APPENDIX

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[ENTERED: May 7, 2018]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1166

EDWARD MICHAEL NERO;
GARRETT EDWARD MILLER,

Plaintiffs – Appellees,

v.

MARILYN J. MOSBY,

Defendant – Appellant,

and

MAJOR SAMUEL COGEN,

Defendant.

No. 17-1168

BRIAN SCOTT RICE,

Plaintiff – Appellee,

v.

MARILYN J. MOSBY,

Defendant – Appellant,

and

MAJOR SAMUEL COGEN,

Defendant.

No. 17-1169

ALICIA WHITE; WILLIAM PORTER,

Plaintiffs – Appellees,

v.

MARILYN J. MOSBY,

Defendant – Appellant,

and

MAJOR SAMUEL COGEN; STATE OF MARYLAND,

Defendants.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Marvin J. Garbis, Senior District Judge. (1:16-cv-01288-MJG; 1:16-cv-01304-MJG; 1:16- cv-02663-MJG)

Argued: December 6, 2017 Decided: May 7, 2018

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

Reversed by published opinion. Chief Judge Gregory wrote the opinion, in which Judge Wilkinson and Judge Harris joined. Judge Wilkinson wrote a concurring opinion.

ARGUED: Karl Aram Pothier, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellant. Andrew James Toland, III, TOLAND LAW, LLC, Sparks, Maryland; Brandy Ann Peeples, LAW OFFICE OF BRANDY A. PEEPLES, Frederick, Maryland, for Appellees. **ON BRIEF:** Brian E. Frosh, Attorney General, Michael O. Doyle, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellant. Joseph T. Mallon, Jr., MALLON & MCCOOL, LLC, Baltimore, Maryland, for Appellees Edward Michael Nero and Garrett Edward Miller. David Ellin, LAW OFFICE OF DAVID ELLIN PC, Reisterstown, Maryland, for Appellee Brian Scott Rice. Michael E. Glass, THE MICHAEL GLASS LAW FIRM, Baltimore, Maryland, for Appellees Alicia White and William Porter.

GREGORY, Chief Judge:

Freddie Gray, Jr., suffered fatal injuries while handcuffed and shackled in the custody of the Baltimore City Police Department. The Baltimore State's Attorney's Office, led by State's Attorney Marilyn Mosby, conducted an investigation into Gray's death. After the State Medical Examiner ruled Gray's death a homicide, Major Samuel Cogen of the Baltimore City Sheriff's Office criminally charged six of the police officers involved in Gray's arrest and detention. The same day, State's Attorney Mosby

announced the charges and read the supporting probable-cause statement to the public at a press conference. A grand jury subsequently indicted the officers on substantially similar counts, but ultimately, none was convicted.

Five of the charged officers—Officer Edward Michael Nero, Officer Garrett Edward Miller, Lieutenant Brian Scott Rice, Officer William Porter, and Sergeant Alicia White ("Officers")[1]—now seek to make State's Attorney Mosby stand trial for malicious prosecution, defamation, and false light invasion of privacy. They claim that her role in independently investigating their conduct strips her of absolute prosecutorial immunity and that their bare allegations of malice or gross negligence overcome Maryland's statutory immunity protections. We resoundingly reject the invitation to cast aside decades of Supreme Court and circuit precedent to narrow the immunity prosecutors enjoy. And we find no justification for denying Mosby the protection from suit that the Maryland legislature has granted her.

I.

A.

Because this appeal comes to us at the motion-to-dismiss stage, we recount the facts as alleged by the Officers and must accept them as true for purposes of this appeal. *See Jackson v. Lightsey*, 775 F.3d 170, 173 (4th Cir. 2014).

The morning of April 12, 2015, Lieutenant Rice encountered Freddie Gray, Jr., and another person

[1] The sixth officer charged, Officer Caesar Goodson, Jr., is not a party to this case.

walking along North Avenue in Baltimore City. After making eye contact with Rice, Gray and his companion ran. Rice pursued them and called for backup. Officers Miller and Nero responded; Miller chased Gray, and Nero chased Gray's companion. While pursuing Gray, Miller yelled that he had a taser and instructed Gray to get on the ground. Gray voluntarily surrendered with his hands up. Miller brought him to the ground and handcuffed him in a prone position. When Miller searched Gray, he found a knife and informed Gray that he was under arrest.

A police van arrived to transport Gray to the police station. Nero, who had failed to apprehend Gray's companion, and another officer placed Gray inside. Because a crowd of citizens was forming, the van and the officers—including Rice, Miller, Nero, and Officer Porter, who had arrived on the scene—reconvened one block south to complete the paperwork for Gray's arrest. At this second stop, Rice and Miller removed Gray from the van, replaced his handcuffs with flex cuffs, shackled his legs, and placed him back in the van. The van departed, and the officers returned to their patrol duties.

Shortly thereafter, Porter received a call from the van driver requesting assistance at another location several blocks away. Porter met the van at this third location, assisted the driver with opening the van's rear doors, and observed Gray lying prone on the floor of the van. Gray asked for medical assistance. Porter informed the driver that Gray should be taken to the hospital, and then he left.

Meanwhile, Miller and Nero returned to North Avenue, where they arrested another person and called for a police van and additional units. The van

carrying Gray responded to this fourth location, as did Porter and Sergeant White, who had already "received supervisor complaints" about Gray's arrest. J.A. 169. The second arrestee was placed in the van. Gray again communicated to Porter that he wanted medical assistance. White separately attempted to speak with Gray, but Gray did not respond. Porter and White returned to their vehicles and followed the van to the Western District police station.

At the police station, Gray was found unconscious in the back of the van. An officer rendered emergency assistance, and Porter called a medic. White confirmed that a medic was en route. Gray was taken to the University of Maryland Shock Trauma Unit, where he died due to a neck injury on April 19, 2015. The State Medical Examiner ruled Gray's death a homicide.

On May 1, 2015, Major Cogen executed an application for Statement of Charges for each of the five Officers, plus the driver of the van. Each application contained the same affidavit, sworn by Major Cogen, reciting the facts supporting probable cause. The affidavit explained that Rice, Miller, and Nero illegally arrested Gray without probable cause because the knife found on him was legal: "The blade of the knife was folded into the handle. The knife was not a switchblade knife and is lawful under Maryland law." J.A. 35. The affidavit further stated that the officers repeatedly failed to seatbelt Gray in the back of the van, contrary to a Baltimore City Police Department General Order. It noted that Porter observed Gray on the floor of the van, but "[d]espite Mr. Gray's seriously deteriorating medical condition, no medical assistance was rendered to or summonsed

for Mr. Gray at that time." J.A. 37. And, the affidavit asserted, "White, who was responsible for investigating two citizen complaints pertaining to Mr. Gray's illegal arrest, spoke to the back of Mr. Gray's head. When he did not respond, she did nothing further despite the fact that she was advised that he needed a medic. She made no effort to look, assess or determine his condition." J.A. 37.

A Maryland district court commissioner approved the applications and issued warrants for the Officers' arrests. Nero and Miller were each charged with two counts of assault in the second degree, two counts of misconduct in office, and false imprisonment. Rice was charged with manslaughter, two counts of assault in the second degree, two counts of misconduct in office, and false imprisonment. Porter and White were each charged with manslaughter, assault in the second degree, and misconduct in office.

Later that day, State's Attorney Mosby held a press conference to announce the charges and call for an end to the riots that had erupted in Baltimore following Gray's death. She told the public, "The findings of our comprehensive, thorough and independent investigation, coupled with the medical examiner's determination that Mr. Gray's death was a homicide . . . has led us to believe that we have probable cause to file criminal charges." J.A. 29. She then read the full statement of probable cause verbatim.

During the press conference, Mosby emphasized that she and her office independently investigated Gray's death:

> It is my job to examine and investigate the evidence of each case and apply those facts to the elements of a crime, in order to make a determination as to whether individuals should be prosecuted. . . . [I]t is precisely what I did in the case of Freddie Gray.
>
> Once alerted about this incident on April 13, investigators from my police integrity unit were deployed to investigate the circumstances surrounding Mr. Gray's apprehension. . . . [M]y team worked around the clock; 12 and 14 hour days to canvas and interview dozens of witnesses; view numerous hours of video footage; repeatedly reviewed and listened to hours of police video tape statements; surveyed the route, reviewed voluminous medical records; and we leveraged the information made available by the police department, the community and family of Mr. Gray.

J.A. 29. Mosby concluded her speech by calling for peace in Baltimore as she moved forward with the charges:

> To the people of Baltimore and the demonstrators across America: I heard your call for 'No justice, no peace.' Your peace is sincerely needed as I work to deliver justice on behalf of this young man. . . .
>
> [T]o the youth of the city[,] I will seek justice on your behalf. This is a moment.

> This is your moment. Let's insure we have peaceful and productive rallies that will develop structural and systemic changes for generations to come. You're at the forefront of this cause and as young people, our time is now.

J.A. 32–33.

On May 21, 2015, a grand jury indicted all six officers on charges substantially similar to those listed in the Statements of Charges. Porter was tried before a jury, and after the jury could not reach a unanimous verdict, the judge declared a mistrial. Nero and Rice underwent bench trials, and the judge ultimately found them not guilty on all counts. Thereafter, Mosby dismissed all outstanding charges against Miller, White, and Porter.

B.

While the criminal charges against all of the Officers were still pending, the Officers sued State's Attorney Mosby. The Officers claimed that she violated their rights by bringing charges without probable cause and defamed the Officers by making false accusations against them at the May 1, 2015 press conference.[2] The Officers filed three separate suits—one brought by Nero and Miller in the district court; one brought by Rice, also in the district court; and one brought by Porter and White in state court but removed to the district court. The district court consolidated the three cases. The Officers alleged, in

[2] The Officers also sued Major Cogen and the State of Maryland, but because neither is a party to this appeal, we need not address the claims against them here.

relevant part, a 28 U.S.C. § 1983 claim for malicious prosecution under the Fourth Amendment, a claim for malicious prosecution under Article 26 of the Maryland Declaration of Rights, and common-law claims for malicious prosecution, defamation, and false light invasion of privacy.[3]

Mosby moved to dismiss the Officers' claims, asserting various immunities. She asserted absolute prosecutorial immunity, or alternatively qualified immunity, for the § 1983 malicious-prosecution claim; absolute prosecutorial immunity under Maryland common law and statutory immunity under the Maryland Tort Claims Act (MTCA) for the state malicious-prosecution claims; and MTCA immunity and common-law public-official immunity for the defamation and false-light claims. Mosby further argued that the Officers failed to state claims on which relief could be granted.

After a hearing, the district court allowed the three malicious-prosecution claims, the defamation claim, and the false-light claim to proceed. *Nero v. Mosby*, 233 F. Supp. 3d 463, 489 (D. Md. 2017). The court held that, although Mosby was entitled to absolute immunity for her conduct before the grand jury, she was not entitled to absolute immunity for any of her actions prior to convening the grand jury. *Id.* at 483–86. The court further concluded that the

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[3] The complaints also alleged claims for unreasonable seizure under the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights, false arrest, false imprisonment, abuse of process, and civil conspiracy; however, the district court dismissed these counts for failure to state a claim, and the Officers do not challenge that decision on appeal.

Officers had pled sufficient facts to overcome Mosby's qualified- immunity and MTCA-immunity defenses to the malicious-prosecution claims at the motion-to-dismiss stage. *Id.* at 486–88. And the court determined that Mosby was not entitled to any conditional privileges for the defamation and false-light claims. *Id.* at 478–80. The court did not expressly address Mosby's immunity defenses to these latter two claims.

Mosby timely appealed. She challenges the district court's denial of immunity for the § 1983 malicious-prosecution claim, the denial of immunity for the state malicious- prosecution claims, and the failure to grant immunity for the defamation and false-light claims. We address each challenge in turn.

II.

We begin with the Officers' § 1983 malicious-prosecution claim and State's Attorney Mosby's assertion of absolute prosecutorial immunity. We have jurisdiction to review the district court's denial of absolute immunity for this claim pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. *See Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982); *Gray-Hopkins v. Prince George's County*, 309 F.3d 224, 229 (4th Cir. 2002). We review denials of absolute immunity de novo. *See Goldstein v. Moatz*, 364 F.3d 205, 211 (4th Cir. 2004).

A.

Absolute immunity protects "the vigorous and fearless performance of the prosecutor's duty" that is so essential to a fair, impartial criminal justice system. *Imbler v. Pachtman*, 424 U.S. 409, 427–28

(1976). As representatives of the people, prosecutors have a responsibility to enforce the laws evenhandedly and to exercise independent judgment in seeking justice. *See id.* at 423–24. "The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Id.* at 424–25. No matter how conscientious a prosecutor may be, "a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." *Id.* at 425. Without immunity from suit, this threat of retaliatory litigation would predispose prosecutors to bring charges based not on merit but on the social or political capital of prospective defendants. *See id.* at 438 (White, J., concurring) ("[T]he fear of being harassed by a vexatious suit, for acting according to their consciences would always be greater where powerful men are involved." (internal quotation marks omitted)).

The protection that absolute immunity affords "is not grounded in any special 'esteem for those who perform [prosecutorial] functions, and certainly not from a desire to shield abuses of office.'" *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)). Rather, it stems from courts' recognition that "any lesser degree of immunity could impair the judicial process itself." *Id.* (quoting *Malley*, 475 U.S. at 342).

Because absolute immunity safeguards the process, not the person, it extends only to actions "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430–31. All

other actions are entitled only to qualified immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). To determine whether a particular act is "intimately associated with the judicial phase," *Imbler*, 424 U.S. at 430, we employ a functional approach. We look to "the nature of the function performed," without regard to "the identity of the actor who performed it," "the harm that the conduct may have caused," or even "the question whether it was lawful." *Buckley*, 509 U.S. at 269, 271 (internal quotation marks and citation omitted). The official claiming absolute immunity "bears the burden of showing that such immunity is justified for [each] function in question." *Burns v. Reed*, 500 U.S. 478, 486 (1991).

In applying this functional approach, the Supreme Court has distinguished between advocative functions and investigative or administrative functions, holding that the former enjoy absolute immunity but the latter do not. *See Kalina*, 522 U.S. at 125–26. A prosecutor acts as an advocate when she professionally evaluates evidence assembled by the police, *Buckley*, 509 U.S. at 273, decides to seek an arrest warrant, *Kalina*, 522 U.S. at 130, prepares and files charging documents, *id.*, participates in a probable cause hearing, *Burns*, 500 U.S. at 492, and presents evidence at trial, *Imbler*, 424 U.S. at 431. In contrast, a prosecutor does not act as an advocate, but rather in an investigative or administrative capacity, when she gives legal advice to police during an investigation, *Burns*, 500 U.S. at 493, investigates a case before a probable cause determination, *Buckley*, 509 U.S. at 274, and personally attests to the truth of averments in a statement of probable cause, *Kalina*, 522 U.S. at 129.

B.

Mosby's alleged wrongs fall squarely under the umbrella of absolute immunity. Mosby correctly argued that the specific conduct the Officers challenge was within her role as an advocate. Therefore, the district court should have dismissed the § 1983 malicious-prosecution claim.

1.

The gravamen of the Officers' complaints is that Mosby and her office conducted an investigation into Gray's death, and despite finding no evidence of criminal wrongdoing, Mosby either instructed Cogen to file false charges or erroneously advised him that probable cause supported the charges. The Officers contend that Mosby brought charges against them "for the purpose of stopping the riots rather than prosecuting charges supported by probable cause." J.A. 183.

The Officers also allege that Mosby misrepresented facts in the applications for Statement of Charges that Cogen executed and filed. They claim that Mosby included false information—e.g., that the knife found on Gray was legal, that the Officers' failure to seatbelt Gray was a crime, and that the Officers were aware Gray was in medical distress prior to arriving at the police station. And they claim that she omitted key facts—e.g., that the second arrestee placed in the police van reported Gray was conscious and banging his head against the wall, that another officer observed Gray was not in medical distress, and that the medics who examined Gray at the police station reported his neck was normal.

At bottom, the Officers take issue with Mosby's decision to prosecute them and her role in preparing the charging documents.

2.

