No. _____

In The
Supreme Court of the United States

KENNETH SEALEY, in his individual capacity; and ROBERT E. PRICE, Administrator C.T.A. of the Estate of Joel Garth Locklear, Sr.,
***Petitioners*,**

v.

J. DUANE GILLIAM, Guardian of the Estate of Leon Brown; and RAYMOND C. TARLTON, Guardian Ad Litem for Henry Lee McCollum,
***Respondents*.**

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

PETITION FOR WRIT OF CERTIORARI

James R. Morgan, Jr.
Counsel of Record
Bradley O. Wood
Sonny S. Haynes
WOMBLE BOND DICKINSON (US) LLP
One West Fourth Street
Winston-Salem, North Carolina 27101
(336) 721-3600
jim.morgan@wbd-us.com
brad.wood@wbd-us.com
sonny.haynes@wbd-us.com

Counsel for Petitioners ***Dated: November 22, 2019***

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

The questions presented here are:

1. Did the Fourth Circuit err in holding that District Courts are not required to properly apply the qualified immunity analysis as to each officer and each claim at the Rule 56 summary judgment stage?

2. Did the Fourth Circuit err in holding that in cases where the qualified immunity defense is properly raised and argued, a District Court may nevertheless refuse to rule, at the summary judgment stage, on each individual officer's entitlement to qualified immunity as to each claim?

3. Did the Fourth Circuit err in holding that a District Court need not rule on an individual officer's entitlement to qualified immunity at the Rule 56 summary judgment stage if the Court deems the facts to be "convoluted?"

4. Did the Fourth Circuit err in holding that a District Court need not rule on individual officer's entitlement to summary judgment at the Rule 56 summary judgment stage if Plaintiffs simply make an allegation that officers "acted in concert to violate their constitutional rights?"

In this case, the defendants Kenneth Sealey and Robert E. Price, as Administrator C.T.A. of the

Estate of Joel Garth Locklear, Sr.[1] properly raised the qualified immunity defense, and clearly argued to the District Court at the Rule 56 summary judgment stage that both Sealey and Locklear were entitled to qualified immunity as to each claim asserted by Plaintiffs. Nevertheless, in denying Sealey and Locklear's motion for summary judgment, the District Court failed to apply the qualified immunity analysis as to each individual officer as to each of Plaintiffs' claims. Instead, the District Court stated that, "in light of plaintiffs' allegations that defendants worked in concert to deny the plaintiffs their constitutional rights, as well as the specifics regarding the grouping of SBI and Robeson County defendants to engage in different aspects of Plaintiffs' interrogations, arrests, and investigations, the Court will not at this time attempt to parse the liability of each officer as it relates to each claim." App. 84a. In other words, the District Court refused to apply the qualified immunity analysis to the specific actions of Sealey and Locklear at the summary judgment stage and, instead, postponed until trial a ruling on Sealey and Locklear's entitlement to qualified immunity as to each of Plaintiffs' claims. Id.

The Fourth Circuit affirmed the District Court's refusal to rule on Sealey and Locklear's entitlement to qualified immunity as to each of Plaintiffs' claims at the summary judgment stage, holding that "it would be counterproductive to require

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[1] Shortly after being served, Officer Joel Garth Locklear, Sr. passed away. Thereafter, Robert E. Price, as Administrator C.T.A. of the Estate of Joel Garth Locklear, Sr., was substituted as a party. In an attempt to avoid confusion, this Petition will refer to this defendant as "Locklear."

a district court to wade through convoluted issues of fact at this stage" in order to determine Sealey and Locklear's entitlement to qualified immunity. App. 22a.

PARTIES TO THE PROCEEDING

The Petitioners in this case are Kenneth Sealey, in his individual capacity; and Robert E. Price, Administrator C.T.A. of the Estate of Joel Garth Locklear, Sr.; who were defendants in the proceedings below.

The Respondents in this case are J. Duane Gilliam, Guardian of the Estate of Leon Brown; and Raymond C. Tarlton, Guardian Ad Litem for Henry Lee McCollum; who were plaintiffs in the proceedings below.

Additional remaining defendants in this case are Kenneth Snead and Leroy Allen, former agents of the North Carolina State Bureau of Investigations.

Former defendants in this case are the Town of Red Springs, North Carolina, and its former officers, Larry Floyd and the Estate of Luther Haggins. These Red Springs defendants were dismissed pursuant to a settlement.

STATEMENT OF RELATED CASES

- Tarlton for McCollum v. Sealey, No. 5:15-CV-451-BO, U.S. District Court for the Eastern District of North Carolina. Judgment entered Mar. 1, 2018.

- Gilliam v. Sealey, Nos. 18-1366 and 18-1402, U.S. Court of Appeals for the Fourth Circuit. Judgment entered July 30, 2019.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Kenneth Sealey and Robert E. Price, Administrator C.T.A. of the Estate of Joel Garth Locklear, Sr. respectfully petition for a writ of certiorari to review the published judgment and decision of the United States Court of Appeals for the Fourth Circuit entered in this case on July 30, 2019, and published at Gilliam v. Sealey, 932 F.3d 216 (4th Cir. 2019).

OPINIONS BELOW

The Fourth Circuit panel's opinion is published at Gilliam v. Sealey, 932 F.3d 216 (4th Cir. 2019), and is reproduced in the Appendix ("App.") filed herewith at App. 1a–48a. The opinion of the United States District Court was not published, but is reproduced at App. 49a–86a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 30, 2019. App. 1a–48a. The Fourth Circuit denied the Petitioners' petition for rehearing and petition for rehearing en banc on August 27, 2019. App. 87a–89a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Plaintiffs allege that Officer Sealey and Officer Locklear violated their civil rights under the Fourth Amendment to the United States Constitution, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to the searched, and the persons or things to be seized.

Plaintiffs also allege that Officer Sealey and Officer Locklear violated the Due Process Clause of the Fourteenth Amendment, which states in relevant part as follows:

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

Plaintiffs brought the underlying action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity,

> injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

Under clear and longstanding Supreme Court precedent, a district court is required to rule upon the qualified immunity issues at the earliest possible stage of the proceedings, because qualified immunity is an entitlement not to stand trial or face the other burdens of litigation. See Saucier v. Katz, 533 U.S. 194, 200-201, 121 S. Ct. 2151, 2156 (2001); Hunter v. Bryant, 502 U.S. 224, 227, 112 S. Ct. 534 (1991) (per curiam). Therefore, under Supreme Court precedent, when a public officer moves for summary judgment on the ground or basis of qualified immunity, a District Court is required to rule upon the qualified immunity issue at the Rule 56 stage as to each of a plaintiff's asserted claims, Saucier, supra., and cannot refuse to rule on the qualified immunity issue as to any claim at the Rule 56 stage. Otherwise, the officer's qualified immunity as to each of a plaintiff's asserted claims "is effectively lost[.]" Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806 (1985).

In spite of clear and direct guidance from the Supreme Court on this point, the District Court refused to fulfill its duty to rule on the issue of whether Officer Sealey and Officer Locklear were entitled to qualified immunity at the Rule 56 stage on

each of Plaintiffs' asserted claims. Instead, the district court stated that "in light of plaintiffs' allegations that defendants worked in concert to deny the plaintiffs their constitutional rights, as well as the specifics regarding the grouping of SBI and Robeson County defendants to engage in different aspects of plaintiffs' interrogations, arrests, and investigations, the Court will not at this time attempt to parse the liability of each officer as it relates to each claim." App. 84a.

The Fourth Circuit, in its published opinion, also ignored clear Supreme Court precedent directing that a district court must rule on the qualified immunity issue at the Rule 56 stage as to every claim asserted by Plaintiffs. Instead, the Fourth Circuit held that "it would be counterproductive to require a district court to wade through convoluted issues of fact" to determine the individual officers' entitlement to qualified immunity as to each of Plaintiffs' claims in this case. Gilliam v. Sealey, 932 F.3d 216, 229-30 (4th Cir. 2019). This is directly contrary to Supreme Court directives that a district court is required to rule upon the qualified immunity issues at the earliest possible stage of the proceedings – in this case, at the summary judgment stage.

The Court should grant this Petition on all questions or, alternatively, summarily reverse the Fourth Circuit. The Fourth Circuit should not be permitted to defy, ignore, or circumvent the clear directives of this Court that when a public officer moves for summary judgment on the ground of qualified immunity, a district court is required to rule upon the qualified immunity issue at the summary

judgment stage as to each of the Plaintiffs' asserted claims.

STATEMENT OF THE CASE

I. Factual Introduction

On September 24, 1983, eleven-year-old Sabrina Buie, an African American female, went missing. Her nude body was found in a soybean field in Red Springs, North Carolina on September 26, 1983. The same day, the Red Springs Police Department asked the North Carolina State Bureau of Investigations ("SBI") to take control of the criminal investigation.

Local law enforcement officers, including Officer Sealey and Officer Locklear of the Robeson County Sheriff's Office, worked on the investigation under the supervision of the SBI. There were a number of officers involved in the investigation and different officers worked on different aspects of the case. For example, the processing of the crime scene was conducted by SBI Agent Allen. Furthermore, only three of the officers—Snead, Allen, and Sealey—interviewed McCollum. Two other officers, Chief Haggins of Red Springs and Locklear, interviewed Brown. Neither Sealey nor Locklear was in any way involved with obtaining or processing any physical evidence, requesting that any evidence be examined or processed by the North Carolina Crime Lab, or the cancellation of any such request.

On September 29, 1983, Henry McCollum and Leon Brown confessed to participating in the rape and murder of Buie. McCollum and Brown were indicted by a grand jury on January 3, 1984, on charges of

first-degree murder and rape. They were tried and convicted in October of 1984.

On appeal, the North Carolina Supreme Court reversed and remanded for a new trial based on an error in the jury instructions. North Carolina v. McCollum, 321 N.C. 557, 364 S.E.2d 112 (1988). In 1991, McCollum was found guilty by a jury of first-degree murder and rape. In 1992, Brown was found guilty by a jury of first-degree rape. Both convictions were affirmed on appeal. State v. McCollum, 334 N.C. 208, 433 S.E.2d 144 (1993), cert. den., 512 U.S. 1254, 114 S. Ct. 2784 (1994); State v. Brown, 112 N.C. App. 390, 436 S.E.2d 163 (1993), aff'd, 339 N.C. 606, 453 S.E.2d 165 (1995).

McCollum and Brown filed a motion for appropriate relief based on newly discovered DNA evidence—i.e., a cigarette butt found at or near the crime scene containing DNA matching Roscoe Artis. The motion was brought under N.C. Gen. Stat. §§ 15A-269 and 15A-270, statutes dealing with relief available to convicts who come forward with favorable DNA evidence post-conviction. In September of 2014, a Robeson County Superior Court judge granted the motion for appropriate relief of McCollum and Brown based on the DNA evidence, vacated their convictions, and dismissed the charges against them.

II. Proceedings

A. District Court

Plaintiffs filed suit against a number of defendants, including Kenneth Sealey and Joel Garth

Locklear, Sr., arising out of the alleged wrongful arrests and convictions of Plaintiffs.[2]

Plaintiffs asserted the following claims: (1) a 42 U.S.C. § 1983 claim brought under the Fourth Amendment for "false arrest" (JA 134-136); (2) a claim under 42 U.S.C. § 1983 under the Fourth Amendment for "malicious prosecution" (JA 140-142); and (3) a claim under 42 U.S.C. § 1983 for "deprivation of due process" (JA 136-140).

Plaintiffs' Fourth Amendment claims are based on the allegation that the officers who questioned McCollum (Snead, Sealey, and Allen) coerced McCollum into confessing, and that the different officers who questioned Brown (Haggins and Locklear) coerced Brown into confessing. App. 83a. The Plaintiffs' Due Process claims were ultimately based on the following assertions: (1) the officers who questioned McCollum (Snead, Sealey, and Allen) "fabricated" McCollum's confession; (2) the officers who questioned Brown (Haggins and Locklear) "fabricated" Brown's confession; (3) unspecified "defendants" failed to investigate and/or withheld evidence regarding the "similarities between the rape and murder of … Buie and the rapes and murders committed by … Artis"; (4) "Defendants" withheld evidence of a statement by a witness, Mary Richards, that she witnessed Artis attacking Buie; (5) unnamed "defendants" coerced L.P. Sinclair to testify against Plaintiffs (JA 322); and (6) unnamed "defendants"

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[2] Shortly after being served, Officer Joel Garth Locklear, Jr. passed away. Thereafter, Robert E. Price, as Administrator C.T.A. of the Estate of Joel Garth Locklear, Sr., was substituted as a party. In an attempt to avoid confusion, this Petition will refer to this defendant as "Locklear."

were somehow responsible for the State's failure to test fingerprints of Sinclair and Artis in 1984. (JA 327).

Defendants Sealey and Locklear moved for summary judgment on all claims. In the summary judgment brief and the statement of material facts filed by Sealey and Locklear, Sealey and Locklear pointed out facts showing, among other things, that during the investigation, Locklear and Sealey worked under the direction of the SBI; neither Sealey nor Locklear were involved in the processing of the crime scene; that Locklear was not involved in questioning McCollum; that Sealey was not involved in questioning Brown; Sealey and Locklear provided copies of all notes and documents that they created or obtained to members of the SBI with the understanding that the notes and documents would be produced to the District Attorney's Office; neither Sealey nor Locklear had any involvement in obtaining or processing any physical evidence; neither Sealey nor Locklear had any involvement in requesting that any evidence be examined or processed by the North Carolina Crime Lab or the cancellation of any such request. App. 96a, 134a.

In their Brief in Support of Motion for Summary Judgment, the defendants Sealey and Locklear first argued that the Plaintiffs had not shown that either defendant Sealey or defendant Locklear had taken any action that violated Plaintiffs' constitutional rights. App. 90a–133a. Defendants then clearly and specifically made "individualized" qualified immunity arguments, arguing that defendant Sealey, in his individual capacity, and defendant Locklear, in his individual capacity, were

each entitled to qualified immunity in light of the specific actions taken by each officer, the specific facts of the case, and established law. More particularly, in the summary judgment brief filed in the District Court by Sealey and Locklear, Sealey and Locklear made the following argument:

> PLAINTIFFS' FEDERAL CLAIMS AGAINST SEALEY AND LOCKLEAR, IN THEIR INDIVIDUAL CAPACITIES, FAIL AS A MATTER OF LAW BECAUSE SEALEY AND OFFICER LOCKLEAR ARE ENTITLED TO QUALIFIED IMMUNITY
>
> A court required to rule upon the qualified immunity issue considers whether the plaintiff has proved that a constitutional violation occurred. Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156 (2001). If there has been no constitutional violation, then the officers are entitled to qualified immunity. Saucier, supra. However, if the facts could establish a constitutional violation, the Court must analyze whether the constitutional right alleged to have been violated was "clearly established" at the time of the officer's actions. Id. In considering this second prong of the Saucier framework, the key issue is whether the law "gave the officials 'fair warning' that their conduct was unconstitutional." Ridpath v. Board of Governors Marshall Univ., 447 F.3d 292, 313 (4th Cir. 2006). For the right to

have been clearly established, "existing precedent must have placed the…constitutional question beyond debate." Ashcroft v. al-Kidd, 563 U.S. 731, 741, 131 S. Ct. 2074, 2083 (2011). "[T]he 'contours of the right' must have been so conclusively drawn as to leave no doubt that the challenged action was unconstitutional." Swanson v. Powers, 937 F.2d 965, 969 (4th Cir. 1991), quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034 (1987). Thus, the inquiry into whether the right was clearly established must "be undertaken in light of the specific context of the case" and "not as a broad general proposition…." Saucier, supra. See White v. Pauly, 137 S.Ct. 548, 552, 137 L.Ed.2d 548 (2017) (reiterating the "longstanding principle that 'clearly established law' should not be defined 'at a high level of generality,'" but must be "particularized to the facts of the case").

The doctrine of qualified immunity serves fundamental concerns of fairness: "Officers sued in a civil action for damages…have the same right to fair notice as to defendants charged with criminal offense[s]." Hope v. Pelzer, 536 U.S. 730, 739, 122 S. Ct. 2508 (2002). "[T]he qualified immunity test is simply the adaptation of the fair warning standard to give officials…the same protection from civil liability and its consequences that individuals have

traditionally possessed in the face of vague criminal statutes." United States v. Lanier, 520 U.S. 259, 270-71, 117 S. Ct. 1219 (1997). In other words, officers are entitled to qualified immunity "if a reasonable officer possessing the same information could have believed that his conduct was lawful." Slattery v. Rizzo, 939 F.2d 213, 216 (4h Cir. 1991) (emphasis added). The "safe harbor" of qualified immunity "ensures that officers will not be liable for 'bad guesses in gray areas' but only for 'transgressing bright lines.'" Doe v. Broderick, 225 F.3d 440, 453 (4th Cir. 2000) (citations omitted). Thus, an officer will be entitled to qualified immunity unless "every reasonable official would have understood that what he [was] doing" violated the Constitution. Ashcroft v. al-Kidd, 131 S. Ct. at 2083, quoting Anderson, 483 U.S. at 640.

As shown at length above, Sealey and Locklear did not violate the plaintiffs' constitutional rights. However, even assuming arguendo that the plaintiffs' constitutional rights may have been violated by these officers, it was not clearly established, at the time of the officers' actions, that their actions violated the Constitution. For example, on the issue of probable cause, an officer is entitled to qualified immunity "if officers of reasonable competence could disagree" on the issue of probable cause.

Mally v. Briggs, 475 U.S. 335, 341 and 346 n. 9, 106 S.Ct. 1092 (1988). In 1983, suspects' confessions were obviously sufficient to provide probable cause, and the case law existing in 1983 did not clearly establish that the plaintiffs' confessions were coerced under the specific facts of this case. Indeed, a Magistrate issued warrants, a Grand Jury indicted both plaintiffs, every judge to consider the issue held that the plaintiffs' confessions were voluntary, both plaintiffs were convicted, and the convictions were affirmed on appeal. See McKinney v. Richland County Sheriff's Dept., 431 F.3d 415, 419 (4th Cir. 2005) (holding that an officer was entitled to qualified immunity in part because a magistrate and prosecutor concluded that probable cause existed). See also, e.g., Keil v. Triveline, 661 F.3d 981, 986-87 (11th Cir. 2011) (Officers are entitled to qualified immunity if there was "arguable probable cause"). As to the Due Process Brady-based claims, it was not even clearly established in 1984 that officers had the duty to turn exculpatory evidence over to prosecutors. See Jean v. Collins, 155 F.3d 701 (4th Cir. 1998), superseded by Jean v. Collins, 221 F.3d 656 (4th Cir. 2000). However, in this case, Sealey and Locklear gave all the information in their possession to the SBI, with the understanding and belief that all

> evidence would be produced by the SBI to prosecutors. This conduct does not violate Due Process, and did not violate "clearly established" Due Process law as it existed in 1984. Furthermore, plaintiffs cannot show that the moving defendants fabricated any evidence, and it cannot be argued, under the facts of this case, that it was clearly established that the evidence plaintiffs allege was suppressed or fabricated was material and/or the cause or proximate cause of plaintiffs' loss of liberty. In other words, reasonable officers in the specific factual scenario faced by Sealey and Locklear in this case could have believed that their conduct was lawful. Slattery, supra. Therefore, Sealey and Locklear in their individual capacities are entitled to qualified immunity.

App. 124a–128a.

Similarly, in defendants Sealey and Locklear's Response in Opposition to Plaintiffs' Motion for Summary Judgment, defendants Sealey and Locklear once again argued that Plaintiffs had not shown, under the specific facts of this case, that either defendant Sealey or defendant Locklear, through their own personal individual actions, violated Plaintiffs' constitutional rights. (Doc. 177, pp. 14-27). Defendants Sealey and Locklear then again argued that they were each individually entitled to qualified immunity:

DEFENDANTS SEALEY AND LOCKLEAR, IN THEIR INDIVIDUAL CAPACITIES, ARE ENTITLED TO QUALIFIED IMMUNITY AS TO PLAINTIFFS' FEDERAL CLAIMS AGAINST THEM

At pages 20-22, pars. 55-64 of their motion/brief, the plaintiffs make the absurd argument that they are entitled to summary judgment as to the defendants Sealey and Locklear's claim of entitlement to qualified immunity. However, as shown in the summary judgment brief of Sealey and Locklear and below, the plaintiffs are not entitled to summary judgment as to defendants' defense of qualified immunity. Instead, defendants Sealey and Locklear in their individual capacities are entitled to summary judgment as to all claims because they are entitled to qualified immunity.

The plaintiffs' discussion of qualified immunity contains a fatally defective, fundamental flaw. Plaintiffs discuss "clearly established law" at a high level of generality instead of focusing on the particularized facts of this case. For example, at page 21 of their motion/brief, plaintiffs argue that defendants are not entitled to qualified immunity because it was clearly established that plaintiffs' "had a Due Process right to exculpatory material,"

had a "constitutional right to not be prosecuted by fabricated evidence," had "a right not to be subjected to coercive interrogation," and that it was clearly established that the Constitution forbids "arresting people without probable cause."

As the United States Supreme Court recently stated:

> Today, it is again necessary to reiterate the longstanding principle that "clearly established law" should not be defined "at a high level of generality." Ashcroft v. al-Kidd, 563 U.S. 731, 742, 131 S. Ct. 2074, 179 L.Ed.2d 1149 (2011). As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987). Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity…into a rule of virtually unqualified immunity simply by alleging violation of extremely abstract rights." Id., at 639, 107 S.Ct. 3034.

White v. Pauly, ___ U.S. ___, 137 S. Ct. 548, 552 (2017).

Thus, the inquiry into whether the right was clearly established must "be undertaken in light of the specific context of the case" and "not as a broad general proposition. . . ." Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, supra. If the right was not "clearly established" in the "specific context of the case," that is, if it was not "clear to a reasonable officer" that the conduct in which he allegedly engaged "was unlawful in the situation he confronted," then the law affords immunity from suit. Saucier, supra. In other words, officers are entitled to qualified immunity "if a reasonable officer possessing the same information could have believed that his conduct was lawful." Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991) (emphasis added).

In the instant case, when the doctrine of qualified immunity is analyzed correctly, it is clear that Sealey and Locklear are entitled to qualified immunity. First, the facts establish that Sealey and Locklear did not violate the plaintiffs' constitutional rights. However, even assuming arguendo that plaintiffs' rights may have been violated, it was not clearly established,

> at the time of the officers' actions, that the officers' specific actions violated the Constitution. Thus, under the circumstances, defendants Sealey and Locklear in their individual capacities are entitled to qualified immunity and therefore are entitled to summary judgment.

(Doc. 177, pp. 27-29).

Under established Supreme Court law, all Sealey and Locklear had to do at the summary judgment stage was to " 'show [ ]' – that is, point [ ] out to the district court – that there is an absence of evidence to support the nonmoving part[ies] case." Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). Once Sealey and Locklear met their burden of showing that there was an absence of evidence to support Plaintiffs' claims against them, Plaintiffs had the mandatory duty at the summary judgment stage to demonstrate that a triable issue of fact existed as to each asserted claim against Sealey and each asserted claim against Locklear. Anderson v. Liberty Lobby, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Under established Supreme Court precedent, Plaintiffs could not defeat Sealey and Locklear's summary judgment motion with mere allegations or general denials. Id. This well-established law applies, of course, to summary judgment motions in which a defendant invokes the defense of qualified immunity. See, e.g., Crawford-El v. Britton, 523 U.S. 574, 600, 118 S. Ct. 1584, 1598, 140 L.Ed.2d 759 (1998).

In the instant case, Sealey and Locklear met their burden of pointing out to the District Court that there was an absence of evidence to support Plaintiffs' claims against them. Under clear Supreme Court precedent, at the Rule 56 stage, Plaintiffs had the duty to demonstrate that a triable issue of fact existed as to each claim against Sealey and each claim against Locklear. However, Plaintiffs failed to fulfill this duty. Specifically, Plaintiffs failed to identify specific facts showing that the specific actions of Sealey, and/or the specific actions of Locklear, violated Plaintiffs' Fourth Amendment rights or Due Process rights. Instead, Plaintiffs, in their response to Sealey and Locklear's summary judgment brief, made general allegations regarding what "defendants" allegedly did, without specifically referencing evidence of specific actions taken by Sealey or specific actions taken by Locklear. (Pls.' Resp. to Sealey and Locklear's Motion for Summ. Judgment, Doc. 185).

Finally, in their Reply Brief in Support of Motion for Summary Judgment, defendants Sealey and Locklear again reiterated that they each were entitled to qualified immunity.

> PLAINTIFFS' CLAIMS AGAINST SEALEY AND LOCKLEAR IN THEIR INDIVIDUAL CAPACITIES FAIL AS A MATTER OF LAW BECAUSE SEALEY AND LOCKLEAR ARE ENTITLED TO QUALIFIED IMMUNITY
>
> As shown in defendants' summary judgment brief at pages 25-28, the defendants Sealey and Locklear are

> entitled to qualified immunity as to all claims. Defendants Sealey and Locklear incorporate by reference their response to Plaintiffs' summary judgment motion/brief at pages 27-29.

App. 143a.

In an Order dated March 1, 2018, the district court denied the motions for summary judgment of Sealey and Locklear in their individual capacities as to all claims, rejecting the officers' claims of entitlement to qualified immunity. In so ruling, the district court failed to fulfill its duty to analyze each claim of plaintiffs as to each individual defendant. First, the District Court stated that, "[g]enuine issues of material fact exist as to whether Plaintiffs' constitutional rights were violated," without any reference to what action or actions of Sealey or Locklear violated which Plaintiffs' rights. App. 69a. Later in its decision, the District Court stated that, "the Court cannot determine at this time whether Plaintiffs' constitutional rights were violated," without regard to what specific actions of which defendant may have violated Plaintiffs' rights. App. 84a. Finally, the District Court made it clear that it was not going to analyze what action or action of which individual defendant violated which Plaintiffs' constitutional rights. Instead, the district court stated that, "in light of plaintiffs' allegations that defendants worked in concert to deny the plaintiffs their constitutional rights, as well as the specifics regarding the grouping of SBI and Robeson County defendants to engage in different aspects of plaintiffs' interrogations, arrests, and investigations, the Court will not at this time attempt to parse the liability of

each officer as it relates to each claim." App. 84a. (emphasis added). In other words, the district court refused to apply the qualified immunity analysis to the specific actions of Sealey and Locklear at the Rule 56 stage; instead, the District Court postponed a ruling on Sealey and Locklear's qualified immunity claims until trial. This was clear error under binding Supreme Court authority.

B. The Fourth Circuit Court of Appeals

The Fourth Circuit issued its published decision on July 30, 2019. Gilliam v. Sealey, 932 F.3d 216 (4th Cir. 2019). The Fourth Circuit opinion erroneously held that it was permissible for a district court to fail to fulfill its duty to analyze each individual defendant's entitlement to qualified immunity as to each claim at the Rule 56 stage. Specifically, the Fourth Circuit stated as follows:

> Appellants assert that the district court broadly misapplied the test for qualified immunity because it did not identify "what each individual officer knew, when he knew it, and what specific actions he did or did not take." Appellants' Br. 20. Critically, Appellants did not argue before the district court that individual officers were entitled to qualified immunity based on the officer's individual actions, but instead asserted collective qualified immunity defenses. In other words, Appellants fault the district court for not identifying and resolving in their favor

> individual liability arguments that Appellants themselves did not raise.
>
> It is true that the defense of qualified immunity is a defense for individual defendants. But it would be counterproductive to require a district court to wade through convoluted issues of fact at this stage in order to determine individual liability, where: (1) Appellants did not raise individualized qualified immunity arguments before the district court but instead asserted collective qualified immunity defenses; (2) the facts have yet to be resolved, and the district court only determined whether qualified immunity applies as a matter of law; and (3) appellees alleged that Appellants acted in concert to violate their constitutional rights. Accordingly, the district court did not improperly apply the test for qualified immunity by waiting to parse the liability of each individual defendant as to each claim until the facts are determined.

Gilliam, 932 F.3d at 229-30. In other words, the Fourth Circuit held that the district court could disregard its duty to analyze each individual defendant's entitlement to qualified immunity at the Rule 56 stage – and, therefore, postpone ruling on each officer's entitlement to qualified immunity until trial – because (1) the Fourth Circuit panel opinion inaccurately stated that Sealey and Locklear did not argue to the district court that these officers were

entitled to qualified immunity based on each officer's individual actions; (2) the facts were "convoluted"; (3) the facts "have yet to be resolved" at trial; and (4) the Plaintiffs "alleged" that the officers acted in concert to violate their constitutional rights. App. 22a.

The Fourth Circuit opinion holding that a district court can disregard its duty to analyze each individual officer's entitlement to qualified immunity at the Rule 56 stage is clearly erroneous. Under binding Supreme Court authority, a district court (and a Circuit Court hearing the appeal de novo): (1) must rule upon the qualified immunity issue at the earliest possible stage of the proceeding; (2) must not postpone a ruling on qualified immunity until after the Rule 56 stage; (3) must hold plaintiffs to their burden of showing that each officer, through his own personal actions, violated the Constitution; and (4) must properly apply the qualified immunity test at the Rule 56 stage by analyzing whether each individual officer is entitled to qualified immunity as to each claim. This is explained in more detail below.

The Fourth Circuit denied the petition for rehearing and petition for rehearing en banc on August 27, 2019. App. 87a–89a.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT OPINION IS IN CONFLICT WITH BINDING SUPREME COURT AUTHORITY IN ITS RULING THAT THE DISTRICT COURT WAS NOT REQUIRED TO PROPERLY APPLY THE QUALIFIED IMMUNITY ANALYSIS AT THE RULE 56 STAGE AS TO EACH OFFICER AND EACH CLAIM

A. A District Court Must Rule Upon the Qualified Immunity Issue, As to Each Individual Officer and Each Claim, at the Rule 56 Stage And Cannot Postpone the Ruling Until Trial

Under binding United States Supreme Court precedent, when an officer seeks a ruling from a district court that he or she is entitled to qualified immunity, the court is "required to rule upon the qualified immunity issue" at the earliest possible stage of the proceedings. See Saucier v. Katz, 533 U.S. 194, 200-201, 121 S. Ct. 2151, 2156 (2001). This is because qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation," Mitchell v. Forsyth, 472 U.S. 511, 526 (1985), and it is therefore important to "resolv[e] immunity questions at the earliest possible stage of litigation." Hunter v. Bryant, 502 U.S. 224, 227, 112 S. Ct. 534 (1991) (per curiam). See also, e.g., Ashcroft v. Iqbal, 556 U.S. 662, 672 and 684-5 (2009); Saucier, 533 U.S. at 201; Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

As the Supreme Court has explained, actions against public officials under § 1983 impose

"substantial social costs." Anderson v. Creighton, 483 U.S. 635, 638, 107 S. Ct. 3034 (1987). They threaten potentially significant personal liability for actions that arise out of the performance of official duties, and they can subject officials to burdensome and distracting litigation. This could lead to undesirable *ex ante* effects: reticence of officials in carrying out important public functions and, perhaps worse, a general disaffection with public service, rooted in the calculation that its costs simply outweigh its benefits. See Harlow v. Fitzgerald, 457 U.S. 800, 814, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982).

To avoid these and other evils, the Supreme Court has recognized that public officials enjoy qualified immunity in civil actions that are brought against them in their individual capacities and that arise out of the performance of their duties. See Anderson, 483 U.S. at 638, 107 S. Ct. 3034. Qualified immunity is an "immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if the case is erroneously permitted to go to trial." Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985) (internal quotation marks omitted). This standard, by design, "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." Ashcroft v. al-Kidd, ____ U.S. ____, 131 S. Ct. 2074, 2085 (2011).

Moreover, as the Supreme Court has made clear, the doctrine of qualified immunity is designed to protect officers from unwarranted or unnecessary demands customarily imposed upon defendants defending lawsuits, and it is also designed to avoid forcing officers to endure any unnecessary and/or

additional burdens of suit. See, e.g., Siegert v. Gilley, 500 U.S. 226, 232, 111 S. Ct. 1789 (1991) ("One of the purposes of [qualified] immunity. . . is to spare a defendant . . . unwarranted demands customarily imposed upon those defending a … lawsuit"). Thus, as the Supreme Court has made clear, district courts must resolve immunity questions at the earlier possible stage of litigation. Saucier, supra. In this case, binding Supreme Court authority mandated that the district court rule on the officers' entitlement to qualified immunity as to each Plaintiffs' claims at the Rule 56 stage.

Thus, it was error for the Fourth Circuit to hold that a district court does not have to rule on each individual defendant's entitlement to qualified immunity as to each of Plaintiffs' claims at the Rule 56 stage, but instead can postpone such a ruling until later.

1. The duty of the district court and the Fourth Circuit panel to properly apply the qualified immunity analysis at the Rule 56 stage as to Sealey and Locklear is not excused where, as here, Sealey and Locklear properly raised and argued the qualified immunity defense

The Fourth Circuit erroneously held that the defendants "did not raise individualized qualified immunity arguments before the district court, but instead asserted collective qualified immunity defenses," and that the defendants "did not argue before the district court that individual officers were

entitled to qualified immunity based on the officers' individual actions[.]" App. 22a (emphasis in original). The defendants Sealey and Locklear, in arguing that they were entitled to qualified immunity as to each and every claim, were necessarily asking the District Court to apply the proper qualified immunity analysis to the individual defendants based on each defendant's specific actions.

The test for qualified immunity necessarily requires individualized inquiry into the specific actions of each defendant. Further, even if the law were such that the defendants needed to specifically ask the District Court to determine qualified immunity based on the specific actions of each defendant, it is simply untrue that the defendants did not do so. In Sealey and Locklear's summary judgment brief, the undersigned counsel explained the law of qualified immunity, and argued that Sealey and Locklear, in their individual capacities, were entitled to qualified immunity, explaining that the qualified immunity analysis "must be particularized to the facts of the case," and that "reasonable officers in the specific factual scenario faced by Sealey and Locklear could have believed that their conduct was lawful." App. 126a–127a. Similarly, in defendants Sealey and Locklear's response in opposition to Plaintiffs' motion for summary judgment, defendants Sealey and Locklear made the following arguments:

> Thus, the inquiry into whether the right was clearly established must "be undertaken of the specific context of the case" and "not as a broad general proposition. . . ." Saucier v. Katz, U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001).

> "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, supra. If the right was not "'clearly established" in the "specific context of the case," that is, if it was not "clear to a reasonable officer" that the conduct in which he allegedly engaged "was unlawful in the situation he confronted," then the law affords immunity from suit. Saucier, supra. In other words, officers are entitled to qualified immunity "if a reasonable officer possessing the same information could have believed that his conduct was lawful." Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991) (emphasis added).
>
> In the instant case, . . . the facts establish that Sealey and Locklear did not violate the plaintiffs' constitutional rights. However, even assuming arguendo that plaintiffs' rights may have been violated, it was not clearly established, at the time of the officers' actions, that the officers' specific actions violated the Constitution. Thus, under the circumstances, defendants Sealey and Locklear in their individual capacities are entitled to qualified immunity . . . .

(D.E. 177, pp. 28-29). The above argument was also incorporated into the reply brief of Sealey and

Locklear in support of their motion for summary judgment. (D.E. 199, p. 7).

