA51. Marsh ran the license plate and confirmed the car was registered to Plaintiff, though the registration was expired. JA51, JA68.

Marsh and another officer opened the unlocked driver-side door and searched the passenger compartment by hand. JA51. Marsh immediately recognized the smell of cocaine when he opened the door. JA51. Behind the armrest, he located a set of digital scales of the kind commonly used by drug dealers and a plastic bag that was wrapped in layers of plastic. JA51. He also located eighty-eight (88) grams of a white powdery substance and thirteen (13) grams of a white rock substance lying on the rear floorboard. JA51–52.

The trunk of the Cadillac was locked, and the release from the inside was inoperable. JA52. Marsh found Plaintiff with Perry and asked Plaintiff if he had a

key to the Cadillac registered to him. JA52. Plaintiff complained that "[n]otably, Officer Perry did not ask [Plaintiff] if he had the keys to his truck which was parked in the driveway, or to the storage shed in his yard," implying that Perry knew before the search that the Cadillac contained narcotics. In fact, officers sought to search the interior of the Cadillac because Mary alerted to it. JA263. There is no evidence indicating that Mary alerted to another area during her residence and vehicle sniff. JA51, JA263.

In response to Marsh, Plaintiff requested that he be allowed to lead Marsh into the home to find the keys. JA52. Plaintiff led Marsh to a rack of keys on his bedroom door where the Cadillac keys were hung. JA52. Plaintiff told officers which doors on the Cadillac were locked and unlocked, that it was missing a battery, and that the trunk would not operate. JA139. Marsh brought the keys outside and used them to operate the ignition, though, as Plaintiff predicted, the car would not start and the trunk would not open. JA52.

Marsh notified the other officers of the items located within the vehicle so the evidence would be photographed, packaged, and seized. JA52. He then conferred with Lowery, via phone, and Perry regarding probable cause to arrest Plaintiff. JA53. Officer Perry related that Plaintiff stated his son had not been at the home in months until earlier that day. JA53. Both officers knew this was untrue based on the surveillance of the home. JA242.

Given the presence of what appeared to be a sizeable amount of cocaine inside Plaintiff's Cadillac along with digital scales, Plaintiff's ready control of the keys to his Cadillac, the presence of numerous guns inside the home, Plaintiff's known association with the DBC drug house, the officers' prior knowledge that Harris, Jr., had other locations to store his narcotics, Plaintiff's statement to Perry that his son had not brought anything to the residence, and Plaintiff's deceptive statement to Perry about his son's recent whereabouts, the officers determined that the totality of the circumstances provided probable cause to arrest Plaintiff. JA42, JA52–53, JA138. They determined that it seemed less likely at the time that Harris, Jr., would use Plaintiff's property to store and/or sell drugs because

> Harris, Jr., had so many other places that he could place and sell drugs from[,] such as 811 West New York, 1090 West Indiana, the storage building, it made no sense for him to put his parents in harm's way, put their property in question by placing drugs on his parents' property like that.

JA139.

C. PLAINTIFF'S ARREST AND PROSECUTION

Perry placed Plaintiff under arrest for possession of the cocaine and drug paraphernalia. JA42–43. Plaintiff was taken to SPPD, then transported to the Moore County jail. JA47. There, Lowery testified before Magistrate Carol Wright to his knowledge of the facts regarding the investigation, and the facts as told to him by Perry and Marsh about the execution of the search warrant at Plaintiff's residence.

JA47. Magistrate Wright concluded that probable cause existed for Plaintiff's arrest and set a bond. JA47–48. Plaintiff was charged with trafficking cocaine, maintaining a vehicle to keep controlled substances, possession of cocaine with the intent to distribute, and possession of drug paraphernalia. JA48.

Plaintiff was indicted by a Moore County grand jury on March 5, 2018. JA84. SPPD's entire investigative file was made available to the Moore County District Attorney's Office on March 19, 2018. JA307. The State dismissed the charges against Plaintiff following Plaintiff's indictment by a federal grand jury on July 31, 2018, and federal prosecutors taking over the case to pursue federal drug conspiracy charges. JA73, JA77. On December 18, 2018, Plaintiff's federal charges were dismissed without prejudice, JA80, after the DBC defendants, including Harris, Jr., pled guilty to charges arising out of Operation Leader. *See, e.g.*, Plea Agreement, *United States v. Lee Marvin Harris, Jr.*, No. 1:18-CR-249-2 (M.D.N.C. Dec. 14, 2018), ECF No. 105; Acceptance of Entry of Guilty Plea, *United States v. Lee Marvin Harris, Jr.*, No. 1:18-CR-249-2 (M.D.N.C. Dec. 26, 2018), Judge William L. Osteen, Jr. Minute Entry. Plaintiff spent approximately five months in jail, followed by five months of home detention.

D. ALLEGATIONS OF MISCONDUCT BY SPPD OFFICERS

Plaintiff cited statements from three individuals, Arthur Darby, Martha Dickerson, and Tracy Williams, purporting to show prior occasions on which Officer

Perry allegedly "attempted to coerce individuals to falsely testify against others through wrongful arrests or the threat of arrests." JA104–109, JA229–230, JA261–262. There is no evidence that any of these three individuals lodged a complaint with SPPD over Officer Perry's conduct. In fact, only Darby's affidavit alleged that Officer Perry solicited false testimony. JA105, JA229–230, JA261–262. Darby filed a *pro se* civil lawsuit against Perry. The suit was dismissed by U.S. Magistrate Judge Joi Elizabeth Peake on frivolity review because Darby "failed to allege facts which allow the Court to reasonably infer that Defendant Perry has violated any of [Darby's] constitutional rights or otherwise violated any federal statute." JA110. Moreover, as is later discussed in Section V, Plaintiff failed to advance any argument in his Brief to this Court about why the district court erred in dismissing the *Monell* claim.