These claims are barred by settled Supreme Court and circuit precedent. In *Kalina*, the Supreme Court held that a prosecutor's "selection of the particular facts to include in the certification" of probable cause, "her drafting of the certification, her determination that the evidence was sufficiently strong to justify a probable-cause finding, her decision to file charges, and her presentation of the information" to the court are all entitled to absolute immunity. 522 U.S. at 130. And, in *Springmen*, we held that a Maryland Assistant State's Attorney enjoyed absolute immunity for reviewing an application for Statement of Charges prepared by a police officer and for advising the officer that the facts were sufficiently strong to proceed with filing the application. *Springmen v. Williams*, 122 F.3d 211, 212 (4th Cir. 1997).

We see no material difference between the conduct protected in *Kalina* and *Springmen* and the acts the Officers allege here. Mosby's assessment of the evidence— the knife, the failure to seatbelt Gray, information regarding what the Officers knew about Gray's medical condition before finding him unconscious—and her conclusion that it supported probable cause mirror the prosecutor's "determination" in *Kalina* "that the evidence was sufficiently strong to justify a probable-cause finding." *See* 522 U.S. at 130. Mosby's alleged instruction to Cogen to file charges against the Officers is tantamount to a "decision to file charges"

under *Kalina*. *See id.* And that decision is absolutely immune regardless of its motivation. *See id.*; *Buckley*, 509 U.S. at 271. Mosby's advice to Cogen that there was probable cause to charge the Officers is indistinguishable from that in *Springmen*, where the Assistant State's Attorney advised a police officer that the facts in an application for Statement of Charges were sufficient to warrant filing. *See* 122 F.3d at 212. And, assuming Mosby helped write the application here, both her characterization of the facts and her decision to provide some facts while omitting others fall within *Kalina*'s "drafting of the certification" of probable cause and "selection of the particular facts to include." *See* 522 U.S. at 130.

We reject the argument, as we did in *Springmen*, that providing legal advice to police is never entitled to absolute immunity. *See* 122 F.3d at 213–14. To be sure, the Supreme Court held in *Burns* that "advising police in the *investigative phase* of a criminal case" is not "so intimately associated with the judicial phase of the criminal process that it qualifies for absolute immunity." 500 U.S. at 493 (emphasis added) (internal quotation marks and citation omitted). But the Court has not retreated from the principle that "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings"— including "the professional evaluation of the evidence assembled by the police"—are absolutely immune. *Buckley*, 509 U.S. at 273. Where, as here, plaintiffs allege that a prosecutor initiated charges against them by informing a police officer that the evidence gathered amounted to probable cause and directing the officer to file charges, the prosecutor is entitled to absolute immunity. *Springmen*, 122 F.3d at 213–14.

We also reject the Officers' argument that Mosby's involvement in the investigation of Gray's death strips her of absolute immunity. Certainly, prosecutors enjoy only qualified immunity for their actions before securing probable cause for an arrest. *Buckley*, 509 U.S. at 274. And Mosby apparently began investigating before she had probable cause. *See* J.A. 29 ("Once alerted about this incident on April 13, investigators from my police integrity unit were deployed to investigate the circumstances surrounding Mr. Gray's apprehension."). But conducting an investigation is not actionable—in fact, it was Mosby's *responsibility* to investigate—and the Officers make no specific allegation that Mosby engaged in misconduct during that investigation.[4]

To the extent the Officers ask us to create a new rule that participation in an investigation deprives a prosecutor's subsequent acts of absolute immunity, we balk at the proposition. Such a rule would not only upend the functional approach that the Supreme Court has articulated and applied for decades, *see Buckley*, 509 U.S. at 269–70, but it would effectively eliminate prosecutorial immunity in police-misconduct cases. Most jurisdictions, including Baltimore, charge prosecutors with independently investigating cases of criminal

[4] The Officers claimed that the State's Attorney's Office "manipulated evidence to facilitate [the] indictments," J.A. 176, that "Mosby created false facts and omitted material facts," J.A. 179, and that she "conduct[ed] a bogus and sham investigation," J.A. 179. But, absent specific supporting facts, these conclusory allegations are "not entitled to be assumed true." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

behavior by police.[5] Per the Officers' theory, whenever a prosecutor takes on one of these cases, her actions—even those intimately tied to the judicial phase— no longer enjoy absolute immunity. This approach torpedoes the fundamental premise of absolute prosecutorial immunity: ensuring a fair, impartial criminal justice system, in which prosecutors have the independence to hold even powerful wrongdoers accountable without fear of vexatious litigation. *See Imbler*, 424 U.S. at 424–25; *id.* at 438 (White, J., concurring). And we refuse to sanction it. When determining whether a prosecutor is entitled to absolute immunity, we look at the specific act challenged, not the prosecutor's preceding acts. *See Burns*, 500 U.S. at 487 (noting that "it is important to determine the precise claim" that plaintiff made concerning defendant's conduct).

For the foregoing reasons, Mosby's absolute-immunity defense plainly defeats the Officers' § 1983 claim. Holding otherwise would require us to rewrite the doctrine of absolute prosecutorial immunity. This we will not do.

III.

Having determined that State's Attorney Mosby is entitled to absolute immunity for the Officers' § 1983 claim, we turn to the Officers' state malicious-prosecution claims, brought under the Maryland Declaration of Rights and Maryland

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[5] *See* J.A. 29; *see generally* Isaac G. Lara, Note, *Shielded from Justice: How State Attorneys General Can Provide Structural Remedies to the Criminal Prosecutions of Police Officers*, 50 Colum. J.L. & Soc. Probs. 551 (2017) (discussing models states have adopted to investigate police shootings).

common law. Mosby asserted Maryland common-law absolute prosecutorial immunity and MTCA immunity, but the district court denied both defenses. *Nero*, 233 F. Supp. 3d at 483–87. The Officers argue that we lack jurisdiction over this aspect of the district court's decision. We disagree and further conclude that Mosby's absolute-prosecutorial-immunity defense bars both state malicious-prosecution claims. Because we dispose of these claims on common-law immunity grounds, we need not reach whether Mosby is also entitled to MTCA immunity.

A.

Our jurisdiction is limited to appeals "from final decisions of the district courts." 28 U.S.C. § 1291. Although the denial of a motion to dismiss is generally not a "final" judgment, the collateral order doctrine renders such an order final for purposes of our jurisdiction in certain narrow circumstances. *See Gray-Hopkins*, 309 F.3d at 229. Specifically, we have jurisdiction over an order if "it conclusively determines the disputed question, resolves an important issue completely separate from the merits of the action, and would be effectively unreviewable on appeal from a final judgment." *Id.* (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)).

Orders denying immunity often fall within the collateral order doctrine. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (federal qualified immunity); *Nixon*, 457 U.S. at 742 (federal absolute immunity). But "[o]nly a claimed *immunity from suit*, not a mere defense to liability," satisfies the doctrine's requirements and thus can provide a basis for our jurisdiction. *Davis v. City of Greensboro*, 770 F.3d

278, 281 (4th Cir. 2014) (internal quotation marks omitted). Unlike a defense to liability, which confers only a right not to pay damages, an immunity from suit confers a right not to bear the burdens of litigation and cannot be "effectively vindicated" after litigation. *See Mitchell*, 472 U.S. at 525–27. To determine the nature and scope of an asserted state-law immunity, we look to state substantive law. *Davis*, 770 F.3d at 281.

Here, Maryland law indicates that the state's common-law absolute prosecutorial immunity confers a right to be free from litigation. In *Gill v. Ripley*, the Maryland Court of Appeals adopted the U.S. Supreme Court's rule that prosecutors enjoy absolute immunity in suits for conduct intimately related to the judicial process. 724 A.2d 88, 96 (Md. 1999). The court recognized that prosecutorial immunity "arose initially as an adjunct to the doctrine of judicial immunity," *id.* at 91, which was established "to forestall endless collateral attacks on judgments through civil actions against the judges themselves," *id.* at 91–92 (quoting *Parker v. State*, 653 A.2d 436, 443 (Md. 1995)). The court noted that absolute prosecutorial immunity was based on the same considerations, including "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 94 (quoting *Imbler*, 424 U.S. at 422–23). Accordingly, the court concluded that absolute immunity was necessary to protect prosecutors' decision making "from the harassment and intimidation associated with

litigation"—not just damages liability. *See id.* at 95 (quoting *Burns*, 500 U.S. at 494) (emphasis added).[6]

For these reasons, before *Gill* was decided, the Supreme Court had deemed absolute prosecutorial immunity a "complete protection from suit." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *accord Mitchell*, 472 U.S. at 525 ("[T]he essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action."). And the *Gill* court endorsed the Supreme Court's prosecutorial-immunity doctrine without qualification: "There is no reason to depart from [the Supreme Court's] approach with respect to prosecutorial immunity." *Gill*, 724 A.2d at 96. Thus, we see no reason to construe the nature of absolute prosecutorial immunity under Maryland common law differently than the same immunity under federal common law.

We recognize that the denial of absolute prosecutorial immunity would not be immediately appealable under Maryland's collateral order doctrine. *See Md. Bd. of Physicians v. Geier*, 154 A.3d 1211, 1228–29 (Md. 2017) (holding that denial of quasi- judicial immunity did not satisfy Maryland's collateral order doctrine); *Dawkins v. Balt. City Police Dep't*, 827 A.2d 115, 122 (Md. 2003) (stating that denial of any immunity asserted by government official other than "Governor, Lieutenant Governor,

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[6] Prior to *Gill*, Maryland courts had stated in passing that "judges have an absolute privilege from suits arising out of their judicial acts," and "[p]rosecutors in judicial hearings are afforded the same privilege." *Simms v. Constantine*, 688 A.2d 1, 7 n.2 (Md. App. 1997) (quoting *Eliason v. Funk*, 196 A.2d 887, 889–90 (Md. 1964)).

Comptroller, Treasurer, Attorney General, Speaker of the House, President of the Senate, or judges" is not appealable under Maryland's collateral order doctrine). But Maryland's collateral order doctrine does not apply in federal court. We apply federal procedural rules—here, the federal collateral order doctrine—and look to state law only to determine whether the claimed immunity is an immunity from suit, versus an immunity from liability. *Gray-Hopkins*, 309 F.3d at 231 ("In determining whether appellate jurisdiction exists[,] the parties in a federal action such as this one involving pendent state claims, are bound by federal procedural rules governing appeals, including the collateral order doctrine. We must look to substantive state law, however, in determining the nature and scope of a claimed immunity." (internal quotation marks, citations, and alterations omitted)). Given the Court of Appeals' discussion in *Gill v. Ripley* regarding absolute prosecutorial immunity, we are confident Maryland courts would hold that such immunity is an immunity from suit. *See* 724 A.2d at 94–96.

In arguing otherwise, the Officers rely on the Court of Appeals' opinion in *Dawkins*. But *Dawkins* dealt with Maryland's procedural rules—not the substantive right that absolute prosecutorial immunity confers. *See* 827 A.2d at 120–22. There, the Court of Appeals held that interlocutory orders denying "*any*" type of immunity are "not appealable under the Maryland collateral order doctrine" except in "extraordinary situations." *Id.* at 121–22 (emphasis added). Maryland's collateral order doctrine, like its federal counterpart, applies only to orders that "would be effectively unreviewable if the appeal had to await the entry of a final judgment." *Id.*

at 118 (citation omitted). Yet the *Dawkins* court rejected the federal-court rule that a claim of immunity from suit would be "effectively unreviewable" at the end of litigation. *Id.* at 118, 120 ("[T]he claimed right of immunity from trial itself does not suffice to satisfy the 'unreviewability' requirement[.]" (citation omitted)). The court expressed concern that such a rule would cause "a proliferation of appeals under the collateral order doctrine" and "be flatly inconsistent with the long-established and sound public policy against piecemeal appeals." *Id.* at 119 (citation omitted). Accordingly, the court added another requirement to the doctrine—that the challenged order present an "extraordinary situation." *See id.* at 121. While this additional procedural requirement narrowed the pool of collateral orders eligible for immediate review, it did not change the nature of the immunities available to government officials under Maryland substantive law.

The collateral order doctrine strikes a balance between courts' interest in protecting government officials entitled to immunity from burdensome litigation and the competing interest in not overburdening appellate courts with piecemeal appeals. *See Will v. Hallock*, 546 U.S. 345, 351–53 (2006); *Dawkins*, 827 A.2d at 121. The federal courts have determined that the need to resolve absolute prosecutorial immunity disputes "at the earliest possible stage of litigation" outweighs concerns about encumbering appellate courts with interlocutory appeals. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *Will*, 546 U.S. at 350–52. Maryland courts have struck a different balance, instead limiting interlocutory appeals involving immunity questions

to "extraordinary situations." *See Dawkins*, 827 A.2d at 119–21. But Maryland's policy choice—to err on the side of reducing piecemeal appeals—does not transform an immunity from suit into an immunity from liability.

Even if absolute prosecutorial immunity could be construed under Maryland law as merely an immunity from liability, and thus outside the scope of the collateral order doctrine, we would still have pendent appellate jurisdiction here. Pendent appellate jurisdiction permits appellate courts to "retain the discretion to review issues that are not otherwise subject to immediate appeal when such issues are so interconnected with immediately appealable issues that they warrant concurrent review." *Rux v. Republic of Sudan*, 461 F.3d 461, 475 (4th Cir. 2006). Two issues are sufficiently interconnected when they are "inextricably intertwined"—i.e., they involve "the same specific question," and resolution of the appealable issue necessarily resolves the other. *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 111 (4th Cir. 2013) (citation omitted).[7] The Officers' § 1983 malicious-prosecution claim is based on the same facts as their state malicious-prosecution claims, and Mosby's federal and state absolute-immunity defenses raise identical issues. As explained above, Maryland has adopted wholesale the federal doctrine of absolute prosecutorial immunity. *Gill*, 724 A.2d at 96. Thus, our resolution of Mosby's absolute- immunity defense

[7] The interconnected requirement is also met where "review of [the] jurisdictionally insufficient issue is necessary to ensure meaningful review of [the] immediately appealable issue." *Id.* (internal quotation marks and citation omitted).

to the § 1983 claim necessarily resolves her absolute-immunity defense to the corresponding state claims. *See Scott*, 733 F.3d at 111 (exercising pendent appellate jurisdiction where resolution of appealable and non-appealable orders turned on interpretation of same law).

In sum, we have jurisdiction to review the district court's denial of Mosby's claimed absolute-immunity defense to the state malicious-prosecution claims both under the federal collateral order doctrine and via our pendent appellate jurisdiction.

B.

In Part II.B, we held that Mosby is entitled to absolute prosecutorial immunity for the Officers' § 1983 malicious-prosecution claim under federal common law. Because the Officers' § 1983 malicious-prosecution claim and their state malicious-prosecution claims rest on the same facts, and absolute prosecutorial immunity is the same under federal law and Maryland law, we also hold that Mosby is entitled to absolute prosecutorial immunity for the Officers' state malicious-prosecution claims under Maryland common law.

IV.

Finally, we address the Officers' state-law defamation and false-light claims, which arise from Mosby's press-conference statements. As a defense to these claims, Mosby asserted statutory immunity under the MTCA and public-official immunity under Maryland common law. The district court declined to dismiss the press-conference torts, finding that the Officers had alleged sufficient facts to state plausible

claims for relief and that Mosby was not entitled to the fair reporting or fair comment privileges. *Nero*, 233 F. Supp. 3d at 476–80. The district court did not expressly address Mosby's immunity defenses to the defamation and false-light claims. *See id.* The Officers maintain that we do not have jurisdiction to review the district court's decision as to these state claims. We again disagree and hold that the MTCA bars the Officers from bringing suit based on Mosby's press-conference statements. Because we dispose of the press-conference torts on statutory-immunity grounds, we need not reach whether Mosby is also entitled to public-official immunity.

A.

Under the collateral order doctrine, we have jurisdiction to review the district court's order denying Mosby's motion to dismiss the defamation and false-light claims if the order denies an immunity from suit and thereby "conclusively determines" the immunity question. *See Gray-Hopkins*, 309 F.3d at 229; *see also supra* Part III.A. We first look to state substantive law to determine the nature and scope of the claimed MTCA immunity and then consider whether the district court's order in fact denied Mosby such immunity.