In fact, the Fourth Circuit decision in this case has it backwards: as shown at length above, defendants Sealey and Locklear correctly sought rulings that each of them was entitled to qualified immunity. It was Plaintiffs who argued for "collective" liability by failing to identify or make arguments regarding what specific actions were taken by Sealey or by Locklear. Instead of pointing out what specific actions of Sealey or Locklear violated the Constitution, Plaintiffs simply argued that "defendants" violated their rights. As this Court well knows, the qualified immunity defense applies solely to individual liability, not "collective" liability.

In short, a review of the summary judgment briefs of defendants Sealey and Locklear reveals that they did in fact raise individualized qualified immunity arguments before the district court. Thus, the statement in the panel opinion that the defendants "did not raise individualized qualified immunity arguments" before the district court is not an accurate statement.[3]

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[3] The undersigned attorneys, who have been counsel for Sealey and Locklear since the beginning of this case, have for decades made their living representing North Carolina public officers and municipalities in Section 1983 cases. Thus, the Fourth Circuit's erroneous statement that the defendants, including Sealey and Locklear, "did not raise individualized qualified immunity arguments before the district court," has the potential for affecting the reputation and/or livelihood of the undersigned attorneys. Therefore, the undersigned attorneys respectfully request that even if this Court elects to not grant this Petition,

Disturbingly, the Fourth Circuit in this case did not give any explanation as to what it meant when it asserted that the defendants Sealey and Locklear "did not raise individualized qualified immunity arguments before the district court but instead asserted collective qualified immunity defenses[.]" Gilliam, 932 F.3d at 229. In light of the arguments advanced by Sealey and Lockear at the Rule 56 stage, set forth at length above, the Fourth Circuit's assertion that Sealey and Locklear "did not raise individualized qualified immunity arguments" amounts to a non sequitur. The defendants Sealey and Locklear specifically argued at the Rule 56 stage in the District Court that Sealey, in his individual capacity, as well as Locklear, in his individual capacity, were entitled to qualified immunity. Sealey and Locklear made detailed arguments showing that they were each entitled to qualified immunity because neither Sealey nor Locklear violated Plaintiffs' constitutional rights and because, "even assuming arguendo that the plaintiffs' constitutional rights may have been violated by these officers [Sealey and Locklear], it was not clearly established, at the time of [Sealey and Locklear's] actions, that their actions violated the Constitution." Defendants Sealey and Locklear added: "In other words, reasonable officers in the specific factual scenario faced by Sealey and Locklear could have believed that their conduct was lawful … Therefore, Sealey and Locklear in their

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this Court issue an order directing the Fourth Circuit to correct its erroneous statement that Sealey and Locklear "did not raise individualized qualified immunity arguments before the district court." The undersigned attorneys realize that this is an extraordinary request, but the undersigned believe that the request is warranted in this case.

individual capacities are entitled to qualified immunity." App. 127a–128a. Similarly, in Sealey and Locklear's response in opposition to Plaintiffs' motion for summary judgment, Sealey and Locklear made it crystal clear that they were arguing that both Sealey and Locklear, in their respective individual capacities, were each entitled to qualified immunity:

> In the instant case, when the doctrine of qualified immunity is analyzed correctly, it is clear that Sealey and Locklear are entitled to qualified immunity. First, the facts established that Sealey and Locklear did not violate the plaintiffs' constitutional rights. However, even assuming arguendo that plaintiffs' rights may have been violated, it was not clearly established, at the time of [Sealey and Locklear's] actions, that [Sealey and Locklear's] specific actions violated the Constitution. Thus, under the circumstances, defendants Sealey and Locklear in their individual capacities are entitled to qualified immunity and therefore are entitled to summary judgment.

(Doc. 177, Defs.' Resp. in Opp., pp. 27-29). Thus, it is clear that the Fourth Circuit's assertion that Sealey and Locklear "did not raise individualized qualified immunity argument" is an incorrect assertion. If the qualified immunity arguments made by Sealey and Locklear to the District Court at the Rule 56 stage were not "individualized qualified arguments," then

there is virtually no qualified immunity argument made by any officer in any case that would be considered an "individualized qualified immunity argument." At a minimum, this Court should require the Fourth Circuit to explain what defendant public officers need to do to satisfy the Fourth Circuit's unstated test for asserting "individualized qualified immunity arguments." If the Gilliam decision stands, neither the undersigned attorneys nor any other member of the Fourth Circuit bar will know what a defendant and his or her attorney would have to argue in order to satisfy the Fourth Circuit that an "individualized qualified immunity argument" has been made. This puts attorneys representing public officers in the impossible and untenable position of guessing whether or not their qualified immunity arguments meet the Fourth Circuit's mysterious and unarticulated test for properly raising an "individualized qualified immunity argument." This is unfair, contrary to established law, and should not be allowed to stand.

In short, the Fourth Circuit's statement that Sealey and Locklear "did not raise individualized qualified immunity arguments" is clearly and demonstrably untrue. Therefore, the Fourth Circuit's main stated justification for holding that the district court did not have to properly rule on Sealey and Locklear's entitlement to qualified immunity at the Rule 56 stage turns out to be a justification based upon a demonstrably false premise.

Moreover, even if it were true that Sealey and Locklear could have somehow made their argument even more clear to the District Court, the District

Court nevertheless had a duty to analyze the qualified immunity issues as to each defendant officer and each claim. The Fourth Circuit's ruling to the contrary is in direct conflict with binding Supreme Court authority.

2. The duty of the District Court and the Fourth Circuit panel to properly apply the qualified immunity analysis at the Rule 56 stage as to each officer and each claim is not excused because the facts may be "convoluted"

The District Court was not excused from properly applying the qualified immunity analysis to Sealey and Locklear as to each claim because the facts are "convoluted" or because the facts have yet to be fully resolved. Instead, under binding Supreme Court precedent, the District Court must analyze Sealey and Locklear's entitlement to qualified immunity at the Rule 56 stage by viewing the evidence in the light most favorable to Plaintiffs. See, e.g., Scott v. Harris, 550 U.S. 372, 377, 127 S. Ct. 1769, 1774 (2007); Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L.Ed.2d 272 (2001). A federal court is not excused from this duty simply because, as the Fourth Circuit phrased it, the facts are "convoluted."

Thus, the panel opinion's holding that a district court need not apply the qualified immunity test as to each officer and each claim if the facts are "convoluted" is in conflict with binding Supreme Court precedent.

3. The Fourth Circuit's holding that a Court need not rule on an individual officer's entitlement to qualified immunity at the summary judgment stage if a plaintiff "alleges" that multiple officers "acted in concert" is in conflict with binding Supreme Court precedent holding that a plaintiff must prove that each officer, through his own individual actions, violated the Constitution

Under binding Supreme Court precedent, in order to hold any individual liable under Section 1983, plaintiffs must "prove that each Government-official defendant, through the official's own individual actions, has violated the Constitution … [E]ach Government official … is only liable for his or her own misconduct." Ashcroft v. Iqbal, 556 U.S. 676-77 (2009). This is relevant to the first prong of the Saucier qualified immunity analysis. Saucier v. Katz, 533 U.S. 194, 201 (2001).

Justice Thomas's dissent in Hope v. Pelzer articulates the principle well:

> In conducting qualified immunity analysis, … courts do not merely ask whether, taking the plaintiff's allegations as true, the plaintiff's clearly established rights were violated. Rather, courts must consider as well whether each defendant's alleged conduct violated the plaintiff's clearly established rights. For instance, an allegation that Defendant A violated

> a plaintiff's clearly established rights does nothing to overcome Defendant B's assertion of qualified immunity, absent some allegation that Defendant B was responsible for Defendant A's conduct.

536 U.S. 730, 751 n. 9, 122 S. Ct. 2508 (2002) (Thomas, J., dissenting).

For example, in the Supreme Court recent decision in City of Escondido v. Emmons, 139 S. Ct. 500 (2019), a case analyzing qualified immunity, the Supreme Court reversed the Ninth Circuit's decision denying summary judgment as to Sergeant Kevin Toth because the District Court had stated that "only Defendant Craig was involved in the excessive force claim" and the plaintiff "fail[ed] to identify contrary evidence." 139 S. Ct. at 502-3. In other words, the Supreme Court reversed the judgment as to Sergeant Toth because the plaintiff did not produce evidence that Toth was personally involved in the alleged excessive force used against the plaintiff. Id.

The Tenth Circuit's decision in Pahls v. Thomas, 718 F.3d 1210 (10th Cir. 2013) contains an instructive articulation of how the binding Supreme Court authority must be applied in cases involving multiple individual defendants:

> But common to all § 1983 . . . claims is the requirement that liability be predicated on a violation traceable to a defendant-official's "own individual actions." Iqbal, 556 U.S. at 676 . . . .
>
> … To make out viable § 1983 … claims and to overcome defendants' assertions

> of qualified immunity, plaintiffs here must establish that each defendant – whether by direct participation or by virtue of a policy over which he possessed supervisory responsibility – caused a violation of plaintiffs' clearly established constitutional rights … Plaintiffs must do more than show that their rights "were violated" or that "defendants," as a collective and undifferentiated whole, were responsible for those violations … They must identify specific actions taken by particular defendants … that violated their clearly established constitutional rights … Failure to make this showing . . . dooms plaintiffs' § 1983 … claims and entitles defendants to qualified immunity.

718 F.3d at 1225-26, 28.

Several other federal courts have followed this Court's precedent by evaluating each individual defendant's conduct to determine entitlement to qualified immunity. Because the qualified-immunity inquiry is necessarily an individualized one, the allegations against each defendant must always be scrutinized. See Vietnam Veterans of Am. v. McNamara, No. CIV.A. 02-2123(RMC), 2005 WL 485341, at *7 (D.D.C. Feb. 17, 2005), aff'd, 201 Fed. Appx. 779 (D.C. Cir. 2006) (citing Harlow, 457 U.S. at 819 (pertinent inquiry is into the "reasonableness of an official's acts")). See also Krutko v. Franklin County, Ohio, 559 Fed. Appx. 509, 511 (6th Cir. 2014) (remanding case to district court to conduct an individualized inquiry to determine whether any of

the defendants were entitled to qualified immunity); Dorsey v. Barber, 517 F.3d 389, 399 (6th Cir. 2008) (remarking that district court should have "distinguish[ed] between the actions of [defendant police officers]" instead of "lump[ing] them together" for purposes of the qualified-immunity analysis); Poe v. Leonard, 282 F.3d 123, 134 (2d Cir. 2002) (the "qualified immunity analysis depends upon an individualized determination of the misconduct alleged"); Cunningham v. Gates, 229 F.3d 1271 (9th Cir. 2000) (the qualified immunity determination requires that a court "carefully examine the specific allegations against each individual defendant"); Rouse v. Plantier, 182 F.3d 192, 200 (3d Cir. 1999) (explaining that "the District Court should have addressed the specific conduct of each of the individual defendants in determining whether that particular defendant acted in an 'objectively unreasonable' manner."); Reitz v. County of Bucks, 125 F.3d 139, 147 (3d Cir. 1997) (stating that qualified immunity analysis "requires application of the law to the particular conduct at issue"); Grant v. City of Pittsburgh, 98 F.3d 116, 122 (3d Cir. 1996) ("crucial to the resolution of any assertion of qualified immunity is a careful examination of the record … to establish, for purposes of summary judgment, a detailed factual description of the actions of each individual defendant[.]"); Bakalis v. Golembeski, 35 F.3d 318, 326–27 (7th Cir. 1994) ("Qualified immunity is an individual defense available to each individual defendant in his individual capacity."); Waldrop v. Evans, 871 F.2d 1030, 1034 (11th Cir. 1989) (evaluating challenged conduct individually because the standard is fact-specific); Ghandi v. Police Dep't of City of Detroit, 747 F.2d 338, 344 (6th Cir.

1984) ("Each of the individual federal defendants played a different role in the investigation … Therefore, the conduct of each defendant must be examined to determine whether the district court was correct in granting summary judgment on the basis of qualified immunity.").

Thus, the panel opinion's holding that a court need not apply a qualified immunity analysis as to each individual officer and each claim if a plaintiff "alleges" that defendants acted in concert is in direct conflict with binding Supreme Court authority and the holdings of numerous federal courts following this Court's precedent. Under well-established Supreme Court precedent, a plaintiff cannot defeat an individual officer's entitlement to summary judgment based on qualified immunity simply by alleging that the officer "acted in concert" with other defendants. As the Supreme Court stated in Liberty Lobby, supra., "a party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Id., quoting First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-89, 88 S. Ct. 1575, 1592 (1968). Thus, the Fourth Circuit's holding that a plaintiff can defeat an officer's entitlement to qualified immunity simply by alleging that defendants "acted in concert" is directly contrary to binding Supreme Court precedent.

The District Court and the Fourth Circuit's error in this regard is significant to Sealey and Locklear because Plaintiffs have not shown that Sealey and Locklear acted personally with regard to a number of Plaintiffs' claims.

As noted by the District Court, Locklear did not participate in the interview of McCollum. (JA 319). Thus, Locklear is entitled to qualified immunity for any claim relating to McCollum's confession. Moreover, Plaintiffs have not shown that any specific action of Sealey in McCollum's interview violated clearly established law.

It is undisputed that Sealey was not present for the questioning of Brown. (JA 548, 555-556, 660-661). Therefore, Sealey cannot be held liable for any claims arising out of Brown's confession. Moreover, Plaintiffs have not shown that any specific action of Locklear in Brown's interview violated clearly established law.

As to Plaintiffs' due process claim regarding Sinclair purportedly changing his story on October 5, 1984, neither Sealey nor Locklear had anything to do with that. (JA 354, 807-813, 1177). Therefore, Sealey and Locklear are entitled to qualified immunity as to this claim.

The Fourth Circuit panel opinion held that officers violated Brady because "once officers identified Artis as a suspect [in the Buie rape and murder], they were obligated to disclose this exculpatory information." App. 41a–42a. However, there is no evidence that Sealey or Locklear ever considered Artis to be a suspect in the Buie case.

The panel opinion states that the Plaintiffs' due process claim for failure to adequately investigate included the failure to test Artis or Sinclair's fingerprints. App. 45a. However, neither Sealey nor Locklear had any involvement or responsibility whatsoever in processing the physical evidence,

including fingerprints. (JA 1560). Therefore, Sealey and Locklear are entitled to qualified immunity regarding this claim.

In short, the Fourth Circuit's holding—that a court need not apply the qualified immunity analysis as to each officer and each claim in cases where a plaintiff "alleges" the officers acted in concert—is in direct conflict with binding Supreme Court authority.

CONCLUSION

The Fourth Circuit's opinion defies the Supreme Court's established jurisprudence on qualified immunity. The Court should grant the petition for writ of certiorari and reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted, this the 22nd day of November, 2019.

/s/ James R. Morgan, Jr.
James R. Morgan, Jr., N.C. State Bar No. 12496
Counsel of Record
Bradley O. Wood, N.C. State Bar No. 22392
Sonny S. Haynes, N.C. State Bar No. 41303
WOMBLE BOND DICKINSON (US) LLP
One West Fourth Street
Winston-Salem, NC 27101
Telephone: (336) 721-3600
Facsimile: (336) 721-3660
E-mail: Jim.Morgan@wbd-us.com
E-mail: Brad.Wood@wbd-us.com
E-mail: Sonny.Haynes@wbd-us.com
Counsel for Defendant-Appellants Kenneth Sealey and Robert E. Price, Administrator C.T.A. of the Estate of Joel Garth Locklear, Sr.

APPENDIX

APPENDIX TABLE OF CONTENTS

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[ENTERED: July 30, 2019]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1366

J. DUANE GILLIAM, Guardian of the Estate of Leon Brown; RAYMOND C. TARLTON, Guardian Ad Litem for Henry Lee McCollum,

Plaintiffs - Appellees,

and

HENRY LEE MCCOLLUM; LEON BROWN; GERALDINE BROWN RANSOM, Guardian of Leon Brown; KIMBERLY PINCHBECK, as limited guardian and conservator of the estate of Henry Lee McCollum,

Plaintiffs,

v.

KENNETH SEALEY, both individually and in his official capacity as the Sheriff of Robeson County; ROBERT E. PRICE, Administrator C.T.A. of the Estate of Joel Garth Locklear, Sr.,

Defendants - Appellants,

and

ROBESON COUNTY; TOWN OF RED SPRINGS; KENNETH SNEAD; JOEL GARTH LOCKLEAR; LARRY FLOYD; LEROY ALLEN; ESTATE OF LUTHER HAGGINS; GERALDINE BRITT HAGGINS, as Administratix/Executrix of the Estate of Luther Haggins; PAUL CANADY, Administrator C.T.A of the Estate of Luther Haggins; FAYETTEVILLE OBSERVER-TIMES; ASSOCIATED PRESS; WTVD TELEVISION LLC; CHARLOTTE OBSERVER,

Defendants.

No. 18-1402

J. DUANE GILLIAM, Guardian of the Estate of Leon Brown; RAYMOND C. TARLTON, Guardian Ad Litem for Henry Lee McCollum,

Plaintiffs - Appellees,

and

HENRY LEE MCCOLLUM; LEON BROWN; GERALDINE BROWN RANSOM, Guardian of Leon Brown; KIMBERLY PINCHBECK, as limited guardian and conservator of the estate of Henry Lee McCollum,

Plaintiffs,

v.

KENNETH SNEAD; LEROY ALLEN,

Defendants - Appellants,

and

ROBESON COUNTY; TOWN OF RED SPRINGS; KENNETH SEALEY, both individually and in his official capacity as the Sheriff of Robeson County; JOEL GARTH LOCKLEAR; LARRY FLOYD; ESTATE OF LUTHER HAGGINS; GERALDINE BRITT HAGGINS, as Administratix/Executrix of the Estate of Luther Haggins; PAUL CANADY, Administrator C.T.A of the Estate of Luther Haggins; ROBERT E. PRICE, Administrator C.T.A. of the Estate of Joel Garth Locklear, Sr.; FAYETTEVILLE OBSERVER-TIMES; ASSOCIATED PRESS; WTVD TELEVISION LLC; CHARLOTTE OBSERVER,

Defendants.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (5:15-cv-00451-BO)

Argued: March 20, 2019 Decided: July 30, 2019

Before NIEMEYER, THACKER, and RICHARDSON, Circuit Judges.

Affirmed by published opinion. Judge Thacker wrote the opinion, in which Judge Niemeyer joined. Judge Richardson wrote a separate opinion concurring in part and dissenting in part.

ARGUED: James R. Morgan Jr., WOMBLE BOND DICKINSON (US) LLP, Winston-Salem, North Carolina, for Appellants. Catherine E. Stetson, HOGAN LOVELLS US LLP, Washington, D.C., for Appellees. **ON BRIEF:** Bradley O. Wood, WOMBLE BOND DICKINSON (US) LLP, Winston-Salem, North Carolina, for Appellants K. Sealey and R. Price. Joshua H. Stein, OFFICE OF THE ATTORNEY GENERAL OF NORTH CAROLINA, Raleigh, North Carolina; Matthew W. Sawchak, Brian D. Rabinovitz, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellants K. Snead and L. Allen. E. Desmond Hogan, Kirti Datla, David W. Maxwell, Elizabeth C. Lockwood, Matthew J. Higgins, HOGAN LOVELLS US LLP, Washington, D.C., for Appellees.

THACKER, Circuit Judge:

This case stems from the wrongful conviction of two brothers, both teenaged boys with severe intellectual disabilities, for the rape and murder of an 11 year old girl in 1983. Henry McCollum and Leon Brown ("Appellees") spent 31 years in prison and on death row[1] before being exonerated based on DNA evidence linking another individual, a man who was known to officers at the time of the investigation, to the crime. Following their release from prison, Appellees brought this case pursuant to 42 U.S.C. § 1983 alleging that the state and county law

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[1] Brown spent nearly a decade on death row before being retried in 1992 and sentenced to life in prison, while McCollum remained on death row following his second trial.

enforcement officers investigating the crime violated their Fourth Amendment and due process rights.

The officers moved for summary judgment on the basis of qualified immunity. The district court denied their motion, and this appeal followed. Because Appellees have alleged facts sufficient to show that the officers violated their clearly established Fourth Amendment and due process rights, we affirm the district court's denial of qualified immunity.

I.

A.

The Underlying Crime and Investigation

Eleven year old Sabrina Buie went missing on the evening of September 24, 1983, in Red Springs, North Carolina. Two days later, her body was discovered in a soybean field near a convenience store in Red Springs. She was found naked from the waist down, with her bra pushed up over the back of her head. Her panties were shoved down her throat with a stick, and she had been sexually assaulted.

The Red Springs Police Department and the North Carolina State Bureau of Investigation ("SBI") worked together to investigate the case. SBI Agents Leroy Allen and Kenneth Snead and Robeson County Detectives Joel Garth Locklear and Kenneth Sealey (collectively, "Appellants") were assigned to the case. While processing the crime scene, Appellants discovered three Schiltz Malt Liquor beer cans, three match sticks, one Newport cigarette butt, and two wooden sticks reddened with blood.

On September 27, 1983, while canvassing the neighborhood for witnesses, Detective Locklear spoke to Henry McCollum, who denied any knowledge of Buie's disappearance. However, the following evening, Agent Snead and Detective Sealey interviewed Ethel Furmage, a high school student, who said that she had "heard at school" that McCollum "had something to do with" Buie's murder. J.A. 304.[2] Shortly after 9:00 that evening, Snead, Sealey, and Agent Allen traveled to McCollum's home to interview him. McCollum agreed to ride with the officers to the police station, where he was fingerprinted and questioned.

B.

Interrogations of Appellees

1.

McCollum

What exactly happened in the interrogation room is at the heart of this case and is, as the district court determined, a dispute of material fact that must be determined by a jury. This is what we know for sure. At the time of these events, McCollum was 19 years old, and he suffered from severe intellectual disabilities. He scored a 56 on an IQ test, where any score below a 69 indicates intellectual disability. In high school, McCollum performed at the level of an eight to ten year old. And in 1990, McCollum was formally diagnosed as intellectually disabled. McCollum had never been in legal trouble.

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[2] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

A *Miranda*[3] waiver form bearing McCollum's signature is dated September 28, 1983, at 10:26 p.m. At 2:10 a.m. on September 29, McCollum signed a handwritten confession that was drafted by Agent Snead and witnessed by Detective Sealey and Red Springs Police Department Chief Luther Haggins. This confession stated the following: McCollum, along with four other boys -- Darrell Suber, Louis Moore, Chris (last name unknown), and Leon Brown -- were with Buie at approximately 9:30 p.m. on September 24, the day she went missing. Suber and Chris left the group to buy a six-pack of beer from the nearby convenience store. When they returned, Suber, Chris, McCollum, Moore, and Brown discussed raping Buie, because she had not agreed to have sex with them voluntarily. After this conversation, Moore left. The rest of the group walked with Buie to the woods at the edge of a field and drank beer. Suber and Chris smoked Newport cigarettes.

Per the confession, McCollum grabbed Buie's right arm while Brown grabbed her left arm. The group of boys then took turns raping Buie, with McCollum going third and Brown going last. Afterwards, Suber said they had to do something so that Buie would not tell the police what they had done. Chris tied Buie's pink panties to a stick, then used it to choke Buie to death. While this was happening, McCollum and Brown held Buie down and Suber cut her with a knife. Then, after they believed Buie was dead, the boys dragged her body to the edge of the woods. Suber had blood on his brown corduroy

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[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

jacket and gray Nike tennis shoes, and Chris had blood on his sneakers.

After McCollum signed the confession, he was placed under arrest for Buie's rape and murder.

2.

Brown

During McCollum's interrogation, his mother Mamie Brown and brother Leon Brown arrived at the police station. At approximately 2 a.m. on September 29, and based on McCollum's written confession, Detective Locklear and Chief Haggins began to interrogate Brown.

Brown was 15 years old at the time, and like his brother, he had been diagnosed with severe intellectual disabilities. He consistently scored in the mid-50s range on IQ tests, and although he was in seventh grade, he performed at a third grade level. In 1982, a school psychologist had placed Brown in a special education class. Like his brother, Brown had not previously been in legal trouble.

At 2:24 a.m., Brown signed a form entitled "Juvenile Rights Warning."[4] Then, around 6 a.m., Brown signed a confession that had been drafted by Detective Locklear. Following Brown's confession, he was arrested for the rape and murder of Buie.

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[4] This form lists the rights available to a juvenile questioned by law enforcement officers, including the rights "to remain silent"; "to have a parent, guardian, or custodian present during questioning"; and "to talk with a lawyer for advice before questioning and to have that lawyer with you during questioning." J.A. 1313.

3.

Confession Inconsistencies

Brown's confession implicated Suber and Chris, but it differed in certain aspects from McCollum's confession. Notably, Brown's confession makes no mention of Moore's involvement, and it does not reference a stick being used to force Buie's underwear down her throat.

The confessions of McCollum and Brown also contained certain details that were later proven false. For example, both confessions stated that Suber and Chris were involved in the crime and took turns raping Buie, but the police verified that Suber, Chris, and Moore all had alibis on the night of the murder. And contrary to the confessions, an autopsy revealed that Buie's panties were white, not pink, and she had no stab wounds.

C.

Criminal Proceedings and Post-Conviction Relief

1.

1984 Trial

Appellees were indicted by a grand jury on January 3, 1984, on charges of first-degree murder and rape. They were tried together in Robeson County Superior Court in October 1984. The prosecutor was District Attorney Joe Freeman Britt, McCollum was represented by Earl Strickland, and Brown was represented by Robert Johnson.

Appellees both moved to suppress their confessions. These motions were denied. The trial court concluded that both McCollum and Brown had voluntarily gone to the police station; each had knowingly and intelligently waived his rights; and each had made statements freely, voluntarily, and knowingly. Appellees both testified at trial, and each was convicted and sentenced to death.

2.

Second Trials

On appeal, the North Carolina Supreme Court reversed and remanded the case for a new trial based on error in the jury instructions. *See North Carolina v. McCollum*, 364 S.E.2d 112 (N.C. 1988). Appellees were then tried separately in adjacent counties.

McCollum was retried in Cumberland County in November 1991. The Cumberland County Superior Court denied McCollum's motion to suppress his confession, concluding that McCollum's constitutional rights were not violated by his arrest, detention, interrogation, or confession; that his confession was made freely and voluntarily; and that McCollum waived his rights freely, knowingly, and intelligently. During the November 1991 trial, and with McCollum's consent, McCollum's attorney argued to the jury that McCollum was present for the rape and murder of Buie, and he asked the jury to return a verdict of second-degree murder. McCollum was found guilty of first-degree murder and rape, and he was again sentenced to death. The North Carolina Supreme Court affirmed McCollum's conviction and sentence. *See North Carolina v. McCollum*, 433 S.E.2d 144 (N.C. 1993). The United States Supreme

Court denied McCollum's petition for writ of certiorari. *See McCollum v. North Carolina*, 512 U.S. 1254 (1994).

After McCollum's trial, Brown was retried in Bladen County Superior Court in June 1992. Brown's motion to suppress his confession was denied after the trial court concluded that Brown knowingly, intelligently, and voluntarily waived his rights; that his constitutional rights had not been violated; and that his confession was voluntary. The trial court later granted a defense motion to dismiss the first-degree murder charge, finding that Brown had withdrawn from the conspiracy to commit murder. The jury found Brown guilty of first-degree rape, and he was sentenced to life in prison. The North Carolina Court of Appeals and the North Carolina Supreme Court affirmed Brown's conviction and sentence. *See North Carolina v. Brown*, 436 S.E.2d 163 (N.C. Ct. App. 1993); *North Carolina v. Brown*, 453 S.E.2d 165 (N.C. 1995). Brown did not file a petition for writ of certiorari to the United States Supreme Court.

3.

NCIIC Investigation

In 2009, Brown sought assistance from the North Carolina Innocence Inquiry Commission ("NCIIC"), and the NCIIC accepted his case. The NCIIC then reached out to McCollum and accepted his case as well. In its investigation, the NCIIC uncovered DNA evidence on the Newport cigarette butt found at the scene of the crime. The DNA matched Roscoe Artis, a man known to Appellants during the investigation of Buie's murder.

In 1984, Artis was convicted of a crime strikingly similar to Buie's murder: the first-degree murder and rape of Joann Brockman, also in Red Springs, North Carolina. On October 22, 1983 -- less than one month after Buie's murder -- Brockman's body was found naked except for a sweater and bra pushed up above her breasts, and an autopsy revealed that she died from manual strangulation during sexual intercourse. Artis was arrested the same day, and he was tried in August 1984. The prosecutor for Artis's trial was district attorney Joe Freeman Britt, and Artis was represented by Earl Strickland -- both of whom would be involved in McCollum and Brown's October 1984 trial just two months later. Appellants Agent Allen and Detective Locklear, who were involved in the investigation of Brockman's murder, testified for the state in Artis's trial.[5] Artis received a death sentence, which was commuted to life in prison. *See North Carolina v. Artis*, 384 S.E.2d 470 (N.C. 1989), *judgment vacated*, 494 U.S. 1023 (1990); *see also North Carolina v. Artis*, 406 S.E.2d 827 (N.C. 1991).

The DNA tested on other items of physical evidence from the scene of Buie's murder did not match McCollum or Brown.

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[5] Detective Locklear testified that he responded to the scene of the crime, observed the victim's body, and interviewed Artis on the day of Brockman's murder. According to Locklear, during this interview Artis confessed to the murder and led officers back to the location where Brockman's body had been discovered. Allen testified that he transported certain evidence, including a blood sample taken from Artis, to the SBI lab for testing as part of the investigation.

4.

MAR Court Proceedings and Pardons

Based on this DNA evidence, Appellees filed motions for appropriate relief ("MAR") in the Robeson County Superior Court. At a hearing on these motions held September 2, 2014, the NCIIC's investigator testified about inconsistencies between Appellees' written confessions and the DNA match to Artis on the cigarette. The state did not contest that the newly discovered DNA evidence was favorable to Appellees, and it conceded that Appellees had satisfied the requirements of N.C. Gen. Stat. § 15A-270(c), which governs the relief available to petitioners who come forward with favorable DNA evidence post-conviction. The MAR court held, "especially when considered together with the rest of the results of the [NCIIC]'s investigation," the favorable DNA evidence "tend[s] to establish Henry McCollum's and Leon Brown's innocence of [the] crime for which they were convicted and sentenced." J.A. 309. Accordingly, the MAR court vacated Appellees' convictions and sentences from Robeson, Cumberland, and Bladen counties, dismissed with prejudice all charges in the cases, and ordered Appellees' immediate release.

On June 5, 2015, North Carolina Governor Pat McCrory issued full pardons of innocence to Appellees.

D.

District Court Proceedings

Appellees filed this action against Appellants on August 31, 2015. The amended complaint alleges

four claims arising pursuant to 42 U.S.C. § 1983: false arrest, malicious prosecution, deprivation of due process, and municipal liability. At the root of these claims, Appellees assert that Appellants coerced and fabricated Appellees' confessions, and then, to cover up this wrongdoing, Appellees allege that Appellants withheld in bad faith exculpatory evidence that demonstrated Appellees' innocence and buried pieces of specific evidence indicating that Artis -- and not Appellees -- raped and murdered Buie.

Appellants sought summary judgment on the basis of qualified immunity. The district court concluded that genuine disputes of material fact preclude summary judgment based on qualified immunity, and that a jury must determine whether Appellees' confessions were voluntary and whether Appellants acted in bad faith while investigating Buie's murder after the confessions were obtained. The district court summarized these disputes of material fact as follows.

1.

The Confessions

a.

McCollum

The district court noted that "[t]he parties offer[ed] drastically different versions of the events surrounding the confessions given by [Appellees]." J.A. 318. Agent Snead and Detective Sealey stated that they began questioning McCollum around 9:30 p.m. But Snead and Sealey's recollections of when McCollum received his *Miranda* warning differ;

Snead testified in his deposition that McCollum signed the waiver prior to questioning, whereas Sealey testified in his deposition that McCollum signed the waiver after he admitted to holding Buie down. Sealey testified that he asked few if any questions during the interview, and that Snead took the lead. Agent Allen was also present during the interview, according to Snead.

After what Detective Sealey thought might have been five or ten minutes of questioning -- but Agent Snead recalls being anywhere from twenty to forty-five minutes -- McCollum admitted to them, "I just held her down." J.A. 319. Sealey testified at his deposition that he thought McCollum was about to have a seizure just before he admitted this; meanwhile, Snead testified at his deposition that McCollum was extremely calm.

According to Agent Snead, he talked with McCollum until about 1:50 a.m., McCollum confessed, and Snead wrote out McCollum's statement. Then, Snead testified, McCollum confronted Brown and Suber, who were at the police station, and told them that he (McCollum) had told the truth and wanted them to also tell the truth about killing Buie. McCollum then asked Chief Haggins if he could go home, and Snead informed McCollum that things had changed and asked Haggins to arrest McCollum for murder.

As the district court noted, "McCollum's description of his interview by Snead, Sealey, and Allen bears no resemblance to the [officers' accounts]." J.A. 319. According to McCollum, the officers told him that if he signed a form -- the

Miranda waiver form -- they would let him go home. McCollum signed the form without reading it. In his deposition, McCollum testified that the officers questioning him "got into his face, hollered at him, . . . threatened him, . . . [and] McCollum repeatedly denied being involved." *Id.* According to McCollum, he was called racial epithets, and Detective Sealey threatened that McCollum "was going to get the gas chamber," J.A. 988, if he did not talk. McCollum believed this to mean that Sealey had the "power and authority" to kill him. *Id.* at 1022. During the interrogation, McCollum's mother arrived at the station and asked the officers to see her son. McCollum likewise asked if he could see his mother. The officers refused, and McCollum heard one of the officers tell his mother to "shut up" and threaten to "lock her up." *Id.* at 986–87. McCollum further testified that the officers told him to sign a paper that said if he could help them in the case as a witness, they would let him go home. McCollum signed the paper -- which was actually the confession written out by Snead -- but he did not read it and it was not read to him. McCollum denies that he confessed to raping and murdering Buie.

b.

Brown

As the district court summarized, Brown came to the police station with his mother at about 11 p.m. on September 28, 1983, while McCollum was being questioned. Brown testified at the 1984 trial that he could hear his brother crying when he arrived. At around 2:30 a.m., while Brown was waiting at the station with L.P. Sinclair (a friend of the boys and

eventual witness in the case), Detective Locklear and Agent Allen took Brown to an interrogation room and began questioning him.

Agent Allen testified at his deposition that he read Brown his juvenile rights, including the right to have a parent present, and that Brown stated he understood his rights and wished to answer questions without a lawyer or parent present. Allen stated that he did not recall Brown asking to speak with his mother, or Brown's mother asking to see Brown. Agent Snead testified at his deposition that he does not know why Brown was taken to an interview room, and that he witnessed Brown's rights form but was not in the room when Brown confessed. Detective Locklear testified at the 1984 trial that he took Brown's statement, and that Brown was "quite alert of mind and very precise in what he wanted to say to me." J.A. 321. Further, Locklear testified that he made Brown no promises and did not threaten him.