E. THE DISTRICT COURT GRANTED SUMMARY JUDGMENT FOR THE OFFICERS ON THE MERITS OF PLAINTIFF'S CLAIMS AND ON THE BASES OF QUALIFIED AND PUBLIC OFFICIAL IMMUNITY

Plaintiff filed this suit on December 16, 2021, alleging causes of action against Perry, Lowery, and Marsh for malicious prosecution under the Fourth Amendment and North Carolina state law, fabrication of evidence under 42 U.S.C. § 1983, and failure to intervene under 42 U.S.C. § 1983. He also brought claims against Officer Perry for First Amendment retaliation, and against Chief Robert Temme and the Town of Southern Pines for *Monell* liability for failure to train and supervise.

Plaintiff abandoned his retaliation claim at summary judgment. JA310. The district court granted Defendants' Motion for Summary Judgment on all of Plaintiff's remaining claims, finding that Plaintiff's arrest was supported by probable cause, there was no basis for his fabrication of evidence claim, his constitutional rights were not violated, and there was no evidence indicating that the Town was deliberately indifferent to his constitutional rights. JA327.

SUMMARY OF ARGUMENT

The district court properly granted Defendants' Motion for Summary Judgment on the merits and on the bases of qualified and public official immunity for Plaintiff's federal and state claims, respectively. The district court correctly concluded that Perry, Lowery, and Marsh did not deprive Plaintiff of any constitutional rights because his arrest and detention were supported by probable cause based on the discovery of eighty-eight grams of suspected cocaine, thirteen grams of suspected crack-cocaine, and digital scales in plain view inside a Cadillac that was parked on Plaintiff's property and registered to Plaintiff, when Plaintiff demonstrated acute familiarity with the inner workings of the car and had the keys hung on his bedroom door. Plaintiff was the only occupant of the home at the time of the search. He expressly denied that his son ever brought items to his property and lied to Defendants that his son had not been at his home in months. Based on these factors, Defendants reasonably believed that he possessed the cocaine and

paraphernalia found in his Cadillac. Defendants' belief was further bolstered by Plaintiff previously making a suspicious hand-to-hand cash transaction at the DBC drug house with a known drug dealer. Based on these facts, any reasonable investigator would believe that Plaintiff committed a crime.

Plaintiff's representations of the facts that were allegedly omitted and misrepresented to the magistrate, grand juries, and prosecutors following Plaintiff's arrest are not supported by the record and were not material to the determination of probable cause. Plaintiff's purported innocent explanation for his transaction with a known drug dealer at the DBC drug house was not supported by the record, and Defendants would not be required to consider it and rule it out before probable cause could be established. Moreover, his representation that Defendants saw Harris, Jr., placing narcotics into the Cadillac during their surveillance of Plaintiff's property is neither supported by the record, exculpatory, nor material to the determination of probable cause. Finally, Plaintiff's argument that Defendants fabricated and misrepresented evidence regarding the Cadillac's registration or operability is untrue and irrelevant to the issues in this case because the probative issue on probable cause was Plaintiff's clear dominion and control over the vehicle and its contents, not whether the car could legally be used for transportation. There is no evidence to support a finding that Defendants omitted material exculpatory evidence, misrepresented material facts, or fabricated evidence when testifying to establish probable cause. Accordingly, the district court properly found that Defendants were

entitled to summary judgment on the merits of Plaintiff's malicious prosecution claims and fabrication of evidence claims.

The district court correctly concluded that even if Plaintiff could survive summary judgment on the merits, his federal claims were barred by qualified immunity because Plaintiff failed to sufficiently show that his constitutional rights were violated and that the right allegedly violated was clearly established at the time of the violation. Similarly, his state law malicious prosecution claim failed on the basis of public official immunity because his constitutional rights were not violated, and he failed to show the requisite additional element of malice to overcome Defendants' presumptive entitlement to the defense.

Finally, Plaintiff waived appeal of his *Monell* liability and failure to intervene claims. He failed to advance any arguments in his opening Brief, as required by the Federal Rules of Appellate Procedure. As a result, these claims are not subject to the consideration of this Court.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT PLAINTIFF'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED BECAUSE THE CHARGES AGAINST HIM WERE SUPPORTED BY PROBABLE CAUSE

Plaintiff alleged that Perry, Lowery, and Marsh arrested him and aided in his prosecution despite knowing that probable cause did not exist. In order "[t]o state such a Fourth Amendment claim [for malicious prosecution] we have required that

(1) the defendant has seized plaintiff pursuant to legal process that was not supported by probable cause and (2) that the criminal proceedings have terminated in plaintiff's favor." *Massey v. Ojaniit*, 759 F.3d 343, 356 (4th Cir. 2014). The existence of probable cause to arrest Plaintiff for *any* crime based on the facts known to the officer defeats his claim for malicious prosecution. *Devenpeck v. Alford*, 543 U.S. 146, 154–55, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004).