1.

Maryland's legislature has made clear that the MTCA confers a right to be free from suit. The MTCA provides in relevant part that "State personnel," including State's Attorneys, "are *immune from suit* in courts of the State and from liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel and is made

without malice or gross negligence." Md. Code Ann., Cts. & Jud. Proc. § 5-522(b) (emphasis added); *see* Md. Code Ann., State Gov't § 12-101(a)(8) (defining "State personnel" to include State's Attorneys). The plain language of the statute grants State's Attorneys immunity from tort lawsuits that are based on actions taken within the scope of employment and without malice or gross negligence. *See Barbre v. Pope*, 935 A.2d 699, 716 (Md. 2007) ("[F]or a State employee to be granted immunity from suit by the MTCA, he must act within the scope of his public duties and without malice or gross negligence[.]" (internal quotation marks and brackets omitted)); *Ford v. Balt. City Sheriff's Office*, 814 A.2d 127, 142 (Md. App. 2002) ("[T]he MTCA permits suit against the State for a negligent violation of the State Constitution by State personnel, but State personnel shall be immune from such suits.").

Indeed, the statute's mention of *both* immunity from suit *and* immunity from liability requires us to conclude that it confers both a right to be free from suit and a right to be free from liability. "When we interpret statutes, we must 'construe all parts to have meaning'" and "avoid interpretations that would turn some statutory terms into nothing more than surplusage." *United States v. Briley*, 770 F.3d 267, 273 (4th Cir. 2014) (quoting *PSINet, Inc. v. Chapman*, 362 F.3d 227, 232 (4th Cir. 2004)). Reading the MTCA to grant only immunity from liability would render the phrase "immune from suit" meaningless. *See Litz v. Md. Dep't of Env't*, 131 A.3d 923, 938 n.18 (Md. 2016) ("[T]he MTCA provides state employees with direct immunity from suit, whereas the LGTCA grants to local government employees only immunity from damages, not from suit."); *Bd. of Educ. of Prince*

George's Cty. v. Marks-Sloan, 50 A.3d 1137, 1155 (Md. 2012) ("In contrast to the complete immunity from suit given to State personnel under the MTCA, local government employees are granted only an immunity from damages under the LGTCA.").

To be sure, Maryland's Court of Appeals has stated that "interlocutory trial court orders rejecting defenses of . . . statutory immunity . . . are not appealable under the Maryland collateral order doctrine." *Dawkins*, 827 A.2d at 122. But, again, this restriction on the immediate appealability of a denial of MTCA immunity is a function of Maryland's collateral order doctrine, not the scope of the immunity itself. *See supra* Part III.A. The statute clearly states that MTCA immunity is an "immunity from suit." Md. Code Ann., Cts. & Jud. Proc. § 5-522(b). "When a policy is embodied in a constitutional or statutory provision entitling a party to immunity from suit (a rare form of protection), there is little room for the judiciary to gainsay its 'importance.'" *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994).

2.

Because MTCA immunity protects Maryland State's Attorneys from suit, the district court's decision to allow the Officers' defamation and false-light claims to go forward conclusively determined that Mosby was not entitled to MTCA immunity. Permitting a suit to proceed beyond the dismissal stage in spite of an immunity defense "subjects the official to the burdens of pretrial matters, and some of the rights inherent in [the] immunity defense are lost." *Jenkins v. Medford*, 119 F.3d 1156, 1159 (4th Cir. 1997) (en banc). Accordingly, we have held that a

district court's refusal to rule on an immunity- from-suit defense decided the immunity question for purposes of the collateral order doctrine. *See id.* Here, the district court denied Mosby's motion to dismiss the defamation and false-light claims but did not expressly reject the MTCA-immunity defense she asserted to those claims. *Nero*, 233 F. Supp. 3d at 476–80. Yet forcing Mosby to continue to litigate these claims necessarily deprived her of the immunity Maryland granted State's Attorneys in the MTCA. *See Marks-Sloan*, 50 A.3d at 1155 (noting that MTCA gives State personnel "complete immunity from suit"). We therefore conclude that the district court's decision denied Mosby immunity from suit and is appealable under the collateral order doctrine.

B.

Satisfied that we have jurisdiction to review the district court's ruling on the press- conference torts, we turn to the merits of Mosby's MTCA-immunity claim. The Officers allege that, at the press conference, Mosby defamed them and invaded their privacy by placing them before the public in a false light. The MTCA bars these claims if Mosby's press-conference statements were "within the scope of [her] public duties" and "made without malice or gross negligence." Md. Code Ann., Cts. & Jud. Proc. § 5-522(b). Whether the complaints allege sufficient facts to overcome Mosby's assertion of MTCA immunity is a question of law that we review de novo. *See Marks v. Dann*, 600 F. App'x 81, 84–85 (4th Cir. 2015); *Chinwuba v. Larsen*, 790 A.2d 83, 115 (Md. App. 2002) (hereinafter "*Chinwuba I*"), *aff'd in part, rev'd in part on other grounds*, 832 A.2d 193 (Md. 2003).

1.

At least two of the Officers allege, somewhat confusingly, that by holding the press conference and reading the statement of probable cause, Mosby acted both within the scope of her employment and outside it. *Compare* J.A. 185 ("At all times, Defendants Mosby and Cogen were acting . . . within the scope of their employment[.]"), *with* J.A. 188 ("Defendant Mosby went outside the scope of her employment as a State's Attorney by holding a press conference, acting in an investigative capacity, [and] reading the statement of charges to the public[.]"). We agree with the former assertion.

The MTCA's within-the-scope-of-employment requirement "is coextensive with the common law concept of 'scope of employment' under the doctrine of respondeat superior." *Larsen v. Chinwuba*, 832 A.2d 193, 200 (Md. 2003) (hereinafter "*Chinwuba II*") (quoting *Sawyer v. Humphries*, 587 A.2d 467, 470 (Md. 1991)). Per that doctrine, conduct falls within the scope of employment when it is "authorized by the employer" and "in furtherance of the employer's business." *Id.* at 200 (internal quotation marks and citation omitted). The conduct need not be "intended or consciously authorized," so long as it is "of the same general nature as that authorized" or "incidental to the conduct authorized." *Id.* at 201.

The Maryland Court of Appeals has held that the head of an executive agency acts within the scope of her employment when she shares with the public information about the agency's activities to further the agency's mandate. In *Chinwuba*, the Commissioner of the Maryland Insurance Administration, while conducting an investigation

into a Maryland health maintenance organization (HMO), allegedly disclosed to the press letters he had sent to the HMO and made statements to the press about the investigation. *Chinwuba II*, 832 A.2d at 194, 196. The HMO sued the Commissioner for defamation and false light invasion of privacy, and the Commissioner asserted MTCA immunity in defense. *Id.* The court held that the Commissioner's disclosure and statements to the press were within the scope of his employment. *Id.* at 201. It reasoned that "the head of a major agency in the executive branch of government is authorized to disclose to the public matters concerning the agency's operations." *Id.* Moreover, the "disclosures were made during the regular course of business," "related entirely to the operations of the Insurance Administration," and "incidental to the business of managing the Insurance Administration." *Id.* Had the Commissioner acted not in furtherance of the agency's business but for his own personal benefit, however, his disclosures would not have been protected. *Id.* at 202 (citing *Sawyer*, 587 A.2d at 471, and *Ennis v. Crenca*, 587 A.2d 485, 489–91 (Md. 1991)).

Applying these principles here, Mosby's press-conference statements clearly fell within the scope of her employment. As Baltimore City's State's Attorney, Mosby was elected by the people of Baltimore to lead the city's State's Attorney's Office, a key agency in Maryland's state government. *See* Md. Const., Art. 5, § 7. The State's Attorney's Office houses Baltimore's Police Integrity Unit and prosecutes crimes on behalf of the public. *See* Md. Code Ann., Crim. Pro. § 15-102. At the press conference, Mosby informed the public that her Police Integrity Unit had conducted an investigation into

Freddie Gray's death, found probable cause to believe that the Officers had committed numerous crimes, and initiated criminal prosecutions against them. Like the Insurance Commissioner's disclosures in *Chinwuba*, these statements "were made during the regular course of business" and "related entirely to the operations" of her office. *See Chinwuba II*, 832 A.2d at 201. Mosby also called for peace in Baltimore as she prosecuted the Officers. Such an appeal to the public to comply with the law was certainly "incidental," if not directly related, to her role as the chief law enforcement officer in the city. *See id.*

The Officers allege that Mosby used their arrests "for her own personal interests and political agendas" and thus acted outside the scope of her employment. Appellees' Br. 42 (internal quotation marks omitted). But their argument is entirely devoid of support. The statements they cite—"I heard your call for 'No justice, no peace,'" "your peace is sincerely needed as I work to deliver justice," and "I will seek justice on your behalf"—simply do not give rise to a reasonable inference that Mosby acted for reasons other than furthering the operations of the State's Attorney's Office. *See id.* (quoting J.A. 32–33). The people of Baltimore elected Mosby to deliver justice. *See* Md. Const., Art. 5, § 7. A young African-American man had been killed in the custody of the Baltimore City Police Department, and the city was rioting. Pursuing justice—i.e., using the legal system to reach a fair and just resolution to Gray's death—was not a political move. It was Mosby's duty. And Mosby was well within her role to tell the people of Baltimore, and the nation, that she was carrying out that duty. *Cf. Miner v. Novotny*, 498 A.2d 269, 275 (Md. 1985) ("The viability of a democratic government

requires that the channels of communication between citizens and their public officials remain open and unimpeded."). That Mosby may gain some future career advantage for doing her job well does not take her actions outside the scope of her employment.

2.

The Officers further assert that Mosby is not entitled to MTCA immunity because she made the press-conference statements with either malice or gross negligence. But the allegations in the complaints simply cannot sustain such a finding.

For MTCA purposes, malice is "conduct characterized by evil or wrongful motive, intent to injure, knowing and deliberate wrongdoing, ill-will or fraud." *Barbre*, 935 A.2d at 714 (internal quotation marks and citation omitted). To establish malice, a plaintiff must show that the government official "intentionally performed an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff." *Bord v. Baltimore County*, 104 A.3d 948, 964 (Md. App. 2014) (quoting *Town of Port Deposit v. Petetit*, 688 A.2d 54, 62 (Md. App. 1997)).

Nothing in the complaints even suggests that Mosby spoke at the press conference out of "hate" or "to deliberately and willfully injure" the Officers. *See id.* In discussing Mosby's MTCA-immunity defense to the state malicious-prosecution claims, the district court noted the same. *Nero*, 233 F. Supp. 3d at 486. The Officers do not seriously challenge that conclusion on appeal. Thus, the only question at this stage is whether Mosby was grossly negligent.

Gross negligence is "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another," *Cooper v. Rodriguez*, 118 A.3d 829, 845 (Md. 2015) (citation omitted)—"something *more* than simple negligence, and likely more akin to reckless conduct," *Barbre*, 935 A.2d at 717 (quoting *Taylor v. Harford Cty. Dep't of Soc. Servs.*, 862 A.2d 1026, 1035 (Md. 2004)). A government official commits gross negligence "only when he or she inflicts injury intentionally or is so utterly indifferent to the rights of others that he or she acts as if such rights did not exist." *Cooper*, 118 A.3d. at 846 (brackets and citation omitted). To get past Mosby's MTCA-immunity defense, the Officers must point to specific facts that raise an inference that Mosby's actions were improperly motivated. *Chinwuba I*, 790 A.2d at 115; *Barbre*, 935 A.2d at 717 ("[C]onclusory allegations of gross negligence [a]re not enough to bring the claim outside the immunity and non-liability provisions of the MTCA.").

The only statements that the Officers challenge as tortious are those Mosby read from the application for Statement of Charges. Specifically, the Officers allege that Mosby intentionally included false facts and omitted material facts in the application such that when she read it to the public at the press conference, she knowingly publicized inaccurate and defamatory information about them. Maryland courts have not directly addressed the necessary showing for gross negligence in the defamation or false-light context. But, given that gross negligence turns on "reckless disregard of the consequences" of one's actions, *see Cooper*, 118 A.3d at 845, we presume that Maryland courts would require a showing of reckless disregard for the truth or reckless disregard as to

whether the omissions rendered the statements materially misleading.

This standard is a familiar one. It echoes the first prong of the *Franks* test, which provides that a criminal defendant cannot challenge a probable-cause affidavit, such as the application for Statement of Charges, unless he shows that the affiant "knowingly and intentionally, or with reckless disregard for the truth," included "a false statement." *See Franks v. Delaware*, 438 U.S. 154, 155–56 (1978). And it mirrors the necessary showing of "actual malice" in a defamation action brought by a police officer under *New York Times Co. v. Sullivan*—"that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *See* 376 U.S. 254, 279–80 (1964) (holding that public officials must show "actual malice" to recover for defamation); *Smith v. Danielczyk*, 928 A.2d 795, 805 (Md. 2007) ("[P]olice officers, from patrol officers to chiefs, are regarded for *New York Times* purposes as public officials."). Thus, in the absence of Maryland case law, we will look to cases applying *Franks* and *New York Times* for guidance as to how Maryland's gross-negligence standard applies to the publication of an allegedly misleading application for Statement of Charges.[8]

We have said that an allegedly false statement in a probable-cause affidavit amounts to "reckless disregard" if the drafter made the statement "with a high degree of awareness of [its] probable falsity." *Miller v. Prince George's County*, 475 F.3d 621, 627

[8] The Officers in fact conceded at oral argument that if the application for Statement of Charges passes the *Franks* test, their defamation and false-light claims fail. *See* Oral Argument at 46:40–47:10.

(4th Cir. 2007) (citation omitted); *see also Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 714 (4th Cir. 1991) (en banc) ("Reckless disregard has in turn been defined as publishing with a 'high degree of awareness of [a statement's] probable falsity.'" (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964))). In other words, "when viewing all the evidence, the [drafter] must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported." *Miller*, 475 F.3d at 627 (citation omitted); *see also Reuber*, 925 F.2d at 711 ("[R]eckless disregard relates to a state of mind in which a 'defendant in fact entertained serious doubts as to the truth of his publication.'" (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968))). The Officers contend that three statements in the application for Statement of Charges were false: (1) Rice, Miller, and Nero arrested Gray without probable cause because the knife found on Gray "was not a switchblade knife and is lawful under Maryland law," J.A. 30; (2) Porter and White "observed Mr. Gray unresponsive on the floor of the wagon" but "[d]espite Mr. Gray's seriously deteriorating medical condition, no medical assistance was rendered or summoned," J.A. 31; and (3) "White who [was] responsible for investigating two citizen complaints pertaining to Mr. Gray's illegal arrest spoke to the back of Mr. Gray's head. When he did not respond, she did nothing further despite the fact that she was advised that he needed a medic. She made no effort to look or assess or determine his condition," J.A. 31. According to the Officers, the knife was in fact illegal, Porter and White "did not observe that Mr. Gray was in any distress," J.A. 179, and White called for medical assistance as soon as she learned Gray was unconscious.

But the Officers offer no facts to support their assertion that Mosby knew that any of her statements were false or seriously doubted their veracity. *See Miller*, 475 F.3d at 627; *Reuber*, 925 F.2d at 714. The Officers' mere disagreement with Mosby as to whether the knife found on Gray qualified as an illegal switchblade, or how to interpret the law, does not show that Mosby recklessly disregarded their rights. The lawfulness of the knife is a legal question—not a discrete fact that can be proven true or false. And the existence of a counterfactual to Mosby's narrative does not give rise to an inference that she "had obvious reasons to doubt the accuracy of the information" she reported. *See Miller*, 475 F.3d at 627 (citation omitted). In fact, the Officers' narrative of the events of April 12, 2015, is so similar to that described in the application for Statement of Charges that it almost confirms the accuracy of the information Mosby reported.[9] While the Officers' version of events may have provided a defense to

[9] For example, the Porter-White complaint alleges that "Porter observed Freddie Gray lying on the floor of the vehicle . . . in a prone position, with his feet at the rear area of the transport compartment"; Porter heard Gray say "help" and "inquired if Mr. Gray wanted to see a medic and/or if he wanted medical help," to which Gray "indicated that he did want to have medical assistance"; Porter "advised Officer Goodson that he would need to transport Mr. Gray to the hospital," but Gray was instead taken to North Avenue where the van picked up a second arrestee. J.A. 172–73. The Porter-White complaint also states that White "received supervisor complaints"; observed "Mr. Gray sitting in-between the seat and the floor of the back of the police wagon, with his head down, leaning over"; "attempted to speak with him"; received no response; "heard him making noises" and "saw him breathing"; "concluded that his non-responsiveness was due to Mr. Gray continuing to be uncooperative and non-compliant"; and "got back into her patrol car and left the scene." J.A. 169.

criminal liability, it is insufficient to establish that Mosby had a "high degree of awareness" that anything in the application for Statement of Charges was false. *See id.* (citation omitted); *Reuber*, 925 F.2d at 714 (citation omitted).