Brown, meanwhile, testified at his 1984 trial that Detective Locklear did not advise him of his rights, that Brown asked for his mother when an officer grabbed Brown's arm, and that Brown (like McCollum) was told he would be taken to the gas chamber if he did not sign the rights waiver. Then, Brown testified that when the officers gave him a piece of paper, he circled "no" on it. According to Brown, that "no" was supposed to indicate that he could not help the officers. Brown testified that the officers then "began to hammer him, calling him racial epithets and stating that he [Brown] had committed the crime or that he knew something about it." J.A. 320. During Brown's interrogation, his mother was knocking on the door asking to see him,

but she was refused entry. Brown denied any knowledge of the crime and stated that he was innocent. Brown testified at his deposition that he did not say the things that are written in the confession; instead, Detective Locklear drafted it and told Brown to sign it, which Brown did after an officer told him doing so would ensure his release. Locklear then read the confession to Brown, and Brown told the officers that it was not true. Like his brother, Brown was then placed under arrest.

2.

The Investigation

The district court noted additional disputes of material fact regarding Appellants' conduct during the investigation that precluded summary judgment on Appellees' due process claims. Specifically, these factual disputes involved Appellees' assertion that Appellants failed to investigate and withheld exculpatory evidence regarding (1) the similarities between the rape and murder of Buie and Artis's rape and murder of Brockhart; (2) a statement by a potential eyewitness, Mary McLean Richards, that she saw Artis attacking Buie; and (3) the alleged coerced testimony of Brown and McCollum's friend L.P. Sinclair.

Appellees assert that Artis was a suspect in Buie's murder, but Appellants failed to disclose this to Appellees. According to Appellees, on October 5, 1984, three days before Appellees' first trial, investigators submitted Artis's fingerprints to the SBI for comparison to the latent prints found on the beer can at the Buie crime scene. Artis was listed as a suspect on the fingerprint comparison request.

However, the investigators canceled the request that same day, and the fingerprint comparison was never completed.

Next, Appellees assert that Richards told Appellants that she witnessed Artis attacking Buie on the night of the murder, and that she attempted to intervene but Artis frightened her away. Richards further testified that when she went home and told her mother what she had seen, her mother would not allow her to call the police. Richards testified in her deposition that she provided this information to Detective Sealey during the investigation in 1983. However, Sealey's investigation notes do not reflect this information.

Finally, Appellees assert that Appellants coerced false testimony from Sinclair. After meeting with investigators multiple times, Sinclair submitted to, and passed, a polygraph test three days before Appellees' first trial, declaring he "did not know anything about [Buie's death]." J.A. 1305. SBI then marked him as a suspect in the case and ordered analysis of his fingerprints at the same time it requested an analysis of Artis's fingerprints. Sinclair then changed his story and testified at Appellees' 1984 trial that McCollum had confessed to him the day after Buie's murder. Sinclair further testified that McCollum and Brown had discussed raping Buie in his presence and that he (Sinclair) had declined to participate.[6]

For their part, Appellants dispute that they should have taken any additional action with respect to investigating Artis. Appellants further dispute that

[6] Sinclair was killed in 1990, prior to Appellees' retrials.

Richards made a statement in 1983 to any member of law enforcement that she witnessed Buie's attack, or that any Appellant coerced or instructed Sinclair to testify untruthfully at the 1984 trial.

II.

We review a district court's denial of summary judgment in the qualified immunity context de novo, and we "view all reasonable inferences drawn from the evidence in the light that is most favorable to the non-moving party." *Smith v. Munday*, 848 F.3d 248, 251 (4th Cir. 2017) (internal quotation marks omitted); *see also Iko v. Shreve*, 535 F.3d 225, 230 (4th Cir. 2008). To be granted summary judgment, Appellants must prove that there is no genuine dispute of material fact and they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

Qualified immunity protects government officials from liability for violations of constitutional rights so long as they could reasonably believe that their conduct did not violate clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Further, qualified immunity is "immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis omitted). Thus, to the extent a district court's denial of a claim of qualified immunity turned on an issue of *law*, it is immediately appealable. *See id.* at 530. But if the denial turned on an issue of *fact*, "we lack jurisdiction to re-weigh the

evidence in the record to determine whether material factual disputes preclude summary disposition." *Iko*, 535 F.3d at 234. Thus, the question before us is whether, "if we take the facts as the district court gives them to us, and we view those facts in the light most favorable to [Appellees]," Appellants are still entitled to qualified immunity. *Williams v. Strickland*, 917 F.3d 763, 768 (4th Cir. 2019) (footnote omitted).

III.

Appellants raise a host of challenges to the district court's denial of summary judgment, asserting that the district court: (1) misapplied the summary judgment standard by failing to parse Appellants' liability individually; (2) erred in denying Appellants' claims of qualified immunity as to Appellees' false arrest and malicious prosecution claims; and (3) erred in denying Appellants' claims of qualified immunity as to Appellees' due process claims. We address each issue in turn.[7]

A.

Individualized Liability Analysis

Appellants assert that the district court broadly misapplied the test for qualified immunity because it did not identify "what each individual officer knew, when he knew it, and what specific

[7] Appellants also argue that the district court erred in denying Appellants' motion for summary judgment for Appellant Sealey in his official capacity. Because we affirm the district court's denial of summary judgment for the individual capacity claims against Appellant Sealey, we decline to exercise pendant jurisdiction over the official capacity claim.

actions he did or did not take." Appellants' Br. 20. Critically, Appellants did not argue before the district court that *individual* officers were entitled to qualified immunity based on the officer's *individual* actions, but instead asserted collective qualified immunity defenses. In other words, Appellants fault the district court for not identifying and resolving in their favor individual liability arguments that Appellants themselves did not raise.

It is true that the defense of qualified immunity is a defense for individual defendants. But it would be counterproductive to require a district court to wade through convoluted issues of fact at this stage in order to determine individual liability, where: (1) Appellants did not raise individualized qualified immunity arguments before the district court but instead asserted collective qualified immunity defenses; (2) the facts have yet to be resolved, and the district court only determined whether qualified immunity applies as a matter of law;[8] and (3) Appellees alleged that Appellants acted in concert to violate their constitutional rights. Accordingly, the district court did not improperly apply the test for qualified immunity by waiting to parse the liability of each individual defendant as it relates to each claim until the facts are determined.

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[8] *See* J.A. 330 ("In light of plaintiffs' allegations that the defendants worked in concert to deny plaintiffs' their constitutional rights as well as the specifics regarding the grouping of SBI and Robeson County defendants to engage in different aspects of plaintiffs' interrogations, arrests, and investigations, the Court will not at this time attempt to parse the liability of each individual defendant as it relates to each claim.").

B.

False Arrest and Malicious Prosecution Claims

Appellants next challenge the district court's denial of Appellants' motions for summary judgment as to Appellees' false arrest and malicious prosecution claims. The district court denied Appellants' motions after concluding that, viewing the facts in the light most favorable to Appellees, Appellees presented evidence that their confessions were fabricated or coerced, which was sufficient to create a genuine issue of material fact as to whether Appellants violated Appellees' clearly established constitutional rights not to be arrested in the absence of probable cause and on the basis of a coerced confession. This dispute of fact precluded a ruling on qualified immunity.

Appellants argue that they did not violate Appellees' constitutional rights because probable cause existed for Appellees' arrest as a matter of law. Alternatively, Appellants argue that even if they did violate Appellees' constitutional rights, the officers could have believed that their conduct was lawful because those constitutional rights were not clearly established by existing precedent. For the reasons that follow, we affirm the district court's denial of summary judgment as to Appellees' false arrest and malicious prosecution claims.

1.

Whether Appellants' Violated Appellees' Constitutional Rights

Appellants argue that they did not violate Appellees' constitutional rights for three reasons:

(1) North Carolina's collateral estoppel doctrine prevents relitigation of the constitutional issues alleged; (2) McCollum's attorney's admission at McCollum's 1991 trial judicially estops McCollum from challenging the voluntariness of his confession; and (3) and Appellants had probable cause to arrest Appellees as a matter of law. We address each in turn.

a.

Collateral Estoppel

Appellants contend that North Carolina's collateral estoppel doctrine prevents Appellees from relitigating in their § 1983 case whether probable cause existed to support their arrests and whether their confessions were voluntary. Specifically, Appellants argue that under North Carolina law, (1) Appellees' criminal convictions -- though later vacated, and despite Appellees receiving pardons of innocence from the governor -- conclusively establish that probable cause existed for their arrest; and (2) the state court judges' rulings on the Appellees' motions to suppress their confessions in their criminal cases conclusively establish that the confessions were voluntary. We will address these collateral estoppel issues in turn, starting with whether Appellees' criminal convictions conclusively establish that there was probable cause for Appellees' arrests.

i.

Criminal Convictions

At the outset, it is necessary to address how state collateral estoppel doctrine bears on this federal

§ 1983 action. Pursuant to 28 U.S.C. § 1738, federal courts must give full faith and credit to state court judgments. Additionally, "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Accordingly, and as the district court noted in its opinion, "[t]he doctrines of res judicata and collateral estoppel apply to § 1983 actions, and federal courts must afford preclusive effect to issues which have been decided by state courts when the courts of that state would do so." J.A. 311; *see also Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 85 (1984) ("We hold, therefore, that petitioner's state-court judgment in this litigation has the same claim preclusive effect in federal court that the judgment would have in the Ohio state courts.").

Appellants contend that North Carolina courts would find that Appellees' criminal convictions, even though they have since been vacated, collaterally estop Appellees from challenging whether Appellants had probable cause to arrest. *See Griffis v. Sellars*, 20 N.C. 315 (1838) (holding that conviction is conclusive evidence of probable cause, even where "a contrary verdict and judgment be given in a higher Court"); *see also Overton v. Combs*, 108 S.E. 357, 358 (N.C. 1921) (holding that a conviction establishes the existence of probable cause, even if the conviction "is thereafter set aside or reversed on appeal or other ruling in the orderly progress of the cause").

Contrary to Appellants' assertion that this rule "remains settled North Carolina law to this day," Appellants' Br. 26, North Carolina courts have

repeatedly called this rule into question. *See Myrick v. Cooley*, 371 S.E.2d 492, 495 (N.C. Ct. App. 1988) ("We question the continuing validity of this rule . . . which allows a District Court judgment which is subsequently overturned upon a trial de novo in Superior Court to insulate the arresting officer from liability . . . ."); *see also Simpson v. Sears, Roebuck & Co.*, 752 S.E.2d 508, 509 (N.C. Ct. App. 2013) ("We note . . . that this doctrine has eroded somewhat over time."). Accordingly, there is reason to doubt whether it remains good law that even a vacated conviction precludes an individual from challenging whether there was probable cause for his/her arrest in North Carolina.[9]

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[9] Additionally, we question whether a state's collateral estoppel doctrine can require a federal court to afford preclusive effects to an *invalid* state judgment in a federal § 1983 case. Such an outcome would conflict with the Supreme Court's holding in *Heck v. Humphrey*, which specifically permits a plaintiff to proceed with a § 1983 action when a conviction has been reversed, expunged, or declared invalid:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

512 U.S. 477, 486–87 (1994) (footnote omitted). Because we conclude that North Carolina courts would not afford preclusive effect to Appellees' vacated convictions in this case, we need not resolve this question.

We need not resolve these uncertainties in North Carolina law, however, because to the extent it remains the rule that reversed or vacated judgments are afforded preclusive effect on the issue of probable cause, and assuming this is a matter of state collateral estoppel doctrine and not a pleading requirement for state malicious prosecution claims (as argued by Appellees), we conclude that North Carolina courts would refuse to give preclusive effect to a judgment that was obtained improperly and later invalidated.

As Appellants concede, there is an exception to the rule that even reversed or vacated judgments are afforded preclusive effects on the issue of probable cause: "where a conviction [is] procured by 'fraud or other unfair means,' it [does] not conclusively establish probable cause." *Simpson*, 752 S.E.2d at 509 (quoting *Myrick*, 371 S.E.2d at 495). Appellants assert, however, that the fraud exception *only* applies when convictions were appealed to the superior court and reversed. Thus, Appellants argue, the exception does not apply in this case, where Appellees' convictions were affirmed on direct appeal but later vacated in the superior court on a motion for appropriate relief.

Appellants cite two cases to support this assertion: *Moore v. Winfield*, 178 S.E. 605 (N.C. 1935), and *Simpson v. Sears, Roebuck & Co.*, 752 S.E.2d at 510. But neither case justifies reading the fraud exception so narrowly. Both *Moore* and *Simpson* involved convictions that were reversed on direct appeal, and both courts dealt with the facts before them. Neither *Moore* nor *Simpson* display an intention to exclude convictions that were vacated or

otherwise invalidated on the merits in ways other than reversal in the superior court. And Appellants do not provide any reason (much less a compelling reason) to explain why North Carolina's collateral estoppel doctrine would differentiate between invalidations on the merits.

Accordingly, the most sensible reading of the fraud exception is the one espoused by the North Carolina Court of Appeals in *Myrick*: "*[I]n the absence of a showing that the District Court conviction of Myrick was obtained improperly*, the conviction establishes, as a matter of law, the existence of probable cause for his arrest and defeats both his federal and state claims for false arrest or imprisonment." 371 S.E.3d at 495 (emphasis supplied). In this case, Appellants have sufficiently alleged that their now-vacated state court convictions were obtained improperly. Accordingly, collateral estoppel does not preclude Appellants from challenging the probable cause for their arrests.

ii.

Voluntariness of Confessions

Next, Appellants assert that Appellees are estopped from disputing the voluntariness of their confessions in this § 1983 action because the state court judges presiding over Appellees' criminal trials ruled that the confessions were voluntary.

Appellants' contentions are meritless. Appellees' criminal convictions were *vacated*. Apart from the use of criminal convictions to establish probable cause, which is not relevant to Appellants' voluntariness argument, North Carolina collateral

estoppel cases uniformly require a judgment to be valid to have preclusive effect. *See, e.g.*, *North Carolina v. Jones*, 808 S.E.2d 280, 283 (N.C. Ct. App. 2017) ("The doctrine of collateral estoppel means simply that when an issue of ultimate fact has once been determined by a *valid and final judgment*, that issue cannot again be litigated between the same parties in any future lawsuit." (emphasis supplied) (internal quotation marks omitted)); *North Carolina v. Spargo*, 652 S.E.2d 50, 53 (N.C. Ct. App. 2007) ("Under the doctrine of collateral estoppel, an issue of ultimate fact, once determined by a *valid and final judgment*, cannot again be litigated between the same parties in any future lawsuit." (emphasis supplied) (citation omitted)). Accordingly, collateral estoppel does not prevent Appellees from litigating the voluntariness of their confessions because there is no valid and final judgment on the issue.

b.

Judicial Estoppel

Appellants further allege that Appellee McCollum's attorney's judicial admission at McCollum's 1991 trial -- that McCollum "was there" during the rape and murder, *see* Appellants' Br. 48 -- judicially estops McCollum from challenging the voluntariness of his confession in his § 1983 action.

Of note, Appellants point to no case holding judicial estoppel to apply in comparable circumstances, and as we have made clear, the doctrine of judicial estoppel "must be applied with caution" and only "in the narrowest of circumstances." *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996). In *Lowery*, we applied judicial estoppel to preclude a

plaintiff from asserting in a § 1983 case that he did not "maliciously attack[]" a police officer -- a claim that was directly contrary to that plaintiff's guilty plea related to the underlying encounter, during which he specifically admitted that he "maliciously attacked" the officer. *Id.* at 221, 223. There are significant differences between (1) estopping a litigant from basing a civil claim on factual allegations that are directly contrary to specific admissions made by that litigant during a guilty plea for the same conduct; and (2) binding a party to statements previously made by counsel in a criminal trial involving the death penalty, especially when the conviction resulting from that criminal trial was subsequently vacated.

The *Lowery* court listed three elements "that have to be met before courts will apply judicial estoppel": (1) "the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation"; (2) "the prior inconsistent position must have been accepted by the court"; and (3) "the party sought to be estopped must have 'intentionally misled the court to gain unfair advantage.'" 92 F.3d at 224 (quoting *Tenneco Chems., Inc. v. William T. Burnett & Co.*, 691 F.2d 658, 665 (4th Cir. 1982)). Appellants make no attempt to show that all three factors are present in this case. Nor could they: significantly, there is no evidence that counsel, either during the 1991 trial or in this § 1983 case, "intentionally misled the court to gain unfair advantage." *Id.* McCollum's counsel's attempt during the 1991 trial to "make a case for mercy in order to save his client's life," Appellees' Br. 38, does not judicially estop McCollum from challenging the voluntariness of his confessions in this case.

c.

Probable Cause as a Matter of Law

Finally, Appellants assert that they did not violate Appellees' constitutional rights because they had probable cause to arrest Appellees as a matter of law, on the basis of Appellees' confessions and subsequent incriminating statements. The district court rejected this argument, concluding that whether Appellants had probable cause to arrest Appellees turns on whether Appellees' confessions were coerced or fabricated, which is a factual question.

As this court has explained, "[p]robable cause is determined by a 'totality-of-the circumstances' approach." *Smith v. Munday*, 848 F.3d 248, 253 (4th Cir. 2017) (quoting *Illinois v. Gates*, 462 U.S. 213, 230 (1983)). "While probable cause requires more than bare suspicion, it requires less than that evidence necessary to convict." *Id.* (quoting *United States v. Gray*, 137 F.3d 765, 769 (4th Cir. 1998)). "It is an objective standard of probability that reasonable and prudent persons apply in everyday life." *Id.* (quoting *Gray*, 137 F.3d at 769). In making this inquiry, we consider only the information the officers had at the time of the arrest. *See id.*; *Graham v. Gagnon*, 831 F.3d 176, 184 (4th Cir. 2016). Additionally, "we do not examine the subjective beliefs of the arresting officers to determine whether they thought that the facts constituted probable cause." *Munday*, 848 F.3d at 253 (quoting *Graham*, 831 F.3d at 185).

Viewing the facts recited by the district court in the light most favorable to Appellees, there is no basis for us to conclude that Appellants had probable

cause to arrest Appellees as a matter of law. A coerced or fabricated confession that police know to be coerced -- as Appellees assert here, based on the use of coercive interrogation tactics, the age and intellectual disabilities of Appellees, and the inconsistencies between the confessions and the crime scene -- does not give police probable cause to arrest the suspect as a matter of law. *See Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944) ("The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession."). For the same reason, McCollum's confession implicating Brown, if police knew it was coerced or fabricated, did not provide probable cause for Appellants to arrest Brown.[10] Accordingly, the district court did not err in concluding that Appellants did not have probable cause as a matter of law to arrest Appellees, and whether Appellees' confessions were coerced or fabricated must be determined by a jury.

2.

Whether Appellants' Constitutional Rights Were Clearly Established

Appellants next assert that even if they did violate Appellees' constitutional rights, the officers

[10] Appellants also assert that even if McCollum's confession did not establish probable cause on its own, McCollum's subsequent statements to police and others corroborated his first confession and "reaffirmed" the probable cause. Appellants' Br. 65. These statements -- to the extent they are not factual disputes that must be determined by a jury -- occurred after McCollum was arrested and were not "information the officers had at the time" of the arrest. *Munday*, 848 F.3d at 253. As a result, any subsequent incriminating statements could not "cure" arrests made without probable cause.

could have believed that their conduct was lawful because those constitutional rights were not clearly established by existing precedent. Specifically, Appellants argue that because "[t]here is no bright-line rule for determining whether a suspect's statements were given voluntarily," Appellants' Br. 69 (quoting *United States v. Rutherford*, 555 F.3d 190, 195 (6th Cir. 2009)), they cannot be liable for allegedly coercing Appellees' confessions because qualified immunity ensures that officers will be liable "only for 'transgressing bright lines.'" *Id.* (quoting *Doe v. Broderick*, 225 F.3d 440, 453 (4th Cir. 2000)).

Appellants are correct that "[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Iko v. Shreve*, 535 F.3d 225, 238 (4th Cir. 2008) (quoting *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992)). However, there does not need to be a case directly on point for a right to be clearly established, and the fact that the voluntariness of a confession is a fact-specific inquiry does not excuse Appellants from abiding by clearly established law regarding coercive police conduct. "Clearly established . . . includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked." *Id.* at 240 (quoting *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992)). "In the end, the lodestar for whether a right was clearly established is whether the law 'gave the officials fair warning that their conduct was unconstitutional.'" *Id.* at 238 (quoting *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 313 (4th Cir. 2006)).

There can be no reasonable dispute that it was clearly established in 1983 that an arrest in the

absence of probable cause was a violation of an individual's Fourth Amendment rights, and that a coerced confession could not form the basis of probable cause for an arrest. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); *Ashcraft*, 322 U.S. at 155. Further, existing precedent in 1983 would have made it clear to a reasonable officer that the police conduct at issue here, viewed in the light most favorable to Appellees, was coercive.

For example, in *Ashcraft*, the Supreme Court concluded that questioning a suspect continuously for 36 hours, without rest or sleep, was "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear." 322 U.S. at 154. To be sure, Appellees' interrogations did not span 36 hours, but Appellees were questioned late in the night and into the very early morning without sleep. And unlike Appellees, the suspect in *Ashcraft* was a 45 year old man with no intellectual disability or other characteristic that would make him particularly vulnerable to coercion. Of note, the Supreme Court's decision in *Ashcraft* established that an interrogation can be coercive *solely* due to the length of the questioning, even when there is no allegation that the questions or other police conduct was itself coercive, or that any violence was involved.[11]

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[11] Appellants make much of the fact that the officers "did not hit or beat" Appellees during the interrogation. Appellants' Br. 5, 40. As *Ashcraft* makes clear, violence is not the only indicator of coercive police interrogations. And, in any event, Appellants did threaten Appellees, including with the specter of the gas chamber.

Then, in *Haley v. Ohio*, the Supreme Court held that it was coercive to question a 15 year old boy alone for about five hours, with no parent or lawyer present and without advising the suspect of his right to counsel.[12] 332 U.S. 596, 598 (1948). This was true even though the suspect's written confession included a statement about his right not to make the statement. As the Court held:

> What transpired would make us pause for careful inquiry if a mature man were involved. . . . A 15-year old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest.

Id. at 599–600.

And in *Ferguson v. Boyd*, 566 F.2d 873 (4th Cir. 1977), we concluded that a confession was involuntary when it was coerced by psychological means and induced by a promise that the suspect's girlfriend would be released from jail if he confessed. As we noted, "It has long been recognized that involuntary confessions may be exacted as a result of mental coercion as well as physical abuse." *Id.* at 877.

Significantly, each of the police strategies found to be coercive in these cases were present in Appellees' interrogations. Viewing the evidence in

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[12] Although the suspect alleged that he had been beaten by the officers, the Supreme Court did not consider this evidence. *See Haley*, 332 U.S. at 597–98.

the light most favorable to Appellees, (1) the interrogations took place very late in the night into the early morning; (2) Appellees were 19 and 15, both with serious intellectual disabilities; (3) Appellants threatened Appellees with the gas chamber and yelled racial epithets at them; (4) neither Brown nor McCollum was aware of his rights; and (5) both Appellees were "tricked," J.A. 600, into signing the confessions drafted by Appellants. Appellees' "background[s] and experience[s]," such as their age, mental disabilities, and lack of prior interactions with the police, are highly "relevant to the totality of the circumstances" of the interrogation. *United States v. Giddins*, 858 F.3d 870, 885 (4th Cir. 2017); *see also United States v. Ayesh*, 702 F.3d 162, 168 (4th Cir. 2012) ("[P]ersonal attributes," such as "age, education, intelligence, and mental state" are relevant considerations). And, similar to *Ferguson*, Appellees alleged that Appellants induced their confessions using a number of promises and threats: that Appellees could go home if they signed the *Miranda* waivers and written confessions, which officers suggested were merely paperwork for their release; that Appellants would arrest Appellees' mother; and that Appellees would be taken to "the gas chamber" if they did not confess, J.A. 319, 321.

Appellants rely heavily on our decision in *United States v. Wertz*, 625 F.2d 1128 (4th Cir. 1980), to argue that the alleged actions of the officers here did not render Appellees' confessions involuntary. According to Appellants, *Wertz* stands for the proposition that "a gun . . . drawn on a suspect shortly before the suspect made an incriminating statement [does] not render the statement involuntary." Appellants' Br. 43. Thus, Appellants' argument goes,

if drawing a gun on a suspect is not coercive, neither is threatening a suspect with the gas chamber. But this was not at all our holding in *Wertz*. There, we emphasized that whether a confession is involuntary "is a question of fact to be determined from 'the totality of all the surrounding circumstances[,] both the characteristics of the accused and the details of the interrogation.'" *Wertz*, 625 F.2d at 1134 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). This determination may not "rest solely upon any one circumstance." *Id.* We did not hold, as Appellants suggest, that an officer drawing a gun on a suspect to extract a confession could not result in an involuntary confession -- quite the opposite is true. *See Beecher v. Alabama*, 389 U.S. 35 (1967) (holding a confession involuntary where the suspect was ordered at gunpoint to confess or be killed). The circumstances in *Wertz* bear no resemblance to the facts alleged by Appellees here.[13]

In light of all of the above, the circumstances of Appellees' interrogations easily fall within the bounds

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[13] In *Wertz*, an undercover officer posing as an illegal drug trafficker attempted to purchase a bag of heroin from a suspect, but instead purchased a $1,300 bag of sugar. The undercover officer -- still appearing to be a drug trafficker, as far as the suspect knew -- confronted the suspect about the "rip-off" in a parking garage. A fight ensued, and the undercover officer drew his gun. At some point during the encounter, the suspect "confessed" that the undercover officer's confidential informant was to blame for the sugar. We concluded that the sole fact that the undercover officer drew his gun during the fight was not sufficient to establish that the suspect's statements were involuntary, where "[n]one of the factors found important on the voluntariness issue, other than that one fact, was present," and "[t]he encounter had none of the aspects of a police interrogation, with its inherent compulsions." *Wertz*, 625 F.2d at 1134, 1135.

of coercive police conduct outlined in *Ashcraft*, *Haley*, *Ferguson*, and other established precedent as "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom" by Appellees. *Ashcraft*, 322 U.S. at 154. Therefore, the district court did not err by concluding that Appellees' right not to be arrested without probable cause based on a coerced and fabricated confession was clearly established in 1983, and the district court was correct to deny summary judgment to Appellants on the basis of qualified immunity in light of the numerous material disputes of fact.

C.

Due Process Claims

Appellants next challenge the district court's denial of summary judgment as to Appellees' due process claims. Appellees assert that Appellants, in order to shield their wrongful conduct related to the coerced or fabricated confessions, "hid exculpatory information and blocked the production of evidence that showed [Appellees'] innocence." Appellees' Br. 11. Specifically, Appellees allege that Appellants violated the *Brady* doctrine[14] by failing to disclose (1) evidence that another suspect, Roscoe Artis, committed similar crimes in the same area and during the same time period as Buie's rape and murder; and (2) a statement to police by Mary McLean Richards that she witnessed Artis attack Buie the night Buie went missing. In addition to these *Brady*-based claims, Appellees further assert that Appellants violated their due process rights by (1) coercing a witness, L.P. Sinclair, to testify falsely;

[14] *Brady v. Maryland*, 373 U.S. 83 (1963).

(2) coercing Appellees to confess; and (3) failing in bad faith to adequately investigate the crime.

Appellants moved for summary judgment as to Appellees' due process claims on the basis of qualified immunity. The district court denied summary judgment upon concluding that the facts, viewed in the light most favorable to Appellees, demonstrated that Appellants violated Appellees' clearly established due process right "not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity." J.A. 322 (quoting *Massey v. Ojaniit*, 759 F.3d 343, 354 (4th Cir. 2014)).

Appellants assert that the district court's denial of summary judgment was erroneous because each of Appellees' due process claims fails as a matter of law. In the alternative, Appellants argue that even if they did violate Appellees' constitutional rights, the officers could have believed that their conduct was lawful because those constitutional rights were not clearly established by existing precedent. For the reasons that follow, we affirm the district court's denial of summary judgment as to Appellees' due process claims.

1.

Claims for Suppression of Evidence

Appellees allege that Appellants violated the *Brady* doctrine by suppressing two types of information that implicated Artis, rather than Appellees, as Buie's attacker: (1) evidence that Artis committed similar crimes in the same area and during the same time period as Buie's rape and

murder, and that Appellants considered Artis a suspect in Buie's case; and (2) a statement to police by Richards that she witnessed Artis attack Buie the night Buie went missing. Appellants assert that neither type of evidence establishes a claim of a *Brady* violation as a matter of law.

a.

Evidence Connecting Artis as a Suspect

In *Brady v. Maryland*, 373 U.S. at 87, the Supreme Court held that the government's suppression of material exculpatory evidence violates the Due Process Clause. "Evidence is material if there is a 'reasonable probability that its disclosure would have produced a different result.'" *United States v. Parker*, 790 F.3d 550, 558 (4th Cir. 2015) (quoting *United States v. Bartko*, 728 F.3d 327, 340 (4th Cir. 2013)). "This standard does not require a showing that a jury more likely than not would have returned a different verdict. Rather, the 'reasonable probability' standard is satisfied if 'the likelihood of a different result is great enough to undermine confidence in the outcome of the trial,'" *id.* (quoting *Barkto*, 728 F.3d at 340), or the suppression "cast[s] serious doubt on the proceedings' integrity," *Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 398 (4th Cir. 2014).

Unlike prosecutors, however, police officers commit a constitutional violation only when they suppress exculpatory evidence in bad faith. *Owens*, 767 F.3d at 396 & n.6, 401. Accordingly, as the district court correctly noted, Appellees' *Brady*-based due process claims hinge on the jury determining that Appellants suppressed material *Brady* exculpatory

evidence in bad faith. Additionally, to prove a due process violation, Appellees must prove both but-for causation and proximate causation -- in other words, that the alleged wrongful act(s) caused Appellees' loss of liberty and the loss of liberty was a reasonably foreseeable result of the act. *See Massey*, 759 F.3d at 354–56; *Evans v. Chalmers*, 703 F.3d 636, 647–48 (4th Cir. 2012).

Appellants assert that they did not violate *Brady* by failing to disclose information linking Artis as a suspect of the crime because (1) Artis's criminal history and the facts of his conviction for Joanne Brockman's rape and murder were publicly available information; (2) the district attorney who prosecuted Appellees had also prosecuted Artis, so he was aware of Artis's criminal history; and (3) attorney Earl Strickland, a member of Appellees' defense team in their October 1984 trial, was also Artis's attorney in the August 1984 Brockman trial. As Appellants argue, this means that Artis's criminal history and the details of Artis's 1984 trial and conviction were well known to Appellees at the time of their first trial, and "there is no *Brady* violation where 'the defense already possesses the evidence.'" Appellants' Br. 57 (quoting *United States v. Higgs*, 663 F.3d 726, 735 (4th Cir. 2011)). Further, Appellants argue that they did not suppress Artis's criminal history from the district attorney since he was already aware of it.

Appellants' arguments are unconvincing. Appellees' claim is not that Appellants should have turned over Artis's rap sheet, but that once the officers identified Artis as a suspect -- particularly in light of other evidence that pointed to Artis as the perpetrator of the crime -- they were obligated to

disclose this exculpatory information. The fact that Artis's rap sheet was public information, the district attorney was aware of Artis's crimes, or that a member of the defense team was an attorney for Artis is not enough to disclose to Appellees that *the officers*, in the course of their investigation, recognized the similarities between Buie's murder and Artis's crimes and identified Artis as a suspect. Indeed, the fact that the same district attorney prosecuted Artis in a different rape and murder case does not mean that district attorney should have known that Artis was a suspect in Buie's rape and murder. It is the officers' job to investigate the crime and identify suspects, not the prosecutor's. The same is true for Attorney Strickland: the connection between Artis and one of Appellees' counsel is not enough to show that Appellees possessed the relevant information about Artis. Even if Strickland noticed the similarities between the crimes, he had no way to know that Appellants had considered Artis a suspect in Buie's murder, which is the key evidence Appellants failed to disclose.

Accordingly, the district court did not err in denying Appellants' motion for summary judgment as to their failure to disclose evidence that Artis committed similar crimes in the same area and during the same time period as Buie's rape and murder, and that Artis was considered a suspect in the crime.

b.

Richards's Statement

As for Richards's statement to Detectives Sealey and Locklear that she had seen Artis attack

Buie the night Buie went missing, we conclude that the evidence was clearly material, and a reasonable jury could conclude that it was suppressed by Appellants in bad faith. Indeed, the stark difference between what Richards alleges she told the officers and the two officers' interview notes supports the conclusion that if Appellees' allegations are true, this evidence was suppressed and obscured by Appellants. Neither set of interview notes from the officers mentions Artis, or the fact that Richards was an eye-witness to the crime. Instead, Detective Sealey's notes say Richards reported that she saw "three (3) Indian males at Hardin's Grocery at this time and one (1) of the Indian males was talking rough to [Buie]," J.A. 1595, whereas Detective Locklear's notes indicate only that the interview generated "negative results," *id.* at 326.

Appellants argue that Appellees cannot establish a *Brady* violation on these facts because Appellants disclosed that they interviewed Richards, and Detective Sealey's notes indicated that Richards stated she had seen Buie shortly before the crime with "three (3) Indian males," one of which was "talking rough" to Buie. J.A. 1595. But viewing the facts in the light most favorable to Appellees, Sealey's notes egregiously mischaracterized the content of Richards's statement. This was insufficient to insulate Appellants from liability for a *Brady* violation, even if the fact of Richards's interview was disclosed.

Here, if Appellees' assertions are true, Appellants intentionally fabricated, obscured, and failed to disclose the most relevant and exculpatory evidence in the case: the statement from an eye-

witness affirmatively identifying a *different suspect* as Buie's attacker. Accordingly, Appellees adequately alleged that Appellants failed to comply with their *Brady* disclosure obligations, and that they did so in bad faith.

2.

Remaining Due Process Claims

In addition to the *Brady*-based claims, Appellees raise three due process claims: (1) Appellants unconstitutionally coerced a witness, L.P. Sinclair, to testify falsely; (2) Appellees' confessions were unconstitutionally coerced (which violated Appellees' right to due process in addition to their Fourth Amendment rights); and (3) Appellants in bad faith failed to adequately investigate the crime. Appellants argue that each of these claims fails as a matter of law. For the reasons explained below, Appellants are incorrect.

a.

Coerced, False Testimony by L.P. Sinclair

Appellees assert that Appellants coached or coerced Sinclair to testify falsely, which Sinclair agreed to do only after Appellants identified Sinclair as a suspect and requested his fingerprints. As Appellees allege, "[t]his, combined with Sinclair's youth (age 16), along with the other evidence of [Appellants'] bad faith, suggest that Sinclair's statements were coerced or fabricated." Appellees' Br. 52 (citation omitted).

Viewing the facts in the light most favorable to Appellees, Appellants' assertion that Sinclair's

testimony was voluntary as a matter of law is unsupported by the record. And whether any Appellants were present on October 5, 1984, when Sinclair changed his story to implicate McCollum, is a question of fact for a jury to determine.

b.

Coerced Confessions by Appellees

In its decision, the district court suggested that the use of Appellees' confessions, if coerced, may violate Appellees' rights to due process. To the extent Appellees assert a due process claim on this basis, Appellants' arguments that these confessions were voluntary as a matter of law fail for the same reasons explained above. Further, like the district court, we conclude that Appellees' incarceration was a clearly foreseeable result of the alleged fabrication of Appellees' confessions. Accordingly, if Appellees' allegations are true, they have demonstrated both but-for and proximate causation. *See Massey*, 759 F.3d at 354–56.

c.