> "[P]robable cause" to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed . . . an offense.

Michigan v. DeFillippo, 443 U.S. 31, 37, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979); *Ross v. Early*, 746 F.3d 546, 561 (4th Cir. 2014). Probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n. 13, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Probable cause to arrest "is not a high bar." *District of Columbia v. Wesby*, 583 U.S. 48, 57, 138 S. Ct. 577 199 L. Ed. 2d 453 (2018) (internal quotation omitted).

Under North Carolina law, in order to state a malicious prosecution claim, the plaintiff must establish: (1) the defendant initiated the earlier proceeding; (2) malice on the part of the defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff. *Best v. Duke Univ.*, 337 N.C. 742, 749, 448 S.E.2d 506, 510 (1994).

"Malice may be inferred from want of probable cause in reckless disregard of plaintiff's rights." *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 86–87, 249 S.E.2d 375, 379 (1978). North Carolina law is coterminous with federal law on the issue of probable cause. *Richardson v. Hiatt*, 95 N.C. App. 196, 200, 381 S.E.2d 866, 868 (1989). The question is, therefore, whether a reasonable officer could have believed Plaintiff committed any one of the offenses for which he was charged based on the evidence known to the officers at the time of his arrest.

Before Plaintiff's residence was searched, he was recorded on a surveillance video at the DBC drug house engaging in a cash hand-to-hand transaction with Robert McRae, a known drug dealer. JA41. Officers also knew that Harris, Jr., the supposed leader of the DBC drug distribution operations and stayed at Plaintiff's residence when he was in Moore County, JA152, though officers never observed Harris, Jr., handling narcotics at Plaintiff's residence. As a result, Plaintiff's residence became a location of interest in the investigation.

During the February 20, 2018 search pursuant to the warrant covering Plaintiff's residence and all vehicles on his property, Officer Dean's K9, Mary, performed a sniff of the outside of Plaintiff's house and vehicles on his property. JA51. Mary alerted to the presence of narcotics on the Cadillac parked on the right side of the house. JA51. The Cadillac was under a gray car cover. JA51. Officer Dean pulled the cover away and observed what appeared to be narcotics in plain view inside the vehicle on the floorboard and behind the armrest. JA51.

Upon learning of Mary's alert and Officer Dean's observations, Marsh ran the vehicle's license plate and discovered that it was registered to Plaintiff, though the registration had expired. JA51. After discovering that the driver-side door was unlocked, officers searched the interior of the Cadillac pursuant to the search warrant. JA51. Marsh immediately recognized the smell of cocaine inside the vehicle. JA51. During the search of the Cadillac, officers discovered eighty-eight (88) grams of a white powdery substance, thirteen (13) grams of a white rock substance, and digital scales of the kind commonly used by drug dealers. JA51–52.

While the search was ongoing, Perry detained Plaintiff and read him the *Miranda* warnings before asking any questions. JA42. Plaintiff told Perry that Harris, Jr., had not been home in months, though Perry knew this was untrue based on SPPD's surveillance, and that Harris, Jr., never brought anything to the property. JA42. After finding the cocaine in the Cadillac, Marsh found Plaintiff with Perry and asked if he had the keys to the Cadillac registered to him. JA52. Plaintiff led Marsh into his home to a rack of keys on his bedroom door where the Cadillac keys were hung. JA52. Plaintiff told officers which doors were locked and unlocked, that the trunk was inoperable, and that the Cadillac did not have a battery. JA139. When Marsh tested the keys, they worked for the ignition but, as Plaintiff predicted, the car did not start, and the trunk would not open. JA52.

Defendants reasonably believed that Plaintiff knowingly possessed the drugs found in the Cadillac based on: (1) the discovery of what appeared to be cocaine, in a quantity for sale, and digital scales of the kind commonly used by drug dealers located inside the Cadillac; (2) the Cadillac being parked in Plaintiff's yard and registered to Plaintiff, the keys for which Plaintiff readily located on his bedroom door, and his knowledge of the inner workings of the car; (3) Plaintiff's deceptive statements about his son's recent whereabouts and denial of his son bringing anything to the home; and (4) the officers' knowledge that Plaintiff was previously spotted engaging in a cash hand-to-hand transaction at the DBC drug house with a known drug dealer, and Plaintiff was therefore placed under arrest. JA42–43, JA52–53, JA138–139.

Given this evidence, any reasonable investigator would believe that Plaintiff committed one or more crimes. No greater level of certainty was necessary, as this Court has specifically rejected the idea that "probable cause means more likely than not, [more than] 50/50," and has made it clear that "the probable cause standard does not require that the officer's belief be more likely true than false." *United States v. Humphries*, 372 F.3d 653, 660 (4th Cir. 2004); *see also Texas v. Brown*, 460 U.S. 730, 742, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983) ("[Probable cause] does not demand any showing that such a belief be correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all

that is required."). No other person claimed ownership of the drugs, and Plaintiff previously denied the possibility that they belonged to his son. JA138. In addition, it seemed less likely at that time that Harris, Jr., would put his parents in harm's way by using Plaintiff's property to store and/or sell drugs without Plaintiff's knowledge, as officers knew that Harris, Jr., had several other places that he could store and sell drugs, including the DBC drug house and Harris, Jr.'s storage unit where drugs were later found. JA139. Therefore, there was sufficient evidence for any reasonable officer to believe that Plaintiff had dominion and control of the drugs in the vehicle.