With regard to omissions in a probable-cause statement, we have said that a drafter acts with reckless disregard when she "fail[s] to inform the judicial officer of facts [she] knew would negate probable cause"—i.e., material facts. *Miller*, 475 F.3d at 627. Allegations of mere "negligence or innocent mistake" are insufficient. *Id.* at 627–28 (quoting *Franks*, 438 U.S. at 171). The Officers contend that Mosby omitted the following facts: (1) the second arrestee, who was placed in the police wagon with Gray, reported that Gray was conscious and banging his head against the wall "during much of the ride," J.A. 180; (2) another police officer reported that, at some point in time, he saw Gray in the back of the wagon in a "praying position" and not in medical distress, J.A. 180; and (3) the medics who treated Gray determined that his neck was "Normal" and treated him for possible drug ingestion or overdose, J.A. 180. According to the Officers, this information is material because it shows that they could not have known that Gray was in medical distress.

But these facts do not negate probable cause, let alone establish that the Officers had no knowledge of Gray's condition. Probable cause is "a probability or substantial chance of criminal activity, not an actual showing of such activity," and it is assessed based on the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 230, 243 n.13 (1983). Here, Gray was conscious and healthy (or at least in good enough

condition to run from the police) when he was arrested, and he was fatally injured and in a coma by the time he arrived at the police station. We therefore know that Gray was in medical distress at some time while in the Officers' custody. And the Officers agree that Gray in fact requested medical assistance at least twice.

With this background in mind, we do not see how the Officers' proffered facts preclude "a probability or substantial chance" the Officers knew Gray needed medical attention and failed to act. *See Gates*, 462 U.S. at 243 n.13. First, that Gray's co-passenger reported he was conscious and banging his head against the wall does not contradict the application's assertion that Gray was in medical distress. Gray could have been banging his head *and* in medical distress. Second, a police officer's opinion that Gray was not in medical distress because he observed Gray in a "praying position" at some unspecified time during the wagon ride—a ride that spanned at least four stops—also does not show that Gray was not in distress. Third, that the medics treated Gray for the wrong medical problem is likewise of no moment. While it may show that the cause of Gray's medical distress was not immediately obvious, it does not show that the fact of Gray's medical distress was not obvious.

And, importantly, Mosby was "not required to include every piece of exculpatory information" in the application for Statement of Charges. *See Evans v. Chalmers*, 703 F.3d 636, 651 (4th Cir. 2012). Drafting a probable-cause statement involves advocacy—that is precisely why it falls under the umbrella of absolute immunity. *See Kalina*, 522 U.S. at 130; *see also supra*

Part II. So long as the application includes all *material* facts, a prosecutor need not also present the defendant's defense. *See Evans*, 703 F.3d at 651. Here, because none of the omitted facts identified in the complaints is material, the Officers cannot show that Mosby acted with reckless disregard when she omitted them.

Accordingly, the Officers' allegations cannot support a finding of gross negligence. Although questions of gross negligence are typically for the factfinder to decide, *Barbre*, 935 A.2d at 717, we hold as a matter of law that nothing in the complaints gives rise to an inference that Mosby recklessly disregarded the consequences of her statements. *See E.W. by and through T.W. v. Dolgos*, 884 F.3d 172, 187 (4th Cir. 2018) (citing *Cooper*, 118 A.3d at 846); *see also Boyer v. State*, 594 A.2d 121, 132 (Md. 1991) (holding that plaintiff failed to plead sufficient facts to show that officer acted with wanton or reckless disregard for public's safety).

V.

In conclusion, none of the Officers' claims can survive the motion-to-dismiss stage. That the Officers disagree with Mosby's decision to prosecute—as most defendants do— or with the information in the application for Statement of Charges—which inherently contains defamatory information—does not entitle them to litigate their disagreement in court, and much less recover damages.

The Officers' malicious-prosecution claims epitomize the "vexatious litigation" that absolute prosecutorial immunity is designed to preclude. *See Pachaly v. City of Lynchburg*, 897 F.2d 723, 727–28

(4th Cir. 1990). Having "transform[ed] [their] resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate," *see Imbler*, 424 U.S. at 425, the Officers ask us depart from well-settled law so that they can force Mosby to defend her decision to seek justice on behalf of Freddie Gray. We find their arguments both meritless and disconcerting.

The Officers' defamation and false-light claims are equally bereft of support. The Officers cite no facts showing that Mosby spoke at the press conference with malice or gross negligence, as required by the MTCA. Their allegations, accepted as true, do not even negate that Mosby had probable cause to charge them. And the Officers' contention that Mosby acted outside the scope of her employment by telling the public that she would pursue justice borders on absurd.

Perhaps to the Officers' chagrin, they must accept that they are subject to the same laws as every other defendant who has been prosecuted and acquitted. Those laws clearly bar the type of retaliatory suits that the Officers brought here. The district court therefore erred in allowing their claims to proceed.

REVERSED

WILKINSON, Circuit Judge, concurring:

I am pleased to join Chief Judge Gregory's fine opinion. It is an eloquent defense and application of neutral principles of law, no matter what the context.

I wish only to underscore my colleague's concern about the perils of appellees' defamation claim. State's Attorney Mosby is an elected official. After the death of Freddie Gray, her community, her constituents, and her city faced a crisis of confidence. Baltimore's citizens had their faith shaken, not only in the police, but in the very ability of government to administer justice. As any of us would expect of our political leaders, Mosby responded to a crisis. And as all of us should demand from our political leaders, Mosby explained her actions to the public. At a press conference, she read from a charging document, praised investigators, and explained the basis of the prosecution. To say that an elected official exposes herself to liability by discharging her democratic duty to justify the decisions she was elected to make is to elevate tort law above our most cherished constitutional ideals.

The First Amendment requires public officials, such as the police officers who brought this suit, to make a showing of "actual malice" in an action for defamation relating to their official duties. *See New York Times v. Sullivan*, 376 U.S. 254 (1964). That much is not in question. But powerful speech interests arise not only when public officials bring defamation actions, but when public officials are *subject* to them. Just as *Sullivan* recognized the sacred right of the citizen to criticize his government free from the threat of legal damages, the First Amendment also protects the public official's ability to explain his actions to

his constituents. This free exchange between government and governed legitimates and nourishes our democratic system. For the First Amendment was founded on the belief "that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

This is not to say that a prosecutor can never face consequences for reckless public remarks. But the proper avenue for regulating prosecutorial statements is a state's ethical code governing attorneys, not private tort suits. Under Maryland's Rules of Professional Conduct, for example, a prosecutor may face discipline if he makes "extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused," or "extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding." Maryland Attorneys' Rules of Professional Conduct, Rule 19-303.8. Notably exempt from that rule, however, are those "statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose." *Id.* Mosby's comments were of precisely that ilk. And for similar reasons, her comments were privileged under state law. *See Piscatelli v. Van Smith*, 35 A.3d 1140, 1152 (Md. 2012) (privileging "opinions or comments regarding matters of legitimate public interest" such as "the occurrence or prosecution of crimes"); *Smith v. Danielczyk*, 928 A.2d 795, 816 (Md. 2007) (privileging statements "required or permitted in the performance of [a public official's] official duties").

The defamation action here not only attempts to dilute the protections of *New York Times v. Sullivan*. It would weaken the defense of absolute prosecutorial immunity set forth by the Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976). One of the dangers against which *Imbler* warned was the use of hindsight, in this case the trial verdicts, to give rise to a § 1983 action or something akin to a state malicious prosecution claim. It is plain that the "the vigorous and fearless performance of the prosecutor's duty" would be eroded along with robust public discourse. *See Imbler*, 424 U.S. at 427.

By advancing a theory of tort liability for explanations of official acts, the officers here strike at the very heart of the democratic dialogue. Courts must repel such attacks. In doing so, we honor our "profound national commitment to the principle that debate on public issues should be unlimited, robust, and wide-open" on all sides. *Sullivan*, 376 U.S. at 270.

Defamation law unbound is inimical to free expression. I thought the principle of *New York Times v. Sullivan* secure. But no. As the saying goes, the censors never sleep. Here they come again.

[ENTERED: May 7, 2018]

FILED: May 7, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1166 (L)
(1:16-cv-01288-MJG)

EDWARD MICHAEL NERO;
GARRETT EDWARD MILLER

Plaintiffs - Appellees

v.

MARILYN J. MOSBY

Defendant - Appellant

and

MAJOR SAMUEL COGEN

Defendant

No. 17-1168
(1:16-cv-01304-MJG)

BRIAN SCOTT RICE

Plaintiff - Appellee

v.

MARILYN J. MOSBY

Defendant - Appellant

and

MAJOR SAMUEL COGEN

Defendant

No. 17-1169
(1:16-cv-02663-MJG)

ALICIA WHITE; WILLIAM PORTER

Plaintiffs - Appellees

v.

MARILYN J. MOSBY

Defendant - Appellant

and

MAJOR SAMUEL COGEN; STATE OF MARYLAND

Defendants

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is reversed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

[ENTERED: January 27, 2017]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EDWARD MICHAEL NERO, et al.	*	
Plaintiffs	*	CIVIL ACTION
vs.	*	NO.
MARILYN MOSBY, et al.	*	MJG-16-1288
Defendants	*	

* * * * * * * * *

BRIAN SCOTT RICE	*	
Plaintiffs	*	CIVIL ACTION
vs.	*	NO.
MARILYN MOSBY, et al.	*	MJG-16-1304
Defendants	*	

* * * * * * * * *

ALICIA WHITE, et al.	*	
Plaintiffs	*	CIVIL ACTION
vs.	*	NO.
MARILYN MOSBY, et al.	*	MJG-16-2663
Defendants	*	

* * * * * * * * *

CORRECTED[1] MEMORANDUM AND ORDER RE: DISMISSAL MOTIONS

The Court has before it the following motions to dismiss[2] with the materials submitted relating thereto:

In MJG-16-1288:

- Defendant Samuel Cogen's Motion To Dismiss [ECF No. 12].
- Defendant Marilyn Mosby's Motion to Dismiss [ECF No. 25].

In MJG-16-1304:

- Defendant Samuel Cogen's Motion To Dismiss [ECF No. 8].
- Defendant Marilyn Mosby's Motion to Dismiss [ECF No. 24].

In MJG-16-2663:

- Defendant Samuel Cogen's Motion To Dismiss [ECF No. 11].
- Defendant Marilyn Mosby's Motion to Dismiss [ECF No. 22].

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[1] The original Memorandum and Order Re: Dismissal inadvertently referred to Officer Caesar Goodson, not a party of the case, as having had his prosecution resolved by nolle prosequi. In fact, he was found not guilty in a bench trial.

[2] Each motion was filed seeking dismissal or, in the alternative, summary judgment. By the Procedural Order issued August 26, 2016, in each case, the Court denied all summary judgment motions without prejudice as premature.

The Court has held a hearing and has had the benefit of the arguments of counsel.

I. SUMMARY INTRODUCTION[3]

At about 9:15 in the morning of April 12, 2015 ("April 12"), Baltimore City Police Officers detained Freddie Carlos Gray, Jr. ("Gray"), a 25-year-old black man, and found on him a knife that had a spring or other device for opening or closing the blade (the "Knife"). Considering possession of the Knife to be a crime,[4] the police arrested Gray, obtained a police vehicle to transport him to the police station, and placed Gray in the vehicle.

After making four stops along the way, the police vehicle arrived at the station and Gray was observed to be in need of medical care. A medical unit was called and took Gray to the University of Maryland Shock Trauma Unit where he underwent surgery. A week later, on April 19,[5] Gray died from a spinal cord injury sustained in the course of the events of the morning of April 12.

On April 21, six of the Baltimore City Police Officers who had interacted with Gray on April 12 (collectively referred to as "the Six Officers") were

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[3] This summary presents, as a background introduction, what the Court presently understands to be undisputed or not reasonably disputable. See Appendix A for a summary of the by no means undisputed "facts" as alleged by Plaintiffs.

[4] Baltimore City Code § 59-22 states, "It shall be unlawful for any person to sell, carry, or possess any knife with an automatic spring or other device for opening and/or closing the blade, commonly known as a switch-blade knife."

[5] All date references herein are to 2015 unless indicated as in 2016.

suspended with pay. They were the driver of the vehicle, Caesar Goodson ("Goodson), Edward Nero ("Nero"), Garrett Miller ("Miller"), Brian Rice ("Rice"), Alicia White ("White"), and William Porter ("Porter").

On April 27, Gray's funeral was held. After the funeral there was substantial unrest in Baltimore City including riots, declaration of a state of emergency, deployment of the National Guard, and a curfew.

On May 1, an Application for Statement of Charges ("the Application")[6] against the Six Officers was filed in the District Court of Maryland for Baltimore City. Based thereon, a state court commissioner issued warrants, and the Six Officers were arrested.

On May 1, State's Attorney Marilyn Mosby ("Mosby") held a press conference, announced that she had filed charges against the Six Officers, and read from the Statement of Charges. In addition, Mosby stated that her staff had conducted an investigation independently from the Police Department that resulted in the charges against the Six Officers,[7] that the accusations against the Six

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[6] Signed by Major Samuel Cogen of the Baltimore City Sheriff's Office.

[7] Once alerted about this incident on April 13, investigators from my police integrity unit were deployed to investigate the circumstances surrounding Mr. Gray's apprehension. Over the course of our independent investigation, in the untimely death of Mr. Gray, my team worked around the clock; 12 and 14 hour days to canvas and interview dozens of witnesses; view numerous hours of video footage; repeatedly

Officers were not an indictment of the entire police force,[8] and that the actions of the Six Officers would

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> reviewed and listened to hours of police video tape statements; surveyed the route; reviewed voluminous medical records; and we leveraged the information made available to us by the police department, the community, and the family of Mr. Gray.
>
> * * *
>
> Lastly, I'd like to thank my team for working around the clock since the day that we learned of this tragic incident. We have conducted a thorough and independent investigation of this case.

Time Staff, *Read the Transcript of Marilyn J. Mosby's Statement on Freddie Gray*, TIME (May 1, 2015), http://time.com/3843870/marilyn-mosby-transcript-freddie-gray/ [hereinafter referred to as "Transcript"] [ECF No. 23-1 in 16-1304].

> We independently verified those facts and everything we received from the police department, so it's a culmination of the independent investigation that we conducted as well as the information we received from the police department.
>
> * * *
>
> I can tell you that from day one, we independently investigated, we're not just relying solely upon what we were given by the police department, period.

¶ 81 [ECF No. 31 in 16-2663].

[8] "To the rank and file officers of the Baltimore Police Department, please know that these accusations of these six officers are not an indictment on the entire force." Transcript at 5 [ECF No. 23-1 in 16-1304].

not harm the working relationship between police and prosecutors.[9]

Mosby further called upon the public, including those who, themselves, "had experience[d] injustice at the hands of police officers" to be peaceful as the Six Officers were prosecuted.[10] Mosby also said:

> Last, but certainly not least, to the youth of the city. I will seek justice on your behalf. This is a moment. This is your moment. Let's insure we have peaceful and productive rallies that will develop structural and systemic changes for generations to come.

Transcript at 5 [ECF No. 23-1 in 16-1304].