Failure to Adequately Investigate

Finally, Appellees assert that Appellants violated Appellees' right to due process by failing to sufficiently investigate Artis and Sinclair in connection with Buie's rape and murder. This includes Appellants' failure to test whether Artis or Sinclair's fingerprints matched the latent print found on the beer can at the crime scene.

Appellants are correct that in general, there is no independent constitutional right to investigation of

a third party. *See Sattler v. Johnson*, 857 F.2d 224, 227 (4th Cir. 1988) (stating that there is no constitutional right "as a member of the public at large and as a victim to have the defendants criminally prosecuted"); *see also Baker v. McCollan*, 443 U.S. 137, 146 (1979) (stating that law enforcement have no constitutional duty to "investigate independently every claim of innocence" or "perform an error-free investigation"). However, Appellees do not state a claim based on an independent right to an investigation, but rather that Appellants' failure to investigate was a result of their bad-faith suppression of evidence. Indeed, the district court concluded that Appellees' claims could establish a due process violation *if* the jury concluded that Appellants' actions after Appellees' arrests -- including failing to adequately investigate Artis and the crime scene and failing to disclose exculpatory evidence -- were done in bad faith in order to shield Appellants' wrongful acts related to Appellees' coerced or fabricated confessions. We find no error in the district court's conclusion.

3.

Whether the Constitutional Rights were Clearly Established

Finally, Appellants challenge the district court's denial of summary judgment by asserting that even if they violated Appellees' due process rights, "the officers are entitled to summary judgment because, given the existing case law during the relevant time period, it was not 'beyond debate' that the specific actions taken by the officers violated the Constitution." Appellants' Br. 70 (citation omitted).

This is the full extent of Appellants' argument on this point. Appellants include no explanation for how they believe the district court erred.

But there can be no reasonable dispute, as the district court correctly concluded, that it was clearly established in 1983 that an individual has a constitutional right not to be deprived of liberty as a result of the intentional, bad-faith withholding of evidence by an investigating officer. *See Jean v. Collins*, 221 F.3d 656, 663 (4th Cir. 2000) (holding that it was clearly established in 1982 that when police intentionally withhold or destroy evidence, or otherwise act in bad faith, their actions violate the due process rights of a criminal defendant). The same is true for an individual's constitutional right not to be deprived of liberty as a result of the fabrication of evidence by an investigating officer. *See Washington v. Wilmore*, 407 F.3d 274, 283–84 (4th Cir. 2005) (holding that officer's alleged fabrication of evidence, if true, violated clearly established constitutional right). Finally, as the district court concluded, "it has long been established that when law enforcement acts in reckless disregard of the truth and makes a false statement or material omission that is necessary to a finding of probable cause, the resulting seizure will be determined to be unreasonable," J.A. 317 (citing *Franks v. Delaware*, 438 U.S. 154, 157 (1978)), and "it is established that a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment," *id.* (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

It was beyond debate at the time of the events in this case that Appellees' constitutional rights not

to be imprisoned and convicted based on coerced, falsified, and fabricated evidence or confessions, or to have material exculpatory evidence suppressed, were clearly established.

IV.

For all of the reasons detailed herein, the district court did not err in denying summary judgment to Appellants. The judgment of the district court is

AFFIRMED.

RICHARDSON, Circuit Judge, concurring in part and dissenting in part:

I agree that the Plaintiffs' Fourth Amendment claims should survive summary judgment and that their Fifth Amendment claims arising from their confessions and Mary Richards's statement should likewise go to trial. However, on the remaining due process claims—the officers' failure to investigate Artis, the coercive questioning of Sinclair, and the failure to disclose their impressions of Artis as a suspect—the Plaintiffs fail to articulate the violation of a constitutional right. And even if they could, these alleged due process rights were not clearly established in 1983. I would therefore reverse on these remaining Fifth Amendment claims.

[ENTERED: March 1, 2018]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA WESTERN DIVISION
No. 5:15-CV-451-BO

RAYMOND TARLTON, as guardian ad litem for HENRY LEE MCCOLLUM, and J. DUANE GILLIAM, as guardian of the estate of LEON BROWN,	)	
Plaintiffs,	)	
v.	)	ORDER
KENNETH SEALEY,[1] both individually and in his official capacity as the Sheriff of Robeson County, *et al.*,	)	
Defendants.	)	

This cause comes before the Court on motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure as well as plaintiffs' motion for sanctions. A hearing on the dispositive, motions was held before the undersigned on January 23,2018, at Raleigh, North Carolina. The motions have been fully briefed and are in this posture ripe for ruling. For the reasons that follow, defendants' motions for summary judgment are granted in part

[1] The Court has amended the caption to reflect the settlement with the Town of Red Springs defendants.

and denied in part and plaintiffs' motions for summary judgment and for sanctions are denied.

PROCEDURAL HISTORY

Henry McCollum and Leon Brown instituted this action against Robeson County, Kenneth Snead, Joel Locklear, the Town of Red Springs, Kenneth Sealey, Larry Floyd, Paul Canady for the Estate of Luther Haggins, and Leroy Allen on August 31, 2015. [DE 1]. Their amended complaint alleges four claims arising under 42 U.S.C. § 1983: false arrest, malicious prosecution, deprivation of due process, and municipal liability for custom, usages, practices, procedures, and policies as a result of which McCollum's and Brown's[2] constitutional rights were violated. McCollum and Brown seek a declaratory judgment that defendants have violated their rights as provided by the United States Constitution, an award of compensatory and punitive damages, and attorneys' fees. [DE 70].

A guardian was appointed to represent the interests of Leon Brown on March 14,2016 [DE 66]; a substitute guardian was appointed on May 31, 2016. [DE 85]. On May 27, 2016, the Court denied a motion to dismiss by Snead and Allen and granted a motion to dismiss filed by defendant Robeson County. [DE 83 & 84]. On December 12, 2016, Robert E. Price, Administrator C.T.A. of the Estate of Joel Locklear was substituted as a party for defendant Locklear. [DE 116]. A guardian ad litem was appointed to represent the interests of Henry McCollum on May

[2] Henry McCollum will be hereinafter referred to as Henry McCollum or McCollum. Leon Brown will be hereinafter referred to as Leon Brown or Brown.

10, 2017. [DE 204]. On December 18, 2017, the Court approved a settlement between plaintiffs and the Town of Red Springs, Larry Floyd, and Paul Canady, Administrator C.T.A. of the Estate of Luther Haggins. [DE 253].

FACTUAL BACKGROUND

The following is comprised of the undisputed facts upon which all parties rely in their motions for summary judgment. [DE 127-1; 165; 178; 183; 185-1].

Eleven-year old Sabrina Buie went missing on the night of Saturday, September 24, 1983, in the Town of Red Springs in Robeson County, North Carolina. Her parents filed a missing persons report with the Red Springs Police Department on Sunday, September 25, 1983. James Shaw discovered Sabrina Buie's body on Monday afternoon, September 26, 1983, in a soybean field near a convenience store in Red Springs. Miss Buie's body was found naked from the waist down with her bra pushed up over the back of her head. Her panties and a stick were down her throat, and she had been sexually assaulted.

The Red Springs Police Department requested that the North Carolina State Bureau of Investigation (SBI) participate in the murder investigation. Defendant Leroy Allen, then a resident SBI agent in Robeson County, was dispatched to process the crime scene. The Sheriff of Robeson County assigned defendants Detective Joel Garth Locklear and Detective Kenneth Sealey to provide additional support to the SBI. Defendants SBI Agent Kenneth Snead and Detective Sealey,[3] were dispatched to

[3] Sealey is now the Sheriff of Robeson County.

canvass the neighborhood for witnesses. Defendant Locklear also participated in the investigation by canvassing the area near where Sabrina Buie's body was discovered, as did other law enforcement agents.

On September 27, 1983, while canvassing the neighborhood for witnesses, Locklear spoke to plaintiff Henry McCollum outside of McCollum's home at 104 Malpass Avenue. McCollum denied any knowledge of the disappearance of Miss Buie. At the time, McCollum was staying with his mother, Mamie Brown, and his half-siblings Leon and Geraldine Brown; McCollum was visiting from New Jersey. At approximately 6:20p.m. on September 28, 1983, Agent Snead and Detective Sealey interviewed Ethel Furmage, then seventeen years-old, at her residence. Miss Furmage stated that she had heard at school that McCollum (referred to as Buddy by those who knew him) had something to do with Miss Buie's murder. That evening, Snead, Sealey, and Agent Allen traveled to McCollum's home to interview him, arriving at approximately 9:10 p.m. McCollum agreed to ride with the officers to the Red Springs police station. After arriving at the police station, McCollum was fingerprinted and taken to the office of Red Springs Police Chief Luther Haggins for questioning.

A Miranda waiver form bearing McCollum's signature reflects the time of 10:26 p.m. on September 28th. At 2:10a.m. on September 29, 1983, McCollum signed a handwritten confession which was drafted by Agent Snead and witnessed by Sealey and Chief Haggins. [DE 147-29]; [DE 146-11] Snead Dep. at 50. The confession details that McCollum along with Darrell Suber, Louis Moore, Chris (last name

unknown) and Leon Brown walked down the road toward the little red house with Miss Buie at approximately 9:30p.m. on Saturday September 24th. After Suber and Chris left and returned from the convenience store with a six pack of beer, Suber, Chris, McCollum, Moore, and Brown discussed raping Buie as she had not agreed to have sex with them voluntarily. Moore then left, and the remaining men and Miss Buie walked to the woods at the edge of a field where they drank beer. McCollum grabbed Miss Buie's right arm and Brown grabbed her left arm and then men proceeded to rape Miss Buie; McCollum stated he was the third in the group to rape Miss Buie and that Brown was the last. The confession recounts that Suber then stated that they had to do something so that she would not tell the police, and that Chris then picked up a stick and tied Miss Buie's pink panties to the stick and choked Miss Buie to death. McCollum and Brown held Miss Buie down while she was being choked and Suber was cutting Miss Buie with a knife. After they believed Miss Buie to be dead, the men dragged her body to the edge of the woods toward a ditch. Suber had blood on his brown corduroy jacket and gray Nike tennis shoes with a burgundy seal, and Chris had blood on his sneakers, which were New Yorkers. Suber and Chris were smoking Newport cigarettes in the woods. *Id.* Henry McCollum's intelligence quotient has been scored as low as 56.

After signing the transcribed confession, McCollum was placed under arrest for the rape and murder of Miss Buie. While McCollum was being questioned, his mother Mamie Brown and brother Leon Brown had gone to the Red Springs police station. At approximately 2:00 a.m. on September

29th, Brown was asked by law enforcement to step into a room and talk with them, which he did. Brown, then fifteen years-old, signed a form entitled "Juvenile Rights Warning" at 2:24a.m. [DE 148-35]. Brown was interviewed by Detective Locklear and Red Springs Police Chief Haggins. Leon Brown signed a confession that was reduced to writing by Detective Locklear. Leon Brown's confession implicated Darrell Suber and Chris Brown, but differed in aspects from McCollum's confession. For example, Brown's confession makes no mention of Louis Moore's involvement nor does it reference a stick as being used to force Miss Buie's underwear down her throat. Following his confession, Leon Brown was arrested for the rape and murder of Sabrina Buie; juvenile petitions charging Brown with delinquency related to rape and murder were filed on September 29, 1983. [DE 161-13]. Leon Brown's intelligence quotient has been scored consistently in the mid-50s range.

On September 30, 1983, McCollum made an on-camera statement to a television reporter that he had "just held her down. That's it." [DE 161-19] Barnes Aff. ¶6. McCollum and Brown were indicted by a grand jury on January 3, 1984, on charges of first degree murder and rape. [DE 161-16]. They were tried together in Robeson County Superior Court in October 1984. The prosecutor was District Attorney Joe Freeman Britt, McCollum was represented by Earl Strickland, and Brown was represented by Robert Johnson. [DE 140-1] 1984 Trial Tr. at 1. McCollum and Brown both moved to suppress their confessions and their motions were denied. The trial court held that both McCollum and Brown had voluntarily gone to the Red Springs police station and

that before each was questioned he had knowingly and intelligently waived his rights. [DE 142-3] 1984 Trial Tr. at 1346-51]. The trial court held that the statements of McCollum and Brown were made freely, voluntarily, and knowingly without duress, coercion, or inducement. *Id.* McCollum and Brown both testified at trial, each was convicted of first degree murder and rape, and each was sentenced to death.

On appeal, the North Carolina Supreme Court reversed and remanded for a new trial, finding error in the trial court's jury instructions. *State v. McCollum*, 321 N.C. 557 (1988). McCollum and Brown were retried separately in adjacent counties. McCollum was retried in Cumberland County in November 1991. On July 31, 1991, the Cumberland County Superior Court denied McCollum's motion to suppress his confession, specifically concluding that none of McCollum's constitutional rights were violated by his arrest, detention, interrogation, or statement, that his statement was made freely and voluntarily, that McCollum was in full understanding of his constitutional rights and that he waived those rights freely, knowingly, and intelligently. [DE 161-31]. During his opening and closing statements, and with the consent of McCollum, McCollum's attorney argued to the jury to that McCollum was present for the rape and murder of Miss Buie and asked the jury to return a verdict of second degree murder. The jury returned a verdict of guilty on the charges of first degree murder and rape, and McCollum was again sentenced to death. [DE 141-1] 1991 Trial Tr. at 1597-98; 1632-33; 2058-2065]. The North Carolina Supreme Court affirmed McCollum's conviction and sentence. *State v. McCollum*, 334 N.C. 208 (1993).

The United States Supreme Court denied McCollum's petition for writ of certiorari. *McCollum v. North Carolina,* 512 U.S. 1254 (1994).

In June 1992 Brown was retried in Bladen County Superior Court. Brown's motion to suppress his confession was denied, the court concluding that Brown knowingly, intelligently, and voluntarily waived his rights, that none of his rights under the North Carolina or United States Constitution had been violated, and that his statement was voluntary and not the result of any coercion, pressure, or intimidation. [DE 166-3]. The trial court later granted a defense motion to dismiss the first degree murder charge, finding that Brown had withdrawn from a conspiracy to commit murder, and the jury found Brown guilty of first degree rape. [DE 146-1] 1992 Trial Tr. at 288]. Brown was sentenced to life imprisonment. *Id.* at 310. Brown's conviction and sentence were affirmed on appeal both in the North Carolina Court of Appeals and the North Carolina Supreme Court. *State v. Brown*, 112 N.C. App. 390 (1993); *State v. Brown*, 339 N.C. 606 (1995). Brown did not file a petition for writ of certiorari to the United States Supreme Court.

In 2009, Brown sought assistance from the North Carolina Innocence Inquiry Commission (NCIIC). The NCIIC accepted Brown's case and began its investigation, which included DNA testing of physical evidence found at the scene of the crime. A Newport-brand cigarette butt found near other evidence was found to contain DNA which matched that of Roscoe Artis. Roscoe Artis is currently serving a life sentence, commuted from death, following his conviction in Robeson County for the first degree

murder and rape of Joann Brockman. *See State v. Artis,* 325 N.C. 278 (1990), *cert. granted, judgment vacated,* 494 U.S. 1023 (1990); *see also State v. Artis,* 329 N.C. 679, 680 (1991). Artis was arrested on October 22, 1983, the same day Ms. Brockman went missing and her body was discovered, and tried in August 1984. [DE 129-1]. Defendants Allen and Locklear testified for the state in Artis' trial, Locklear having participated in the arrest and investigation of Artis and Allen having conducted testing on a blood sample taken from Artis. *See* [DE 129-1;132-1] Artis Trial Tr. at 618-620; 707-711.

Other than Miss Buie, the DNA tested on other items of physical evidence found at the crime scene did not match any known person, including McCollum and Brown. Although McCollum had not filed a claim with the NCIIC, the Commission expanded its investigation to include McCollum. Following a hearing held September 2, 2014, on motions for appropriate relief (MAR) filed by McCollum and Brown, at which the investigator from the NCIIC, Ms. Sharon Stellato was the sole witness, the Robeson County Superior Court granted the motions and vacated McCollum and Brown's convictions. [DE 154-7; 155-7]. The State did not contest that the newly-discovered DNA evidence was favorable to McCollum and Brown and conceded that McCollum and Brown had satisfied the requirements of N.C. Gen. Stat. § 15A-270 (c)(2), which governs the relief available to petitioners who come forward with favorable DNA evidence post-conviction. The MAR court held that, "especially when considered together with the rest of the results of the [NCIIC]'s investigation," the favorable DNA evidence "tend[s] to establish Henry McCollum's and Leon Brown's innocence of crime for

which they were convicted and sentenced ...." [DE 155-7 at 3-4]. The MAR court ordered the vacatur of their convictions and sentences as imposed in Robeson, Cumberland, and Bladen Counties, dismissed with prejudice all charges in the cases, or order their immediate release. *Id.* On June 5, 2015, McCollum and Brown were issued full pardons of innocence by Governor Pat McCrory. [DE 147-14].

DISCUSSION

I. Motions for Summary Judgment

The parties have moved for entry of summary judgment or partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. A motion for summary judgment may not be granted unless there are no genuine issues of material fact for trial and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If that burden has been met, the non-moving party must then come forward and establish the specific material facts in dispute to survive summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). In determining whether a genuine issue of material fact exists for trial, a trial court views the evidence and the inferences in the light most favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). However, "[t]he mere existence of a scintilla of evidence" in support of the nonmoving party's position is not sufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "A dispute is genuine if a

reasonable jury could return a verdict for the nonmoving party. . . . and [a] fact is material if it might affect the outcome of the suit under the governing law." *Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013) (internal quotations and citations omitted). Speculative or conclusory allegations will not suffice. *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645,649 (4th Cir. 2002).

The Court considers first the motions for summary judgment by the two remaining sets of defendants and the affirmative defenses raised therein.

A. *Collateral Estoppel*

Both the SBI defendants, Allen and Snead, and the Robeson County Sheriff's Office defendants, Sealey and Locklear, have raised the defense of collateral estoppel or res judicata. Specifically, defendants contend that collateral estoppel prevents plaintiffs from re-litigating here whether probable cause existed to support their arrests and whether their confessions were voluntary. Defendants argue that plaintiffs' convictions, though later vacated, conclusively establish that probable cause existed and that the state court judges' rulings on the plaintiffs' motions to suppress their confessions conclusively establish that their confessions were voluntary.

> The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues

> that were or could have been raised in that action. . . . Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. . . . As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.

Allen v. McCurry, 449 U.S. 90, 94 (1980) (internal citations omitted). The doctrines of res judicata and collateral estoppel apply to § 1983 actions, and federal courts must afford preclusive effect to issues which have been decided by state courts when the courts of that state would do so. *Id.* at 95-96 (citing 28 U.S.C. § 1738); *see also Davenport v. N Carolina Dep't of Transp.*, 3 F.3d 89, 92 (4th Cir. 1993) (federal court considering § 1983 action to give res judicata effect to a state court judgment and to apply the law of the rendering state to determine whether and to what extent the state court judgment should be given preclusive effect).

> In order to assert collateral estoppel under North Carolina law, a party must show that the issue in question was identical to an issue actually litigated and necessary to the judgment, that the prior action resulted in a final judgment on the merits, and that the present

> parties are the same as, or in privity with, the parties to the earlier action. North Carolina courts have abandoned the final requirement of "mutuality of estoppel" for the defensive use of collateral estoppel, so long as the party seeking to reopen the issue "had a full and fair opportunity to litigate" the matter in the previous action.

Sartin v. Macik, 535 F.3d 284, 287-88 (4th Cir. 2008) (citing *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421,349 S.E. 2d 552,557, 560 (1986)).

Although identical issues which were necessary to the judgment were actually litigated by the North Carolina courts, the Court holds that the doctrines of collateral estoppel and res judicata are inapplicable here.

A movant may recover damages for an allegedly unconstitutional conviction or imprisonment by proceeding with causes of action under 42 U.S.C. § 1983 where the conviction or sentence has been, *inter alia,* expunged by executive order or declared invalid by an appropriate state tribunal. *Heck v. Humphrey,* 512 U.S. 477, 486-87 (1994). This is because where, as here, the prior conviction has been vacated or overturned, concerns regarding finality and consistency are no longer at issue. McCollum's and Brown's convictions and sentences, as imposed at both their first and second trials, were vacated by the North Carolina Superior Court in its MAR opinion. [DE 155-7]. To vacate means to nullify or cancel, make void, or invalidate. Black's Law Dictionary (10th ed. 2014). Accordingly, it is a "bedrock principle

of preclusion law" that a judgment that has been reversed or vacated cannot form the basis of a preclusion defense. *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.,* 719 F.3d 1367, 1372 (Fed. Cir. 2013); *see also* S.C. *Nat. Bank v. Atl. States Bankcard Ass'n, Inc.*, 896 F.2d 1421, 1430 (4th Cir. 1990).

In asserting their collateral estoppel defenses, the defendants rely on cases in which North Carolina courts have applied a rule which provides that, in civil actions for malicious prosecution, "absent a showing that the conviction in District Court was procured by fraud or other unfair means, the conviction conclusively establishes the existence of probable cause, even though plaintiff was acquitted in Superior Court." *Falkner v. Almon*, 22 N.C. App. 643, 645 (1974); *see also Myrick v. Cooley*, 91 N.C. App. 209, 213 (1988). The North Carolina Supreme Court has noted specifically that a prior conviction, even if reversed on appeal, is conclusive evidence of probable cause for the arrest. *Priddy v. Cook's United Dep't Store*, 17 N.C. App. 322, 324 (1973) (citing *Moore v. Winfield*, 207 N.C. 767, 770 (1935)).

Plaintiffs' convictions have not been reversed on appeal, however, they have been vacated by the superior court on a motion for appropriate relief. The 'majority of cases relied upon by defendants concern convictions in state district court with a different outcome in superior court; the facts of this case are markedly distinguishable. Further, even if this rule were to apply to this case, plaintiffs here have proffered evidence that fraud or other unfair means infected their arrests and prosecutions. *See, e.g., Simpson v. Sears, Roebuck & Co.*, 231 N.C. App. 412,

416 (2013) (allegations that conviction was based on false, fabricated, and fraudulent "confession" sufficient to show that conviction should not conclusively establish probable cause).

Whether or not the MAR court's vacatur is sufficient to undo the preclusive effect of plaintiffs' convictions, however, of critical importance in this case is that McCollum's and Brown's convictions were not merely overturned or vacated based on a legal error; instead, both men have been granted full pardons of innocence by the Governor of North Carolina. The North Carolina Constitution grants the governor "the exclusive prerogative to issue pardons." *State v. Clifton*, 125 N.C. App. 471, 481 (1997) (citing N.C. Const. art. III, § 5(6)). "The effects of a pardon are well settled in law: as far as the State is concerned, they destroy and entirely efface the previous offence; itis as if it had never been committed." *State v. Keith*, 63 N.C. 140, 143 (1869); *see also* N.C. Gen. Stat. § 15A-149 (persons who have been granted pardons of innocence are permitted to seek expungement from all official records any entries related to that person's apprehension, charge, or trial).

Defendants have provided the Court with no basis on which to hold that prior rulings of the North Carolina state courts would continue to hold preclusive effect after a governor's pardon of innocence entirely effaced a plaintiff's previous offenses. Indeed, pardon decisions are confined to the executive and are traditionally not the business of the courts. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981); *Bacon v. Lee,* 353 N.C. 696, 704 (2001); *see also United States v. Surratt*, 855 F.3d 218,

219 (4th Cir. 2017) (President's commutation of sentence "closes the judicial door" absent some constitutional infirmity in the commutation order). To allow the opinions of the state judiciary to continue to be determinative of the voluntariness of plaintiff's confessions or the existence of probable cause would improperly intrude into the province of the executive to determine and grant a pardon of innocence. Defendants have cited no case, applying either North Carolina or the federal common law, which would support such a result. Accordingly, defendants' motion for summary judgment on the basis of collateral estoppel is denied.

B. *Absolute Immunity*

Both sets of defendants correctly argue that "a trial witness has absolute immunity with respect to *any* claim based on the witness' testimony," and this immunity further extends to any witness testifying before a grand jury. *Rehberg v. Paulk*, 566 U.S. 356, 367 (2012); *see also Briscoe v. Lattue*, 460 U.S. 325, 332-33 (1983). This absolute testimonial immunity applies to both lay and police-officer witnesses. *Rehberg*, 566 U.S. at 367. Accordingly, defendants' motions for summary judgment with respect to any claims based solely on defendants' alleged perjured testimony at trial are granted.

C. *Qualified Immunity*

The privilege of qualified immunity protects government officials from liability so long as they could reasonably believe that their conduct does not violate clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (en banc). Qualified

immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court recognized a two-step procedure for determining whether qualified immunity applies that "asks first whether a constitutional violation occurred and second whether the right violated was clearly established." *Melgar v. Greene*, 593 F.3d 348, 353 (4th Cir. 2010). Judges are permitted to exercise their discretion, however, in regard to which of the two prongs should be addressed first in light of the facts and circumstances of the particular case. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

A plaintiff bears the burden to show that the constitutional violation occurred, while defendants bear the burden on the second inquiry, whether the right was clearly established. *Henry*, 501 F.3d at 377-378. Whether qualified immunity applies is ordinarily decided at summary judgment; the question of whether a constitutional right was clearly established is always a legal question which can be decided at summary judgment, but "a genuine question of material fact 'regarding whether the conduct allegedly violative of the right actually occurred' must be reserved for trial." *Willingham v. Crooke*, 412 F.3d 553, 559 (4th Cir. 2005) (internal alteration and citation omitted).

i. *The rights plaintiffs allege were violated were clearly established*

Plaintiffs have alleged claims for false arrest, malicious prosecution, and deprivation of due process against defendants in the individual capacities.

Whether a right was clearly established is a case specific inquiry, and the "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. "In determining whether a right is clearly established, [a court] may rely upon cases of controlling authority in the jurisdiction in question, or a 'consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.'" *Rogers v. Pendleton*, 249 F.3d 279, 287 (4th Cir. 2001) (citation omitted).

It was clearly established in 1983 that an arrest in the absence of probable cause was a violation of an individual's Fourth Amendment right to be free from unreasonable search and seizure. *See Merch. v. Bauer*, 677 F.3d 656, 666 (4th Cir. 2012) (citing *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)). It was further clear to a reasonable officer that a coerced confession could not form the basis of probable cause for an arrest. *Ashcraft v. State of Tenn.*, 322 U.S. 143, 155 (1944) ("The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession.").

Plaintiffs' due process claims arise in part out of defendants' alleged withholding of exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. *Brady,* on its face, applies to the prosecutor's duty to disclose exculpatory evidence to the defense, and "[i]n *Barbee*, decided a year after *Brady*, [the Fourth Circuit] held that '[t]he police are also part of the prosecution,' and thus, they too violate

the Constitution if and when they suppress exculpatory evidence." *Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 399 (4th Cir. 2014) (quoting *Barbee v. Warden, Md. Penitentiary*, 331 F.2d 842, 846 (4th Cir. 1964)).

The Court finds defendants' reliance on the vacated opinion in *Jean v. Collins*, 155 F.3d 701, 709 (1998) (*Jean* I) (en banc) *cert. granted, judgment vacated*, 526 U.S. 1142 (1999), to be misplaced. In *Jean I*, the court held that, in 1982, it was not clear that "police had a duty grounded in federal law to turn over the evidence at issue to a prosecutor." *Id.* However, in the subsequent en banc opinion, court noted that the cases *are* clear that when police intentionally withhold or destroy evidence, or otherwise act in bad faith, their actions violate the due process rights of a criminal defendant. In *Jean* II, the court of appeals noted that

> the concept of constitutional deprivation articulated in both *Daniels* and *Youngblood* requires that the officer have intentionally withheld the evidence for the purpose of depriving the plaintiff of the use of that evidence during his criminal trial. This is what is meant by "bad faith." And that must be established on the basis of evidence, including among other things the nature of the withheld material, that would negate any negligent or innocent explanation for the actions on the part of the police.

Jean v. Collins, 221 F.3d 656, 663 (4th Cir. 2000) (en banc) (*Jean* II) (citing *Daniels v. Williams*, 474 U.S. 327 (1986) and *Arizona v. Youngblood,* 488 U.S. 51 (1988)). Thus, to the extent the duty of police to turn over exculpatory evidence to the prosecutor was not plain in 1983, a reasonable officer would have been aware that the intentional, bad faith withholding of evidence, would violate the Constitution. *See also Trulock v. Freeh*, 275 F.3d 391, 409 (4th Cir. 2001) ("qualified immunity was never intended to relieve government officials from the responsibility of applying familiar legal principles to new situations.").

As to plaintiffs' due process claims arising out of the fabrication of evidence or use of false evidence, "the violation of [the] constitutional right not to be deprived of liberty as a result of the fabrication of evidence by an investigating officer. . . . was clearly established in 1983, when the events relevant to this litigation took place." *Washington v. Wilmore*, 407 F.3d 274, 283-84 (4th Cir. 2005) (citing *Miller v. Pate*, 386 U.S. 1, 7 (1967)). While there is no Constitutional duty on law enforcement to investigate independently every claim of innocence or conduct an error-free investigation, *Baker v. McCollan*, 443 U.S. 137, 146 (1979), it has long been established that when law enforcement acts in reckless disregard of the truth and makes a false statement or material omission that is necessary to a finding of probable cause, the resulting seizure will be determined to be unreasonable. *Franks v. Delaware,* 438 U.S. 154, 156 (1978); *see also Miller v. Prince George's Cty., MD*, 475 F.3d 621, 627 (4th Cir. 2007). Finally, "it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth

Amendment . . .." *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959).

ii. *Genuine issues of material fact exist as to whether plaintiffs' constitutional rights were violated*

Plaintiffs' claims rest on three theories. The first concerns the absence of probable cause for arrest and the manufacture of probable cause by coercing or fabricating plaintiffs' confessions. Plaintiffs' claims for relief which arise from this first theory, § 1983 false arrest and § 1983 malicious prosecution, are properly examined as claims founded on the Fourth Amendment. *See Lambert v. Williams*, 223 F.3d 257, 262 (4th Cir. 2000) (noting "there is no such thing as a '§ 1983 malicious prosecution' claim."); *Gantt v. Whitaker*, 57 Fed. App'x 141 (4th Cir. 2002) (unpublished). Plaintiffs do not appear to dispute that if probable cause existed at the time of their arrests, their § 1983 claims for false arrest and malicious prosecution fail.

a) *Fourth Amendment claims and probable cause*

"The Fourth Amendment prohibits law enforcement officers from making unreasonable seizures, and seizure of an individual effected without probable cause is unreasonable." *Brooks v. City of Winston-Salem, N.C.*, 85 F.3d 178, 183 (4th Cir. 1996). Probable cause is a result of a practical, common-sense consideration of all of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *Smith v. Munday*, 848 F.3d 248, 253 (4th Cir. 2017). Probable cause "requires more than a bare suspicion" but less than evidence sufficient to convict. *United States v.*

Gray, 137 F.3d 765, 769 (4th Cir. 1998). Only those facts and circumstances known to the officer at the time of the arrest are to be considered when determining whether probable causes existed. *Wilson v. Kittoe*, 337 F.3d 392, 398 (4th Cir. 2003).

The parties offer drastically different versions of the events surrounding the confessions given by McCollum and Brown. Defendants Snead and Sealey have stated that after they picked up McCollum at his house shortly after 9:00 p.m. on September 28, 1983, and brought him back to the Red Springs police station, they took McCollum's finger prints and escorted him to Chief Haggins' office at about 9:30 p.m. Snead's and Sealey's recollections of when McCollum received his *Miranda* warning differ, but the *Miranda* form reflects that McCollum was advised of his rights at 10:20 p.m. [DE 147-28]; [DE 146-11] Snead Dep. at 42-43 *(Miranda* waiver signed prior to questioning); Sealey Dep. at 132-133 *(Miranda* waiver signed after McCollum admits to holding Miss Buie down). Sealey testified that he asked few if any questions of McCollum during the interview, and that Snead took the lead. Sealey Dep. at 136-37. Agent Allen, who had processed the crime scene, was also present during McCollum's interview, but he sat behind McCollum and only shook his head a couple of times. Snead Dep. at 83-84.

After what Sealey thought might have been five or ten minutes of questioning, and Snead recalls to be anywhere from twenty to forty-five minutes, McCollum admitted to them that "I just held her down." [DE 146-11] Snead Dep. at 27-48; [DE 139-5] Sealey Dep. at 103-132. Sealey testified at his deposition that he thought McCollum was about to

have a seizure just before he admitted to them that he had held Miss Buie down. Sealey Dep. at 132. Snead testified at his deposition that McCollum was extremely calm and never denied having anything to do with the crime, but that almost from the beginning of the interview McCollum repeatedly stated that he did not kill her, and after ten or fifteen minutes McCollum stated that he had just held her down. Snead Dep. at 45-47. In his deposition, Snead stated that he talked with McCollum until about 1:50 a.m., that McCollum confessed, that Snead wrote out McCollum's statement, and that McCollum then confronted Leon Brown and Darrell Suber, who were at the police station, telling them that he had told the truth and that he [McCollum] wanted them to also tell the truth about killing Miss Buie. Snead Dep. at 50; 96-97. Snead testified that McCollum then asked Chief Haggins if he could go home, and Snead informed McCollum that things had changed and asked Chief Haggins to arrest McCollum for murder. Snead Dep. at 50.

McCollum's description of his interview by Snead, Sealey, and Allen bears no resemblance to the above. McCollum has testified at his deposition that the men questioning him got into his face, hollered at him, that they threatened him, told him that he [McCollum] had killed that girl and that he should admit it, that McCollum repeatedly denied being involved, and that Sealey threatened McCollum with the gas chamber if he did not talk. [DE 144-3] McCollum Dep. at 148-151. McCollum testified that the law enforcement officers told him to sign a paper that said if he could help them in the case as a witness they would let him go home, and that McCollum signed the paper but did not read it and it was not

read to him. McCollum Dep. at 154. McCollum denies that he confessed to the rape and murder of Sabrina Buie. McCollum Dep. at 159-160; [DE 147-29] (McCollum's handwritten statement).

Leon Brown came to the police station with his and McCollum's mother, Mamie Brown, at about 11:00 p.m. on September 28, 1983, after McCollum had already been taken to the police station for questioning. [DE 142-2] 1984 Trial Tr. at 1198. Brown testified at the 1984 trial that he could hear his brother McCollum crying when he arrived at the police station. [DE 142-3] 1984 Trial Tr. at 1669. At approximately 2:30 a.m., while Brown was waiting in an area with drink and snack machines with L.P. Sinclair, Detective Locklear and Agent Allen took Brown to an interrogation room and administered a juvenile rights warning; the form indicates that Brown was then fifteen years old and had completed the seventh grade. [DE 148-35]; [DE 146-13] Brown Dep. at 35. Brown has testified that after he circled "no" on a scrap of paper given to him by the officers, which he stated was supposed to indicate that he could not help them, the officers began to hammer him, calling him racial epithets and stating that he [Brown] had committed the crime or that he knew something about it. Brown Dep. at 41-42. Brown stated that he denied any knowledge of the crime and that he was innocent. Brown Dep. at 42. Brown. testified at his deposition that he was not read his rights or asked if he wanted an attorney, and that he was told that if he signed another piece of paper he could go home. Brown Dep. at 45; 51-52. While Brown was being questioned; his mother Mamie Brown was knocking on the door asking to see him but was

refused entry; Brown also asked to see his mother but his request was denied. Brown Dep. at 69-70.