The reasonableness of Plaintiff's arrest and subsequent prosecution is further bolstered by the manner in which his criminal case proceeded. The facts of this case were examined in multiple bond hearings and two grand jury proceedings and reviewed by state and federal prosecutors. At each point, the probable cause determination made by the officers was reviewed and confirmed. The July 31, 2018, federal grand jury indictment is particularly compelling. *See Durham v. Horner*, 690 F.3d 183, 189 (4th Cir. 2012) ("It has long since been settled by the Supreme Court that an indictment, 'fair upon its face,' returned by a 'properly constituted grand jury,' conclusively determines the existence of probable cause.") (quoting *Gerstein v. Pugh*, 420 U.S. 103, 117 n. 19, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975)).

Throughout the course of Plaintiff's criminal proceedings, starting with his arrest, there was sufficient probable cause to arrest and prosecute him. "Evidence

sufficient to convict is not required." *Taylor v. Waters*, 81 F.3d 429, 434 (4th Cir. 1996). Plaintiff failed to demonstrate the existence of a genuine issue of material fact that Defendants lacked probable cause to arrest him, as is required to sustain his malicious prosecution claims under federal and state law, and that Defendants acted with malice, as is required under state law. The district court, therefore, properly granted summary judgment to Defendants on the state and federal malicious prosecution claims. This Court should affirm the district court's ruling.

A. PRECEDENT FROM THIS COURT AND THE UNITED STATES SUPREME COURT SUPPORT THE FINDING OF PROBABLE CAUSE TO ARREST PLAINTIFF

In *Ker v. California*, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963), officers had probable cause to arrest the plaintiff's husband for possession of marijuana. When officers arrived at their apartment, which the husband was believed to be using as a base for his drug distribution operations, the plaintiff was exiting the doorway to the kitchen. *Id.* at 36, 83 S. Ct. 1623. An officer "walked to the doorway from which she emerged and, without entering, observed the brick-shaped package of marijuana in plain view." *Id.* The plaintiff denied knowledge of the contents of the package. *Id.* at 28, 83 S. Ct. 1623. The Court held that even if her presence in the kitchen with the marijuana in plain view did not establish probable cause to arrest her for joint possession, her close proximity to the drugs in plain view combined with the officers' knowledge that her husband was using their apartment as a base for his drug distribution operations gave rise to the officers' reasonable belief that

she, as well as her husband, was committing the offense of possession of marijuana. *Id.* at 36–37, 83 S. Ct. 1623. Notably, the Court did not hold that the plaintiff's joint possession, alone, was insufficient to arrest her. *Id.*

In *Taylor v. Waters*, 81 F.3d 429 (4th Cir. 1996), the plaintiff's roommate was a narcotics dealer who was believed to use their apartment as a base for his drug distribution operations. During a search of the apartment, officers found a pot with white residue on it in the kitchen, which they believed was consistent with the process for converting cocaine to cocaine base. *Id.* at 435. The plaintiff stated that he had used the pot to make tea, *id.* at 432, demonstrating to the officers his knowledge of the existence of and a connection to the pot, *id.* at 435. Plastic bags of a kind commonly used for packaging and distributing cocaine were found nearby in a common area of the apartment, as well as an envelope containing a white powdery substance. *Id.* Officers also found a large amount of currency in the plaintiff's bedroom, along with bank statements consistent with his involvement in a cocaine distribution operation. *Id.* This Court found that an officer in the arresting officer's position "could reasonably have believed that the facts known to him were sufficient to establish probable cause for [the plaintiff]'s arrest" based on his joint possession of the evidence of drug manufacturing and distribution. *Id.*

Here, the evidence supporting probable cause to arrest Plaintiff was more directly incriminating to Plaintiff than that deemed sufficient in *Ker* and *Taylor*.

While Harris, Jr., primarily laid his head at Plaintiff's house when he was in Moore County, officers had reason not to and in fact did not believe that Harris, Jr., was using his parents' residence as a base of operations for distributing narcotics. JA139, JA198, JA204 (describing controlled purchases of narcotics at two other residences believed to be operations bases for the DBC). Moreover, unlike *Ker*, Perry, Lowery, and Marsh could not readily point to another individual on the premises at the time the drugs were found as the owner of the contraband, even assuming the law required them to do so. *But see Wesby*, 583 U.S. at 61, 138 S. Ct. 577 (rejecting a "divide-and-conquer approach" to investigating crimes and making related arrests upon establishing probable cause and holding, "probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts"); *Ker*, 374 U.S. at 36–37, 83 S. Ct. 1623. In *Taylor*, no drugs were even found in the search, but this Court still found that "the facts known to [the law enforcement officer] appear[ed] more than adequate to support a finding of probable cause for Taylor's arrest." 81 F.3d at 435.

As was the case in *Ker* and *Taylor*, officers found a substantial quantity of drugs and drug paraphernalia on Plaintiff's property inside a vehicle over which Plaintiff demonstrated ownership and control, evidencing his joint possession of the contraband. JA42. Officers considered the discovery of cocaine in plain view in combination with Plaintiff's suspicious hand-to-hand cash transaction with a known

drug dealer, Harris, Jr. staying at the home, Plaintiff's deceptive statements about his son's whereabouts, and Plaintiff's denial of his son bringing anything to the home, in order to establish probable cause to arrest Plaintiff. This Court should hold, as it did in *Taylor* and as the Supreme Court did in *Ker*, that under the totality of the circumstances, the facts known to the officers were more than adequate to support a finding of probable cause to arrest Plaintiff on February 20, 2018.