On May 21, a Baltimore City grand jury indicted the Six Officers, charging:

- Goodson with second degree depraved heart murder, involuntary manslaughter, second-degree negligent assault, manslaughter by vehicle by means of gross negligence, manslaughter by vehicle by means of

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[9] "I can tell you that the actions of these officers will not and should not, in any way, damage the important working relationships between police and prosecutors as we continue to fight together to reduce crime in Baltimore." Transcript at 5 [ECF No. 23-1 in 16-1304].

[10] "To the people of Baltimore and the demonstrators across America: I heard your call for 'No justice, no peace.' Your peace is sincerely needed as I work to deliver justice on behalf of this young man. To those that are angry, hurt or have their own experiences of injustice at the hands of police officers I urge you to channel that energy peacefully as we prosecute this case." Transcript at 4 [ECF No. 23-1 in 16-1304].

criminal negligence, misconduct in office by failure to secure prisoner, and failure to render aid.

- Rice with involuntary manslaughter, assault in the second degree, assault in the second degree [sic], misconduct in office, and false imprisonment.
- Miller with intentional assault in the second- degree, assault in the second-degree negligent, misconduct in office, and false imprisonment.
- Nero with assault in the second degree intentional, assault in the second degree negligent, misconduct in office, and false imprisonment.
- White with manslaughter, involuntary manslaughter, second-degree assault, and misconduct in office.
- Porter with involuntary manslaughter, assault in the second degree, and misconduct in office.

Transcript at 4 [ECF No. 23-1 in 16-1304].

None of the Six Officers was convicted of any crime. Three proceeded to trial. First, Porter was tried by a judge and jury that failed to agree upon a unanimous verdict. Second, Goodson, Nero, and Rice were tried separately by Judge Williams of the Circuit Court of Baltimore City without a jury, and all three Officers were acquitted. On July 27, 2016, Mosby dismissed all charges against Miller, Porter, and White.

Five of the Six Officers[11] (collectively referred to as "Plaintiffs") have filed the instant lawsuits against Mosby and Cogen:[12]

- Nero and Miller, (MJG-16-1288)[13]
- Rice, (MJG-16-1304)[14]
- White and Porter (MJG-16-2663).[15]

By the instant motions, Mosby and Cogen seek dismissal of all claims against them pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. DISMISSAL STANDARD

A motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6)[16] tests the legal sufficiency of a complaint. A complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atl.

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[11] I.e., all but Goodson.

[12] Cogen, while not admitting any wrongdoing on the part of Mosby, contends that the Application for Statement of Charges that he signed was based on the investigation conducted by the State's Attorney's Office and the Baltimore City Police. Hence, he alleges, he cannot be held liable on any of Plaintiffs' claims.

[13] Filed on April 29, 2016, in this Court.

[14] Filed on May 2, 2016, in this Court.

[15] Filed on May 2, 2016, in the Circuit Court of Maryland for Baltimore City and, on July 26, 2016, removed to this Court.

[16] All "Rule" references herein are to the Federal Rules of Civil Procedure.

Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations omitted). When evaluating a 12(b)(6) motion to dismiss, a plaintiff's well- pleaded allegations are accepted as true and the complaint is viewed in the light most favorable to the plaintiff. However, conclusory statements or a "formulaic recitation of the elements of a cause of action" will not suffice. Id. A complaint must allege sufficient facts to "cross 'the line between possibility and plausibility of entitlement to relief.'" Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009) (quoting Twombly, 550 U.S. at 557).

Inquiry into whether a complaint states a plausible claim is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. Thus, if the well-pleaded facts contained within a complaint "do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009)).

Generally, a motion to dismiss filed under Rule 12(b)(6) cannot reach the merits of an affirmative defense. Goodman v. Praxair, Inc., 494 F.3d 458, 464 (4th Cir. 2007). However, affirmative defenses are appropriate to consider at the Rule 12(b)(6) stage "when the face of the complaint clearly reveals[17] the

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[17] In the limited circumstances where the allegations of the complaint give rise to an affirmative defense, the defense may be raised under Rule 12(b)(6), but only if it clearly appears on the face of the complaint. Richmond, Fredericksburg & Potomac R. Co. v. Forst, 4 F.3d 244, 250 (4th Cir. 1993).

existence of a meritorious affirmative defense." Occupy Columbia v. Haley, 738 F.3d 107, 116 (4th Cir. 2013) (emphasis added) (quoting Brockington v. Boykins, 637 F.3d 503, 506 (4th Cir. 2011)).

III. DISCUSSION

While the three Complaints are not absolutely identical, there is essentially commonality of the factual allegations and claims. Moreover, the Court will, if necessary, grant Plaintiffs leave to file amended complaints consistent with the instant decision. Therefore, the claims and defenses presented in all three cases shall be discussed collectively.

Plaintiffs assert the following claims:

1. Common Law Claims
    a. False Arrest & False Imprisonment[18]
    b. Malicious Prosecution[19]
    c. Abuse of Process[20]
    d. Defamation & Invasion of Privacy[21]
    e. Conspiracy[22]
2. Constitutional Claims

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[18] Counts VI and VIII in 16-2663. Counts I-II in 16-1304. Counts I-IV in 16-1288.

[19] Count XI in 16-2663.

[20] Count XII in 16-2663.

[21] Counts II and IV in 16-2663. Count V (defamation) in 16-1304. Counts IX and X (defamation) in 16-1288.

[22] Count XIII in 16-2663.

a. 42 U.S.C. § 1983 – Violation of the Fourth and Fourteenth Amendments[23]

b. Violation of Maryland Declaration of Rights, Articles 24 and 26[24]

3. Claims Against the State of Maryland[25]

Defendants assert immunity from suit on certain of Plaintiffs' claims. Mosby claims absolute prosecutorial immunity from suit. Mosby and Cogen both claim public official immunity, statutory immunity, and qualified immunity.

The Court shall address Plaintiffs' claims and Defendants' immunity assertions in turn.

A. Common Law Claims

1. False Arrest & False Imprisonment

The Court stated in the October 11, 2016 Order issued in each case:

> Absent a showing to the contrary, I shall dismiss the claims for false imprisonment and false arrest but consider claims for malicious prosecution.

[ECF No. 44 in 16-1304].

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[23] Count X in 16-2663. Count IV in 16-1304. Counts VII and VIII in 16-1288.

[24] Count IX in 16-2663. Count III in 16-1304. Counts V and VI in 16-1288.

[25] All claims asserted against individual Defendants except malicious prosecution, abuse of process, and conspiracy.

There has been no showing to the contrary.

In Maryland, when an individual is arrested pursuant to an arrest warrant, no claim for false arrest or false imprisonment lies against "either the instigator or the arresting officer where the plaintiff is not detained by the instigator." Montgomery Ward v. Wilson, 664 A.2d 916, 927 (Md. 1995). "Rather, to the extent that the instigator acts maliciously to secure the warrant for the plaintiff's arrest, the plaintiff's cause of action against the instigator is malicious prosecution." Id.

All claims of false arrest and false imprisonment are dismissed.

2. Malicious Prosecution

To establish a malicious prosecution claim,[26] a plaintiff must prove that:

1. A criminal proceeding was brought against plaintiff,
2. The case terminated in the plaintiff's favor,
3. The absence of probable cause, and
4. Malice, meaning "a primary purpose in instituting the proceeding other than that of bringing an offender to justice."

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[26] A disfavored, but potentially valid, claim. See Exxon Corp. v. Kelly, 381 A.2d 1146, 1149 (Md. 1978) (citing Siegman v. Equitable Trust Co., 297 A.2d 758, 762 (Md. 1972))("While the tort is not a favorite of the law, the cause of action remains a viable one in this State.").

Exxon Corp. v. Kelly, 381 A.2d 1146, 1149 (Md. 1978) (quoting Safeway Stores, Inc. v. Barrack, 122 A.2d 457, 460 (Md. 1956)).

There is no doubt that each Plaintiff was the subject of criminal proceedings that terminated in his/her favor.

As discussed in Appendix B, accepting as true Plaintiffs' factual allegations, they have pleaded[27] plausible claims that there was no probable cause to arrest and prosecute them.

There is no plausible claim that either Defendant had actual personal malice toward any Plaintiff. However,

> [a]s a substantive element of the tort of malicious prosecution, malice means that the defendant "was actuated by an improper motive," a purpose "other than that of bringing [the plaintiff] to justice." That kind of malice, though a separate element of the tort, may be inferred from the lack of probable cause.

DiPino v. Davis, 729 A.2d 354, 374 (Md. 1999) (quoting Montgomery Ward, 664 A.2d at 925).

Accordingly, Plaintiffs' malicious prosecution claims are not dismissed.[28]

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[27] Allegations are not evidence. The Court is not deciding whether Plaintiffs can present evidence adequate to avoid summary judgment.

[28] As discussed below, Mosby asserts absolute prosecutorial immunity for her actions as a prosecutor. Plaintiffs' malicious prosecution claims relate to her actions when functioning as an investigator and not as a prosecutor.

3. Abuse of Process

To establish an abuse of process claim, a plaintiff must prove an ulterior motive, and "a willful act in the use of process not proper in the regular conduct of the proceeding." Palmer Ford, Inc. v. Wood, 471 A.2d 297, 310-11 (Md. 1984)(quoting W. Prosser, Handbook of the Law of Torts 857 (4th ed. 1971)).

As discussed in Appendix B, Plaintiffs have alleged facts adequate to establish a plausible claim of an ulterior motive on the part of the Defendants.

However, to establish an abuse of process there must be a willful act that takes place after the process has issued. That is, "[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process." Id. (emphasis added).

"[T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." Id.; see also Berman v. Karvounis, 518 A.2d 726, 729 (Md. 1987) ("Appellants have failed to allege in what manner process was used in some abnormal fashion 'to coerce/extort money and/or property from' them.").

Plaintiffs do not allege that the process was used for other than its regular purpose, i.e., to arrest persons charged with crimes. Thus, Plaintiffs have not alleged facts adequate to present a plausible claim that the Defendants wrongfully misused the arrest warrant after it was issued by the Commissioner.

Accordingly, all abuse of process claims shall be dismissed.

4. Press Conference - Defamation and False Light

Plaintiffs assert claims against Mosby for statements she made[29] during her May 1, 2015, press conference. Plaintiffs claim that Mosby committed the torts of defamation and invasion of privacy (false light).[30]

As discussed herein, Plaintiffs' press conference-based claims for defamation and invasion of privacy (false light) are not dismissed.

a. Defamation

To establish a defamation claim, a plaintiff must prove (1) that the defendant made a defamatory statement to a third person, (2) falsity, (3) legal fault, and (4) harm. Rosenberg v. Helinski, 616 A.2d 866, 876 (Md. 1992). Moreover, when a plaintiff is, as are these Plaintiffs, a public official, a higher degree of legal fault (actual malice) must be proven.

Plaintiffs have adequately alleged that, in the press conference, Mosby made statements to third parties, i.e., the public. Some of Mosby's statements

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[29] There are no factual allegations supporting a plausible defamation or invasion of privacy (false light) against Cogen for any public statement made by him.

[30] Because "[a]n allegation of false light must meet the same legal standards as an allegation of defamation," courts often analyze the torts concurrently. Piscatelli v. Van Smith, 35 A.3d 1140, 1146-47 (Md. 2012); see also Bagwell v. Peninsula Reg'l Med. Ctr., 665 A.2d 297, 315 n.8 (Md. App. 1995).

at the press conference are at least plausibly, if not obviously, defamatory.[31]

For example, Mosby read from the Application, the statement that

> [t]he knife [found on Gray] was not a switchblade and is lawful under Maryland law. . . . Lt. Rice, Officer Miller and Officer Nero failed to establish probable cause for Mr. Gray's arrest as no crime had been committed by Mr. Gray.

Transcript at 2 [ECF No. 23-1 in 16-1304].

Mosby also read from the Application, statements that:

- Gray exhibited an "obvious and recognized need for medical assistance." Id. at 3.
- White and Porter observed "Mr. Gray unresponsive on the floor of the wagon." Id.
- "When [Gray] did not respond, [Officer White] did nothing further despite the fact that she was advised that he needed a medic." Id.
- Officer White "made no effort to look, assess or determine [Gray's] condition." Id.

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[31] A statement is defamatory if it "tends to expose a person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or associating with, that person." Rosenberg v. Helinski, 616 A.2d 866, 871 (Md. 1992); see also Ross v. Cecil Cty. Dep't of Soc. Servs., 878 F. Supp. 2d 606, 624 (D. Md. 2012).

In addition to reading from the Application, Mosby made statements that are plausibly, in context, defamatory. For example:

> To those that are angry, hurt or have their own experiences of injustice at the hands of police officers I urge you to channel that energy peacefully as we prosecute this case…
>
> To the rank and file officers of the Baltimore Police Department, please know that these accusations of these six officers are not an indictment on the entire force.
>
> . . . I can tell you that the actions of these officers will not and should not, in any way, damage the important working relationships between police and prosecutors as we continue to fight together to reduce crime in Baltimore.

Transcript at 4-5 [ECF No. 23-1 in 16-1304].

Plaintiffs, as police officers, are considered public officials who are subject to an augmented burden when asserting a defamation claim. "[A] public official [cannot] recover[] damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964). "[P]olice officers, from patrol officers to chiefs, are regarded for New York Times purposes as public officials." Smith v. Danielczyk, 928 A.2d 795, 805 (Md. 2007).

To establish actual malice for defamation purposes, a plaintiff must prove by clear and convincing evidence that a defamatory statement was a "calculated falsehood or lie 'knowingly and deliberately published.'" Capital-Gazette Newspapers, Inc. v. Stack, 445 A.2d 1038, 1044 (Md. 1982) (quoting Garrison v. State of La., 379 U.S. 64, 75, (1964)). It is not sufficient merely to prove that the statement was erroneous, derogatory or untrue, that the speaker acted out of ill will, hatred or a desire to injure the official, acted negligently, or acted without undertaking a reasonable investigation. Id.

However, malice can be proven by circumstantial evidence because a plaintiff will "rarely be successful in proving awareness of falsehood from the mouth of the defendant himself." Batson v. Shiflett, 602 A.2d 1191, 1214 (Md. 1992) (quoting Herbert v. Lando, 441 U.S. 153, 170 (1979)).

> Absent such an admission, a public figure's proof must rely solely upon circumstantial evidence, which, by it, can establish actual malice and override a defendant's claim of good faith and honest belief that his statements were true.
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> Id. (internal citations omitted).

Plaintiffs allege facts adequate to present a plausible claim that at least some of Mosby's defamatory press conference statements were made with knowledge that they were false or made with reckless disregard of whether they were false or not, that is with the requisite malice for defamation purposes. See Appendix B.

b. Invasion of Privacy (False Light)

In regard to the tort of invasion of privacy (false light), Maryland follows the Restatement (Second) of Torts' definition of "false light," which states:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if (a) the false light in which the other person was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Bagwell, 665 A.2d at 318 (citing Restatement (Second) of Torts § 652E (1977)). The tort does not require "making public any facts concerning the private life of the individual." Restatement (Second) of Torts § 652E cmt. a; see also Klipa v. Bd. of Educ. of Anne Arundel Cty., 460 A.2d 601, 607–08 (Md. App. 1983).

There is no doubt that Mosby gave publicity to the statements made in her press conference.

Plaintiffs present a plausible claim that Mosby, in her press conference statements, placed them in a false light that would be highly offensive to a reasonable person. For example, she made the statements referenced in the foregoing discussion regarding the defamation claim.

Plaintiffs have presented factual allegations adequate to present a plausible claim that Mosby knew of the falsity of her statements, or acted with reckless disregard of the truth and the false light, in which Plaintiffs would be placed. See discussion in Appendix B.

c. Mosby's Affirmative Defenses

Mosby presently seeks dismissal of Plaintiffs' claims based upon her press conference statements by virtue of

1. The alleged running of limitations, and

2. Conditional privileges.

(i) Limitations

Mosby held her press conference on May 1, 2015. Plaintiffs' defamation and invasion of privacy claims are subject to a one-year limitations period.[32] The Complaint in MJG-16-1288 was filed on April 29, 2016, within a year of the press conference. The Complaints in MJG-16-1304 and MJG-2663 were filed on May 2, 2016, a year and a day after the press conference. However, May 1, 2016, was a Sunday. Therefore, the limitations period was extended to the next business day. Md. Rule 1-203(a)(2) (2016 Repl. Vol.).