Agent Allen testified at his deposition that he read Brown his juvenile rights, including the right to have a parent present, and that Brown stated that he understood each right as recited and that he wished to answer questions without a lawyer or a parent or guardian present. [DE 139-4] Allen Dep. at 135. Allen stated that he did not recall Brown asking to speak with his mother or Brown's mother asking to see Brown. Allen Dep. at 135. Snead testified at his deposition that does not know why Leon Brown was taken to an interview room and that he witnessed Brown's rights form but was not in the room when Brown gave his statement. [DE 146-11] Snead Dep. at 92; 104; 110. At the 1984 trial, Detective Locklear testified that he took Brown's statement, [DE 161-12] (Brown's handwritten statement), that he was "quite alert of mind and very precise in what he wanted to stay to me," that he made Brown no promises, did not threaten him, and was attentive to his comforts. [DE 142-2] 1984 Trial Tr. at 1183. Brown testified at his 1984 trial that Locklear did not advise him of his rights, that Brown asked for his mother when an officer grabbed Brown's arm and told him what he'd better do, and that Brown was told he would be taken to the gas chamber if he did not sign the rights waiver. [DE 142-3] 1984 Trial Tr. at 1659-1663. At his deposition, Brown testified that he did not say the things that are written in his statement, and that an officer just sat and wrote it and told Brown to sign it, and that Brown, after being read his statement, told the officer that it was not true. [DE 146-13] Brown Dep. at 58.

Defendants contend that plaintiffs' confessions clearly establish a basis for probable cause upon which to arrest plaintiffs. Plaintiffs contend, and have presented evidence that, their confessions are fabricated, were coerced, or are otherwise infirm, and that clearly the coercion was known to defendants. Plaintiffs' proffered deposition testimony is sufficient to create a genuine issue of material fact as to the veracity of their confessions, as "all that is required [to survive a motion for summary judgment] is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial," *Anderson*, 477 U.S. at 249; *see also Berry v. Chicago Transit Auth.*, 618 F.3d 688, 691 (7th Cir. 2010) (testimony that is based on personal knowledge or firsthand experience can be evidence of a disputed fact). Such genuine dispute precludes a ruling on qualified immunity as the Court cannot, in the absence of fact-finding, determine whether probable cause existed to arrest plaintiffs. *See, e.g., Niemann v. Whalen,* 911 F. Supp. 656, 668 (S.D.N.Y. 1996) (whether defendants coerced plaintiff's confession is "material to resolving the issue of probable cause.").

b) *Due Process and fabrication of evidence, failure to disclose, and failure to investigate*

Plaintiffs' second theory of liability rests on their assertion that defendants, in order to shield their wrongful acts related to the coerced or fabricated confessions of plaintiffs, deliberately and in bad faith failed to investigate other leads and withheld exculpatory evidence from the prosecution and defense, namely the similarities between the rape and murder of Sabrina Buie and rapes and murders

committed by a known individual in the Red Springs area, Roscoe Artis, the statements of Mary McLean Richards that she witnessed Roscoe Artis attacking Sabrina Buie, and the failure to investigate and alleged coerced testimony of L.P. Sinclair. Plaintiffs argue that the foregoing violated their rights under the Due Process Clause of the Fourteenth Amendment. The Fourth Circuit has "recognized a due process 'right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity.'" *Massey v. Ojaniit*, 759 F.3d 343, 354 (4th Cir. 2014) (internal quotation and citation omitted). A plaintiff alleging a claim for violation of due process based on fabricated evidence must demonstrate that law enforcement fabricated evidence and that that fabrication resulted in the deprivation of the plaintiff's liberty. *Washington*, 407 F.3d at 282. However, the failure to investigate other leads, if determined to be negligent or even grossly negligent, does not violate due process. *Wilson v. Lawrence Cnty.,* 260 F.3d 946, 955 (8th Cir. 2001) (citing *Daniels v. Williams*, 474 U.S. 327, 334 (1986)).

The record provides the following evidence which relates to plaintiffs' due process claim. According to an SBI report expert, Darrell Suber, who was implicated by both McCollum and Brown, was interviewed by law enforcement on September 29, 1983. Suber submitted to a polygraph, the results of which were inconclusive. [DE 148-29]. Suber later refused a second polygraph. [DE 148-26]. However, he was excluded as a suspect based on his alibi and interviews with others which supported his claimed whereabouts. [DE 150-3]. Christopher Brown, a/k/a Chris Brown or "Inzar", who was also implicated by

both McCollum and Brown in their confessions, was interviewed at the Red Springs police station on September 29, 1983, between 4:00 a.m. and 6:00 a.m. [DE 148-26]; [DE 149-2 at 43-45]. Chris Brown was interviewed by SBI Agent Lee Sampson and defendant Sealey after he waived his rights, and he informed them that he had stayed with his grandmother the night that Sabrina Buie had disappeared. Chris Brown also submitted to two polygraph examinations, the results of which were inconclusive. *Id.* On October 6, 1983, Chris Brown was interviewed again at the Cumberland County Sheriff's Office by Agent Sampson and SBI Agent Van Parker. [DE 149-2 at 45]. During that interview Chris Brown stated that he had stayed at his grandmother's house on Friday, September 23rd not Saturday, September 24th, that he had been with McCollum, Brown, and L.P. Sinclair, at Lisa Logan's house on the Saturday before September 24th, that he had recently stated to someone in the bathroom at school that he had killed that girl but he was just kidding, and that he did not see Miss Buie, McCollum, Brown, or L.P. Sinclair on Saturday September 24th. *Id.* at 45-46. Chris Brown's mother confirmed that Chris had stayed with her mother on Friday, September 23rd and that she had let him into her home when he returned between 11:00 p.m. and midnight on Saturday September 24th. *Id* at 46. McCollum also implicated Louis Moore in his confession, but Moore was determined to be living in Kentucky at the time of Miss Buie's murder. [DE 149-2 at 34]; [DE 154-7] MAR Hrg. Tr. at 11. Neither Moore, Suber, nor Chris Brown were investigated further in relation to the rape and murder of Sabrina Buie.

On October 22, 1983, less than a month after the arrests of plaintiffs, another young woman went missing in Red Springs, North Carolina. Close to midnight that night, Roscoe Artis was questioned about the missing woman, Joann Brockman, whose body had been found near a pear tree covered partly with dirt and brush. *State v. Artis*, 325 N.C. 278, 289 (1989), *cert. granted, judgment vacated*, 494 U.S. 1023 (1990). Ms. Brockman's body was found naked except for a sweater and bra pushed above her breasts, and an autopsy revealed that she had been manually strangled to death and had died during sexual intercourse. *Id.* Roscoe Artis made several statements to law enforcement on the night of October 22nd and early morning hours of October 23rd; Artis "completed a third, briefer statement at 3:10 a.m. in which he admitted that he had killed Joann Brockman, that he had been advised of and understood his rights, and that he had voluntarily assisted officers in finding Joann's body and pants." *Id.* at 293. One of the investigating officers to whom Artis had shown where to find Ms. Brockman's pants was defendant Locklear. *Id.* According to Artis, Sabrina Buie's death was discussed while he was speaking to law enforcement about Ms. Brockman's murder. [DE 139-2] Interview of Roscoe Artis (April 6, 2015) at 17. Defendant Allen was also involved in Artis' case, having assisted in processing evidence from the crime scene and Artis. [DE 132-1] Artis Trial Tr. at 707-712.

During the Artis investigation, Allen was asked to accompany defendant Locklear and another Robeson County deputy to the Gastonia Police Department to investigate other cases which may have involved Artis. [DE 139-.4] Allen Dep. at 26-28.

On January 19, 1984, prior to McCollum and Brown's first trial, Locklear and Allen went to Gastonia, North Carolina and received Artis' finger prints from his arrest for the assault of Billie Ann Woods. Locklear and Allen interviewed Ms. Woods, who indicated that she would be willing to testify at Artis' capital trial for the murder of Ms. Brockman. [DE 150-7]. Artis had been arrested in Gaston County Superior Court in 1974 of assault with intentto rape Ms. Woods. [DE 128-4]. Ms. Woods testified at Artis' 1984 trial for the purpose of showing motive, intent, and scienter of Artis. [DE 132-1] Artis Trial Tr. at 764. Ms. Woods testified that when she was sixteen years-old Artis had grabbed her while she was walking between two buildings in Gastonia and that he began to strangle her after telling her that she would "give [him] some." *Id.* at 767-68. Another individual happened to walk past and Artis stopped the assault and began to act as though Ms. Woods had taken money from him. *Id.* at 770. Artis was tried for the murder of Ms. Brockman beginning on August 20, 1984, in Robeson County. District Attorney Joe Freeman Britt prosecuted Artis for the murder of Ms. Brockman and Artis was represented by Earl Strickland, both of whom would be involved in McCollum and Brown's first trial. [DE 129-1] Artis Trial Tr. at 1.

On October 5, 1983, L.P. Sinclair was administered a polygraph examination, in which he denied having any involvement or knowledge of Sabrina Buie's death; the results of this examination revealed that L.P. Sinclair was being truthful. [DE 148-31]. At the 1984 trial of plaintiffs, however, L.P. Sinclair, who was then seventeen years-old, testified that McCollum had confessed to him the day following Miss Buie's murder. [DE 142-3] 1984 Trial Tr. at

1718-1719. L.P. Sinclair further testified that McCollum and Brown had discussed raping Sabrina Buie in his presence and that he [Sinclair] had declined to participate. *Id.* at 1715-16. L.P. Sinclair was questioned about his change-of-story by counsel for plaintiffs during the trial, and testified that his first statement to law enforcement had been a lie and that he now wanted to tell the truth. *Id.* at 1736. L.P. Sinclair was killed in 1990, prior to plaintiffs' retrials. [DE 144-1] 1991 Trial Tr. at 1857.

On October 5, 1984, three days prior to the start of McCollum's and Brown's first trial, the fingerprints of L.P. Sinclair and Roscoe Artis were submitted to the SBI for comparison to the latent prints found at the Sabrina Buie crime scene. [DE 148-34]. Artis and L.P. Sinclair are listed as suspects on the fingerprint comparison request. *Id.*; [DE 154-7] MAR Hrg. Tr. at 103-04. The fingerprints of Artis and L.P. Sinclair were never compared to the latent prints from the Sabrina Buie crime scene, however, and the request was canceled on October 5, 1985. *Id.*

Although Mary McLean Richard's interview with Detective Locklear on September 26, 1983, is noted in the records, *see, e.g.,* [DE 149-2 at 51], it is only with the notation of"negative results." Ms. Richards stated in 2014, however, that she witnessed Roscoe Artis attacking Sabrina Buie on the night she was killed, that she attempted to intervene but that Artis frightened her away, and that when she went home and told her mother what she had seen her mother told her to keep quiet. [DE 148-39 at 2-3]. Ms. Richards stated that she provided this information to defendant Sealey during the investigation in 1983. *Id.* at 22-25.

Plaintiffs contend that, taken together, the above-recited evidence demonstrates that defendants acted in bad faith, in particular in failing to investigate Roscoe Artis and the statement of Mary McLean Richards. Additionally, McCollum and Brown in their confessions identify different individuals as having participated in the rape and murder, McCollum states that Miss Buie was stabbed several times when the evidence does not reveal any stab wounds on Miss Buie, and, although his home was searched, no bloody clothing or shoes were recovered from Darrell Suber. These inconsistencies are not explained by the evidence at trial or any further investigation by law enforcement.

Defendants dispute that Mary McLean Richards made a statement in 1983 to Locklear or any other member of law enforcement that she witnessed Miss Buie's attack. Defendants further dispute that any additional action should have been taken with respect to investigating Roscoe Artis and that any one of them coached or instructed L.P. Sinclair to testify untruthfully at the 1984 trial. Because genuine issues of material fact exist regarding whether the conduct alleged by plaintiffs' to have violated their Fourteenth Amendment Due Process rights actually occurred, a determination cannot be made at this time as to whether defendants are entitled to qualified immunity.

The Court would note that, as to their false confession claim, plaintiffs' incarceration was a clearly foreseeable result of the alleged fabrication of plaintiffs' confessions, and thus plaintiffs have, if their allegations are true, demonstrated causation. *Washington*, 407 F.3d at 284. As to their claims

arising out of a failure to investigate or disclose, only if a finder of fact were to decide that defendants' actions following plaintiffs' arrests, including their failure to investigate Roscoe Artis for Sabrina Buie's rape and murder, failure to disclose evidence of Mary Richards' statement to the prosecution or defense, and failure to test the fingerprints of L.P. Sinclair and Roscoe Artis against those found at the Sabrina Buie crime scene, were done in bad faith could qualified immunity fail to shield defendants for these actions.[4] *See Owens*, 767 F.3d at 396-97.

Accordingly, defendants' motions for summary judgment on the privilege of qualified immunity are denied at this time as to plaintiffs' due process claims.

D. *Official capacity claim;* Monell *liability*

The final theory advanced by plaintiffs is that all of the constitutional violations inflicted upon them in their wrongful arrest, prosecution, and conviction were as a result of a pattern or practice of the Red Springs Police Department and the Robeson County Sheriff's Office. As the Town of Red Springs defendants have settled their claims with plaintiffs, this claim lies solely against defendant Sealey in his official capacity as Sheriff of Robeson County.

The Supreme Court has determined that § 1983 applies to local governments. *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 690 (1978); *see also Wilcoxson v. Buncombe Cty.*, 129 F. Supp. 3d 308, 317 (W.D.N.C. 2014) (North Carolina Sheriff is final law enforcement policymaker for

[4] Plaintiffs' allegations concerning defendants' own perjured testimony are barred by absolute immunity.

county and subject to liability, under *Monell*). However, this application is not without limits. "A local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Monell*, 436 U.S. at 694. In other words, there is no *respondeat superior* liability under § 1983. Municipal liability only results "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell* 436 U.S. at 694.

A policy or custom for which a municipality may be held liable may be (1) an express policy, such as a written ordinance or regulation; (2) the decisions of a person with final policymaking authority; (3) an omission, such as a failure to properly train officers, that manifests deliberate indifference to the rights of citizens; or (4) a practice that is so persistent and widespread as to constitute a custom or usage with the force of law. *Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003) (internal quotation marks, alteration omitted). "Proof of the existence of a municipal policy or custom under § 1983 does not require a plaintiff to evidence numerous similar violations," *Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183, 195 (4th Cir. 1994), but to succeed against a municipality, a § 1983 plaintiff must demonstrate that the custom or policy is the "moving force" behind the alleged violation. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (citations omitted).

Defendant Sealey has testified that there were no written policies or procedures in the Rob son County Sheriff's Office prior to 1994 or 1995, and that he received no training in how to interview or

question someone with a low IQ or mental disability. [DE 139-5] Sealey Dep. at 33-35. The foregoing evidence, should it include a finding by a jury that plaintiffs' confessions were fabricated or coerced, could, in light of the lack of training referenced by defendant Sealey, plainly support plaintiffs' allegation that, at a minimum, the Robeson County Sheriff failed train his deputies in such a way as resulted in the deliberate indifference to the rights of citizens or a practice so persistent and widespread so as to constitute a custom. The Court therefore will allow this claim to proceed to trial.

In sum, the Court finds that plaintiffs' claims arising under the Fourth and Fourteenth Amendments turn on a finding that their confessions were coerced or fabricated. If a finder of fact determines that plaintiffs' confessions were coerced or fabricated, a genuine issue arises as to whether these defendants, in an effort to conceal their coercion or fabrication of the confessions, intentionally and in bad faith failed to investigate or disclose to the prosecution and defense another known and potential suspect, Roscoe Artis, failed to disclose a potential witness to the crime, Mary McLean Richards, and intentionally coerced another individual, L.P. Sinclair, to testify against plaintiffs. A question would further arise as to whether such actions were as a result of a policy or custom which allowed defendants to violate plaintiffs' constitutional rights. If, however, a finder of fact determines that the confessions of the plaintiffs were not coerced and were, in fact, voluntary- whether or not they were truthful-probable cause would have existed for defendants to arrest plaintiffs, and their subsequent actions would likely be more properly deemed to be

negligent or grossly negligent, and would thus not rise to the level of a constitutional violation. *See also Grayson v. Peed*, 195 F.3d 692, 697 (4th Cir. 1999) (no municipal liability under § 1983 where there is no constitutional violation).

Accordingly, the Court cannot determine at this time whether plaintiffs' constitutional rights were violated, and thus whether defendants are shielded by the privilege of qualified immunity. A finder of fact is required to make determinations as to the voluntariness of plaintiffs' confessions and the faith of the officers conducting the investigation into Sabrina Buie's murder after plaintiffs' confessions were obtained. In light of plaintiffs' allegations that the defendants worked in concert to deny plaintiffs' their constitutional rights as well as the specifics regarding the grouping of SBI and Robeson County defendants to engage in different aspects of plaintiffs' interrogations, arrests, and investigations, the Court will not at this time attempt to parse the liability of each individual defendant as it relates to each claim. Finally, because, as discussed in detail above, genuine issues of material fact exist as to whether defendants are entitled to qualified immunity, plaintiffs' motion for entry of summary judgment in their favor must be denied on application of the appropriate Rule 56 standard.

II. Motion for Sanctions

Plaintiffs have moved for sanctions against the remaining defendants pursuant to Ru1e 37 ofe Federal Rules of Civil Procedure. Plaintiffs argue that defendants have failed to furnish on request documentary evidence related to plaintiffs' claims and

that defendants denied possession such documents. Plaintiffs further contend that many or most of those documents had already been turned over to the NCIIC, and that defendants' failure to disclose evidences a continued pattern of deception that has continued since September 1983. Because plaintiffs have gained access to the files and documents they sought through other means, they seek as a sanction an instruction to the jury of defendants' failure to disclose. Fed. R. Civ. P. 37(c)(l)(B).

> Fed. R. Civ. P. 37(c) provides that
>
> > If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
> >
> > (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
> >
> > (B) may inform the jury of the party's failure; and
> >
> > (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

A district court enjoys wide discretion in determining whether to issue sanctions under Rule 37. *See, e.g., S. States Rack And Fixture, Inc. v. Sherwin-Williams*

Co., 318 F.3d 592, 595 (4th Cir. 2003). The Court has considered plaintiffs' motion and, in its discretion, finds it to be premature. Plaintiffs may seek to raise any wrongdoing by defendants at trial, and the Court will consider the issue at that time. The motion for sanctions is denied without prejudice.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for sanctions [DE 123] is DENIED WITHOUT PREJUDICE, plaintiffs' motion for summary judgment [DE 127] is DENIED. The motions for summary judgment by defendants Snead and Allen [DE 159] and Sealey and Price as Administrator C.T.A. of the Estate of Locklear [DE 164] are GRANTED IN PART and DENIED IN PART. The motion to file surreply by Snead and Allen [DE 188] is GRANTED and the motion to withdraw as attorney [DE 258] is ALLOWED.

SO ORDERED, this 1 day of March, 2018.

/s/
TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

[ENTERED: August 27, 2019]

FILED: August 27, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1366 (L)
(5:15-cv-00451-BO)

J. DUANE GILLIAM, Guardian of the Estate of Leon Brown; RAYMOND C. TARLTON, Guardian Ad Litem for Henry Lee McCollum

Plaintiffs - Appellees

and

HENRY LEE MCCOLLUM; LEON BROWN; GERALDINE BROWN RANSOM, Guardian of Leon Brown; KIMBERLY PINCHBECK, as limited guardian and conservator of the estate of Henry Lee McCollum

Plaintiffs

v.

KENNETH SEALEY, both individually and in his official capacity as the Sheriff of Robeson County; ROBERT E. PRICE, Administrator C.T.A. of the Estate of Joel Garth Locklear, Sr.

Defendants - Appellants

and

ROBESON COUNTY; TOWN OF RED SPRINGS; KENNETH SNEAD; JOEL GARTH LOCKLEAR; LARRY FLOYD; LEROY ALLEN; PAUL CANADY, Administrator C.T.A of the Estate of Luther Haggins

Defendants

No. 18-1402
(5:15-cv-00451-BO)

J. DUANE GILLIAM, Guardian of the Estate of Leon Brown; RAYMOND C. TARLTON, Guardian Ad Litem for Henry Lee McCollum

Plaintiffs - Appellees

and

HENRY LEE MCCOLLUM; LEON BROWN; GERALDINE BROWN RANSOM, Guardian of Leon Brown; KIMBERLY PINCHBECK, as limited guardian and conservator of the estate of Henry Lee McCollum

Plaintiffs

v.

KENNETH SNEAD; LEROY ALLEN

Defendants - Appellants

and

ROBESON COUNTY; TOWN OF RED SPRINGS; KENNETH SEALEY, both individually and in his official capacity as the Sheriff of Robeson County;

JOEL GARTH LOCKLEAR; LARRY FLOYD; PAUL CANADY, Administrator C.T.A of the Estate of Luther Haggins; ROBERT E. PRICE, Administrator C.T.A. of the Estate of Joel Garth Locklear, Sr.

Defendants

O R D E R

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

Entered at the direction of the panel: Judge Niemeyer, Judge Thacker, and Judge Richardson.

For the Court

/s/ Patricia S. Connor, Clerk

[ENTERED: April 3, 2017]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA WESTERN DIVISION
Case No. 5:15-cv-00451-BO

HENRY LEE MCCOLLUM and J. DUANE GILLIAM, as Guardian of the Estate of LEON BROWN, Plaintiffs, v. TOWN OF RED SPRINGS, et al., Defendants.	**BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (ON BEHALF OF DEFENDANTS ROBERT E. PRICE, AS ADMINISTRATOR C.T.A. OF THE ESTATE OF JOEL GARTH LOCKLEAR, AND KENNETH SEALEY)**

STATEMENT OF THE CASE

The plaintiff Henry Lee McCollum and J. Duane Gilliam, as Guardian of the Estate of Leon Brown, filed suit against a number of defendants, including Robeson County, Sheriff Sealey (in his individual and official capacity) and Officer Locklear, arising out of plaintiffs' alleged wrongful arrests and convictions.[1] In an Order dated May 27, 2016, this Court dismissed Robeson County as a defendant. [D.E. #84] The plaintiffs assert the following claims

[1] Shortly after being served, Officer Locklear passed away. Thereafter, Robert Price as administrator C.T.A. of the Estate of Locklear, was substituted as a party. However, in an attempt to avoid confusion, this brief will refer to this defendant as "Locklear."

against defendants Sealey and Locklear: (1) a claim under 42 U.S.C. § 1983 for "false arrest" (First Cause of Action); (2) a claim under 42 U.S.C. § 1983 for "malicious prosecution" (Third Cause of Action); (3) a claim under 42 U.S.C. § 1983 for "deprivation of due process of law" (Second Cause of Action); and (4) a claim against Sealey and Locklear in their official capacity for "municipal liability pursuant to 42 U.S.C. § 1983" (Fourth Cause of Action).

The defendants Sealey and Locklear now move for summary judgment as to all claims.

STATEMENT OF THE FACTS

On September 24, 1983, eleven year-old Sabrina Buie went missing. [1984 trial: 982:3-10, 996:13-18; 1991 McCollum trial, 1339:22-1342:14] On September 26, 1983, Buie's nude body was found in a soybean field in Red Springs. [1984 joint trial, 989:2-10, 1013; 1991 McCollum retrial, 1346:2-1347:12]

The Red Springs Police Department requested the North Carolina State Bureau of Investigation (SBI) to take control of the murder investigation. SBI agents began arriving in Red Springs in the afternoon and evening of September 26, 1983 to begin work on the investigation. [1984 joint trial, 1023:5-9, 1144:9-14; 1991 McCollum retrial, 1368:24-1370:7; 1992 Brown trial 14:6-8, 181:24-182:10; Snead dep., 10:7-12:3; Allen dep. 37:15-38:3] The Sheriff of Robeson County assigned defendants Detective Garth Locklear and Detective Kenneth Sealey to provide additional support to the SBI. Locklear arrived in Red Springs that afternoon at approximately 4:00 p.m., while Sealey arrived at the Red Springs Police Department that evening. [Sealey dep. I, 72:16-74:20;

Sealey Aff. ¶¶ 11, 18; 1992 Brown retrial, 237:18-24] Neither Locklear nor Sealey were involved in processing the crime scene, which was conducted by SBI Agent Leroy Allen. [Sealey dep. I, 72:16-74:20; Sealey Aff. ¶¶ 11, 18; 1992 Brown retrial, 237:18-24] Upon his arrival at the Red Springs Police Department, Sealey was assigned to work with defendant SBI Agent Kenneth Snead. Snead and Sealey worked together during the course of the investigation, canvassing the area in search of leads. [January 17, 1991 suppression hearing trans., 33:24-34:4; Sealey dep. I, 74:12-20; Sealey Aff. ¶ 8; Snead dep. 11:21-12:23] Detective Locklear assisted Red Springs Police Department officers in canvassing the area. [1992 Brown trial, 237:22-24]

It was and is the policy of the Robeson County Sheriff's Office to comply with the United States Constitution, the North Carolina Constitution, and all applicable federal and state law and authority, including law and authority applicable to arrests, the questioning of criminal suspects, and regarding the turning over of exculpatory evidence. [Sealey, Aff., ¶¶ 5, 7]

Agent Snead and Sealey interviewed seventeen year-old Ethel Furmage at approximately 6:20 p.m. on September 28, 1983. Miss Furmage advised Snead and Sealey that she had heard at school that "Buddy" (plaintiff Henry McCollum) had killed Buie, and that David Murray and Chris Brown were also involved in the murder. [Snead dep., 18:21-24:18; 27:1-8; Sealey Aff. ¶ 9; SBI summary of September 28, 1983 interview with Ethel Furmage]

Following up on this lead, Snead, Sealey and SBI Agent Leroy Allen went to McCollum's residence

at approximately 9:10 p.m. on September 28, 1983. [1984 trial, 1145:1-3, 1155:16-18; Snead dep., 37:12-38:15; Sealey dep. I, 114:7-115:25; Sealey Aff., ¶ 9] After being advised that he had no obligation to speak with or accompany them, McCollum voluntarily agreed to ride with the officers to the Red Springs Police Department to talk. [1984 joint trial, 1145:3-8, 1258:19-1259:3, 1277:2-23; January 16, 1991 suppression hearing trans., 5:1-6:6, 40:6-41:7, 43:1-46:2; 1991 McCollum trial, 1468:15-1471:14; Snead dep. I, 38:25-39:13; McCollum dep., 31:20-32:19, 99:20-24]

Upon their arrival at the Red Springs Police Department, McCollum was again advised that he was not under arrest. He was told on several occasions that he could leave at any time. [1984 trial 1146:11-13, 1150:21-22, 1166:8-16, 1273; January 17, 1991 suppression hearing trans., 7:22-8:3; McCollum dep., 69:11-15; Snead dep., 37:12-38:15; Sealey Aff., ¶ 10] McCollum consented to his fingerprints being taken by Agent Allen. [1984 joint trial, 1145:11-14; January 17, 1991 suppression hearing trans., 7:18-21; 1991 McCollum retrial, 1417:16-1418:2, 1471:22-1472:1; Sealey dep. I, 114:7-115:25] Officers then spoke to McCollum for 20 to 30 minutes about matters unrelated to Sabrina Buie. When the subject of the murder of Sabrina Buie was raised, officers observed McCollum to become visibly nervous. [1984 trial 1146:6-7, 1159:20-21; January 17, 1991 suppression hearing trans., 6:16-7:11, 8:6-9, 23:23-24:11; 1991 McCollum retrial, 1472:7-13, 1473:6-1474:12; McCollum dep., 48:8-12; Sealey dep. I, 131:22-133:4; Sealey Aff., ¶ 10] Agent Snead advised McCollum of his Miranda rights, which McCollum waived in writing at 10:26 p.m. [McCollum rights waiver form,

1984 joint trial, 1146:7-1149:15, 1169:9-22, 1354:9-1358:13; January 17, 1991 suppression hearing trans., 8:25-11:3, 41:19-42:22; 1991 McCollum retrial 1474:15-1480:6; Snead dep., 39:25-40:45, 43:12-45:12; Sealey dep. I, 127:4-130:1; Sealey Aff., ¶ 10] McCollum provided a statement, which was reduced to writing by Snead and signed in six places by McCollum, in which he confessed his involvement, along with several other individuals including his half-brother, Leon Brown, in the rape and murder of Sabrina Buie. [McCollum confession; 1984 joint trial, 1149:16-1150:13, 1162:8-1163:24, 1359:15-1365:24; January 17, 1991 suppression hearing trans., 11:12-16:12, 26:21-27:11; 1991 McCollum retrial, 1480:5-1491:3; 1496:22-1497:11; Snead dep. 40:1-68:3; Sealey Aff., ¶¶ 12-13; McCollum dep., 106:23-107:2] During his questioning, McCollum was provided with cigarettes, soft drinks, and was permitted water and restroom breaks. [1984 trial, 1149:16-1150:13, 1162-63, 1359:2-6; January 17, 1991 suppression hearing trans., 11:7-11, 16:19-17:10; 1991 McCollum retrial, 1487:22-1488:22; McCollum dep., 49:3-50:2, 52:1-11] McCollum also drew a diagram of the crime scene, with the assistance of Agent Allen. [McCollum crime scene sketch; January 17, 1991 suppression hearing trans., 18:18-22; Allen dep., 119:15-121:4]

After McCollum signed his statement, Sealey took another short statement from McCollum in the presence of Red Springs Police Chief Luther Haggins and Agent Allen, in which McCollum recounted his individual acts committed during the rape and murder of Sabrina Buie. [McCollum confessions (last page); January 16, 1991 suppression hearing trans., 47:11-23, 49:7-20, 51:12-52:3; McCollum dep., Ex. 2, (final page); Sealey dep. I 137:16-140:5; Sealey Aff.,

14] Thereafter, McCollum was placed under arrest. [1984 joint trial, 1376:1-11; January 17, 1991 suppression hearing trans., 25:19-26-26; 1991 McCollum retrial, 1493:20-22]

During this time, Leon Brown voluntarily came to the Red Springs Police Station with his mother. [Brown dep., 33:14-20; 1984 joint trial, 1198:12-18, 1317:16-18] There, Brown voluntarily spoke with the officers. Agent Allen advised Brown of his Miranda rights, which he waived. [Leon Brown, Juvenile Rights petition; 1984 joint trial, 1151:2-1152:19, 1170:19-1172:18, 1365:25-1370:7; 1992 Brown retrial 14:23-21:25; 25:25-28:19] At the direction of SBI Agents, Brown was then interviewed by Detective Locklear, with Chief Haggins also present. [1984 joint trial, 1154:17-20, 1181:13-19, 1189:15-17, 1388:21-1389:16; 1992 Brown retrial 16:15-21:25] Prior to the start of Brown's interview, McCollum confronted Brown and advised his brother that he had told the truth – that they had raped and murdered Buie -- and encouraged Brown to also tell the truth. [1984 joint trial, 1771:20-1772:9, 1390:17-1402:3; 1991 McCollum retrial, 1493:11-19; January 16, 1991 suppression trans., 56:7-14; 1992 Brown retrial 27:11-17; 233:8-10; Brown dep. 81:8-18, Ex. 8]

During his interview, Leon Brown confessed to being present and involved in the rape and murder of Sabrina Buie. [1984 joint trial, 1180:21-1193:22, 1390:17-1402:3; 1992 Brown retrial 40:7-48:24, 243:6-253:6; 261:5-268:17-271:21, Brown dep., Ex. 6] Brown's statements were reduced to writing by Locklear, who sat next to him and carefully reviewed it with him for accuracy. [1984 joint trial, 1191:14-1192:4, 1390:17-1402:3-1410:19; 1992 Brown retrial

34:14-22, 37:15-38:8, 254:6-255:4; Stellato dep., Ex. 24, 30:1-5] Brown initialed corrections to his confession in numerous places and then signed it. [Leon Brown confession; 1984 joint trial 1336:20-1339:3; 1992 Brown retrial 41:32-34, 49:15-18; 253:10-225:8; Brown dep. 54:13-57:21 59:17-60:3, 60:17-61:7, Ex. 6] Brown also assisted Locklear in creating a sketch of the crime scene. [Leon Brown sketch; 1992 Brown retrial, 257:10-261:3] After confessing to the rape and murder of Sabrina Buie, Brown was placed under arrest. [1992 Brown retrial, 268:6-10]

Warrant/juvenile petitions for the plaintiffs' arrests were issued by a magistrate on September 29, 1983. [See copies of arrest warrants for Henry McCollum and Juvenile Petition for Leon Brown]

On or about September 30, 1983, following his first appearance in the Robeson County Courthouse, McCollum admitted on camera to a television reporter that he had held Buie down while others raped and murdered her, stating "I just hold her down. That's it." [Barnes Aff., ¶ 6, Ex A (copy of video recording); 1984 joint trial 1275:1-23, 1596:12-1599:22; McCollum dep. 74:12-75:7; 109:24-112:11]

During the investigation, Locklear and Sealey worked under the direction of the SBI. Locklear and Sealey provided copies of all notes and documents that they created or obtained to members of the SBI for incorporation into the final SBI investigation report to be produced to the District Attorney. [Sealey Aff., ¶ 17]

Both plaintiffs were indicted by a grand jury on charges of First Degree Murder and Rape on January 3, 1984. [See copies Indictments]

Plaintiffs were tried together in Robeson County Superior Court in October 1984. During a hearing on the plaintiffs' motion to suppress their confessions, the plaintiffs both testified, contending that their confessions were coerced by law enforcement officers who shouted at them, threatened them and called them names. [1984 joint trial, 1255:21-1299:13 (McCollum), 1317:4-1339:16 (Brown)] In his testimony during the motion to suppress, McCollum admitted to holding Sabrina down while she was raped and killed. [1984 joint trial, 1273:1-8] Plaintiff Brown also offered the expert testimony of Dr. Franklin Egolf, Jr., a psychologist, who opined that Brown's I.Q. scores fell within the mild range of mental retardation, but that Brown was capable of understanding his rights and waiving the opportunity to have a lawyer present on a concrete level. [1984 joint trial, 1300:4-1307:4] After hearing testimony from Snead and Locklear for the State and both of the plaintiffs, their mother, their sister, Lewis Sinclair and Dr. Egolf, for the defense, the trial court ruled that the plaintiffs' confessions were each knowingly, intelligently and voluntarily made, and therefore admissible. [1984 joint trial, 1346:6-1351:9] Following a trial in which both of the plaintiffs testified during the case in chief, both plaintiffs were convicted of first degree murder and rape and were sentenced to death.

On appeal, the North Carolina Supreme Court reversed and remanded for a new trial, finding error in the trial court's jury instructions. State v. McCollum, 321 N.C. 557, 563, 364 S.E.2d 112, 115 (1988). The Plaintiffs were subsequently retried separately.

During pre-trial motions in McCollum's 1991 retrial, his criminal defense attorney, James C.