B. AT THE VERY LEAST, DEFENDANTS REASONABLY CONCLUDED THAT PLAINTIFF CONSTRUCTIVELY POSSESSED THE COCAINE FOUND IN THE CADILLAC.

Probable cause may also be established through constructive possession of contraband that is not in the plaintiff's immediate possession or control. *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003). "Constructive possession may be proved by demonstrating that the [plaintiff] exercised, or had the power to exercise, dominion and control over the item." *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997) (internal citation and quotation marks omitted). The plaintiff must also have knowledge of the presence of the contraband, which can be established through circumstantial evidence. *United States v. Moody*, 2 F.4th 180, 189, 192 (4th Cir. 2021).

The record shows that officers never observed Harris, Jr., placing items into or taking items out of the Cadillac. JA170, JA241–242, JA285–300. On the other hand, Plaintiff had a substantial degree of dominion and control over the Cadillac as

it was registered to him, parked on his property, he was very familiar with the then current state and inner workings of the car, and the keys were hung on his door. Even assuming, as Plaintiff argues, officers knew that Harris, Jr., had access to the inside of the Cadillac and used it to store and move narcotics despite having multiple other nearby locations actually used for those purposes, the car would be like the common areas of the residences in *Ker* and *Taylor*, where the plaintiffs' apparent joint possession of contraband in plain view—based on their proximity to the evidence at the base of the target suspect's drug distribution operations—was sufficient to establish probable cause to arrest both plaintiffs without the need to analyze constructive possession. *Ker*, 374 U.S. at 36–37, 83 S. Ct. 1623; *Taylor*, 81 F.3d at 435. Here, under Plaintiff's theory, he would be in no better position than the plaintiff in *Ker* with respect to probable cause. Moreover, Plaintiff denied that his son ever brought items to his home, leaving the officers with only one potential owner of the cocaine on the property, Plaintiff. *But see Durham*, 690 F.3d at 190 (holding that officers are not required to exhaust every exculpatory lead before probable cause is established).

Plaintiff's clear dominion and control over the Cadillac, combined with the video footage of Plaintiff appearing to engage in a drug transaction in front of a known drug house, led the officers to reasonably conclude that Plaintiff knew about the cocaine in the car. *See also Shorter*, 328 F.3d at 172 (holding that contraband

found at a defendant's residence "permits an inference of constructive possession," even when some of the contraband was "not in plain view."). Under the totality of the circumstances, the facts known to the officers were clearly sufficient to warrant a reasonable investigator to find a substantial probability that Plaintiff possessed—outright, jointly, or constructively—the cocaine in the Cadillac. It follows that his arrest was adequately supported by probable cause, and the district court's holding should be affirmed.

Plaintiff's argument that the district court misapplied precedent in reaching its decision in favor of Defendants misrepresents the limited purpose for which the cases on constructive possession were used by the district court. *See,* JA334–338. Specifically, *United States v. Myers*, 986 F.3d 453 (4th Cir. 2021), was cited not as a direct parallel to this case, but for the propositions discussed in *Ker* and *Taylor*, that multiple individuals' access to illegal drugs may provide "probable cause to arrest all individuals present." JA340. Plaintiff was the only person with access to the Cadillac at the time of the search and his arrest.

II. DEFENDANTS DID NOT OMIT MATERIAL EXCULPATORY FACTS RELATED TO ESTABLISHING PROBABLE CAUSE TO ARREST PLAINTIFF

An indictment by a properly constituted grand jury conclusively determines the existence of probable cause. *Gerstein*, 420 U.S. at 117 n. 19, 95 S. Ct. 854. An officer may be liable to an accused only if he omitted material exculpatory evidence

or deliberately supplied false or misleading information to the prosecutor and grand jury to secure the indictment. *Massey*, 759 F.3d at 356–57. Only false statements or omissions that are "material," meaning the statements are "necessary to the finding of probable cause" violate an accused's constitutional rights. *Id.* at 357 (quoting *Franks v. Delaware*, 438 U.S. 154, 156, 98 S. Ct. 2764, 57 L. Ed. 2d 667 (1978)) (internal citation and quotation omitted).

The statements are "material" if the evidence presented without the false statements and with the omitted information would not establish probable cause. *Id.* Still, false statements alone do not establish a violation of the plaintiff's constitutional rights. *Id.* "[T]he false statements must have been made 'deliberately or with reckless disregard for the truth.'" *Id.* (quoting *Miller v. Prince George's Cty., Md.*, 475 F.3d 621, 627 (4th Cir. 2007)). For false statements, reckless disregard can be established by showing, "when viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported" to the magistrate or grand jury. *Miller*, 475 F.3d at 627 (internal citation and quotation omitted). For omissions, the plaintiff must show that the police officer failed to inform the magistrate or grand jury of facts he knew would negate probable cause. *Id.* Negligence or innocent mistakes "[do] not provide a basis for a constitutional violation." *Id.*

Individuals are also protected from deprivations of liberty as a result of the fabrication of evidence by an officer. *Jean v. Collins*, 221 F.3d 656, 663 (4th Cir. 2000). A claim for fabrication of evidence must be based on intentional misrepresentations by the officer as a result of bad faith. *Id.* Moreover, as the district court held, Plaintiff's due process claim for fabrication of evidence fails because he was not convicted of any crime. JA347.