Mosby does not present a valid limitations defense.

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[32] Md. Code Ann., Cts. & Jud. Proc. § 5-105 (2013 Repl. Vol.).

(ii) Conditional Privileges

Mosby claims that her statements at the press conference were protected by conditional privileges.

"Conditional privileges 'rest upon the notion that a defendant may escape liability for an otherwise actionable defamatory statement, if publication of the utterance advances social policies of greater importance than the vindication of a plaintiff's reputational interest.'" Woodruff v. Trepel, 725 A.2d 612, 622 (Md. 1999)(quoting Marchesi v. Franchino, 387 A.2d 1129, 1131 (Md. 1978)). A conditional privilege, unlike an absolute one, can be lost if it is abused or if the defendant acted with malice. See Piscatelli, 35 A.3d at 1148. The same conditional privileges apply to both defamation and invasion of privacy (false light). See Restatement (Second) Torts § 652G cmt. a ("Under any circumstances that would give rise to a conditional privilege for the publication of defamation, there is likewise a conditional privilege for the invasion of privacy."); Steer v. Lexleon, Inc., 472 A.2d 1021, 1023-24 (Md. App. 1984) (applying privilege to defamation and false light claims).

There are two conditional privileges that could apply to Mosby's statements:

- The fair reporting privilege[33] and its self-reporting exception in regard to the statements Mosby read from the Application, and
- The fair comment privilege pertinent to Mosby's other statements.

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[33] Although Mosby did not raise the fair reporting privilege in her responses, Plaintiffs addressed the fair reporting privilege in their briefs, and the Court finds it appropriate to address it.

(a) Fair Reporting Privilege

The fair reporting privilege protects reports and re- statements of legal and official proceedings, which themselves are protected by absolute privilege. Woodruff, 725 A.2d at 617 ("It is well-settled in Maryland that statements uttered in the course of a trial or contained in pleadings, affidavits, or other documents related to a case fall within an absolute privilege . . ."). The fair reporting privilege applies "even if the story contains defamatory material, as long as the account is fair and substantially accurate," Chesapeake Pub. Corp. v. Williams, 661 A.2d 1169, 1174 (Md. 1995), meaning the report must be "substantially correct, impartial, coherent, and bona fide." Piscatelli, 35 A.3d at 1149.

According to the Restatement (Second) of Torts, "[a]n arrest by an officer is an official action, and a report of the fact of the arrest or of the charge of crime made by the officer in making or returning the arrest is therefore within the [fair reporting] privilege covered by this Section." § 611 cmt. h. Analogously, Mosby's verbatim reading from the Application of the Statement of Charges at the press conference could be within the fair reporting privilege because the underlying document is related to the charge of crime and a court proceeding.

In the absence of an exception, Mosby would have a fair reporting privilege in regard to her reading verbatim the Application submitted to the District Court Commissioner. However, Plaintiffs present a plausible claim that Mosby's statements fall within an exception to that privilege.

The Restatement (Second) of Torts commentary acknowledges an exception to privilege, which the Maryland Court of Appeals has labeled the "self-reported statement exception." See Rosenberg, 616 A.2d at 876. The Restatement explains, "[a] person cannot confer this [fair reporting] privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated. This is true whether the original publication was privileged or not." Restatement (Second) of Torts § 611 cmt. c (1977). In its interpretation of this exception, the Rosenberg Court held that

> . . . the privilege will be forfeited only if the defamer illegitimately fabricated or orchestrated events so as to appear in a privileged forum in the first place.
>
> * * *
>
> It is clear that the exception made for self-reported statements aims to deter those persons who, acting out of a corrupt defamatory motive, abuse the privilege accorded to fair and accurate reports of judicial proceedings.

616 A.2d at 876-77. An example of this would be provided by a case in which a person filed a court pleading containing defamatory statements so as to be able to claim a privilege when he/she publicized the defamatory statements and injured another's reputation.

Plaintiffs have alleged facts adequate to present a plausible claim that Mosby was

instrumental in the investigation on which the Application was based and participated in writing the Application - even though Cogen signed it and submitted it to the Commissioner. They have plausibly alleged that Mosby, in her press conference, read false statements in the Application that she had created and knew were false for such purposes as "appeasing the public and quelling the riots," ¶ 135 [ECF No. 31 in 16-2663], getting the benefit of national attention and media coverage, id. at ¶ 74, and promoting her political agenda, id. at ¶¶ 236-37.

Plaintiffs' allegations are sufficient to present a plausible claim that the self-reporting exception could be applicable to Mosby's fair reporting privilege.

Mosby is not entitled to dismissal of Plaintiff's press conference-based claims by virtue of the fair reporting privilege.

(b) Fair Comment Privilege

The fair comment privilege covers expressions of "fair and reasonable opinion[s] or comment[s] on matters of legitimate public interest." Piscatelli, 35 A.3d at 1152. Reports on prosecutions of crimes are matters of public interest. See id. (noting that it is an "obvious" principle that prosecutions of crimes, especially murder, are of public interest). However, to be covered by the privilege, the comments must be "pure opinions," not "mixed opinions." Id. at 1153. This means that privileged opinions must be based on non-defamatory, true, readily accessible, or privileged facts – not false, unprivileged, or undisclosed facts. Id.

Plaintiffs have made factual allegations adequate to present a plausible claim that Mosby's

statements were a "mixed opinion" not protected by the fair comment privilege. These include the allegations that Mosby's opinion and comments were based on false statements Mosby read from the Application, that Mosby caused the false statements to be in the Application to be able to publicize them, and that the comments were, at least in part, based on non-disclosed, non-public facts from her independent investigation.[34]

Mosby is not entitled to dismissal of Plaintiffs' press conference based claims by virtue of the fair comment privilege.

5. Conspiracy

Plaintiffs assert claims labelled "civil conspiracy" as if there could be a recovery from a Defendant as a conspirator in the absence of an underlying tort. However, in Maryland, civil conspiracy is not recognized as an independent tort. See Alleco Inc. v. Harry & Jeanette Weinberg Foundation, Inc., 665 A.2d 1038, 1045 (Md. 1995). The Court of Appeals has "consistently held that 'conspiracy' is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff." Id. (quoting Alexander v. Evander, 650 A.2d 260, 265 n.8 (Md. 1994)).

As stated by the Maryland Court of Appeals more than a century ago:

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[34] Mosby stated at the press conference, "the evidence we have collected and continued to collect cannot ethically be released to the public and I strongly condemn anyone in law enforcement with access to trial evidence who has leaked information prior [to] resolution of this case." Transcript at 4.

> There is no doubt of the right of a plaintiff to maintain an action on the case against several, for conspiring to do, and actually doing, some unlawful act to his damage. But it is equally well-established, that no such action can be maintained unless the plaintiff can show that he has in fact been aggrieved, or has sustained actual legal damage by some overt act, done in pursuance and execution of the conspiracy. It is not, therefore, for simply conspiring to do the unlawful act that the action lays. It is for doing the act itself, and the resulting actual damage to the plaintiff, that afford the ground of the action.

Kimball v. Harman & Burch, 34 Md. 407, 409 (Md. 1871).

While there is no separate tort claim for conspiracy, Plaintiffs may utilize a civil conspiracy theory to hold a defendant liable for torts committed by his/her co-conspirators within the scope of the conspiracy. Hence, Plaintiffs may assert a conspiracy theory to hold a Defendant liable on a substantive claim, but not as a free-standing claim.

Accordingly, all conspiracy claims are dismissed.[35]

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[35] Plaintiffs are not precluded from asserting – should there be adequate evidence to support the assertion - that a Defendant should be held liable on a remaining claim as a co-conspirator.

B. Constitutional Claims

Plaintiffs assert claims under the Fourth and Fourteenth Amendments to the United States Constitution and essentially duplicative claims under the Maryland Declaration of Rights Articles 24[36] and 26[37].

Procedurally, Plaintiffs procedurally filed their constitutional claims pursuant to 42 U.S.C. § 1983 that provides in pertinent part:

> Every person who, under color of [state law] subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .

42 U.S.C. § 1983 (2012).

To establish a § 1983 claim, a plaintiff must prove that a defendant:

1. Acted under color of state law,

2. Deprived him/her of a right secured by the Constitution, and

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[36] "[N]o man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges. . . or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Md. Const. Decl. of Rts. art. XXIV.

[37] "[A]ll warrants, without oath or affirmation, . . . to seize any person or property, are grievous and oppressive." Md. Const. Decl. of Rts. art. XXVI.

3. Is not entitled to qualified immunity.[38]

1. Color of State Law

There is no doubt that all pertinent actions of Defendants were performed under color of state law, i.e., as state officials.

2. Deprivation of Rights

The Fourth Amendment to the United States Constitution provides, in pertinent part:

> The right of the people to be secure in their persons, . . . against unreasonable . . . seizures, shall not be violated.

U.S. Const. amend. IV.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV, § 1.

The essence of Plaintiffs' § 1983 claims is that Defendants committed wrongful actions that caused them to be arrested and charged without probable cause, i.e., they effectively present a malicious prosecution claim or wrongful seizure claim under § 1983. "To state such a claim, a plaintiff must allege that the defendant (1) caused (2) a seizure of the

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[38] That is, the right must have been clearly established at the time of events at issue. See Graham v. Gagnon, 831 F.3d 176, 182 (4th Cir. 2016). See discussion of qualified immunity below.

plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in plaintiff's favor." Evans v. Chalmers, 703 F.3d 636, 647 (4th Cir. 2012).

As discussed in Appendix B, Plaintiffs have alleged facts adequate to present plausible claims that Defendants caused their arrest without probable cause. And, all criminal proceedings ended in Plaintiffs' favor. Therefore, Plaintiffs' allegations suffice to state a plausible claim that their Fourth Amendment rights were violated by Defendants.

A "malicious prosecution claim under § 1983 is properly understood as a Fourth Amendment [not a Fourteenth Amendment][39] claim for unreasonable seizure which incorporates certain elements of the common law tort." Lambert v. Williams, 223 F.3d 257, 261 (4th Cir. 2000)(citing other circuits). Therefore, as was done in Evans v. Chalmers,[40] the Court shall dismiss Plaintiffs' Fourteenth Amendment claims.

In sum, Plaintiffs' Fourth Amendment claims are not dismissed but Plaintiffs' Fourteenth Amendment claims are dismissed as effectively subsumed within their Fourth Amendment claims.

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[39] "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing' these claims." Albright v. Oliver, 510 U.S. 266, 273 (1994)(quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

[40] 703 F.3d at 646 n.2 ("Because the Fourth Amendment provides "an explicit textual source" for § 1983 malicious prosecution claims, the Fourteenth Amendment provides no alternative basis for those claims.").

C. Claims Asserted Against the State

The State of Maryland has not waived its sovereign immunity for tortious acts or omissions by State personnel made with malice or gross negligence. Md. Code Ann., Cts. & Jud. Proc. Art. § 5-522(a)(4) (2013 Repl. Vol.).

Plaintiffs seek to recover from the State by virtue of the alleged tortious acts by Mosby and Cogen. However, as discussed herein, Plaintiffs' claims against Mosby and Cogen are viable only if they can establish malice or gross negligence. Thus, even if Plaintiffs should establish their claims based on actions by Mosby and Cogen, the State would be entitled to sovereign immunity.

Accordingly, all claims against the State of Maryland shall be dismissed.[41]

D. Defendants' Immunity Defenses

1. Absolute Prosecutorial Immunity (Mosby)

The Supreme Court recognizes that, in § 1983 cases, a state prosecutor is entitled to absolute immunity in taking actions pursuant to his/her functional role as an advocate for the state. See Buckley v. Fitzsimmons, 509 U.S. 259, 282–83 (1993).

In Gill v. Ripley, the Maryland Court of Appeals held,

> as a matter of Maryland common law, [] prosecutors enjoy absolute immunity

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[41] The State's MTCA Notice Requirement defense to the defamation and false light claims is, accordingly, moot.

> with respect to claims arising from their role in the judicial process - evaluating whether to commence a prosecution by criminal information, presenting evidence to a grand jury in the quest for an indictment, filing charges, and preparing and presenting the State's case in court.

724 A.2d 88, 96 (Md. 1999).

Mosby claims absolute immunity from suit for all actions taken by her when functioning as a prosecutor. However, Mosby, as "the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." Burns v. Reed, 500 U.S. 478, 486 (1991).

To determine the extent of prosecutorial immunity in § 1983 cases, the Supreme Court has adopted a "functional approach," which applies absolute immunity only when a prosecutor is performing an advocacy function, but not an administrative or investigative function. See Burns, 500 U.S. at 486, 491.

Maryland courts have also adopted the functional approach to absolute prosecutorial immunity. Thus, in Maryland law, when a prosecutor acts as an investigator, he/she is not entitled to absolute immunity. See Simms v. Constantine, 688 A.2d 1, 5 (Md. App. 1997) (holding that a prosecutor who investigated three policemen and "falsified evidence against [the three officers] so as to cause the initiation of criminal prosecutions against them" was not entitled to absolute immunity).

The validity of Mosby's claim that she was functioning as a prosecutor is not "clearly reveal[ed]" on the face of the complaint. See Occupy Columbia v. Haley, 738 F.3d 107, 116 (4th Cir. 2013). In fact, Plaintiffs have presented factual allegations plausibly refuting Mosby's claim that she was functioning as a prosecutor when taking the actions upon which their claims are based.

Mosby's prosecutorial immunity defense is asserted regarding Plaintiffs' claims that she:

- Provided erroneous legal advice to Cogen,
- Caused false statements in the Application for Statement of Charges,
- Presented false grand jury evidence,
- Made tortious statements at her press conference. These shall be addressed in turn.

a. False Advice to Cogen

Plaintiffs allege that Mosby knowingly provided Cogen with false advice that probable cause existed to arrest Plaintiffs.

In Burns v. Reed, 500 U.S. 478 (1991), the Supreme Court rejected the proposition that prosecutors are entitled to absolute immunity for legal advice provided to police prior to the prosecution of a case. Prosecutors who give "legal advice to police about an unarrested suspect" are not entitled

to absolute immunity.[42] Buckley, 509 U.S. at 275 (referencing Burns). As stated by the Burns Court:

> Although the absence of absolute immunity for the act of giving legal advice may cause prosecutors to consider their advice more carefully, "[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he should be made to hesitate." Indeed, it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice. Ironically, it would mean that the police, who do not ordinarily hold law degrees, would be required to know the clearly established law, but prosecutors would not.

500 U.S. at 495 (internal citations omitted)(quoting Mitchell v. Forsyth, 472 U.S. 511, 524 (1985)).

And, stated by the Maryland Court of Special Appeals:

> In no sense can any investigative activity undertaken by [a prosecutor] or any legal advice given by them to the police commissioner, to the Mayor, or to anyone else be deemed to be a part of the judicial function of the State's Attorney's Office.

Simms, 688 A.2d at 15.

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[42] They may, however, be entitled to qualified immunity.

In the instant dismissal context, Mosby is not entitled to absolute immunity for her allegedly knowingly providing false advice to Cogen as to the existence of probable cause to arrest Plaintiffs.

b. Application for Statement of Charges

Plaintiffs allege that Mosby knowingly participated with Cogen in creating a false and misleading Application for Statement of Charges that led to Plaintiffs' arrests.

In Buckley, the Supreme Court held that the defendant prosecutor could be entitled to qualified (but not absolute) immunity when he fabricated evidence during the preliminary investigation of a crime. 509 U.S. at 261.[43] The Court stated that "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer, 'it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" Buckley, 509 U.S. at 273 (quoting Hampton v. Chicago, 484 F.2d 602, 608 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974)).

In Kalina v. Fletcher, 522 U.S. 118 (1997), the Supreme Court drew a sharp distinction between a prosecutor's absolutely immune acts of preparing and filing an unsworn information charging plaintiff with burglary and an unsworn motion for an arrest warrant and the prosecutor's non-immune act in signing an accompanying "Certification for Determination of Probable Cause." The Court

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[43] Specifically, the prosecutor developed the false testimony of an expert witness to link the suspect to a boot print left at the crime scene. Id.

concluded that in signing the Certification, the prosecutor could be entitled to qualified [but not absolute] immunity because he was acting as a "complaining witness," not an advocate. Id. at 130.