Fuller, strenuously litigated to exclude McCollum's confession. In hearings held on January 16 and 17, 1991, defense counsel cross-examined States' witnesses Snead, Sealey, Allen and Floyd. [January 16, 1991 suppression hearing trans., 3:23-60:4] Defense counsel also offered the testimony of psychologist Dr. Faye Sultan that McCollum would not have been able to comprehend Miranda warnings or the true meaning of his statement. [January 17, 1991 trans., 82:23-128:5] On July 31, 1991, the trial court entered an Order finding McCollum's confessions to be knowing, intelligent and voluntary, and therefore admissible. [July 31, 1991 Order]

During his opening statement during McCollum's October 1991 retrial, Mr. Fuller, on McCollum's behalf, admitted that McCollum was present for and involved in the murder of Buie. [1991 McCollum retrial, 1330:11-1332:7] During closing argument, Fuller acknowledged McCollum's involvement in the murder, but asked the jury to return a verdict of second degree murder. [1991 McCollum trial, 1602:10-1609:25] The jury returned a verdict of first degree murder and first degree rape. [1991 McCollum retrial, 1632:23-1634:16]

During the sentencing phase of his re-trial, McCollum offered testimony from his psychological expert Dr. Sultan, who testified that McCollum admitted to her that he was present for Sabrina Buie's rape and murder, and that he had helped to hold her down while she was raped and killed. [1991 McCollum trial, 1808:17-1810:10; Sultan dep. 217:1-220:12]

McCollum's conviction was affirmed by the North Carolina Supreme Court. State v. McCollum,

334 N.C. 208, 433 S.E.2d 144 (1993). Among other findings, the Supreme Court held that the trial court correctly concluded that McCollum knowingly and intelligently waived his constitutional rights and voluntarily made statements to the officers, notwithstanding his contention that mental retardation and emotional disabilities prevented him from making a knowing and intelligent waiver of his constitutional rights. Id., 334 N.C. at 236-237. McCollum's writ for petition of certiorari to the United States Supreme Court was denied. McCollum v. North Carolina, 512 U.S. 1254, 114 S.Ct. 2784 (1994).

Brown was re-tried in June 1992 in Bladen County Superior Court. Brown's attorneys also worked strenuously to exclude his confession. [1992 Brown retrial, 14:22-148:9] Brown's attorneys cross-examined the State's witnesses, Locklear and Allen, and offered the testimony of clinical psychologist Dr. Baroff, along with an evaluation report from psychologist Dr. Egolf, that Brown was not capable of understanding Miranda warnings or the meaning of his confession. After hearing this testimony and lengthy arguments, the trial court found that Brown had knowingly, intelligently and voluntarily waived his Miranda rights, that none of his rights were violated, that his statement was not the product of any coercion, pressure or intimidation, and that it was voluntarily in all respects and therefore admissible. [1992 Brown retrial, 116:8-148:9; June 9, 1992 Order] At the close of the trial, the jury found Brown guilty of first degree rape. [1992 Brown retrial, 310:15-23]

Brown's conviction was affirmed on appeal. The North Carolina Court of Appeals held that the trial court's findings of fact, which Brown did not

dispute, adequately supported its conclusions that Brown had knowingly, intelligently and voluntarily waived his Miranda rights, that none of his rights were violated, that his statement was not the product of any coercion, pressure or intimidation, and was voluntary in all respects. State v. Brown, 112 N.C.App. 390, 394-398, 436 S.E.2d 163, 164-168 (1993). The North Carolina Supreme Court affirmed, per curiam. State v. Brown, 339 N.C. 606, 453 S.E.2d 165 (1995).

In 2009, Brown sought assistance from the North Carolina Innocence Commission (NCIIC). During the course of its investigation, the NCIIC discovered evidence of additional confessions that McCollum had made regarding his involvement in the rape and murder of Sabrina Buie: (1) In telephone conversations in July and August of 2010, Geraldine Ransom (Brown's sister and McCollum's half sister) told NCIIC Assistant Director Sharon Stellato that McCollum had confessed his involvement in Buie's rape and murder [Stellato dep., 42:8-49:15, 51:8-53:16, 54:3-56:4, Ex. 21, 22]; (2) In February 2011, plaintiffs' mother told Stellato that McCollum admitted to her that he was involved in the rape and murder of Buie [Stellato dep., 57:20-65:4, Ex. 23]; and (3) In August 2010 and July 2014, plaintiff Brown told Stellato that McCollum told him that he was present during Buie's rape and murder. [Stellato dep., 66:5-68:4, 69:23-70:3, 72:21-73:24, 74:1-78:5, Ex. 24, (17:5-8, 18:8-10, 21:8-12, 21:6), Ex. 25; Brown dep., 84:11-25, 86:7-87:15]

The NCIIC caused DNA testing to be conducted on several items of physical evidence. DNA on a cigarette butt found near a path that ran along the

edge of the soybean field matched Roscoe Artis. [Stellato dep., 118:7] The cigarette butt was found in close proximity to a path used as a short cut between a convenience store where cigarettes were sold and a nearby neighborhood which included a residence wherein Roscoe Artis lived with his sister. [Stellato dep., 120:4-5; Sampson, 80:17-81:1] The DNA match on the cigarette butt does not provide any information regarding when Roscoe Artis may have smoked the cigarette, what was happening while he did so, when the cigarette was deposited at the scene (other than sometime before September 26, 1983), or otherwise link Artis to the rape and murder of Sabrina Buie. [Stellato dep., 118:19-119:24; Sampson, dep. 80:17-81:1; Sealey dep. II, 69:22-70:12] Other than Miss Buie in some instances, DNA testing of the other items of physical evidence did not match any known individuals. [Stellato dep., 130:14-133:19; Ex 27, 57:23-69:4] The NCIIC notified attorneys for Plaintiffs, as well as the District Attorney, regarding the DNA match to Artis on the cigarette butt. However, the NCIIC did not advise the District Attorney regarding McCollum's additional confessions that it had had uncovered.[2] [Stellato dep., 232:20-234:10]

The plaintiffs filed motions for appropriate relief (MAR) in State Court under N.C. Gen. Stat. 15A-269 and 15A-270, statutes dealing with DNA testing. Stellato was subpoenaed to testify by counsel for plaintiffs at a MAR hearing. [Stellato dep., 92:11-16] Stellato testified at the MAR hearing regarding the DNA match to Artis on the cigarette butt. However, she did not disclose the additional confessions by

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[2] The NCIIC did not notify the District Attorney's office of these additional confessions until after the MAR hearing.

McCollum, even when asked the question: "Is there any evidence that has been developed during the course of the [NCIIC] investigation that linked Mr. McCollum and Mr. Brown to the rape and murder of Sabrina Buie?" [Stellato dep., 134:11-140:7, 148:21-152:10, 154:9; transcript of the September 2, 2014 MAR hearing, 115:20-24]

Based upon the testimony elicited from Ms. Stellato, the only witness called to testify at the MAR hearing,[3] Judge Douglas B. Sasser entered an Order vacating the plaintiffs' convictions and ordered their immediate release from prison. [September 2, 2014 Order for Relief] The Order was premised on the DNA evidence. The Order does not address, determine or state that the plaintiffs' arrest was not based upon probable cause, impeach the constitutionality of plaintiffs' confessions, or otherwise impugn the conduct of law enforcement officers in any way. [Order for Relief]

On June 5, 2015, Governor Pat McCrory issued Pardon of Innocences to the plaintiffs. [Pardons of Innocence] The pardons in no way impeach the constitutionality of the plaintiffs' confessions, suggest improper conduct on the part of law enforcement officers, or establish that the Plaintiffs' constitutional rights were violated in any manner.

Roscoe Artis has not been charged in the murder of Sabrina Buie. [Luther Johnson Britt, III Aff., ¶ 10]

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[3] None of the law enforcement officers involved in the case were interviewed by the NCIIC or requested to participate in, the MAR hearing. [Stellato, dep., 146:22-148:20; Snead dep., 99:21-100:10, 156:17-24; Sealey dep. II, 72:17-73:12; Sampson dep., 79:7-79:19]

The moving defendants' statement of undisputed material facts pursuant to Local Rule 56.1 is a more complete statement of the facts, and is hereby incorporated by reference.

I. PLAINTIFFS' FIRST AND THIRD CAUSES OF ACTION, FOR "FALSE ARREST" AND "MALICIOUS PROSECUTION" UNDER SECTION 1983, FAIL AS A MATTER OF LAW BECAUSE PROBABLE CAUSE EXISTED TO ARREST THE PLAINTIFFS

A. Framework for Analyzing Fourth Amendment Claims for Unreasonable Seizure Involving Arrests

The plaintiff's First and Third Causes of Action, for "false arrest" and "malicious prosecution" under Section 1983, are claims under the Fourth Amendment for unreasonable seizure.[4] "The Fourth Amendment prohibits…officers from making unreasonable seizures, and a seizure of an individual effected without probable cause is unreasonable." Brooks v. City of Winston-Salem, 85 F.3d 178, 183 (4th Cir. 1996). See also, e.g., Brown v. Gilmore, 278 F.3d 362, 367 (4th Cir. 2002) ("To establish an unreasonable seizure under the Fourth Amendment,

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[4] The Fourth Circuit has made it clear that the Section 1983 "malicious prosecution" claim "is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort." Lambert v. Williams, 223 F.3d 257, 261-62 (4th Cir. 2000). Thus, since a Section 1983 claim is "simply a claim founded on a Fourth Amendment seizure," plaintiffs' claims under Section 1983 for "malicious prosecution" are "wholly derivative of the false arrest claim" and should not be analyzed separately. Rogers v. Pendleton, 249 F.3d 279, 294 (4th Cir. 2001)

[the plaintiff] needs to show that the officers decided to arrest [him]…without probable cause"). Conversely, a seizure effected with probable cause is reasonable as a matter of law; thus, the existence of probable cause defeats a claim of "unreasonable seizure" under the Fourth Amendment. See, e.g., Street v. Surdyka, 492 F.3d 368, 372-3 (4th Cir. 1974) ("[T]here is no cause of action for 'false arrest' under Section 1983 unless the arresting officer lacked probable cause"). Furthermore, if an arrest is reasonable – i.e., supported by probable cause – then the continuing pretrial seizure of a criminal defendant is also reasonable. See, Brooks, 85 F.3d at 184; Taylor v. Waters, 81 F.3d 429, 435-436 (4th Cir. 1996).

"Probable cause is determined from the totality of the circumstances known to the officer at the time of the arrest." Brown, 278 F.3d at 368; United States v. Garcia, 848 F.2d 58, 59-60 (4th Cir. 1988). Probable cause is a commonsense, nontechnical concept that "deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Ornelas v. United States, 517 U.S. 690, 695, 116 S. Ct. 1657, 1661 (1996). The circumstances are weighed "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." United States v. Dickey-Bey, 393 F.3d 449, 453 (4th Cir. 2004). Thus, probable cause requires substantially less evidence than is necessary to convict. See, e.g., Porterfield v. Lott, 156 F.3d 563, 569 (4th Cir. 1998). Indeed, the Fourth Circuit has specifically rejected the argument that "probable cause means more likely than not, [more than] 50/50," and made it clear that "the probable-cause standard does not require that the officer's belief be more likely true than false."

United States v. Humphries, 372 F.3d 653, 660 (4th Cir. 2004) (emphasis added).

In determining whether probable cause exists, courts are to limit their consideration to the facts and circumstances "known to the officer at the time of the arrest." Taylor v. Waters, 81 F.3d at 434 (emphasis added). See also, e.g., Gomez v. Atkins, 296 F.3d 253, 262 (4th Cir. 2002); United States v. Al-Talib, 55 F.3d 923, 931 (4th Cir. 1995). Because the existence of probable cause is determined solely by reference to the facts and circumstances known to the officer at the time of the arrest, it necessarily follows that evidence which was unknown to the officer at the time of the arrest is totally irrelevant to the determination of whether probable cause existed to arrest the suspect. See, e.g., Xing Qian v. Kautz, 168 F.3d 949, 953-54 (7th Cir. 1999); Reynolds v. Jamison, 488 F.3d 756, 765 (7th Cir. 2007).[5]

In the instant case, plaintiffs voluntarily came to the station and spoke to officers, and confessed to participating in the rape and/or murder of Sabrina Buie. As explained below, under North Carolina collateral estoppel law, the plaintiffs' convictions conclusively establish the existence of probable cause.

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[5] It is well established that "once probable cause to arrest is established, an officer is not required to continue to investigate for exculpatory evidence before arresting such suspect." United States v. Galloway, 274 Fed. Appx. 241, 2008 WL 1751686 (4th Cir. 2008). In other words, law enforcement officers "have no constitutional duty to keep investigating a crime once they have established probable cause." Kompare v. Stein, 801 F.2d 883, 890 (7th Cir. 1986). In fact, if an arrest is reasonable – i.e., supported by probable cause – the Fourth Amendment does not require any further investigation after the arrest in order "to render pretrial seizure reasonable." Taylor v. Waters, 81 F.3d at 436.

Moreover, under North Carolina collateral estoppel law, the plaintiffs' confessions were voluntary and not coerced. The plaintiffs' confessions clearly established probable cause for their arrests. Since probable cause existed, plaintiffs' Section 1983 claims for "false arrest" and "malicious prosecution" fail as a matter of law.

B. The Application Of The Law To The Circumstances Of This Case Reveals That The Plaintiffs' Fourth Amendment Rights Were Not Violated: At The Time Plaintiffs' Were Arrested, Probable Cause Existed

1. Under the North Carolina Doctrine of Collateral Estoppel, the Plaintiffs' Convictions Conclusively Establish the Existence of Probable Cause, and Moreover, the State Judges' Rulings on Plaintiffs' Motions to Suppress their Confessions Establish that Plaintiffs' Confessions Were Not Coerced, but Were, Instead, Voluntary Confessions Under the United States Constitution

a. This Court must apply the North Carolina law of collateral estoppel to determined whether collateral estoppel bars plaintiffs from relitigating any issues in this case

In Allen v. McCurry, 449 U.S. 90, 66 L.Ed.2d 308, 101 S.Ct. 411 (1980), the Supreme Court held that res judicata and collateral estoppel principles are applicable to Section 1983 actions. The Court also stated: "Congress has specifically required all federal courts to give preclusive effect to state-court

judgments whenever the courts of the State from which the judgments emerged would do the same." 449 U.S. at 96. See also, e.g., Migra v. Warren City School Dist. Bd. Of Ed., 465 U.S. 75, 83-85, 79 L.Ed.2d 56, 104 S.Ct. 892 (1983); Kremer v. Chemical Const. Corp., 456 U.S. 461, 467 n. 6, 72 L.Ed.2d 262, 101 S.Ct. 411 (1980). In other words, this Court is obligated to apply the North Carolina law of collateral estoppel to determine whether collateral estoppel bars plaintiffs from relitigating any of the issues in this case. See, e.g., Davenport v. North Carolina Dept. of Transp., 3 F.3d 89, 92 (4th Cir. 1993), citing Migra, supra.

As shown by the discussion below, under the North Carolina law of collateral estoppel, (1) the plaintiffs' convictions on the charges of murder and/or rape conclusively establish that probable cause existed, and (2) the state court judges' rulings on plaintiffs' motions to suppress their confessions at the state criminal trials conclusively establish that plaintiffs' confessions were voluntary.

b. Under North Carolina's doctrine of collateral estoppel, the plaintiffs' convictions conclusively establish that probable cause existed

In the instant case, plaintiffs were convicted of murder and rape in 1984. After the 1984 convictions were reversed, plaintiffs were retried. McCollum was convicted in 1991 of murder and rape, and Brown was convicted of rape in 1992. These convictions were affirmed on appeal. As explained below, under well established North Carolina law – which is part of the doctrine of collateral estoppel in North Carolina – the

plaintiffs' convictions conclusively establish that probable cause existed for the plaintiffs' arrests.

Under longstanding and well established North Carolina law, a conviction in a court of competent jurisdiction conclusively establishes the existence of probable cause, even in the situation where the verdict is later reversed, vacated, or otherwise set aside. For example, in Griffis v. Sellars, 20 N.C. 315, 3 & 4 Dev. & Bat. 315 (1838), the North Carolina Supreme Court held that a verdict and judgment of conviction in a court of competent jurisdiction was conclusive evidence of probable cause, even where, on appeal, "a contrary judgment and verdict be given in a higher court." In Overton v. Combs, 182 N.C. 4, 108 S.E. 357 (1921), the North Carolina Supreme Court made it clear that a conviction conclusively established the existence of probable cause even if the conviction "is thereafter set aside or reversed on appeal or other ruling in the orderly progress of the cause." 182 N.C. at 7, 108 S.E. at 358.

This rule has been applied in numerous cases, and remains settled North Carolina law to this day. Most of the reported cases involved the situation where the suspect was convicted in a North Carolina District Court, and was later acquitted in a North Carolina Superior Court. See, e.g., Hill v. Winn-Dixie Charlotte, Inc., 100 N.C. App. 518, 521-22, 397 S.E.2d 347, 349-50 (1990) (holding that a conviction in District Court conclusively establishes the existence of probable cause, even though the suspect was subsequently acquitted of the charge in Superior Court); Myrick v. Cooley, 91 N.C. App. 209, 213-14, 371 S.E.2d 492, 495-6 (1988) (holding that where a

suspect was convicted in District Court and the charges were subsequently dismissed in Superior Court, "the conviction establishes, as a matter of law, the existence of probable cause for his arrest and defeats both his federal and state claims for false arrest or imprisonment . . . ."); Falkner v. Almon, 22 N.C. App. 643, 645, 207 S.E.2d 388, 389 (1974); Priddy v. Cook's United Dept. Store et al., 17 N.C. App. 322, 324, 194 S.E.2d 58, 59 (1973).

However, this well established rule also applies where a conviction in North Carolina Superior Court is later reversed on appeal. For example, in Cashion v. Texas Gulf, 79 N.C. App. 632, 339 S.E.2d 797 (1986), the Court held that the existence of probable cause was conclusively established by the convictions in Beaufort County Superior Court, even though the North Carolina Court of Appeals later reversed the convictions. 79 N.C. App. At 634-5, 339 S.E.2d at 798. Of course, a North Carolina appellate court's reversal of a trial court's decision serves to vacate the lower court's decision. See, e.g., D&W, Inc. v. City of Charlotte, 268 N.C. 720, 722, 152 S.E.2d 199, 202 (1966) (holding that the Supreme Court's decision "reversing" the judgment entered in the trial court had the effect of vacating the trial court's judgment); Crowder v. Crowder, 147 N.C. App. 677, 682, 556 S.E.2d 639, 642 (2001) ("This Court's first decision reversed the trial court's equitable distribution order, and thus served to vacate the judgment below"). See also Black's Law Dictionary 1319 (6h Ed. 1990) (defining "reverse" as follows: "to overthrow, vacate, set aside, make void, annul, or revoke. . . ."). Thus, under the rule discussed at length above, a conviction in a lower court conclusively establishes probable

cause even in the situation where the conviction is later vacated.

The above-referenced rule – that a conviction in a lower court conclusively establishes the existence of probable cause – is part of the North Carolina doctrine or law of collateral estoppel. This is shown, for example, by the case of Mays v. Clanton, 169 N.C. App. 239, 609 S.E.2d 453 (2005), where the Court stated as follows:

> For the use of defensive collateral estoppel, North Carolina does not require mutuality of parties. Where an issue in a civil suit has already been fully litigated in a criminal trial, evidence of that criminal conviction is admittable in the civil suit. . . .
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> Indeed, . . . this Court has upheld collateral estoppel of an issue in a civil suit when that issue was previously established as an element in a criminal conviction. Hill v. Winn-Dixie Charlotte, Inc., 100 N.C. App. 518, 397 S.E.2d 347, 349 (1990) (plaintiff's conviction in district court is conclusive as evidence of probable cause in a subsequent civil case for malicious prosecution [...])….

169 N.C. App. At 240-2, 454-6. Similarly, in Burton v. City of Durham, 118 N.C. App. 676, 457 S.E.2d 329 (1995), the North Carolina Court of Appeals made it clear that the rule discussed at length above is part of the North Carolina doctrine of collateral estoppel:

> Neither the United States Supreme Court nor [the North Carolina Supreme Court] requires mutuality of parties when collateral estoppel is used defensively, as defendants seek to do here now. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327-28, 99 S.Ct. 645, 649-50, 58 L.Ed.2d 552, 560 (1979) and Thomas M. McInnis & Assoc., Inc. v. Hall, 318 N.C. 421, 434, 349 S.E.2d 552, 560 (1986)….
>
> This Court has upheld collateral estoppel of an issue in a civil suit when that issue was previously established as an element in a criminal conviction. See Hill v. Winn-Dixie Charlotte, Inc., 100 N.C. App. 518, 397 S.E.2d 347, 349 (1990)….
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> Plaintiff's conviction in district court of exceeding safe speed establishes that there was probable cause to stop plaintiff for this infraction. This is true even though the district court conviction was appealed to and dismissed by the superior court. See Myrick v. Cooley, 91 N.C. App. 209, 213-14, 371 S.E.2d 492, 495, disc. review denied, 323 N.C. 477, 373 S.E.2d 865 (1988).

118 N.C. App. At 680 and 682-3, 457 S.E.2d at 331-333. Since the rule discussed above is part of the North Carolina law of collateral estoppel, this Court must apply the rule to the instant case.

It is true that under the rule discussed above, a conviction in a lower court can be impeached for fraud or other unfair means in its procurement in the situation where the conviction is not sustained on appeal. See, e.g., Moore v. Winfield, 207 N.C. 767, 770, 178 S.E. 605, 606 (1935); Simpson v. Sears, Roebuck, and Co., 231 N.C. App. 412, 415, 752 S.E.2d 508, 509 (2013), citing Moore v. Winfield, supra; Hill v. Winn-Dixie, supra; Myrick, supra; Cashion, supra; Falkner, supra; Priddy, supra. However, North Carolina precedent makes it clear that a conviction in a North Carolina court can be impeached for fraud or other unfair means only in the situation where the conviction was not sustained on appeal. Moore v. Winfield, supra (holding that "a conviction and judgment in a lower court is conclusive [on the issue of probable cause]," but the conviction "can be impeached for fraud or other unfair means in its procurement" if the conviction is "not sustained on appeal. . . .") (emphasis added); Simpson v. Sears, Roebuck, and Co., supra (holding that a conviction in a lower court is conclusive on the issue of probable cause, "but if [the conviction is] not sustained on appeal, it can be impeached for fraud or other unfair means. . . .") (emphasis added). In the instant case, both plaintiffs' second convictions were affirmed on appeal. Therefore, under North Carolina law, these convictions conclusively establish the existence of probable cause and cannot be impeached.[6]

In short, under the North Carolina law of collateral estoppel, the plaintiffs' convictions conclusively establish the existence of probable cause.

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[6] Moreover, a review of criminal trial transcripts shows that the convictions were fairly obtained.

Thus, the moving defendants are entitled to summary judgment as to plaintiffs' Section 1983 claims for "false arrest" and "malicious prosecution."

c. Under North Carolina's doctrine of collateral estoppel, the state judges' rulings on plaintiffs' motions to suppress their confessions establish that plaintiffs' confessions were not coerced, but were, instead, voluntary confessions under the Constitution

In their criminal trials in state court, both plaintiffs filed motions to suppress, arguing that their respective confessions should be suppressed on the grounds that the plaintiffs had not knowingly waived their Miranda rights and that their confessions were not voluntary, but were instead the product of unconstitutional coercion. The state courts, after full hearings in each trial, held that the plaintiffs voluntarily came to the station and spoke with officers, knowingly waived their Miranda rights, and that plaintiffs' confessions were not unconstitutionally coerced but were voluntary confessions. These findings were upheld on appeal. The arguments made by plaintiffs at their criminal trials regarding their confessions are the same arguments being made by plaintiffs in this lawsuit. As explained below, the North Carolina doctrine of collateral estoppel prevents the plaintiffs from relitigating the issues of whether their confessions were voluntary confessions.

Under North Carolina law, mutuality of parties is not required where, as here, parties seek to assert collateral estoppel defensively. Thomas M. McInnis &

Assoc., Inc. v. Hall, 318 N.C. 421, 434, 349 S.E.2d 552, 560 (1986). The party invoking collateral estoppel need not have been a party or in privity with a party in the first action "as long as the party to be collaterally estopped had a full and fair opportunity to litigate the issue in the earlier action." 318 N.C. at 432, 349 S.E.2d at 559. Thus, it is clear that collateral estoppel can be used by a defendant in a civil suit when the issue was previously litigated and decided in an earlier criminal action. See Mays v. Clanton, supra.; Burton v. City of Durham, supra. Indeed, there have been numerous federal court decisions in which the federal court held that state collateral estoppel law operated to bar a plaintiff in Section 1983 lawsuit from relitigating an issue decided against him in a previous criminal action. See, e.g., Allen v. McCurry, supra. (holding that a plaintiff was barred from relitigating the constitutionality of a search in a Section 1983 suit when the issue had been decided against him in a suppression motion in an earlier state criminal action); Gray v. Farley, 13 F.3d 142, 146 (4th Cir. 1993) (holding that a plaintiff in a Section 1983 action was barred by collateral estoppel from relitigating the issue of whether his confession had been coerced, because the issue had been decided against him in the earlier state criminal action when the judge denied plaintiff's motion to suppress the confession). Thus, "[a] suppression hearing in an earlier state criminal proceeding collaterally estops the relitigation of the same issues in a §1983 action if the elements of collateral estoppel are met." Gray v. Farley, 13 F.3d at 146.

Under North Carolina law, defensive collateral estoppel applies when the following requirements are met: (1) the issues must be the same as those in the

prior action; (2) the issues were raised and actually litigated in the prior action; (3) the issues were actually determined in the prior action; (4) the issues actually determined were necessary to the resulting judgment; and (5) a final judgment on the merits was reached. Thomas M. McInnis, 318 N.C. at 429-30, 349 S.E.2d at 560. In addition, North Carolina law requires that the party against whom collateral estoppel is asserted had a "full and fair opportunity" to litigate the issue. Thomas M. McInnis, 318 N.C. at 434, 349 S.E.2d at 560.[7]

In the instant case, each requirement is met for the application of collateral estoppel. The issues that plaintiffs seek to relitigate – whether plaintiffs voluntarily came to the station and spoke with officers, knowingly waived their Miranda rights and whether plaintiffs' confessions were coerced – are the exact issues (including the same or similar evidence and arguments) that were raised and actually litigated in plaintiffs' criminal trials. The relevant issues were determined against plaintiffs in the state criminal trials and were necessary to the resulting judgment, and final judgments were reached which were affirmed on appeal. Furthermore, a review of the relevant transcripts for the state criminal trials demonstrates that plaintiffs had a full and fair opportunity to litigate the issues.

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[7] Furthermore, as discussed above, under North Carolina collateral estoppel law, the decided issue is entitled to collateral estoppel effect even in the situation where the judgment is later reversed or vacated. See Mays v. Clanton, supra, and Burton v. Durham, supra, and cases cited therein. See also, e.g., Cashion, supra.

Thus, it is clear that all of the requirements for the application of defensive collateral estoppel are satisfied in this case. The state court judges' rulings on plaintiffs' motion to suppress their confessions in plaintiffs' criminal trials, which were affirmed on appeal, establish that plaintiffs voluntarily came to the station and spoke with officers, and that plaintiffs' confessions were not coerced, but were instead voluntary confessions. Because the plaintiffs voluntarily confessed to participating in the murder and/or rape of Sabrina Buie, it is clear that probable cause existed for their arrests.

2. Furthermore, Even if Collateral Estoppel Did Not Apply, Probable Cause Existed for Plaintiffs' Arrest

In the facts of this case, the plaintiffs were not arrested until after they confessed. The plaintiffs' confessions were not coerced, and establish the existence of probable cause. A neutral and detached magistrate issued arrest warrants, which are presumed to be reasonable, Torchinsky v. Siwinski, 942 F.2d 257, 262 (4th Cir. 1991) and are "the clearest indication that the officers acted in an objectively reasonable manner." Messerschmidt v. Millender, 565 U.S. 535, 546, 132 S.Ct. 1235 (2012). Furthermore, the indictments by the Grand Jury establish probable cause. See Gernstein v. Pugh, 420 U.S. 103, 118 n. 19, 95 S.Ct. 854 (1975). Moreover, McCollum's attorney's admissions in open court, in his 1991 retrial, that McCollum was present for and involved in the murder and rape of Buie are judicial admissions which are binding on McCollum, and further establish the existence of probable cause. See, e.g., United States v. Bentson, 947 F.2d 1353, 1356 (9th Cir. 1991). Also,

the moving defendants incorporate by reference the arguments made by defendants Snead and Allen regarding probable cause at pages 9-18 of their summary judgment brief.

Since probable cause existed for plaintiffs' arrests, plaintiffs' Section 1983 claims for "false arrest" and "malicious prosecution" fail as a matter of law.

II. THE DEFENDANTS SEALEY AND LOCKLEAR ARE ENTITLED TO SUMMARY JUDGMENT AS TO PLAINTIFFS' SECOND CAUSE OF ACTION FOR "DEPRIVATION OF DUE PROCESS"

The plaintiffs' Due Process claims against Sealey and Locklear, as set forth in plaintiffs' Second Cause of Action, put these defendants on notice of three categories of Due Process claims: (1) Brady-based Due Process claims for alleged suppression of material exculpatory evidence; (2) claims for alleged fabrication of evidence; and (3) claims that the officers gave perjurious testimony at judicial proceedings. (Amended Complaint, ¶¶ 135-150). As shown by the discussion below, defendants Sealey and Locklear are entitled to summary judgment as to all of plaintiffs' Due Process claims.

A. Plaintiffs' Brady-Based Due Process Claims Against Sealey and Locklear for Alleged Suppression of Exculpatory Evidence Fails as a Matter of Law

In their Second Cause of Action, plaintiffs assert Brady-based Due Process claims, alleging that the defendants "deprived Plaintiffs of their Constitutional

right to Due Process of Law and a fair trial" by failing to disclose exculpatory evidence prior to trial to plaintiffs' criminal defense attorneys, the Robeson County District Attorney's Office, and the North Carolina Courts. (Amended Complaint, ¶¶ 135-150).

Plaintiffs' Amended Complaint puts defendants on notice of claims that the following alleged exculpatory evidence was suppressed: (1) evidence that Louis Moore was in Kentucky at the time of the murder (Amended Complaint, ¶¶ 62-63, 73); (2) evidence that Ethel Furmage had no personal knowledge as to plaintiffs' involvement in Buie's rape and murder (Amended Complaint, ¶¶ 74, 135(d)); (3) evidence "that on October 5, 1984, three days before the start of plaintiffs' [first] trial, the Red Springs Police Department submitted a request to the [SBI] for fingerprint comparisons" (Amended Complaint, ¶¶ 71-72, 75); (4) unspecified evidence that inculpated Roscoe Artis (Amended Complaint, ¶¶ 75, 135(a)); and (5) that the plaintiffs' confessions had been coerced (Complaint, ¶¶ 2, 44-59, 76). In their amended responses to Sealey's interrogatories, the plaintiffs alleged that defendants also withheld written reports or statements regarding interviews with L.P. Sinclair, Louis Moore's mother, Darrell Suber, plaintiff McCollum, and Ethel Furmage. (See Plaintiff's Amended Responses to Defendant Sealey's Interrogatories, Response to Interrogatory 4).

1. The test for making out a Brady-based Due Process claim against law enforcement officers

In Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the United States

Supreme Court held that a prosecutor's suppression of material exculpatory evidence violates the Due Process clause. In the case of Owens v. Baltimore State Attorney's Office, 767 F.3d 379 (4th Cir. 2014), the Fourth Circuit held that in order for a plaintiff to make out a Due Process claim that officers violated his constitutional right by suppressing exculpatory Brady evidence, a plaintiff must prove that the officers suppressed material Brady exculpatory evidence in bad faith. 767 F.3d at 396-97, 401.[8] Moreover, in order to prove a Due Process violation, the plaintiffs must prove both but-for causation and proximate causation – i.e., that the alleged wrongful act(s) caused the loss of liberty and that the loss of liberty was a reasonably forseeable result of the act. See Evans v. Chalmers, 703 F.3d 636, 647-8 (4th Cir. 2012).

In order to satisfy Brady's materiality requirement, the plaintiffs must show that the suppression "cast serious doubt on the proceedings' integrity," Owens, 767 F.3d at 398, or "undermine[s] confidence in the outcome" of the case. United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). However, "the mere possibility that an item of undisclosed information might have helped the defense…does not establish 'materiality' in

[8] Of course, law enforcement officers have no duty to disclose exculpatory evidence directly to the criminal defense attorneys. Instead, officers have a responsibility to make exculpatory evidence available to the prosecutor's office. See, e.g., Jean v. Collins, 155 F.3d 701, 705-8 (4th Cir. 1998), superseded on other grounds, 221 F.3d 656 (4th Cir. 2000) (holding that officers have no duty to disclose any evidence directly to the defense, and are "absolutely immune from suits challenging a failure to disclose evidence directly to the defense").

the constitutional sense." United States v. Agurs, 427 U.S. 97, 109-110, 96 S.Ct. 2392 (1976).

It is well established that undisclosed evidence is not considered to be "suppressed" under Brady when the criminal defendant or his attorney could have obtained the evidence with any reasonable diligence. See Lynn v. Tanney, 405 Fed.Appx. 753, 762 (4th Cir. 2010). Therefore, the Brady rule is not violated when the evidence that is not disclosed is "available to the defendant from other sources, including diligent investigation by the defense." Fullwood v. Lee, 290 F.3d 663, 686 (4th Cir. 2002), quoting Stockton v. Murray, 41 F.3d 920, 927 (4th Cir. 1994). For example, in United States v. Wilson, 901 F.2d 378 (4th Cir. 1990), the Court held that the government's alleged failure to turn over an exculpatory witness statement did not violate Brady because the criminal defense "was free to question" the witness, and "it would have been natural" for the defense to interview the witness. The Court held: "In situations… where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the Brady doctrine." 901 F.2d at 381. Similarly, in Hoke v. Netherland, 92 F.3d 1350 (4th Cir. 1996), the Court held that the State's failure to disclose interviews of three witnesses did not violate Brady where the criminal defense attorney would have discovered the witnesses if he had conducted a "reasonable and diligent investigation." 92 F.3d at 1355-56. As the Court stated in Barnes v. Thompson, 58 F.3d 971 (4th Cir. 1995):

> Brady requires that the government disclose only evidence that is not available to the defense from other sources, either directly or through diligent investigation…. Nondisclosure, therefore, does not denote that no exculpatory evidence exists, but that the government possesses no exculpatory evidence that would be unavailable to a reasonably diligent defendant….

58 F.3d at 975, fn. 4. Furthermore, there is no Brady violation where "the defense already possesses the evidence." United States v. Higgs, 663 F.3d 726, 735 (4th Cir. 2011); United States v. Roane, 378 F.3d 382, 402 (4th Cir. 2004).