Plaintiff's reliance upon *Miller* is misplaced. *Miller* involved an officer taking out an arrest warrant for a young, skinny white male with the same name as the plaintiff but listing the plaintiff's date of birth, height, weight, driver's license, and an expired vehicle tag as identifiers for the suspect. 475 F.3d at 625. The plaintiff, a middle-aged black male, was arrested after an officer initiated a traffic stop and found the warrant matching the plaintiff's name and personal information. *Id.* The plaintiff was arrested pursuant to the warrant. *Id.* In his subsequent civil suit, the court determined the officer did in fact make material misrepresentations in his affidavit for the arrest warrant. *Id.* at 630.

This case bears no resemblance to *Miller*. Here, no facts, exculpatory or otherwise, were withheld from the prosecutors as SPPD's entire investigative file was made available to the District Attorney's Office on March 19, 2018, JA307, and subsequently to the U.S. Attorney's Office.

Plaintiff argued that Defendants deliberately misrepresented facts regarding Plaintiff's hand-to-hand transaction with McRae because the payment to McRae was actually a payment for a car wash. Plaintiff contended that Defendants also failed to inform the magistrate and grand juries that they observed Harris, Jr., "as he surreptitiously picked up narcotics from the Cadillac and then dropped them at a known trap house." Plaintiff further claimed that officers improperly failed to include details that the Cadillac was inoperable and did not have an active registration, and that the cocaine found in the Cadillac had identical markings to the narcotics found on Harris, Jr.'s supplier. None of these purported omissions and misrepresentations were made, material on the issue of probable cause to arrest Plaintiff, or misrepresented by Defendants.

A. OFFICERS NEITHER OMITTED NOR MISREPRESENTED MATERIAL FACTS RELATED TO THEIR SURVEILLANCE

Plaintiff's alleged innocent explanation for his hand-to-hand transaction with McCrae is of no help to him. *Wesby*, 583 U.S. at 61, 138 S. Ct. 577 ("[P]robable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts."); *Taylor*, 81 F.3d at 434 (stating that seemingly innocuous activity may provide the basis for a showing of probable cause). The same goes for the officers' purported observation of Harris, Jr., placing or taking narcotics from the Cadillac and that the Cadillac was inoperable and had an expired registration. *Wesby*, 583 U.S. at 61, 138 S. Ct. 577; *see also Ker*, 374 U.S. at 28, 83 S. Ct. 1623.

First, Defendants did not know of and ignore Plaintiff's explanation for the transaction as their surveillance did not show Plaintiff's car being washed, JA140, nor were they required to consider his uncorroborated explanation. *Durham*, 690 F.3d at 190. In context, Defendants considered the transaction with the discovery of a significant amount of cocaine in Plaintiff's Cadillac, which provides a substantially different narrative than viewing the transaction in the abstract, as Plaintiff prefers. Viewing the totality of facts and circumstances known to the officers at the time of Plaintiff's arrest, as the officers did here, this fact is hardly exculpatory.

Similarly, Plaintiff's refrain that Defendants observed Harris, Jr., "as he surreptitiously picked up narcotics from the Cadillac and then dropped them at the trap house," lacks support in the record. Officer Lowery observed Harris, Jr., "placing or retrieving *something* from underneath a *tarped item*," on January 25, 2018, and approaching a "vehicle covered with a *blue tarp* on it" on January 31, 2018. JA242 (emphasis added). Plaintiff's substitution of "narcotics" in the place of "something" in Officer Lowery's observations is pure speculation. Indeed, Defendants considered and deemed this inference less probable at the time of Plaintiff's arrest given Harris, Jr.'s nearby alternative locations for storing drugs that would not put his parents' property into question. Equally misleading is Plaintiff's substitution of "Cadillac" for "vehicle" and "tarped item," as Lowery consistently distinguished between the "tarped item" under the "blue tarp" and what he later

discovered was a Cadillac under a gray car cover. JA170; *see also* Pl. Ex. 20 "Photo of Car Under Cover".

The U.S. Attorney's statement in its plea memorandum that Harris, Jr., "went over to a Cadillac covered with a gray car cover," JA222, was a logical leap, offered in support of Harris, Jr.'s guilty plea, not as a rationale for dismissing the charges against Plaintiff. The prosecutor's discretionary decision to dismiss Plaintiff's charges is not the issue before this Court. The issue is whether the officers saw Harris, Jr., appear to place items into or remove items from the Cadillac, and then purposefully failed to disclose that observation to others. The uncontroverted evidence demonstrates that they did not.

Defendants could not withhold from the grand juries or prosecutors observations that they never made. JA130, JA187. Therefore, Plaintiff's argument that Defendants "failed to inform the judicial officer of facts [they] knew would negate probable cause," fails. *Dash v. Mayweather*, 731 F.3d 303, 311 (4th Cir. 2013) ("[T]he nonmoving party must rely on more than conclusory allegations, mere speculation, [and] the building of one inference upon another.").