In Springemen v. Williams, 122 F.3d 211 (4th Cir. 1997), an Assistant State's Attorney reviewed an application for a Statement of Charges and Summons prepared by a police officer, and advised that the facts were sufficient to warrant filing the application. Charges were brought and then dropped. After the charges were dropped, the subject of the prosecution sued, alleging that the prosecutor had violated his Fourth Amendment right. He alleged that there had been no probable cause for filing the charge and that the prosecutor's advice was the proximate cause of the criminal summons, which unreasonably deprived him of his liberty. The Springemen court held that the prosecutor was entitled to absolute immunity, stating:

> Our decision today is not a close one. While the Supreme Court has not extended absolute immunity to all legal advice by prosecutors, it has never hesitated to grant such immunity to prosecutors acting as Williams did here - in their core role as advocates for the state.

122 F.3d at 214. The Springemen court clarified that Burns "held that advising police in the investigative phase of a criminal case" was not a judicial function, whereas professionally evaluating evidence assembled by police was. Id. at 213.

It may well be that the evidence, as distinct from Plaintiffs' allegations, will establish that Mosby, like the prosecutor in Springemen is entitled to absolute immunity for her actions vis-à-vis the Application. Certainly, she did not sign it and did not act as a "complaining witness" like the prosecutor in Kalina. However, Plaintiffs allege that Mosby did not merely evaluate evidence and select the particular facts to include in the Application based on the fruits of an independent police investigation as recognized as acts of advocacy in Kalina. 522 U.S. at 130. Rather, Plaintiffs allege, Mosby acted as an investigator engaged in the gathering (and fabricating) of evidence. Indeed, even Cogen states in a Reply to the pending motions that "the charges were not based on a consultation with prosecutors so much as prosecutors themselves actually selected the charges to be filed based on their own investigation." [ECF No. 43 at 7 in 16-1304]. And, Mosby herself stated in her press conference: "I can tell you that from day one, we independently investigated, we're not just relying solely upon what we were given by the police department, period." ¶ 81 [ECF No. 31 at 16-2663].

Mosby is not entitled to dismissal of claims related to the Application by virtue of absolute immunity for her actions.

c. Grand Jury Evidence

Plaintiffs allege that Mosby caused false and misleading evidence to be presented to the grand jury that indicted them. For example, she[44] required a grand jury witness to testify pursuant to a "script" that included false and misleading statements and

[44] And/or a member of her Office.

not to answer pertinent questions. ¶ 92 [ECF No. 31 in 16-2663].

Prosecutors are entitled to absolute immunity for actions taken before a grand jury. Presenting evidence to seek an indictment is the first step in bringing a case. See Imbler v. Pachtman, 424 U.S. 409, 426 (1976). Hence, even if Mosby, in fact, engaged in the conduct alleged by Plaintiffs, she would be immune from a claim based thereon.

Thus, all claims against Mosby based upon the presentation of evidence to, or withholding evidence from, the grand jury are dismissed.[45]

d. Press Conference Statements

On May 1, Mosby made statements at a press conference on which Plaintiffs base claims for defamation and invasion of privacy (false light). She is not entitled to absolute immunity from these claims.

As stated in Buckley v. Fitzsimmons,

> Comments to the media have no functional tie to the judicial process just because they are made by a prosecutor. At the press conference, [the prosecutor] did not act in "his role as advocate for the State." The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions

[45] This dismissal of claims does not constitute a ruling that Plaintiffs may not introduce evidence of Mosby's actions vis-à-vis the grand jury that would be relevant to claims as to which she does not have immunity.

> preparatory for these functions. Statements to the press may be an integral part of a prosecutor's job, see National District Attorneys Assn., National Prosecution Standards 107, 110 (2d ed. 1991), and they may serve a vital public function. But in these respects a prosecutor is in no different position than other executive officials who deal with the press, and . . . qualified immunity [not absolute immunity] is the norm for them.

509 U.S. at 277–78 (internal citations omitted) (quoting Burns, 500 U.S. at 491).

Mosby is not entitled to dismissal of claims based upon her statements at the press conference by virtue of absolute immunity.

2. Statutory Immunity

Section 5-522 of Maryland Tort Claims Act provides that:

> State personnel, as defined in § 12-101 of the State Government Article, are immune from suit in courts of the State and from liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel and is made without malice or gross negligence.

Md. Code Ann., Cts. & Jud. Proc. § 5-522(b)(2013 Repl. Vol.) (emphasis added).

Mosby, a State's Attorney, and Cogen, a Major in the Sheriff's Office of Baltimore City, are "state

personnel" under § 12-101, and thus are protected by statutory immunity. Md. Code Ann., State Gov't § 12-101(a)(6), (8) (2014 Repl. Vol.). However, the scope of statutory immunity does not extend to tortious actions committed with malice or gross negligence. Plaintiffs' claims are based upon allegations that Defendants acted with malice and/or gross negligence.

"Malice" for statutory immunity purposes "requires a showing that 'the official intentionally performed an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately injure the plaintiff'" and "may be inferred from the surrounding circumstances." Talley v. Farrell, 156 F. Supp. 2d 534, 545 (D. Md. 2001)(internal citations omitted) (quoting Green v. Brooks, 725 A.2d 596, 610 (Md. App. 1999)). The plaintiff "'must allege with some clarity and precision those facts which make the act malicious.'" Id.

Gross negligence, in the context of statutory immunity, has been defined as:

> something more than simple negligence, and likely more akin to reckless conduct; gross negligence is "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them."

Cooper v. Rodriguez, 118 A.3d 829, 845-46 (Md. 2015) (quoting Barbre v. Pope, 935 A.2d 699, 717 (Md. 2007)).

There is no allegation that Defendants' actions were motivated by hate, or an intent to injure Plaintiffs. However, taking Plaintiffs' factual allegations as true, they have presented a plausible claim that Defendants acted with utter indifference to Plaintiffs' rights to be free from unreasonable seizure and deprivations of liberty, i.e., with gross negligence. Hence, while the evidence may later refute Plaintiffs' contentions, Defendants are not entitled to dismissal of Plaintiffs' claims by virtue of statutory immunity.

3. Qualified Immunity

Defendants assert entitlement to qualified immunity for Plaintiffs' constitutional claims.[46]

> "The doctrine of qualified immunity protects government officials 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." In practical effect, qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments." This allowance for reasonable mistakes is the product of "balanc[ing] two

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[46] Defendants also contend that public official immunity, which is a type of common law qualified immunity, applies to Plaintiffs' state claims. However, public official immunity only applies when the official is alleged to have acted negligently, Smith v. Danielczyk, 928 A.2d 795, 813-14 (Md. 2007), whereas, here, the Officers must contend that Defendants acted deliberately, with malice, and/or with gross negligence in order to plead legally cognizable claims. Therefore, it is not necessary for the Court to consider public official immunity.

> important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."
>
> The shield of qualified immunity is lost when a government official (1) violates a constitutional right and (2) that right was clearly established.

Graham v. Gagnon, 831 F.3d 176, 182 (4th Cir. 2016)(internal citations omitted).

As noted in Graham, the right that must be clearly established in question "is not the general right to be free from arrest without probable cause, but rather the right to be free from arrest under the particular circumstances of the case." Id.

In the instant case, the allegedly established right can be stated to be the right to be free from arrest without probable cause caused by Defendants' submitting the Application containing false statements and omitting material facts with at least reckless disregard for the truth. As stated by the United States Court of Appeals for the Fourth Circuit in 2007:

> [T]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. We and our sister circuits have frequently applied this mandate.

Miller v. Prince George's Cty., MD, 475 F.3d 621, 631 (4th Cir. 2007) (internal citations omitted).

Defendants contend that because a District Court Commissioner and the grand jury determined there was probable cause, that should conclusively establish the existence of probable cause to arrest Plaintiffs.[47]

As to the commissioner, the Fourth Circuit expressly has rejected such a contention. "A magistrate's issuance of the warrant [for arrest] will not shield an officer when . . . the underlying affidavit includes deliberate and reckless misstatements and omissions, as here." Id. at 632. If, as alleged here, a judicial officer finds probable cause based upon false statements in an affidavit, qualified immunity shall not shield the affiant when the affidavit includes deliberate and reckless misstatements and omissions. See id.

Even if there were merit to the contention that the grand jury indictment based upon evidence presented to the grand jury established probable cause for prosecution, Plaintiffs were arrested based upon the Application.

Of course, the Court is not definitively deciding that Defendants are not entitled to qualified immunity with regard to probable cause to arrest Plaintiffs. Rather, the Court is determining that the existence of this affirmative defense is not clear on the face of the complaint and a firm conclusion on the reasonableness of the probable cause determination requires greater factual development. Cf. Tobey v.

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[47] See Mosby's Motion to Dismiss [ECF No. 25-1 in 16-1304] at 27 and Cogen's Reply [ECF No. 43 in 16-1304] at 7.

Jones, 706 F.3d 379, 389 (4th Cir. 2013) (concluding "[w]hat is reasonable in this context, therefore, requires greater factual development and is better decided once discovery has been conducted"); Swagler v. Neighoff, 398 F. App'x 872, 878 (4th Cir. 2010) (holding that the district court acted within its discretion in denying qualified immunity in advance of discovery.)[48]

Accordingly, Defendants are not entitled to dismissal of Plaintiffs' constitutional claims by virtue of qualified immunity.

V. CONCLUSION:

For the foregoing reasons:

A. In MJG-16-1288:

1. Defendant Samuel Cogen's Motion To Dismiss [ECF No. 12] is GRANTED IN PART and DENIED IN PART.

2. Defendant Marilyn Mosby's Motion to Dismiss [ECF No. 25] is GRANTED IN PART and DENIED IN PART.

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[48] In its recent decision in Pegg v. Herrnberger, No. 15-1999 (4th Cir. Jan. 4, 2017), ___ F.3d ___ (4th Cir. 2017), the United States Court of Appeals for the Fourth Circuit recognized that "probable cause or its absence will be at least an evidentiary issue in practically all [§ 1983 wrongful arrest] cases" but noted that there is a significant difference between the context of a motion to dismiss and a motion for summary judgment in which the sufficiency of the evidence (as distinct from allegations) can be tested. See also Tobey v. Jones, 706 F.3d 379, 392 (4th Cir. 2013).

B. In MJG-16-1304:

1. Defendant Samuel Cogen's Motion To Dismiss [ECF No. 8] is GRANTED IN PART and DENIED IN PART.

2. Defendant Marilyn Mosby's Motion to Dismiss [ECF No. 25] is GRANTED IN PART and DENIED IN PART.

C. In MJG-16-2663:

1. Defendant Samuel Cogen's Motion To Dismiss [ECF No. 11] is GRANTED IN PART and DENIED IN PART.

2. Defendant Marilyn Mosby's Motion to Dismiss [ECF No. 22] is GRANTED IN PART and DENIED IN PART.

D. In all three cases:

1. The following claims are dismissed:

a. False arrest,

b. False imprisonment,

c. Abuse of process,

d. Conspiracy,[49]

[49] Plaintiffs are not precluded from asserting – should there be adequate evidence to do so - that a Defendant should be held liable on a substantive claim as a co-conspirator.

e. Section 1983 Fourteenth Amendment Violations,

f. Section 1983 Fourth Amendment claims based on presentation to the grand jury (Mosby),[50]

g. All claims against the State of Maryland.

2. The following claims remain pending:

a. Malicious prosecution,

b. Defamation,

c. Invasion of privacy (false light),

d. Section 1983 Fourth Amendment claims.[51]

E. The Court shall, promptly, conduct a conference regarding further proceedings in these cases.

SO ORDERED, this Friday, January 27, 2017.

/s/
Marvin J. Garbis
United States District Judge

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[50] However, this Order does not determine whether evidence regarding Mosby's presentations to the grand jury would be inadmissible in regard to other claims.

[51] And the duplicative Maryland Declaration of Rights Article 26 claims.

APPENDIX A

Summary of "Facts" as Alleged by Plaintiffs

Plaintiffs allege a version of the facts that is by no means undisputed by Defendants. However the Court must, in the instant dismissal context, assume the truth of Plaintiffs' pleading allegations. Therefore, this statement of Plaintiffs' version of the facts, is not intended to, and does not, present any determination as to whether Plaintiffs can present evidence to establish the allegations asserted.

1. Gray's Arrest (Nero, Miller, Rice)

On the morning of April 12, 2015, Baltimore City Police Officers Edward Nero ("Nero") and Garrett Miller ("Miller") and Lieutenant Brian Rice ("Rice") were on bicycle patrol on North Avenue. Rice called for help in pursuing two suspects. Nero and Miller responded. Officer Miller apprehended one of the suspects, Freddie Carlos Gray, Jr. ("Gray") near Mount Street.

After detaining and handcuffing Gray "for officer safety reasons," Miller found "a spring-assisted knife" on Gray's person. Compl., ¶¶ 19, 22 [ECF No. 33-1 in 16-1288]. This knife was illegal under Article 19, Section 59-22 of the Baltimore City Code, which states "[i]t shall be unlawful for any person to sell, carry, or possess any knife with an automatic spring or other device[52] for opening and/or closing the blade,

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[52] That is, the Code prohibits possession of a knife with any automatic device (not just a spring) for opening or closing the blade.

commonly known as a switch-blade knife." Miller arrested Gray for possession of the knife.

During his arrest, Gray "became physically and verbally combative," causing a crowd to form around the Officers and Gray. ¶ 22 [ECF No. 33-1 in 16-1288]. A police wagon was summoned and arrived driven by Officer Caesar Goodson ("Goodson"). Gray refused to enter the police wagon for transport. Therefore, Nero and another Officer carried Gray to the wagon.

Gray stood on the back step of the wagon as Nero conducted a second search for weapons and then was placed inside the wagon. During this entire encounter, Nero, a former EMT, "did not observe Gray exhibiting symptoms of a medical emergency." Id. at ¶ 20.

2. The Transport of Gray

Gray was transported from the scene of his arrest to the Western District police station, driven by Goodson. Goodson made four stops en route.

a. First Stop (Nero, Miller, and Rice)

Once Gray was in the wagon, he "began banging and slamming himself" against the walls of the vehicle while screaming and yelling. Id. at ¶ 27. In order to avoid the gathering crowds, Goodson moved the wagon one block away to complete paperwork and effectuate the arrest. At this first stop, Miller and Rice removed Gray from the wagon, switched his handcuffs for flex cuffs, and placed leg shackles on Gray because he was "thrashing" around the wagon. ¶ 25 [ECF No. 39-2 in 16-1304].

Rice called for back-up because another crowd of onlookers was forming in response to Gray's yelling and banging. Rice, Nero, and Miller had no further interactions with Gray.

b. Second Stop

Goodson made a second stop near Baker and Mount Streets, but none of the Plaintiffs interacted with Gray at this stop.

c. Third Stop (Porter)

Goodson stopped a third time at the intersection of Druid Hill Avenue and Dolphin Street. Goodson requested an additional officer to respond to the area. Officer William Porter ("Porter") responded and observed Gray lying prone on the floor of the vehicle. Gray asked Porter for "help." ¶ 56 [ECF No. 31 in 16-2663]. Porter asked Gray, "what do you mean help?" and Gray asked for help in getting off the floor. Id. Porter raised Gray by his arms to a sitting position on the bench. Porter could not fit in the wagon compartment while Gray was inside. Gray did not appear to need medical assistance, but Porter asked him if he wanted medical help. Gray replied that he did, and Ported advised Goodson to take Gray to the hospital. Porter "observed no exigent medical need, and observed Gray to be able to sit upright, breathe and communicate." Id. at ¶ 57. Porter knew that "many detainees are trying to avoid being transported to the detention facility" by requesting medical assistance. Id.

d. Fourth Stop (Porter, White)

Goodson made a fourth stop at North Avenue to pick up a new arrestee, Donta Allen, who was

detained by Miller and Nero. There was a call for back-up, to which Porter and Officer Alicia White ("White") responded separately.