2. The plaintiffs' Brady-based Due Process claims against Sealey and Locklear fail as a matter of law

Under the facts of this case, plaintiffs' Brady-based Due Process claims against Sealey and Locklear fail for multiple reasons. First, under the facts and North Carolina collateral estoppel law, the plaintiffs' confessions were voluntary and not coerced. Second, defendants Sealey and Locklear acted in good faith: They furnished all information they gathered in the course of their participation in the investigation to the SBI, with the understanding and belief that all the evidence would be provided to the prosecutor's office. Furthermore, even assuming for the sake of argument that the above-referenced evidence was not turned over by the prosecutors to plaintiffs' criminal attorneys, the information was either possessed by plaintiffs (for example, the circumstances

surrounding plaintiffs' confessions) or could have been discovered by a reasonable and diligent investigation. Moreover, aside from plaintiffs' confessions, the evidence that the plaintiffs allege was suppressed was not material, and did not cause or proximately cause plaintiffs' loss of liberty. Therefore, defendants Sealey and Locklear are entitled to summary judgment as to plaintiffs' Brady-based Due Process claims.

B. Plaintiffs' Due Process Claims for Alleged Fabrication of Evidence Against Sealey and Locklear Fail as a Matter of Law

In their Second Cause of Action, the plaintiffs also allege that the defendants "deprived plaintiffs of their Constitutional right to Due Process of Law and a fair trial" by fabricating evidence. (Amended Complaint, par. 135). In their Amended Complaint and amended interrogatory responses, plaintiffs put defendants on notice of the following alleged "fabricated evidence": (1) the plaintiffs' written confessions; (2) reports from May 1988 alleging that McCollum made incriminating statements to inmate Carl Pait; (3) L.P. Sinclair's testimony at the first trial; and (4) Sealey told the District Attorney that McCollum told Sealey that "I'm going to get your ass for this." (Amended Complaint, ¶¶ 2, 44-59, 135(b), (c), and (f); Plaintiffs' Amended Responses to Defendant Sealey's Interrogatories, Response to Interrogatory 5).

The Fourth Circuit has recognized that the fabrication of evidence by an officer "acting in an investigating capacity" may constitute a violation of Due Process. Washington v. Wilmore, 407 F.3d 274,

282 (4th Cir. 2005). However, "[f]abrication of evidence alone is insufficient to state a claim for a due process violation…." Massey v. Ojaniit, 759 F.3d 343, 354 (4th Cir. 2014). Instead, the plaintiffs must prove both but-for and proximate causation – i.e., that the fabrication caused the loss of liberty and that the loss of liberty was a reasonably foreseeable result of the fabrication. See Massey, 759 F.3d at 354-356; Evans v. Chalmers, supra.

The plaintiffs' Due Process claims against Sealey and Locklear fail as a matter of law. As discussed earlier, plaintiffs' confessions were voluntary and not coerced. The plaintiffs have not shown that any evidence was fabricated by any defendant. Furthermore, aside from the voluntary confessions, the evidence that plaintiffs allege was "fabricated" did not cause or proximately cause plaintiffs' loss of liberty. Thus, defendants Sealey and Locklear are entitled to summary judgment as to plaintiffs' purported Due Process claims for alleged "fabrication" of evidence.

C. Plaintiffs' Attempt to Sue the Officers for Their Testimony at Various Judicial Proceedings Fails as a Matter of Law Because the Officers are Absolutely Immune Under Section 1983 for Their Testimony at Trial and Other Judicial Proceedings

The plaintiffs also allege that defendants Sealey and Locklear deprived plaintiffs of their Due Process rights by giving false or perjurious testimony at the trials and/or other judicial proceedings. (Amended Complaint, ¶¶ 80, 135; Plaintiffs' Amended

Responses to Defendant Sealey's Interrogatories, Response to Interrogatory 6).

It is well established that officers are entitled to absolute immunity for testimony before a grand jury or at a trial. Briscoe v. Lattue, 460 U.S. 325, 332-333, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); Rehberg v. Paulk, 566 U.S. 356, 366-375, 132 S.Ct. 1497, 182 L.Ed.2d 593 (2012). See also Lyles v. Sparks, 79 F.3d 372, 378 (4th Cir. 1996). Absolute immunity extends to all witnesses in judicial proceedings, Burke v. Miller, 580 F.2d 108 (4th Cir. 1978), cert. den., 440 U.S. 930 (1979), including law enforcement officers. Brisco, supra.; Rehberg, supra. Moreover, a witness is entitled to testimonial immunity "no matter how egregious or perjurious that testimony was alleged to have been." Spurlock v. Satterfield, 167 F.3d 995, 1001 (6th Cir. 1999).

Therefore, the defendants Sealey and Locklear are entitled to absolute immunity for any purported claims based on these officers' testimony before the Grand Jury, pre-trial proceedings, or at plaintiffs' criminal trials.

III. PLAINTIFFS' FEDERAL CLAIMS AGAINST SEALEY AND LOCKLEAR, IN THEIR INDIVIDUAL CAPACITIES, FAIL AS A MATTER OF LAW BECAUSE SEALEY AND OFFICER LOCKLEAR ARE ENTITLED TO QUALIFIED IMMUNITY

A court required to rule upon the qualified immunity issue considers whether the plaintiff has proved that a constitutional violation occurred. Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156 (2001). If there has been no constitutional

violation, then the officers are entitled to qualified immunity. Saucier, supra. However, if the facts could establish a constitutional violation, the Court must analyze whether the constitutional right alleged to have been violated was "clearly established" at the time of the officer's actions. Id.[9] In considering this second prong of the Saucier framework, the key issue is whether the law "gave the officials 'fair warning' that their conduct was unconstitutional." Ridpath v. Board of Governors Marshall Univ., 447 F.3d 292, 313 (4th Cir. 2006). For the right to have been clearly established, "existing precedent must have placed the… constitutional question beyond debate." Ashcroft v. al-Kidd, 563 U.S. 731, 741, 131 S. Ct. 2074, 2083 (2011). "[T]he 'contours of the right' must have been so conclusively drawn as to leave no doubt that the challenged action was unconstitutional." Swanson v. Powers, 937 F.2d 965, 969 (4th Cir. 1991), quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034 (1987). Thus, the inquiry into whether the right was clearly established must "be undertaken in light of the specific context of the case" and "not as a broad general proposition…." Saucier, supra. See White v. Pauly, 137 S.Ct. 548, 552, 137 L.Ed.2d 548 (2017) (reiterating the "longstanding principle that 'clearly established law' should not be defined 'at a high level of generality,'" but must be "particularized to the facts of the case").

The doctrine of qualified immunity serves fundamental concerns of fairness: "Officers sued in a civil action for damages…have the same right to fair

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[9] In Pearson v. Callahan, 555 U.S. 194, 129 S. Ct. 808, 817-18 (2009), the Supreme Court granted courts discretion over the order of application of the Saucier analysis, while recognizing that conducting the analysis in order is often beneficial. Id.

notice as to defendants charged with criminal offense[s]." Hope v. Pelzer, 536 U.S. 730, 739, 122 S. Ct. 2508 (2002). "[T]he qualified immunity test is simply the adaptation of the fair warning standard to give officials…the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." United States v. Lanier, 520 U.S. 259, 270-71, 117 S. Ct. 1219 (1997). In other words, officers are entitled to qualified immunity "if a reasonable officer possessing the same information could have believed that his conduct was lawful." Slattery v. Rizzo, 939 F.2d 213, 216 (4h Cir. 1991) (emphasis added). The "safe harbor" of qualified immunity "ensures that officers will not be liable for 'bad guesses in gray areas' but only for 'transgressing bright lines.'" Doe v. Broderick, 225 F.3d 440, 453 (4th Cir. 2000) (citations omitted). Thus, an officer will be entitled to qualified immunity unless "every reasonable official would have understood that what he [was] doing" violated the Constitution. Ashcroft v. al-Kidd, 131 S. Ct. at 2083, quoting Anderson, 483 U.S. at 640.

As shown at length above, Sealey and Locklear did not violate the plaintiffs' constitutional rights. However, even assuming arguendo that the plaintiffs' constitutional rights may have been violated by these officers, it was not clearly established, at the time of the officers' actions, that their actions violated the Constitution. For example, on the issue of probable cause, an officer is entitled to qualified immunity "if officers of reasonable competence could disagree" on the issue of probable cause. Mally v. Briggs, 475 U.S. 335, 341 and 346 n. 9, 106 S.Ct. 1092 (1988). In 1983, suspects' confessions were obviously sufficient to provide probable cause, and the case law existing in

1983 did not clearly establish that the plaintiffs' confessions were coerced under the specific facts of this case. Indeed, a Magistrate issued warrants, a Grand Jury indicted both plaintiffs, every judge to consider the issue held that the plaintiffs' confessions were voluntary, both plaintiffs were convicted, and the convictions were affirmed on appeal. See McKinney v. Richland County Sheriff's Dept., 431 F.3d 415, 419 (4th Cir. 2005) (holding that an officer was entitled to qualified immunity in part because a magistrate and prosecutor concluded that probable cause existed). See also, e.g., Keil v. Triveline, 661 F.3d 981, 986-87 (11th Cir. 2011) (Officers are entitled to qualified immunity if there was "arguable probable cause"). As to the Due Process Brady-based claims, it was not even clearly established in 1984 that officers had the duty to turn exculpatory evidence over to prosecutors. See Jean v. Collins, 155 F.3d 701 (4th Cir. 1998), superseded by Jean v. Collins, 221 F.3d 656 (4th Cir. 2000). However, in this case, Sealey and Locklear gave all the information in their possession to the SBI, with the understanding and belief that all evidence would be produced by the SBI to prosecutors. This conduct does not violate Due Process, and did not violate "clearly established" Due Process law as it existed in 1984. Furthermore, plaintiffs cannot show that the moving defendants fabricated any evidence, and it cannot be argued, under the facts of this case, that it was clearly established that the evidence plaintiffs allege was suppressed or fabricated was material and/or the cause or proximate cause of plaintiffs' loss of liberty. In other words, reasonable officers in the specific factual scenario faced by Sealey and Locklear in this case could have believed that their conduct was lawful. Slattery, supra. Therefore,

Sealey and Locklear in their individual capacities are entitled to qualified immunity.

IV. DEFENDANTS SEALY AND LOCKLEAR IN THEIR OFFICIAL CAPACITY ARE ENTITLED TO SUMMARY JUDGMENT AS TO PLAINTIFFS' FOURTH CAUSE OF ACTION FOR "MUNICIPAL LIABILITY"

Plaintiffs' Fourth Cause of Action is a claim under Section 1983 against Sealey and Locklear in their official capacity for "municipal liability." Plaintiffs' "official capacity" claims against Sealey and Locklear are really a suit against the Robeson County Sheriff's Office. Kentucky v. Graham, 473 U.S. 159, 165-66, 105 S.Ct. 3099-3015 (1985). The plaintiffs' federal claim for Section 1983 "municipal liability" against the Sheriff's Office must fail, because as demonstrated in other sections of this brief, the officers did not violate plaintiffs' constitutional rights. It is well established that a municipality cannot be held liable under Section 1983 where there has been no constitutional violation. See, e.g., Belcher v. Oliver, 898 F.2d 32, 36 (4th Cir. 1990). Even assuming arguendo that plaintiffs' constitutional rights were violated, the Sheriff's Office is nevertheless entitled to summary judgment because the alleged constitutional violations were not the result of any official policy, practice, or custom of the Sheriff's Office.

The Robeson County Sheriff's Office may not be held liable under 42 U.S.C. § 1983 "unless action pursuant to official municipal policy of some nature caused [the] constitutional tort." Collins v. City of Harker Heights, 503 U.S. 115, 120-121, 112 S. Ct.

1061, 1066, 117 L. Ed. 2d 261 (1992) (quoting Monell v. New York City Dept. of Social Services, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611 (1978)). In other words, respondeat superior may not serve as the basis for imposing section 1983 liability on a governmental entity. Collins, 503 U.S. at 121, 112 S. Ct. at 1067; City of Canton v. Harris, 489 U.S. 378, 392, 109 S. Ct. 1197, 1206-07, 103 L. Ed. 2d 412 (1989). Instead, governmental liability attaches only when "execution of a government's policy or custom, whether made by its law makers or those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Monell, 435 U.S. at 694. "Thus, not only must there be some degree of 'fault' on the part of the [governmental entity] in establishing or tolerating the custom or policy, but there also must exist a causal link between the custom or policy and the deprivation." City of Oklahoma City v. Tuttle, 471 U.S. 808, 820, 105 S. Ct. 2427, 2434-35, 85 L. Ed. 2d 791 (1985).

In practice, plaintiffs must show (1) that their rights were impaired as a result of an official policy, practice, or custom promulgated by the governmental entity, Jett v. Dallas Independent School District, 491 U.S. 701, 735-736, 109 S. Ct. 2702, 2723, 105 L. Ed. 2d 598 (1989); Monell, supra; or (2) that their rights were impaired by the act or acts of an individual who has final policymaking authority for the challenged act to establish municipal liability. Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986); Jett, supra.

In the instant case, plaintiffs have brought forward no evidence that the alleged constitutional violations were caused by an official custom or policy

of the Sheriff's Office, or that the alleged constitutional violations were caused by the actions of an individual with final policymaking authority. Indeed, the evidence before this court actually demonstrates that, assuming arguendo that plaintiffs' constitutional rights were violated, they were not violated as a result of any official policy or practice of the Sheriff's Office. Given that neither Sealey nor Locklear had "final policymaking authority" and plaintiffs' failure to establish that their injury resulted from a policy of the Sheriff's Office, plaintiffs have failed to meet the requirements for establishing Section 1983 liability under Jett and Pembaur. Thus, defendants Sealey and Locklear are entitled to summary judgments as to plaintiffs' Section 1983 claims for "municipal liability."

CONCLUSION

Based on the foregoing argument and authorities, defendants Sealey and Locklear respectfully submit that their motion for summary judgment should be granted.

Respectfully submitted, this 3rd day of April, 2017.

/S/ James R. Morgan, Jr.
James R. Morgan, Jr.
N.C. State Bar No.: 12496

/S/ Bradley O. Wood
Bradley O. Wood
N.C. State Bar No.: 22392
WOMBLE CARLYLE SANDRIDGE & RICE,
A Limited Liability Partnership
One West Fourth Street
Winston-Salem, NC 27101

Telephone: (336) 721-3600
Facsimile: (336) 721-3660
E-mail: jmorgan@wcsr.com
E-mail: bwood@wcsr.com
Counsel for Defendants Kenneth Sealey, individually and in his official capacity as the Sheriff of Robeson County, and Robert E. Price, as Administrator C.T.A. of The Estate of Joel Garth Locklear, Sr.

CERTIFICATE OF SERVICE

This is to certify that on April 3, 2017, the undersigned caused to be served the foregoing **BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (ON BEHALF OF DEFENDANTS ROBERT E. PRICE, AS ADMINISTRATOR C.T.A. OF THE ESTATE OF JOEL GARTH LOCKLEAR, AND KENNETH SEALEY)** upon the following addressees via first-class mail.

Jaime T. Halscott
Patrick M. Megaro
Halscott Megaro, P.A.
33 East Robinson Street
Suite 220
Orlando, FL 32801
Email: jhalscott@halscottmegaro.com
Email: pmegaro@appealslawgroup.com

Scott Brettschneider
118-35 Queens Boulevard, Suite 400
Forest Hills, NY 11375
Email: scottfreelaw@aol.com

Counsel for Plaintiffs

Hal F. Askins
Special Deputy Attorney General
J. Joy Strickland
Assistant Attorney General
N.C. Department of Justice
P. O. Box 629
Raleigh, NC 27602-0629
Email: haskins@ncdoj.com
Email: jstrickland@ncdoj.com

Counsel for Defendants Kenneth Snead and Leroy Allen

Garris Neil Yarborough
Timothy C. Smith, Jr.
Yarborough Winters & Neville, P.A.
P. O. Box 705
Fayetteville, NC 28302-0705
Email: gnyesq@ywnlaw.com
Email: timsmith@ywnlaw.com

Counsel for Defendants Town of Red Springs, Larry Floyd, and Paul Canady, Administrator of the Estate of Luther Haggins

Dan M. Hartzog
Dan M. Hartzog, Jr.
Katherine M. Barber-Jones
Cranfill Sumner & Hartzog, LLP
Post Office Box 2708
Raleigh, NC 27611
Email: dmh@cshlaw.com
Email: dhartzogjr@cshlaw.com
Email: kbarber-jones@cshlaw.com

Counsel for Defendant Town of Red Springs

John Stewart Butler , III
Anderson, Johnson, Lawrence & Butler, LLP
P. O. Box 53945
Fayetteville, NC 28305-3945
Email: jsbutler@andersonjohnson.com

Counsel for Defendants Town of Red Springs, Larry Floyd, and Paul Canady, Administrator of the Estate of Luther Haggins

/S/ Bradley O. Wood
Bradley O. Wood
N.C. State Bar No.: 22392
WOMBLE CARLYLE SANDRIDGE & RICE,
A Limited Liability Partnership
One West Fourth Street
Winston-Salem, NC 27101
Telephone: (336) 728-7012
Facsimile: (336) 726-6913
E-mail: bwood@wcsr.com
Counsel for Defendants Kenneth Sealey, individually and in his official capacity as the Sheriff of Robeson County, and Robert E. Price, as Administrator C.T.A. of The Estate of Joel Garth Locklear, Sr.

[ENTERED: April 3, 2017]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA WESTERN DIVISION
Case No. 5:15-cv-00451-BO

HENRY LEE MCCOLLUM and J. DUANE GILLIAM, as Guardian of the Estate of LEON BROWN, Plaintiffs, v. TOWN OF RED SPRINGS, KENNETH SEALEY, both individually and in his official capacity as the Sheriff of Robeson County, KENNETH SNEAD, ROBERT E. PRICE, as Administrator C.T.A. of the Estate of Joel Garth Locklear, Sr., LARRY FLOYD, LEROY ALLEN, PAUL CANADY, as Administrator C.T.A. of the Estate of Luther Haggins, Defendants.	**STATEMENT OF UNDISPUTED MATERIAL FACTS PURSUANT TO LOCAL CIVIL RULE 56.1 OF DEFENDANTS KENNETH SEALEY AND ROBERT E. PRICE, AS ADMINISTRATOR C.T.A. OF THE ESTATE OF JOEL GARTH LOCKLEAR, SR.**

NOW COME defendants KENNETH SEALEY and ROBERT E. PRICE, as Administrator C.T.A. of the Estate of Joel Garth Locklear, Sr., by and through counsel, pursuant to Local Civil Rule 56.1(a)(1), and submit this Statement of Undisputed Material Facts in support of their Motion for Summary Judgment previously filed in this matter on September 29, 2016. There is no genuine dispute as to the following facts:

1. On Saturday night, September 24, 1983, eleven year-old Sabrina Buie went missing. [1984 joint trial: 982:3-10, 996:13-18; 1991 McCollum retrial, 1339:22-1342:14]

2. Her parents filed a missing person report with the Red Springs Police Department the next day. [1984 joint trial, 985:9-13, 1003:13-18; 1991 McCollum retrial, 1342:20-1343:5, 1352:17-1353:12]

3. On Monday afternoon, September 26, 1983, Mr. James Shaw found Sabrina's nude body in a soybean field in Red Springs. [1984 joint trial, 989:2-10, 1013; 1991 McCollum retrial, 1346:2-1347:12]

4. The Red Springs Police Department requested the North Carolina State Bureau of Investigation (SBI) to take control of the murder investigation. SBI agents began arriving in Red Springs in the afternoon and evening of September 26, 1983 to begin work on the investigation. [1984 trial, 1023:5-9, 1144:9-14; 1991 McCollum trial, 1368:24-1370:7, 1468:15-1469:7; 1992 Brown trial 14:6-8, 181:24-182:10; Snead dep., 10:7-12:3; Allen dep. 37:15-38:3]

5. The Sheriff of Robeson County assigned defendants Detective Garth Locklear (now deceased) and Detective Kenneth Sealey (now the Sheriff of Robeson County) to provide additional support to the SBI. Neither Locklear nor Sealey were involved in processing the crime scene, which was conducted by SBI Agent Leroy Allen. [Sealey dep., 72:16-74:20; Sealey Aff. ¶¶ 11, 18; 1992 Brown retrial, 237:18-24]

6. Upon his arrival at the Red Springs Police Department, Sealey was assigned to work with defendant SBI Agent Kenneth Snead. Snead and Sealey worked together during the course of the investigation, canvassing the area in search of leads. [January 17, 1991 suppression hearing trans., 33:24-34:4; Sealey dep. I, 74:12-20; Sealey Aff. ¶ 8; Snead dep. 11:21-12:23]

7. Detective Locklear assisted Red Springs Police Department officers in canvassing the area. [1992 Brown trial, 237:22-24]

8. On September 27, 1983, Detective Locklear spoke with Plaintiff Henry McCollum in his yard while McCollum was mowing the grass. According to McCollum, "He pulled up in the yard when I was cutting my mother's grass, and he asked me do I have a free minute. And I told him yeah." Detective Locklear asked McCollum his name and whether he lived in Red Springs. McCollum replied that he was visiting from New Jersey. McCollum states Detective Locklear asked him "where I was the night of September 24th when that little girl was missing." Plaintiff McCollum responded that he was at his mother's house watching television with friends. After a short conversation lasting no more

than five minutes, Detective Locklear departed. [McCollum dep., 25:6-28:13; excerpt of SBI investigative file 1983-00300] (McCollum's 2016 deposition testimony differs to some extent with the summary of Detective Locklear's interview of him in the 1983 SBI report. In any event, however, McCollum denied any knowledge regarding the disappearance of Miss Buie.)

9. Agent Snead and Detective Sealey interviewed seventeen year-old Ethel Furmage at her residence at approximately 6:20 p.m. on September 28, 1983. Miss Furmage advised Snead and Sealey that she had heard at school that "Buddy" (Plaintiff Henry McCollum) had killed Ms. Buie, and that individuals named David Murray and Chris Brown were also involved in the murder. [Snead dep., 18:21-24:18; 27:1-8; Sealey Aff. ¶ 9; SBI investigative file 1983-00300 summary]

10. Following up on this lead, Snead, Sealey and SBI Agent Leroy Allen went to McCollum's residence at approximately 9:10 p.m. on September 28, 1983 to see if he would be willing to speak with them. [1984 trial, 1145:1-3, 1155:16-18; Snead dep., 37:12-38:15; Sealey dep. I, 114:7-115:25; Sealey Aff., ¶ 9] Officers spoke with McCollum's mother, Mamie Brown, and asked her if they could speak with her son, Henry McCollum. McCollum came to the front door from a back room. After being advised that he was not under arrest and that he had no obligation to speak with or accompany them, McCollum voluntarily agreed to ride with the officers to the nearby Red Springs Police Department to talk. [1984 joint trial, 1145:3-8, 1258:19-1259:3, 1277:2-23; January 16, 1991 suppression hearing trans., 5:1-6:6,

40:6-41:7, 43:1-46:2; 1991 McCollum retrial, 1468:15-1471:14; Snead dep., 38:25-39:13; McCollum's response to Request for Admission # 1 by Defendants' Snead and Allen] When asked if he voluntarily accompanied the officers to the police station, McCollum testified, "Yes, I went willingly." [McCollum dep., 99:20-24] "They asked me would I mind going down to the police station. . . I told them okay." "We got in the car and went straight to the Red Springs Police Department." [McCollum dep., 30:7-32:19] McCollum was not handcuffed. [McCollum dep., 46:12-23]

11. Upon their arrival at the Red Springs Police Department, McCollum was again advised that he was not under arrest. He was told on several occasions that he could leave at any time. [1984 trial 1146:11-13, 1150:21-22, 1166:8-16, 1273; January 17, 1991 suppression hearing trans., 7:22-8:3; McCollum dep., 69:11-15; Snead dep., 37:12-38:15; Sealey Aff., ¶ 10]

12. McCollum consented to having his fingerprints taken by Agent Allen. [1984 joint trial, 1145:11-14; January 17, 1991 suppression hearing trans., 7:18-21; 1991 McCollum retrial, 1417:16-1418:2, 1471:22-1472:1; Sealey dep. I, 114:7-115:25]

13. After this took place, McCollum was asked to be seated in an office belonging to the Red Springs Chief of Police. "They told me to sit down. And they said they'll be back." [McCollum dep., 35:20-25]

14. Officers then spoke to McCollum about matters unrelated to Sabrina Buie. When the subject of the murder of Sabrina Buie was raised, officers observed McCollum to become visibly nervous. [1984

trial 1146:6-7, 1159:20-21; January 17, 1991 suppression hearing trans., 6:16-7:11, 8:6-9, 23:23-24:11; 1991 McCollum retrial, 1472:7-13, 1473:6-1474:12; McCollum dep., 48:8-12; Sealey dep. I, 131:22-133:4; Sealey Aff., ¶ 10]

15. As forth in the testimony at McCollum's 1984 trial, in McCollum's 1991 retrial, and in deposition testimony, Snead advised McCollum of his Miranda rights, which McCollum waived in writing at 10:26 p.m. [McCollum rights waiver form; 1984 joint trial, 1146:7-1149:15, 1169:9-22, 1354:9-1358:13; January 17, 1991 suppression hearing trans., 8:25-11:3, 41:19-42:22; 1991 McCollum retrial 1474:15-1480:6; Snead dep., 39:25-40:45, 43:12-45:12; Sealey dep. I, 127:4-130:1; Sealey Aff., ¶ 10]

16. During the course of his questioning McCollum was provided with cigarettes, soft drinks, and was permitted numerous water and restroom breaks. [1984 trial, 1149:16-1150:13, 1162-63, 1359:2-6; January 17, 1991 suppression hearing trans., 11:7-11, 16:19-17:10; 1991 McCollum retrial, 1487:22-1488:22; McCollum dep., 49:3-50:2, 52:1-11] He did not request to make a telephone call to anyone. [McCollum dep., 101:20-24]

17. As McCollum was talking with the officers, Snead wrote down what he said. [McCollum dep., 107-21-108:5] McCollum signed this document, in which he confessed his involvement, along with several other individuals including his half-brother, Leon Brown, in the rape and murder of Sabrina Buie. [McCollum September 29, 1983 confessions; 1984 joint trial, 1149:16-1150:13, 1162:8-1163:24, 1359:15-1365:24; January 17, 1991 suppression hearing

trans., 11:12-16:12, 26:21-27:11; 1991 McCollum retrial, 1480:5-1491:3; 1496:22-1497:11; Snead dep. 40:1-68:3; Sealey Aff., ¶¶ 12-13; McCollum dep., 106:23-107:2; Ex. 2;] McCollum signed each and every page of the document. [McCollum dep., 67:6-8] McCollum also drew a diagram of the crime scene, with the assistance of Agent Allen. [McCollum crime scene sketch; January 17, 1991 suppression hearing trans., 18:18-22; Allen dep., 119:15-121:4]

18. After McCollum signed his statement, Sealey took another short statement from McCollum in the presence of Red Springs Police Chief Luther Haggins and Agent Allen, in which McCollum related his individual actions during the rape and murder of Sabrina Buie. [McCollum September 29, 1983 confessions [last page]; January 16, 1991 suppression hearing trans., 47:11-23, 49:7-20, 51:12-52:3; McCollum dep., Ex. 2, (final page); Sealey dep. I, 137:16-140:5; Sealey Aff., 14]

19. After he had confessed to the rape and murder of Sabrina Buie, McCollum was placed under arrest, as his confession established probable cause to believe that he had committed those crimes. [1984 joint trial, 1376:1-11; January 17, 1991 suppression hearing trans., 25:19-26-26; 1991 McCollum retrial, 1493:20-22] McCollum recalls that he was arrested by Red Springs Police Officer Larry Floyd. [McCollum dep., 71:6-9; Sealey dep. I, 140:10-14]

20. While Agent Snead, Detective Sealey and Agent Allen were talking with Plaintiff McCollum, Leon Brown voluntarily came to the Red Springs Police Station with his mother. [J. Duane Gilliam's response to Request for Admission # 1 by

Defendants' Snead and Allen] Brown testified at his deposition that an officer "asked me would I come in and talk to him for a minute. I say yes. So I – I went in there with him." [Brown dep., 33:14-20; 1984 joint trial, 1198:12-18, 1317:16-18] At the direction of SBI Special Agent in Charge Frank Johnson, Agent Allen advised Leon Brown of his Miranda rights, which he waived. [Leon Brown juvenile rights waiver form; 1984 joint trial, 1151:2-1152:19, 1170:19-1172:18, 1365:25-1370:7; 1992 Brown retrial 14:23-21:25; 25:25-28:19]

21. At the direction of SBI Agents, Detective Garth Locklear interviewed Brown, along with Red Springs Police Chief Luther Haggins. [1984 joint trial, 1154:17-20, 1181:13-19, 1189:15-17, 1388:21-1389:16; 1992 Brown retrial 16:15-21:25]

22. Prior to the start of Brown's interview, McCollum confronted Brown and advised his brother that he had told the truth – that they had raped and murdered Sabrina Buie -- and encouraged Brown to also tell the truth. [1984 joint trial, 1771:20-1772:9, 1390:17-1402:3; 1991 McCollum retrial, 1493:11-19; January 16, 1991 suppression trans., 56:7-14; 1992 Brown retrial 27:11-17; 233:8-10; Brown dep. 81:8-18, Ex. 8] Brown later related to Sharon Stellato, the Assistant Director of the North Carolina Innocence Inquiry Commission, in 2014 that "my brother come back in the room and say we did it." [Stellato dep., 79:8-80:6, Ex. 24, 30:17-18]

23. During his interview, Leon Brown confessed to being present and involved in the rape and murder of Sabrina Buie along with several others, including his brother, Henry McCollum. [1984

joint trial, 1180:21-1193:22, 1390:17-1402:3; 1992 Brown retrial 40:7-48:24, 243:6-253:6; 261:5-268:17-271:21, Brown dep., Ex. 6] Brown's statements were reduced to writing by Detective Locklear, who sat next to him and reviewed it with him for accuracy. [Leon Brown confession; 1984 joint trial, 1191:14-1192:4, 1390:17-1402:3-1410:19; 1992 Brown retrial 34:14-22, 37:15-38:8, 254:6-255:4; Stellato dep., Ex. 24, 30:1-5] Brown initialed corrections to his confession in numerous places and then signed it. [1984 joint trial 1336:20-1339:3; 1992 Brown retrial 41:32-34, 49:15-18; 253:10-225:8; Brown dep. 54:13-57:21 59:17-60:3, 60:17-61:7, Ex. 6] Brown also assisted Detective Locklear in creating a sketch of the crime scene. [Leon Brown crime scene sketch; 1992 Brown retrial, 257:10-261:3]

24. After he had confessed to the rape and murder of Sabrina Buie, Brown was also placed under arrest, as his confession established probable cause to believe that he had committed those crimes. [1992 Brown retrial, 268:6-10]

25. Prior to McCollum and Brown each confessing to the participation in the rape and murder of Sabrina, neither Sealey nor Locklear knew how she had been killed or the details of the crime scene. [1984 joint trial, 1371:13 1992 Brown retrial, 237:25-238:3; Snead dep., 16:2-18:22; Sealey Aff., ¶ 11; Sealey dep. I, 75:14-16, 92:22-95:5; Sealey dep. II, 57:2-14]

26. Plaintiff McCollum was transported from the Red Springs Police Department to the Robeson County Jail by Red Springs Police Officer Larry Floyd. [McCollum dep., 72:6-12]

27. Floyd testified at trial that during the drive to the Robeson County Jail, McCollum made a statement that he did not kill anyone. Instead, McCollum stated that he had only held Sabrina's hands. McCollum further told Officer Floyd that after Brown had left the scene to go home, he and the others had moved Sabrina's body from a ditch to the soybean field. [1984 joint trial, 1744:4-1756:10; 1991 McCollum retrial, 1364:16-1365:5; January 16, 1991 suppression hearing, 57:3-58:3]

28. On September 29, 1983, Magistrate Harry B. Chapman issued warrants for the arrest of Henry McCollum for the rape and murder of Sabrina Buie. [Copies of warrants] On September 29, 1983, juvenile petitions were filed against Leon Brown for the rape and murder of Sabrina Buie. [Copy of juvenile petitions]

29. On or about September 30, 1983, following his first appearance in the Robeson County Courthouse, McCollum admitted on camera to a television reporter that he had held Sabrina down while others raped and murdered her, stating "I just held her down. That's it." [Barnes Aff., ¶ 6, Ex A (copy of video recording); 1984 joint trial 1275:1-23, 1596:12-1599:22; McCollum dep. 74:12-75:7; 109:24-112:11] On camera, McCollum stated that "Izar" (the nickname of Chris Brown [McCollum dep., 101:9-15]) and Darrell Suber, two of the individuals he had implicated in his confession, were the ones who had raped and killed Sabrina Buie. [Barnes Aff., Ex A. (video recording)] McCollum admits that the video recording depicts him stating "I held the girl arm down while they killed her." [McCollum dep., 112:10-11]

30. During the investigation, Detective Locklear and Detective Sealey worked under the direction of the SBI. As the SBI was the lead agency in the investigation and would produce the final investigation report to the District Attorney, Locklear and Sealey provided copies of all notes and documents that they created or obtained to members of the SBI for incorporation into the SBI investigative report. Neither withheld notes or information from the SBI. It was Locklear's and Sealey's belief that the State Bureau of Investigation would provide all the information in its file, including the information that Locklear and Sealey had provided, to the District Attorney's office. [Sealey Aff., ¶ 17]

31. Neither Sealey nor Locklear had any involvement in obtaining or processing any physical evidence regarding the rape and murder of Sabrina Buie. Neither had any involvement in requesting that any evidence be examined or processed by the North Carolina Crime Lab or cancellation of any such request. [Sealey Aff., ¶ 17]

32. As set forth on the cover, a copy of the SBI's investigative report was forwarded to the Robeson County District Attorney's Office. [See SBI reports, DE # 146-10, p. 20; DE # 149-2, p. 6; DE # 161-40, p. 3; DE # 161-41, p. 2]

33. On January 3, 1984, Plaintiffs were each indicted by a grand jury on charges of First Degree Murder and Rape. [See copies of Indictments]

34. Plaintiffs were tried together in Robeson County Superior Court in October 1984. During a hearing on the Plaintiffs' motion to suppress their confessions, the Plaintiffs each testified, contending

that their confessions were coerced by law enforcement officers who shouted at them, threatened them and called them names. [1984 joint trial, 1255:21-1299:13 (McCollum), 1317:4-1339:16 (Brown)] In his testimony during motion to suppress, McCollum admitted to holding Sabrina down while she was raped and killed. [1984 joint trial, 1273:1-8] Plaintiff Brown also offered the expert testimony of Dr. Franklin Egolf, Jr., a psychologist, who opined that Brown's I.Q. scores fell within the mild range of mental retardation, but that Brown was capable of understanding his rights and waiving the opportunity to have a lawyer present on a concrete level. [1984 joint trial, 1300:4-1307:4; 1672:20-1693:23]

35. After hearing testimony from Snead and Locklear for the State and from both of the Plaintiffs, their mother Mamie Brown, their sister Geraldine Brown, another witness, Lewis Sinclair, and Dr. Egolf, for the defense, the trial court ruled that the Plaintiffs' confessions were each knowingly, intelligently and voluntarily made, and therefore admissible. [1984 joint trial, 1346:6-1351:9] More specifically, the Court held:

> In the absence of the jury a voir dire examination was conducted with evidence being received both from the State of North Carolina and from the respective defendants, and based upon the believable evidence in the case the Court makes the findings of fact:
>
> That the defendant McCollum voluntarily went to the police station in Red Springs, North Carolina, to be

questioned by the officers involved and that after questions were asked of that defendant the defendant was charged with the murder and rape of Sabrina Buie.