B. OFFICERS NEITHER OMITTED NOR MISREPRESENTED MATERIAL FACTS RELATED TO THE SEARCH OF PLAINTIFF'S PROPERTY

Perry testified that the Cadillac was inoperable and lacked a battery during the May 1, 2018, bond hearing, JA237, after which the prosecution continued. He also

never represented that the Cadillac's registration was active, only that it had a valid registration to Plaintiff. JA269. Neither fact was relevant to the probable cause determination because whether the Cadillac was operable as a motor vehicle or had an active registration had nothing to do with its role in the case. The issue was whether Plaintiff had dominion and control over it as it sat on his property, the finding of which was supported by the expired registration and Plaintiff's possession of the keys. JA52; *see, e.g.*, *United States v. Gottschalk*, 915 F.2d 1459, 1461 (10th Cir. 1990) (finding that officers executing a narcotics search warrant reasonably believed the resident had "sufficient indicia of control" over an "inoperable" vehicle parked in his driveway when the resident "had physical access to the keys left in the ignition and could easily use the trunk or other compartments in which to hide drugs"); *United States v. Brett*, 872 F.2d 1365, 1369 n. 3 (8th Cir. 1989) ("We note that every other circuit to address this issue agrees that the holder of the key, be it to the dwelling, vehicle, or motel room in question, has constructive possession of the contents therein."). Thus, the omission of these facts or the officers' alleged "fabrication" that the Cadillac's registration was active do not constitute material omissions or misrepresentations for purposes of Plaintiff's claims.

The indicia of control discussed in *Gottschalk* and *Brett*, align with the district court's finding that Plaintiff constructively possessed the cocaine found in his Cadillac. JA334–340; *see Shorter*, 328 F.3d at 172; *Jackson*, 124 F.3d 610. Consequently, had the officers observed and testified to the grand juries that they

observed Harris, Jr., placing or taking narcotics from the Cadillac, these facts would not affect the probable cause determination because Plaintiff was still in constructive possession of the Cadillac and its contents.

Lastly, the fact that Officer Perry later determined the packaging of the cocaine found in the Cadillac appeared to match the packaging of other drugs found at the residence of Harris, Jr.'s supplier was hardly exculpatory. There was nothing unique noted about the packaging. Therefore, this information was unnecessary to the evaluation of probable cause.

Individually or by the sum of their parts, the alleged omitted and misrepresented facts would not affect the findings of probable cause to arrest Plaintiff. Therefore, the district court's ruling in favor of Defendants should be affirmed.

III. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY ON PLAINTIFF'S FEDERAL MALICIOUS PROSECUTION AND FABRICATION OF EVIDENCE CLAIMS

Even in cases where the plaintiff is deprived "of an actual constitutional right," police officers "generally are granted a qualified immunity and are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Robles v. Prince George's County*, 302 F.3d 262, 270 (4th Cir. 2002). In *Saucier v. Katz*, 533 U.S. 194, 195, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001),

the Supreme Court laid out a two-step process for resolving qualified immunity claims of government officials. First, a court must decide whether the facts that the plaintiff alleged or shown make out a violation of a constitutional right. *Id.* at 201. Second, a court must decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Id.* Courts may exercise discretion in deciding which of the two *Saucier* prongs "should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). Notably, it is the plaintiff's burden to overcome the defendant's presumptive entitlement to qualified immunity. *Crawford-El v. Britton*, 523 U.S. 574, 589, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998) ("A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.").

For Plaintiff to meet that burden here, he would have to show that *every* reasonable police officer would have foregone seeking criminal charges against him. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) ("A government official's conduct violates clearly established rights when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would [have understood] that what he is doing violates that right.'"). Plaintiff cannot meet that burden, because even if this Court

determined probable cause was completely lacking, Defendants would still be entitled to qualified immunity, as there was no preexisting "clearly established" case law prohibiting officers from arresting an individual under these circumstances. Indeed, the cases cited herein show the opposite.

After a lengthy investigation into a widespread drug operation and a fruitful search of Plaintiff's residence, Perry and Marsh arrested Plaintiff. As discussed above, Plaintiff's arrest was based on surveillance showing suspicious activity, his own words, and the findings and attendant facts of the search. There is no evidence that the officers' conduct violated Plaintiff's Fourth or Fourteenth Amendment Rights. Plaintiff had no clearly established right *not* to be charged under these facts. Thus, Defendants are entitled to qualified immunity as a matter of law.

IV. DEFENDANTS ARE ENTITLED TO PUBLIC OFFICIAL IMMUNITY ON PLAINTIFF'S STATE LAW MALICIOUS PROSECUTION CLAIM

This Court may affirm the district court's holding on Plaintiff's state law malicious prosecution claim without reaching the merits because Defendants are entitled to public official immunity and Plaintiff failed to raise any argument rebutting their presumptive entitlement. "[T]he argument . . . must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8). Issues not raised in the appellant's opening brief are waived on appeal. *Snyder v. Phelps*,

580 F.3d 206, 217 (4th Cir. 2009) (holding further that issues on appeal may not be raised by an *amicus* brief); *Hunt v. Nuth*, 57 F.3d 1327, 1338 (4th Cir. 1995) (holding that issues on appeal may not be raised for the first time in a reply brief).

Plaintiff challenged whether the officers were entitled to *qualified* immunity. As to the malicious prosecution claim under North Carolina state law, Plaintiff briefly stated:

> In addition to his federal claims, Harris, Sr. also filed suit under North Carolina state law for malicious prosecution. Because the officers lacked probable cause to arrest Harris, Sr.—and omitted material facts evidencing their malice—this claim should proceed to trial, too.