When Porter arrived, he observed Gray kneeling on the vehicle floor and leaning against the bench. Porter spoke to Gray and confirmed that Gray still wanted to go to the hospital. Porter told this to another officer at the scene.

When White arrived, she approached Gray in the wagon and attempted to speak with him. She saw him breathing and heard him making noises, but Gray would not answer her, which White concluded was a sign of his non-compliant behavior. White states that Gray did not appear to be in medical distress. No one told her that a medic was needed. Both White and Porter left to go to the Western District station.

e. Arrival at Western District (White and Porter)

The police wagon arrived at the Western District Station with Gray inside.

When Porter reached the station and approached the wagon, he saw that Gray was unresponsive. Porter tapped Gray, but Gray did not respond. Another officer began emergency aid while Porter called a medic.

When White arrived at the station, she saw officers removing Gray from the wagon and was told, for the first time, to call a medic. Another officer told White a medic had already been called, but White called to confirm it was en route.

3. Gray's Death

A medical unit took Gray from the Western District Station to the University of Maryland Shock Trauma Unit where he underwent surgery. On April 19, 2015, Gray died from a spinal cord injury.

4. The Investigation and Charges

Following Gray's death, State's Attorney Mosby ("Mosby") led an independent investigation into the cause of Gray's death conducted by the State's Attorney's Office ("SAO") police integrity unit. According to Mosby, the "findings of [the SAO's] comprehensive, thorough and independent investigation, coupled with the medical examiner's determination that Gray's death was a homicide, . . . led us to believe that we have probable cause to file criminal charges." Transcript at 1 [ECF No. 23-1 in 16-1304].

Plaintiffs allege that Mosby and Major Samuel Cogen of the Baltimore City Sheriff's Office ("Cogen") committed various improper actions that Mosby and Cogen deny. According to Plaintiffs, Mosby and the SAO manipulated, fabricated, and falsified evidence so that Plaintiffs[53] would be arrested and indicted. ¶ 79 [ECF No. 31 in 16-2663]. Mosby, during her investigation, and "with Cogen's complicity and assistance," developed a false and misleading narrative to justify the Statement of Charges and arrest warrant Application ("Application"). Id. at ¶ 85. This narrative made it seem that Gray had committed no crime, Plaintiffs illegally arrested Gray, purposely neglected to seatbelt him so that he would be injured,

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[53] And Goodson.

and then ignored his medical symptoms and cries for help.

Specifically, the Application stated that the knife Gray possessed was "lawful under Maryland law," and made no mention that it was actually illegal under the Baltimore City Code. The narrative omitted exculpatory facts that would tend to show that Gray was uncooperative, did not exhibit outward signs of medical distress, and had tried to injure himself by banging his head on the wagon wall, as well as other omissions.

Cogen signed and submitted the Statement of Charges and Application for Statement of Charges to a District Court Commissioner at Mosby's direct or indirect instruction. Cogen allegedly knew that the statements submitted to get the arrest warrants were false and unsupported by any evidence because of his participation in the investigation.

On May 1, 2015, Plaintiffs (and Goodson) were arrested and on May 21, 2015, indicted for charges on which no one was convicted.

5. Mosby's Press Conference

On May 1, 2015, Attorney Mosby held a televised press conference regarding her decision to pursue criminal charges against the Officers. Plaintiffs alleged that during her presentation, Mosby spoke in a "divisive and inciting manner." ¶ 65 [ECF No. 33-1 in 16-1288]. Mosby quoted from the Application, including the false statement that the knife recovered from Gray was legal, and therefore, Rice, Nero, and Miller lacked probable cause to arrest Gray.

Mosby made statements emphasizing her role in the SAO's independent investigation. For example:

> Once alerted about this incident on April 13, investigators from my police integrity unit were deployed to investigate the circumstances surrounding Mr. Gray's apprehension. Over the course of our independent investigation, in the untimely death of Mr. Gray, my team worked around the clock; 12 and 14 hour days to canvas and interview dozens of witnesses; view numerous hours of video footage; repeatedly reviewed and listened to hours of police video tape statements; surveyed the route; reviewed voluminous medical records; and we leveraged the information made available to us by the police department, the community, and the family of Mr. Gray.

Transcript at 1 [ECF No. 23-1 at 16-1304].

> We independently verified those facts and everything we received from the police department, so it's a culmination of the independent investigation that we conducted as well as the information we received from the police department.
>
> * * *
>
> I can tell you that from day one, we independently investigated, we're not

> just relying solely upon what we were given by the police department, period.

¶ 81 [ECF No. 31 in 16-2663].

Mosby also made other statements on which Plaintiffs base claims, such as

> To the people of Baltimore and demonstrators across America: I heard your cries for 'No justice, no peace.' Your peace is sincerely needed as I work to deliver justice on behalf of this young man. To those that are angry, hurt or have their own experiences of injustice at the hands of police officers I urge you to channel that energy peacefully as we prosecute this case.

Transcript at 4 [ECF No. 23-1 in 16-1304].

> Last, but certainly not least, to the youth of the city. I will seek justice on your behalf. This is a moment. This is your moment. Let's insure we have peaceful and productive rallies that will develop structural and systemic changes for generations to come.

Id. at 5.

Plaintiffs allege that Mosby made her press conference statements out of improper motives, such as pursuing political ambitions, influencing legislation, and quelling the riots that were taking place in Baltimore at the time.

6. Grand Jury Presentation

On or about May 21, 2015, the SAO presented evidence before a grand jury to get indictments against Plaintiffs.[54] Assistant State's Attorney Janice Bledsoe gave Baltimore City Police Detective Dawnyell Taylor, the lead detective in the criminal investigation of Gray's death, a four-page "script" to read in front of the grand jury. ¶ 92 [ECF No. 31 in 16-2663]. This script was "incomplete, misleading, biased, and partially false"; for example, it falsely stated that the arresting Officers tased Gray. Id. at ¶ 107. Detective Taylor expressed concerns about the document because of its misleading and false information, but she was instructed to read it anyway, and was prevented from responding to jury questions. The grand jury returned criminal indictments against all of the Officers.

7. Prosecutions

The SAO obtained no convictions on any of the charges arising out of the Freddie Gray incident. In December 2015, Porter's trial ended in a hung jury and mistrial. Nero, Goodson, and Rice had bench trials and were acquitted on May 23, 2016, June 23, 2016, and July 18, 2016, respectively. On July 27, 2016, Mosby entered a nolle prosequi in Officers Miller's, Porter's, and White's criminal cases.

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[54] And Goodson.

APPENDIX B

The Franks Analysis

Plaintiffs present § 1983 malicious prosecution and/or unlawful seizure claims of violation of their Fourth Amendment rights. See Massey v. Ojaniit, 759 F.3d 343, 356 (4th Cir. 2014).

"A plaintiff's allegations that police seized him 'pursuant to legal process that was not supported by probable cause and that the criminal proceedings terminated in his favor are sufficient to state a . . . claim alleging a seizure that was violative of the Fourth Amendment.'" Miller v. Prince George's Cty., MD, 475 F.3d 621, 627 (4th Cir. 2007)(quoting Brooks v. City of Winston–Salem, 85 F.3d 178, 183-84 (4th Cir. 1996)). Specifically, the Officers allege that they were arrested pursuant to warrants that lacked sufficient probable cause because the Defendants deliberately included false statements and omitted exculpatory evidence from the Application.

To evaluate a "false affidavit" claim, as made by Plaintiffs, courts apply the two-prong test established in Franks v. Delaware, 438 U.S. 154 (1978).

> First, plaintiffs must allege that defendants "knowingly and intentionally or with a reckless disregard for the truth" either made false statements in their affidavits or omitted facts from those affidavits, thus rendering the affidavits misleading. Second, plaintiffs must demonstrate that those "false statements or omissions [are] material, that is, necessary to" a neutral and disinterested magistrate's authorization of the search.

Evans v. Chalmers, 703 F.3d 636, 649–50 (4th Cir. 2012) (citations omitted) (quoting Franks, 48 U.S. at 155-56)).

Plaintiffs allege that the Application for Statement of Charges ("the Application") contained material false and misleading statements, including (1) the false statement that Rice, Miller, and Nero did not have probable cause to arrest Gray because he had committed no crime; (2) the misleading statement that the knife was "lawful under Maryland law"; (3) the false statement that White was advised that Gray needed a medic at the last stop; and (4) the false statement that Gray was in a "seriously deteriorating medical condition" at or before the last stop before the police station.

Plaintiffs also allege that Defendants caused material omissions from the Application, including the facts that (1) the knife found on Gray was assisted by a spring or other device for opening and/or closing the blade and was illegal to possess in Baltimore City; (2) a crowd was forming around the police wagon at the first and second stops; (3) Gray was being physically uncooperative and banging his head on the wall of the police wagon; (4) the Baltimore Police Department General Order regarding seatbelting arrestees had been issued on April 3, 2015, and did not impose a legal duty on the Officers; (5) two witnesses at later stops stated that Gray was not in obvious medical distress; (6) Gray's neck injury was not obvious to the medics who responded at the station; (7) Porter told the driver (Goodson) to take Gray to the hospital even though he "believed that Gray asked for a medic for purposes of being taken to the hospital to avoid being processed, rather than

because that he was in need of medical assistance," ¶ 98 [ECF No. 31 in 16-2663]; and (8) White "instructed other officers to call for a medic, and then followed up again when the medic did not promptly arrive, as soon as she knew that Gray was in distress, as she clearly stated in her Recorded Statement." Id. at ¶ 100.

Viewed in the light most favorable to the Plaintiffs, they present allegations that present a plausible claim that the Defendants made false statements or omissions either knowingly or with reckless disregard of their truth or falsity.

An official acts with "reckless disregard" when he or she acts "'with a high degree of awareness of [a statement's] probable falsity,' that is, 'when viewing all the evidence, the affiant must have entertained serious doubts" or 'had obvious reasons to doubt the accuracy of the information he reported.'" Miller, 475 F.3d at 627 (quoting Wilson v. Russo, 212 F.3d 781, 788 (3d Cir. 2000)). "With respect to omissions, 'reckless disregard' can be established by evidence that a police officer 'failed to inform the judicial officer of facts [he] knew would negate probable cause,'" but mere negligence or innocent mistake is not sufficient to show "reckless disregard." Id. (quoting Beauchamp v. City of Noblesville, Inc., 320 F.3d 733, 743 (7th Cir. 2003)).

Plaintiffs allege that Mosby and Cogen knew from their investigation that the alleged false statements in the Application were untrue, or stated them with no factual support, and intended to make the Application misleading in order to arrest the Officers and gain national attention, calm the riots in Baltimore City, and accomplish other personal objectives.

For example, Mosby knew that the knife Gray possessed was a spring or other device assisted knife because she saw the knife, she knew that the SAO was prosecuting other individuals for possession of similar knives, and she knew that a District Court Commissioner had found there had been probable cause to arrest Gray because of his possession of the knife. Plaintiffs assert that Mosby intentionally misled the District Court Commissioner by misleadingly wording the Application to say that the knife was "lawful under Maryland law," without accurately describing or even mentioning the Baltimore City Code provision making its possession illegal.

Plaintiffs allege that Cogen participated directly or indirectly in the investigation, presenting a plausible basis for a reasonable inference that Cogen knew what the knife was and that Gray had been charged with illegal possession of it.

Plaintiffs allege that there was no factual basis whatsoever to support the statements in the Application that Gray was obviously injured before arriving at the police station. In fact, Plaintiffs refute the statement, alleging that witnesses said that Gray was conscious at the last stop, banging his head on the wall, and the medics did not see that he had a neck injury.

Furthermore, if the Mosby had – as she claimed – conducted a thorough independent investigation, which Major Cogen either participated in or reviewed the results of, the Defendants would have known the alleged exculpatory facts existed, such as the witness statements and Plaintiffs' attempts to check on Gray and get him medical attention once they knew it was needed. Plaintiffs allege that these facts were omitted

intentionally by Mosby, and with at least reckless disregard by Cogen.

In sum, Plaintiffs plausibly allege that the Application was misleading because the omitted facts, when viewed in a light most favorable to the Plaintiffs, establish the absence of probable cause to arrest Plaintiffs. These facts are: (1) Plaintiffs did have probable cause to arrest Gray, (2) Gray was trying to purposely injure himself to be avoid being taken to jail, (3) Plaintiffs were not ignoring an obvious medical need on Gray's part, and (4) Plaintiffs did not seatbelt Gray out of a need to move the wagon away from the crowd and out of concern for officer safety because Gray was being physically combative. Plaintiffs further allege that they did get medical attention for Gray as soon as they were aware he actually needed medical help.

Plaintiffs have made adequate allegations to satisfy the first Franks prong. That is, that Defendants knowingly and intentionally, or with a reckless disregard for the truth, either made false statements in their affidavits or omitted facts from those affidavits, thus rendering the affidavits misleading.

Under the second Franks prong, Plaintiffs must allege facts to present a plausible claim that the false statements and omissions were material. "To determine materiality, a court must 'excise the offending inaccuracies and insert the facts recklessly omitted, and then determine whether or not the 'corrected' warrant affidavit would establish probable cause.' If the 'corrected' warrant affidavit establishes probable cause, no civil liability lies against the officer." Miller, 475 F.3d at 628 (quoting Wilson, 212 F.3d at 789). "Probable cause exists when the facts

and circumstances within an officer's knowledge — or of which he possesses reasonably trustworthy information — are sufficient in themselves to convince a person of reasonable caution that an offense has been or is being committed." Wadkins v. Arnold, 214 F.3d 535, 539 (4th Cir. 2000)(citing Brinegar v. United States, 338 U.S. 160, 175–76 (1949)).

As a result of the Application, the Officers were arrested and charged with manslaughter (White), involuntary manslaughter (Rice, White, Porter), intentional second degree assault (all Plaintiffs), negligent second degree assault (Rice, Nero, Miller), misconduct in office (all Plaintiffs), and false imprisonment (Nero, Miller, Rice).

The Court has read the Application for the Statement of Charges adding the alleged omissions and subtracting the alleged false statements to evaluate whether the corrected Application could "convince a person of reasonable caution" that Plaintiffs could have committed at least one of the offenses charged. Wadkins, 214 F.3d at 539.

The assault and false imprisonment charges rested on the alleged erroneous assumption that Gray was arrested without probable cause. When the false and misleading statements about the knife are corrected according to Plaintiffs' contentions, it is obvious that there was probable cause to arrest Gray.

The corrected Application presents no probable cause for the voluntary manslaughter charge against Officer White. Voluntary manslaughter is "an intentional homicide, done in a sudden heat of passion, caused by adequate provocation, before there has been a reasonable opportunity for the passion to

cool." Cox v. State, 534 A.2d 1333, 1335 (Md. 988). Viewed in the light most favorable to White, the Application presents no basis to conclude that White, not knowing that Gray was injured or needed a medic until he was at the station, intended to kill him.

The crime of involuntary manslaughter, for which Rice, White, and Porter were charged, "is predicated on negligently doing some act lawful in itself, or by negligently failing to perform a legal duty" and "the negligence necessary to support a conviction must be gross or criminal, viz., such as manifests a wanton or reckless disregard of human life." State v. Gibson, 242 A.2d 575, 579 (Md. App. 1968), aff'd, 254 A.2d 691 (Md. 1969)(citing State of Maryland v. Chapman, 101 F.Supp. 335 (D. Md. 1951)). The Application assertion central to the involuntary manslaughter charges, as well as the misconduct in office charges, is that Plaintiffs failed to seat belt Gray as required by the Baltimore Police Department General Order with a wanton or reckless disregard for human life. Based on the "corrected" Application, viewed in a light most favorable to the Plaintiffs, no reasonable person could conclude that Plaintiffs failed to seat belt Gray due to gross or criminal negligence under the circumstances. Rather, as Plaintiffs allege, the Order was new, they needed to quickly move the wagon to avoid growing crowds, Gray was physically uncooperative making it hard to position him in the wagon, and they did not know Gray was hurt.

In the instant dismissal context, Plaintiffs have alleged facts adequate to present a plausible Fourth Amendment claim.