Though the District Court granted summary judgment on the merits of Plaintiff's state law malicious prosecution claim, it noted that "a reasonable officer would not have understood that arresting Plaintiff upon finding narcotics on his property violated a clearly established constitutional right." JA345, n. 7 (holding that the court need not reach the issues of qualified or public official immunity, definitively, based on the finding in Defendants' favor on the merits); *Cooper v. Sheehan*, 735 F.3d 153, 160 (4th Cir. 2013) ("An officer acts with malice [to overcome a claim of public official immunity] when he 'does that which a man of reasonable intelligence would know to be contrary to his duty.' i.e., when he violates a clearly established right.") (quoting *Bailey v. Kennedy*, 349 F.3d 731, 742 (4th Cir. 2003)).

While the analysis of public official immunity is "functionally identical" to that of the officers' entitlement to qualified immunity under a § 1983 claim, *id.*

Fed. R. App. P. 28(a)(8) still requires that the appellant raise the issue to preserve its consideration on appeal. "[A] question of immunity is separate from the merits of the underlying action." *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (finding that factual overlap between the analysis of the merits of a claim and a defendant's absolute immunity does not inextricably intertwine the issues as to make the Court's decision on the merits dispositive on immunity). The Court's narrow holding in *Johnson v. Jones*, 515 U.S. 304, 319–20, 115 S. Ct. 2151, 132 L. Ed. 2d (1995), does not change the analysis here because in *Johnson*, the district court's denial of summary judgment raised only a question of "evidence sufficiency". *Mitchell*, 472 U.S. at 529 n. 10, 105 S. Ct. 2806.

Here, Plaintiff challenged the District Court's finding that the officers are entitled to qualified immunity on his federal claims. [Doc. 20, pp. 48–50]. He did not challenge the parallel holding that the officers are entitled to public official immunity on his state law claim. *Id.* Because the lower court's finding that the officers are entitled to public official immunity on Plaintiff's malicious prosecution claim under state law remains uncontested, this Court may uphold the dismissal of this claim based on public official immunity without reaching the merits.

Substantively, public official immunity operates to bar Plaintiff's state law claim against Perry, Lowery, and Marsh. Under the doctrine of public official immunity, "police officers enjoy absolute immunity from personal liability for their discretionary acts done without corruption or malice." *Schlossberg v. Goins*, 141

N.C. App. 436, 445, 540 S.E.2d 49, 56 (2000). The burden of proof on the issue of public official immunity rests with Plaintiff. *See, e.g.*, *McCarn v. Beach*, 128 N.C. App. 435, 437, 496 S.E.2d 402, 404 (1998) (holding a plaintiff seeking to defeat an officer's motion to dismiss on grounds of public official immunity "must make a prima facie showing that the officer's conduct is malicious, corrupt, or outside the scope of his official authority."). Public officials are presumed to discharge their duties in good faith. *Strickland v. Hendrick*, 194 N.C. App. 1, 10, 669 S.E.2d 61, 68 (2008). "This presumption places a heavy burden on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence." *Id.*

Plaintiff pled the malice exception to the public official immunity doctrine but can present no competent evidence to support that exception. An act is malicious when it is "(1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." *Brown v. Town of Chapel Hill*, 233 N.C. App. 257, 264, 756 S.E.2d 749, 755 (2014). To survive an officer's motion for summary judgment on public official immunity and prove the officer's individual liability, the plaintiff must produce "actual evidence demonstrating the officer acted corruptly or with malice." *Schlossberg*, 141 N.C. App. at 446, 540 S.E.2d at 56.

Plaintiff alleged that Lowery, Marsh, and Perry acted with malice when they arrested him "despite knowing that probable cause did not exist," but the evidence clearly shows that his arrest was supported by probable cause. Moreover, there is no

indication that Defendants omitted material and exculpatory evidence before the magistrate, grand jury, or prosecutors, or that they made material misrepresentations or fabricated evidence in those proceedings. The allegation simply lacks factual support. Since there was probable cause to arrest Plaintiff and there is no other evidence tending to show malice, Plaintiff has failed to overcome his burden of showing Defendants are not entitled to public official immunity. Therefore, this Court should uphold the lower court's finding in favor of Defendants.

V. PLAINTIFF WAIVED APPEAL OF HIS *MONELL* AND FAILURE TO INTERVENE CLAIMS

The District Court granted summary judgment in favor of the officers on Plaintiff's failure to intervene claim under 42 U.S.C. § 1983. JA350–351. The District Court further held that Chief of Police Robert Tamme and the Town of Southern Pines were entitled to judgment as a matter of law on Plaintiff's failure to train or supervise and *Monell* liability claims and granted summary judgment in favor of Tamme and the Town of Southern Pines. JA356. Plaintiff failed to advance any argument that the District Court erred in its holdings on either issue. (Doc. 20). Accordingly, the Court should affirm the judgment of the District Court. *Snyder*, 580 F.3d at 217.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court affirm the district court's grant of summary judgment.

STATEMENT REGARDING ORAL ARGUMENT

Defendants respectfully request oral argument.

Dated: December 13, 2023.

SUBMITTED BY:

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Respectfully submitted on this 13th December, 2023

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