That the defendant Leon Brown voluntarily and in the absence of officers visited the police station in Red Springs, North Carolina, and was questioned by the officers there, and that after such questioning that defendant was arrested for murder and rape.

That before each defendant was questioned that defendant was advised of his constitutional rights. That each defendant was given a written waiver of rights form setting out his various rights and that the defendant indicated to the officer that he understood his rights as they were read to him and that each defendant affixed his signature to the end of the rights form indicating his answers given therein were true.

That the defendants and each of them was specificallay [sic] advised that he had the right to remain silent and that each defendant advised the officer that he understood that right.

That each defendant was specifically advised whatever he said would and could be used against him, and each defendant that he understood that right.

That each of the defendants was advised that he had a right to consult a lawyer and to have a lawyer present while he was being questioned and that each defendant indicated he understood that right.

That the defendant Brown was advised that he had the right to have his parent or guardian present during any questioning made by the officer and that he understood – he indicated that he understood that right.

That the defendant and each of them was advised that if he could not afford a lawyer that a lawyer would be appointed to represent him and that the defendant indicated that he understood that right.

That the defendant and each of them was advised that in the event he elected to make a statement that he could at any time he deemed it desirable stop answering questions and each defendant indicated he understood that right.

That neither defendant indicated at any time that he desired an attorney to be present during questioning and the defendant Brown did not indicated that he desired the presence of his parent or guardian.

That at the time of interrogation of each defendant neither was under the influence of alcoholic beverage or any impairing substance That each was coherent during the interrogation, even though there was nervousness and some crying on the part of each defendant.

That the answers of the defendant and each of them as given to the respective officers were not incoherent and were sensible. That the officers made no offer of hope of reward or inducement to either defendant to secure from him the statement made. That neither officer may any threat or show of violence and made no act which suggested violence to persuade or induce the defendant to make his statement.

That during the questions refreshments, food and water and toilet facilities were available. That the defendant Brown, though limited in mental capacity, did not – [sic] was capable of understanding his rights as advised by the officers involved.

That each defendant was orally question about the facts of the case and then after the oral interrogation was completed the statement of the individual defendant was reduced in writing by the officer involved, which said statement was individually signed

on each page by the defendant at the end thereof and witnessed by the officers.

Therefore, based upon the foregoing findings of facts, the Court concludes as a matter of law there was no offer of reward or inducement to either defendant to make him make statement. That there was no threats or suggested violence or show of violence to persuade or induce the defendant to make a statement or either of them.

That any statement made by the defendant McCollum and the defendant Brown on September 28th and 29th, was made freely, voluntarily, knowingly, understandingly, and independently without duress, coercion or inducement.

That each defendant at the time he made the statement was in full understanding of his constitutional rights to remain silent, the right to counsel, the right to have his parent or guardian present and all of his other constitutional rights as set forth in the United States Supreme Court case of Miranda versus Arizona, and each defendant was orally advised of those rights before being questioned.

Therefore, that each defendant purposely, freely, knowingly and affirmatively waived each of these rights, including his right to the presence of counsel, retained or

> appointed, and his right to the presence of a parent or guardian during questioning, and therefore made a statement to the officer, and so, for those reasons, then, the motion to suppress with respect to each defendant is denied, and we'll show that each defendant excepts to the ruling of the Court.
>
> And having ruled, the statement as made by each defendant will be admitted, and of course, available to be heard by the jury.

[1984 joint trial, 1346:6-1351:9]

36. Following a trial in which both of the Plaintiffs testified during the case in chief, the Plaintiffs were each convicted of first degree murder and rape and were each sentenced to death. [1984 joint trial, 1546:9-1649:18 (McCollum), 1649:19-1670:20]

37. On appeal, the North Carolina Supreme Court reversed and remanded for a new trial, finding error in the trial court's jury instructions. State v. McCollum, 321 N.C. 557, 563, 364 S.E.2d 112, 115 (1988). In its opinion, the North Carolina Supreme Court held:

> This Court has long held that where, as here, "two or more defendants are jointly tried for the same offense, a charge which is susceptible to the construction that the jury should convict all if it finds one guilty is reversible error." State v. Tomblin, 276 N.C. at 276, 171 S.E.2d at

> 903. The instructions in the present case being susceptible to just such a construction, these defendants must be, and are, granted a new trial as to all of the charges against them giving rise to this appeal. State v. McCollum, 321 N.C. at 563, 364 S.E.2d at 115.

The Court of Appeals' opinion was confined solely to the jury instruction issue. There was no ruling that the Plaintiffs' confessions were inadmissible or otherwise unconstitutional.

38. The Plaintiffs were subsequently retried separately in adjacent counties, McCollum in Cumberland County in 1991 and Brown in Bladen County in 1992.

39. During pre-trial motions held in McCollum's 1991 retrial in Cumberland County Superior Court, his criminal defense attorney, James C. Fuller, litigated strenuously to exclude McCollum's confession. In hearings held on January 16 and 17, 1991, defense counsel cross-examined States' witnesses Snead, Sealey, Allen and Floyd. [January 16, 1991 suppression hearing trans., 3:23-60:4] Defense counsel also offered the testimony of psychologist Dr. Faye Sultan that McCollum would not have been able to comprehend Miranda warnings or the true meaning of his statement. [January 17, 1991 suppression hearing trans., 82:23-128:5] (The Plaintiffs have designated Dr. Sultan as an expert witness in this case.) During the hearing, Mr. Fuller stated to the Court "What I'm suggesting to the Court, were talking about rational conduct – we're talking about a person's psychological make-up. **This is not**

a case about police misconduct." [January 17, 1991 trans., 136:17-18] (emphasis added)

40. On July 31, 1991, the trial court entered an Order finding McCollum's confessions to be knowing, intelligent and voluntary, and therefore admissible. This Order states as follows:

> From the believable evidence, the Court finds the following facts by at least a preponderance of the evidence:
>
> 1. The Defendant, Henry Lee McCollum, was personally present in open Court along with his counsels, William L. Davis, III, Marshal Dyan, and James C. Fuller.
>
> 2. This evidentiary hearing was held in the absence of jury.
>
> 3. The Court has had an opportunity to see and observe each witness's and to determine what weight and credibility to give to each witnesses testimony.
>
> 4. The evidence shows that on or about September 24, 1983 an eleven year old female living in Red Springs, North Carolina was raped and murdered Her body was found in a soy bean field on September 26, 1983 in the city of Red Springs.
>
> 5. The Defendant, Henry Lee McCollum, came to the attention of the investigating officers as a person having

information about the alleged crimes. On the 28th September 1983, approximately 9:10 p.m., Special Agents Kenneth Ray Snead, Jr, and Leroy Allen of the State Bureau of Investigation, along with Detective Kenneth Sealey of the Robeson County Sheriff's Department, went to the residence of the defendant at 401 Malpass Street, Red Springs, North Carolina. Detective Sealey went to the defendant's front door where he observed the defendant, the defendant's mother and other individuals, Detective Sealey asked the defendant if he (the defendant) would go or come down to the Red Springs Police Department and talk with the officers. The defendant did not appear nervous, nor did he appear to be under the influence of any drugs or intoxicating beverage The defendant appeared normal to the Detective. The defendant was told he could accompany the officers to the police department if he wished to do so. The defendant was told by officers he was not under arrest and did not have to go with the officers to the police station. No threats, coersion [sic] or promises were made to the defendant by any of the officers. The Defendant appeared to have no problems understanding what the officers talked about or any instruction given to the Defendant by the officers. Approximately ten minutes later the

defendant went with the officers to the Red Springs Police Department where they arrived around 9:20 p.m. on September 28th. After arriving at the police station, the Defendant was again told he was not under arrest and was free to leave at any time. Agent Snead talked with the Defendant from about 9:20 to 10:20 concerning other matters during which time the Defendant agreed to be fingerprinted. Four times between 9:20 and 10:20, the Defendant was told by Agent Snead and Detective Sealey, he was not under arrest and free to leave any time he wanted. Up until 10:20 no mention was made of Sabrina Buies death. At 10:26 the Agent Snead obtained a standard Miranda form and advised the Defendant of his rights (see State Exhibit l). Prior to being advised of his rights the defendant gave his address, 401 Malpass Street, Red Springs, North Carolina; date of birth, XXXXXXX; Social Security number XXXXXXX: and the number years of completed schooling -- eleven years. The Defendant had no problem understanding the officers or any instructions given to the defendant by the officers. Defendant responses were logical responses to questions asked by the officers. Agent Snead then advised the Defendant:

You have the right to remain silent and not make any statement. His

answer was yes that he understood that and he put his initials beside that statement.

Anything you say can and will be used against you in Court, again, his answer was yes that he understood it and he initialed it.

You have the right to talk to a lawyer before we or I ask you any questions and have him with you during questioning. His answer was right, and his initials are beside that.

You have the same right to advise [sic] and presence of a lawyer even if you cannot afford one. And if you are indigent a lawyer will be appointed to represent you before any questions if you desire. He answered yes that he understood that and he initialed it.

Do you want a lawyer? His answer was no and againshe [sic] initialed that.

If you decide to answer questions now without a lawyer present you will still have the right to stop answering them at any time. You also have the right to stop answering them at any time until you talk to a lawyer. He acknowledged that he understood that and he initialed it.

Do you understand each of these rights that we or I have explained to you. Again, he said yes and initialed it.

Having these rights in mind do you wish to talk to us and answer these questions now. His reply was I'm going to tell you and then I'm going to tell it in Court. He then initialed that response.

I have read this statement of my rights. I understand what my rights are. I'm willing to make a statement and answer questions. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me. No pressure or coercion of any kind has been used against me.

The rights form was executed by Defendant, Henry McCollum and witnessed by Agent Snead, Agent Allen and Detective Sealey.

The Defendant placed his initial beside each question and his response to each question indicating he understood his rights. At no time during this time did the Defendant request either an attorney or the presence of a family member. No threats, promises, pressure or coercion of any kind was made to or against the Defendant. The Defendant never requested water, food, or the use of facilities that were denied him. At 10:26 the Defendant signed the

statement of his rights form in the presence of the officers. The Defendant appeared normal and fully able to understand all his rights. Agent Snead then being [sic] questioning the Defendant concerning Sabrina Buie's death. At that point the Defendant made a voluntary statement to the officers detailing his involvement in the rape and murder of Sabrina Buie. This statement consisted of five pages and lasted until 1:37 a.m., September 28, 1983, During the period of time from 9:20 p.m. until 1:37 a.m. the Defendant was asked twice if he was hungry and responded he was not. The Defendant went to the bathroom twice. He received Cokes at 10:25 p.m., 11:15 p.m. and 1:27 a.m. He got water at 12:02 a.m. and 12:25 a.m. He smoked Vantage Menthol and Salem 100's cigarettes throughout the interview which were provided to the Defendant by the officers. No one threatened the Defendant in any manner and the Defendant was very cooperative. No promises were made to the Defendant. The Defendant never asked for the presence of any other persons and never told the officers he wished to stop talking with them. The defendant never asked to leave the police station or be taken home. The Defendant sat down during most of the statement except to go to the bathroom, obtain water and also when he

demonstrated how the victim, Sabrina Buie was killed. The Defendant also helped draw a map, assisted by Agent Allen, showing where the crimes took place. After the Defendant made his statement to the officers, Agent Snead completely went through the statement orally talking with the Defendant. Once that was completed, Agent Snead went back over the statement reducing it to writing and then read the statement to the Defendant. The Defendant was allowed to initial any corrections. Agent Snead gave the Defendant an opportunity to read the statement and after that the Defendant signed the statement on each individual page. At 12:00 September 29th, the Defendant made a statement to Detective Sealey stating only the Defendant's part in the alleged crimes against Sabrina Buie, Agent Snead who had taken the earlier statement was not present. Detective Sealey had been present when the Defendant had earlier been advised of his rights. The Defendant appeared normal to Detective Sealey, appeared to understand his rights and was very cooperative with Detective Sealey. Detective Sealey never threatened the Defendant or make any promises to him to obtain Defendant's statement. The Defendant knowingly, voluntarily, and intelligently made a statement to Detective Sealey indicating his

involvement in the alleged crimes against Sabrina Buie. This statement ended at 2:10 am, September 29, Considering the nature of the crimes involved and the seriousness of those crimes, the length of the interrogations from 9:20 p.m. September 28 to 2:10 a.m., September 29, was reasonable and not unduly burdensome or prolonged. All of the Defendant's answer [sic] were reasonable in relation to the questions asked by the officers. All the Defendant's physical needs were met by the officers in offering food, water, and the use of bathroom facilities. The Defendant never indicated he wanted to stop talking to officers or wanted the presence of an attorney even though he understood those rights. A written waiver, statements, and map signed by the Defendant have been introduced into evidence as State's Exhibits 1, 2, 3, 4, and 5. After the Defendant completed his statement to Detective Sealey, he started to leave the police station and told another officer Agent Snead earlier told the Defendant he was not under arrest and free to leave. At that time Agent Snead placed the Defendant under arrest. The officer's [sic] conversation with the Defendant ended at 2:10.

On September 29, between 8:00 or 8:30 a.m., Sgt. Larry Floyd of the Red Springs Police Department was asked to

transport the Defendant to the Robeson County Jail in Lumberton, He had known the Defendant prior to September of 1983 and had talked with the Defendant a number of times before. On those occasions, the Defendant carried on a normal conversation and had no trouble understanding the officer and the officer had no trouble understanding the Defendant. Sgt. Floyd saw the Defendant when he arrived at the Red Springs Police Department with Agent Snead and Detective Sealey on the night of September 28, 1983. The Defendant appeared normal, not upset nor under the influence of any impairing substance. The Defendant was familiar with the English language and understood it. As the Defendant was being transported to Lumberton from Red Springs by Sgt. Floyd, the Defendant initiated a conversation with the officer about the death of Sabrina Buie, Sgt. Floyd did not question the Defendant concerning Sabrina Buie's death. The statements were made wholly on the initiative of the Defendant and not pursuant to any interrogation on the part of Sgt Floyd. The statements of the Defendant to Sgt. Floyd were voluntarily made and not because of threats, promises, or coercion on the part of Sgt Floyd. No inducement was made to the Defendant in any manner.

Upon the foregoing findings, as found by at least a preponderance of the evidence, the Court concludes as a matter of law:

1. None of the Constitutional rights, either Federal or State, of Defendant, were violated by his arrest, detention, interrogation, or statement;

2. There were no promises, offers of reward, or inducements to Defendant to make a statement;

3. There was no threat or suggested violence or show of violence to persuade or induce Defendant to make a statement;

4. The statement made by Defendant to Agents Kenneth Snead, Leroy Allen, Detective Kenneth Sealey and Sgt. Larry Floyd on September 28 and 29, 1983 was made freely, voluntarily, and understandingly;

5. The Defendant was in full understanding of his Constitutional right to remain silent and right to counsel, and all other rights; and

6. He freely, knowingly, intelligently, and voluntarily, waived each of those rights, and thereupon made the statement to the officers; above mentioned.

> It is now therefore ordered that the Defendant's objection to the admission of the statement is overruled and Defendant's motion to suppress is denied.

[July 31, 1991 Order]

41. During his opening statement during McCollum's October 1991 retrial, Mr. Fuller, on McCollum's behalf, admitted that McCollum was present for and involved in the murder of Sabrina Buie. [1991 McCollum retrial, 1330:11-1332:7] Prior to closing argument, Mr. Fuller advised the trial court he intended to either invite, or not oppose, a conviction for second degree murder on behalf of his client. The trial court questioned McCollum to confirm his understanding and consent to Mr. Fuller making such an argument. Mr. McCollum told the trial court that he understood the implications of such an argument and consented to his attorney making it on his behalf. [1991 McCollum trial, 1597:17-1599:8] During closing argument, Mr. Fuller acknowledged McCollum's involvement in the murder, but asked the jury to return a verdict that McCollum was guilty of second degree murder. [1991 McCollum trial, 1602:10-1609:25] Mr. Fuller commented that with respect to the law enforcement officers (the defendants in this case) who investigated the Sabrina Buie murders, "These are good, hard working officers and I have no criticism of them." [1991 McCollum trial, 1602:8-9] The jury returned a guilty verdict of first degree murder and first degree rape. [1991 McCollum retrial, 1632:23-1634:16]

42. During the sentencing phase of his retrial, McCollum again offered testimony from his expert psychology witness, Dr. Faye Sultan. Dr. Sultan testified that during one her meetings with McCollum:

> Mr. McCollum told me that he was one among five men – boys who met together one evening. He named those participants as himself, Leon Brown, Darrell Suber, Chris Brown and Louis. And that when he met with those guys, Darrell suggested to the group that they were going to abduct a young girl named Sabrina and that they were going to rape her.
>
> ***
>
> He described them walking with Sabrina to a location and several of those men raping Sabrina there. He told me that he refused to rape Sabrina and that Darrell held him down on top of her but that he did not penetrate her body.
>
> ***
>
> He told me that he was instructed by Darrell Suber to grab Sabrina's arm and to hold her arm. He told me, "I didn't mean for them to kill her. I was afraid of those guys." He reported to me that he made an attempt to intervene in the process that he describes as very inadequate. He said he grabbed Darrell Suber's arm when Suber reached out to

> strike Sabrina or to hurt her with a knife that Mr. McCollum thought he was holding in his hand, and that Darrell Suber pushed him back. And that Chris said to him at that point, "If you try something, I'll hurt you."
>
> Mr. McCollum reported that he continued to hold onto the arm of Sabrina because he was afraid that those guys would hurt him. What he said it, "I did it to keep those guys from hurting me. Chris was already mad at me. I would have saved her if I knew how to."
>
> ***
>
> And he concluded his story by describing to me that a stick had been shoved down her throat with her panties; and concluded by saying, "I wish I was dead."

[1991 McCollum trial, 1808:17-1810:10; Sultan dep. 217:1-220:12]

43. McCollum confirms that Dr. Sultan never threatened him, raised her voice to him, or ever caused him any stress or worry. [McCollum dep., 113:16-24]

44. McCollum's convictions and capital sentence were affirmed by the North Carolina Supreme Court. State v. McCollum, 334 N.C. 208, 433 S.E.2d 144 (1993). Among other findings, the North Carolina Supreme Court held that the trial court correctly concluded that McCollum knowingly

and intelligently waived his constitutional rights and voluntarily made statements to the officers, notwithstanding his contention that mental retardation and emotional disabilities prevented him from making a knowing and intelligent waiver of his constitutional rights. Id., 334 N.C. at 236-237. More specifically, the North Carolina Supreme Court held:

> By another assignment of error, the defendant contends that the trial court erred in failing to exclude from evidence the defendant's statements made to police officers because they were obtained in violation of his constitutional rights. Specifically, the defendant contends that his mental retardation and emotional disabilities prohibited him from making a knowing and intelligent waiver of his constitutional rights. Based upon evidence introduced during the voir dire hearing on the admissibility of the defendant's statements, the trial court made findings and concluded that the defendant knowingly and intelligently waived his constitutional rights and voluntarily made the statements in question. The trial court found from substantial evidence introduced during the voir dire that the officers told the defendant that he could accompany them to the police station if he wished to do so. He chose to go with them and he appeared to have no problems understanding what the officers talked about or any instructions given by the

officers. While at the police station, the officers read each of the defendant's constitutional rights to him, and he indicated that he understood them and then signed a waiver of rights form. During the interview, all of the defendant's answers were reasonable in relation to the questions asked by the officers.

It is well established that mental retardation is a factor to be considered in determining the voluntariness of a confession, but this condition standing alone does not render an otherwise voluntary confession inadmissible. E.g., State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988); State v. Thompson, 287 N.C. 303, 214 S.E.2d 742 (1975). We have also repeatedly held that the trial court's findings of fact following a voir dire hearing concerning the admissibility of a confession are conclusive and binding on the appellate courts when, as here, they are supported by substantial competent evidence. State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992). The conclusions of law made by the trial court from such findings, however, are fully reviewable on appeal. Id. Those conclusions of law will be sustained on appeal if they are correct in light of the findings. Id. In the present case, the trial court's findings were amply supported by substantial evidence presented on voir dire. Furthermore, the trial court's

> conclusion that the defendant knowingly and intelligently waived his constitutional rights and voluntarily made his statements to the officers was a correct conclusion of law in light of the findings. Therefore, we conclude that the trial court did not err in this regard. This assignment of error is without merit.

Id., 334 N.C. at 236-237.

45. McCollum's writ for petition of certiorari to the United States Supreme Court was denied. McCollum v. North Carolina, 512 U.S. 1254, 114 S.Ct. 2784 (1994).

46. Brown was re-tried in June 1992 in Bladen County Superior Court. Brown's attorneys worked strenuously to exclude his confession. [1992 Brown retrial, 14:22-148:9] Brown's attorneys cross-examined the State's witnesses, Joel Garth Locklear[1] and SBI Agent Allen and offered the testimony of an expert witness, clinical psychologist Dr. George S. Baroff, together with an evaluation report from psychologist Dr. Franklin Egolf, the same psychologist who had testified for the Plaintiffs in their 1984 joint trial, that Brown was not capable of understanding Miranda warnings or the meaning of his confession. After hearing this testimony and lengthy arguments by counsel, the trial court found that Brown had knowingly, intelligently and voluntarily waived his Miranda rights, that none of

[1] By 1992, Mr. Locklear had retired from the Robeson County Sheriff's Office and was working as an investigator for the Robeson County Public Defender's Office. [1992 Brown trial, 29:17-19]

his rights were violated, that his statement was not the product of any coercion, pressure or intimidation, and that it was voluntarily in all respects and therefore admissible. [1992 Brown retrial, 116:8-148:9; June 9, 1992 Order]

47. In its June 9, 1992 Order denying Brown's motion to suppress, the trial court held as follows:

> This cause coming on to be heard and being heard before the undersigned at the June 8, 1992, Special Criminal Session of Superior Court, Bladen County, North Carolina; and the defendant, Leon Brown, being present and represented by attorneys Adam Stein, Thomas H. Maher, and E. Knox Chavis; and the State being represented by Assistant District Attorney John B. Carter; and the Court, after hearing evidence and arguments of counsel upon the above-named defendant's motion to suppress dated March 22, 1992, makes the following findings of fact, conclusions of law, and enters the following orders:
>
> **FINDINGS OF FACT**
>
> (1) That Special Agent Leroy Allen of the North Carolina State Bureau of Investigation was directed by his superior on Monday, September 26, 1983, to assist in the investigation of a homicide occurring in Red Springs, North Carolina.

(2) That on September 29, 1983, Special Agent Allen was instructed by his supervisor, Frank Johnson, to advise the defendant, Leon Brown, of his rights; that Special Agent Allen had, had no prior contact with the defendant.

(3) That Special Agent Allen entered a room at the Red Springs Police Department with Chief Haggins and Special Agent Ken Sneed; that the defendant was seated near a desk with his head hanging low; that Special Agent Allen introduced himself and advised the defendant that he was not under arrest; that the defendant was not frightened or upset and was not under the influence of alcohol nor drugs; that the defendant was quiet and did not ask for anyone; that the defendant in response to questions by Special Agent Allen furnished his name, age, sex, race, date of birth, parent, and number of years of school, all of which are reflected on State's Exhibit No, 1 for voir dire, a copy of which is attached to this order and incorporated herein by reference.

(4) That in respect to rights designated as Nos. 1, 2, 4,5, 6, 8, and 9, the defendant responded, "Yes," in each separate case that he understood such rights; that in respect to rights designated No 3 and No. 7, the defendant responded, "Yes, sir,"

indicating that he understood those rights, those rights being reflected on State's Exhibit No. 1 for voir dire; that the defendant acknowledged the understanding of the rights by printing his name in the space provided; that the defendant did not assert at any time that he did not understand any of the enumerated rights; that the defendant had no difficulty in providing the information reflected at the top of State's Exhibit No. 1 for voir dire; that the defendant has been previously involved in court proceedings prior to September, 1983, as a result of a previous charge for breaking and entering and larceny and was thus familiar with court proceedings by way of experience.

(5) That the defendant, Leon Brown, after being advised of the rights reflected on State's Exhibit No 1 for voir dire, gave a statement to Detective Garth Locklear; that the defendant appeared to be nervous, but was sober; that the defendant did not ask for a parent or lawyer, although the defendant's mother was at the Red Springs Police Department during the interview Process of Henry Lee McCollum and the defendant in the police department; that the defendant gave a lengthy and detailed statement concerning his participation with others in the alleged rape of Sabrina Buie; that the defendant gave reasonable and

logical responses to the questions asked by Detective Locklear; that the defendant made corrections to the statement when read very slowly by Detective Locklear back to the defendant to acknowledge that he had limitations on his ability to read and write; that the defendant also reflected his movement and the movement of the others on map drawn by Detective Locklear, that Detective Locklear was not aware of the details of a statement given by Henry Lee McCollum; that the defendant also made oral statements to Detective Locklear reflecting detailed participation in the alleged rape; that a copy of States Exhibit No. it for voir dire and States Exhibit No. 3 for voir dire are attached hereto and incorporated herein by reference.

(6) That the defendant has an I.Q. variously tested between 49 and 65, but has been generally classified as suffering from mild mental retardation; that the defendant's chronological age at the time of the interview was 15;

(7) That State's Exhibit No.2 for voir dire consists of six handwritten pages and one supplemental page.

(8) That the defendant's maturity scale was measured at 12.6 giving the defendant a higher result than the intellectual assessment, that

although the defendant has difficulty understanding abstractions, he is capable of understanding information on a concrete level, that the defendant has a general understanding of the role of lawyers and police in the criminal justice system.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Court enters the following conclusions of law;

(1) That the defendant knowingly, intelligently, and voluntarily waived each of the rights reflected on States Exhibit No.1 for voir dire and the waiver reflected thereon,

(2) That none of the defendant's rights under the North Carolina Constitution, U.S. Constitution, nor the North Carolina General Statutes have been violated.

(3) That the statement made by the defendant was not the product of any coercion, pressure, or intimidation.

(4) That the defendant's statement was voluntary in all respects.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Court enters the following order:

> (1) That the defendant's motion to suppress dated March 22, 1992, be and is hereby denied.

(June 9, 1992 Order in Brown's retrial)

48. After the court granted a defense motion to dismiss the first degree murder charge, finding that Brown had withdrawn from a conspiracy to commit murder, [1992 Brown trial, 288:13-20], a Bladen County jury found Brown guilty of first degree rape and sentenced to him to life in prison. [1992 Brown retrial, 310:15-23]

49. Brown's conviction and sentence were affirmed on appeal. The North Carolina Court of Appeals held that the trial court's findings of fact, which Brown did not dispute, supported its conclusions that Brown had knowingly, intelligently and voluntarily waived his Miranda rights, that none of his rights were violated, that his statement was not the product of any coercion, pressure or intimidation, and was voluntary in all respects. State v. Brown, 112 N.C.App. 390, 394-398, 436 S.E.2d 163, 164-168 (1993). Specifically, the North Carolina Court of Appeals held:

> A defendant may waive his Miranda rights, but the State bears the burden of proving that the defendant made a knowing and intelligent waiver. State v. Simpson, 314 N.C. 359, 334 S.E.2d 53 (1985); Miranda v. Arizona, 384 U.S. 436, 444, 16 L.Ed.2d 694, 707, reh'g denied, 385 U.S. 890, 87 S.Ct. 11, 17 L.Ed.2d 121 (1966). Whether a waiver is knowingly and intelligently made

depends on the specific facts of each case, including the defendant's background, experience, and conduct. Id. 314 N.C. at 367, 334 S.E.2d at 59; Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, reh'g denied, 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981). Although the trial court found that defendant was mildly retarded, "a subnormal mental condition standing alone will not render an otherwise voluntary confession inadmissible." State v. Massey, 316 N.C. 558, 575, 342 S.E.2d 811, 821 (1986) (quoting from State v. Stokes, 308 N.C. 634, 647, 304 S.E.2d 184, 192 (1983)). We look at the totality of the circumstances, and in the case of mentally retarded defendants, we pay particular attention to the defendant's personal characteristics and the details of the interrogation. State v. Fincher, 309 N.C. 1, 19, 305 S.E.2d 685, 697 (1983); State v. Spence, 36 N.C.App. 627, 629, 244 S.E.2d 442, 443, disc. rev. denied, 295 N.C. 556, 248 S.E.2d 734 (1978).

We note at the outset that the trial court's findings of fact are conclusive on appeal when they are supported by competent evidence in the record. State v. Massey, 316 N.C. 558, 575, 342 S.E.2d 811, 820 (1986). However, since defendant does not dispute the trial court's findings of fact, our task is to determine whether the

trial court's legal conclusions are supported by its findings.

The trial court found that as Special Agent Allen read defendant his rights from the waiver form, defendant indicated that he understood each of those rights by writing "Yes" or "Yes sir" beside each rights paragraph on the form. Defendant never indicated to Special Agent Allen that he did not understand any of his rights, and he gave reasonable and logical answers to Detective Locklear's questions. The trial court found that although defendant had difficulty understanding abstractions, he could understand information on a concrete level. The trial court also found that defendant had previously been involved in court proceedings and that he had a general understanding of the role of lawyers and police in the criminal justice system. Prior experience with the criminal justice system is an important factor in determining whether the defendant made a knowing and intelligent waiver. State v. Fincher, 309 N.C. 1, 305 S.E.2d 685 (1983); see also State v. Jackson, 308 N.C. 549, 304 S.E.2d 134 (1983). In State v. Fincher, 309 N.C. 1, 305 S.E.2d 685 (1983), the North Carolina Supreme Court held that the confession of a mentally retarded defendant was admissible despite expert testimony that he could not read and understand the waiver form. The court

> held that the trial court's findings of fact were sufficient to support its conclusion that the defendant made a valid waiver. In Fincher, the trial court found that each time the defendant was read his rights, "he unhesitatingly responded that he understood them." Id. at 20, 305 S.E.2d at 697. The Fincher court also found that the defendant's answers to the officer's questions were responsive and reasonable, and that no threats or inducements were made to the defendant. The Fincher trial court also found that the defendant had prior experience with the criminal justice system. Accordingly, we hold that under Fincher, the trial court's findings of fact adequately support its conclusion that defendant voluntarily, knowingly, and intelligently waived his Miranda rights.

112 N.C.App. 390, 394-398, 436 S.E.2d 163, 164-168.

50. The North Carolina Supreme Court affirmed, per curiam. State v. Brown, 339 N.C. 606, 453 S.E.2d 165 (1995).

51. In 2009, Leon Brown sought assistance from the North Carolina Innocence Commission (NCIIC). The NCIIC agreed to accept Brown's case and began its investigation, which included DNA testing of various pieces of physical evidence found at the scene of the crime, testing that was not possible in 1983 or 1992. [Stellato dep., 39:18-40:17, 117:25-118:8]

52. During the course of its investigation, the NCIIC discovered numerous additional confessions that McCollum had made regarding his involvement in the rape and murder of Sabrina Buie.

53. During a July 19, 2010 telephone conversation with Geraldine Ransom, Brown's sister and McCollum's half-sister, Ms. Ransom told NCIIC Assistant Director Sharon Stellato that McCollum had written her a letter in which he related that James Shaw and a man named Curtis or Kurt had picked McCollum up in a car on the night of the murder. In a memorandum created by the NCIIC in the normal course of business, Ms. Ransom related that McCollum told her that "They drive down the dirt road behind the store and Shaw pulled out a gun and told Henry 'Buddy' McCollum to shut up, that they were going to kill Sabrina. Henry McCollum said they made him help hold Sabrina down." [Stellato dep., 42:8-49:15, 51:8-53:16, Ex. 21]

54. In a recorded follow-up telephone conversation with Ms. Ransom on August 20, 2010, documented in a memorandum created by the NCIIC in the normal course of its business, Ms. Ransom advised Stellato that she could not find any of McCollum's letters, but reiterated that she was "very confident" that McCollum had confessed his involvement in Sabrina's murder. Ransom even offered to elicit another letter from McCollum admitting his involvement in the murder. Stellato advised against this course of action. [Stellato dep., 54:3-56:4, Ex. 22]

55. On February 16, 2011, Stellato spoke with the Plaintiffs' mother, Mamie Brown, via

telephone in a recorded conversation that was documented in a memorandum created by the NCIIC in the normal course of business. Ms. Brown advised Ms. Stellato that "Henry told her that night that James Shaw caught him and made him ride with them and made him hold victim's hand while they raped her. Henry was afraid not to do it or he would be killed." [Stellato dep., 57:20-64:10, Ex. 23] Ms. Brown advised that she believed that McCollum had implicated his brother Leon because he had always been jealous of him. [Stellato dep., 64:11-65:4, Ex. 23]

56. During an interview with Plaintiff Leon Brown on August 4, 2010, documented in the normal course of NCIIC business, Brown told Ms. Stellato that during a prison visit with his brother Henry McCollum, McCollum told Brown that he [McCollum] was present during the murder of Sabrina Buie, but had only held her down. [Stellato dep., 74:1-78:5, Ex. 25]

57. During a subsequent interview with Brown on July 21, 2014, which was recorded and transcribed and included in the NCIIC's case file, Brown told Ms. Stellato that McCollum had related to him during a prison visit McCollum had held Sabrina's arm down while she was murdered. "He said he just held her arm down." [Stellato dep., 66:5-68:4, Ex. 24, 17:5-8] "He told me he just held her down, he didn't do nothing." [Stellato dep., 69:23-70:3, Ex. 24, 18:8-10; Brown dep., 84:11-25] "He, he said that he held her down and one put her panties on a stick – inaudible – down her throat." [Stellato dep., 72:21-73:24, Ex. 24, 21:8-12] Brown also acknowledged that McCollum had implicated him, stating "He told the people that I was involved in

something like that." [Stellato dep., Ex. 24, 21:6; Brown dep., 86:7-87:15] Brown confirmed in his deposition that he had told Ms. Stellato the truth. [Brown dep., 75:14-17; 106:18-107:3]

58. During Plaintiff Brown's 2016 deposition, he confirmed that his brother, Henry McCollum, had admitted to him that he was present during the murder of Sabrina Buie.

> A: I don't – I don't – I don't recall him telling me that, though. But he – he – he said – he said he was there.
>
> Q: He said he was there?
>
> A: Yeah, he said he was there, though –
>
> Q: – Okay.
>
> A: – But he ain't do nothing.
>
> Q: What did he say he saw?
>
> A: He didn't recall. He just said – he told me he was there.
>
> Q: He was there, where?
>
> A: At – at – at the night of the crime. He was there.

(Brown dep., 84:13-25)

59. The NCIIC caused DNA testing to be conducted on several items of physical evidence found at the crime scene. DNA on a cigarette butt found near a path that ran along the edge of the soybean

field was determined to match Roscoe Artis. [Stellato dep., 118:7] This path was used as a short cut between a convenience store where cigarettes were sold and a nearby neighborhood which included a residence wherein Roscoe Artis lived with his sister. [Stellato dep., 120:4-5; Sampson, 80:17-81:1]

60. The DNA match on the cigarette butt does not provide any information regarding when Roscoe Artis may have smoked the cigarette, what was happening while he did so, when the cigarette was deposited at the scene (other than sometime before September 26, 1983), or otherwise link Artis to the rape and murder of Sabrina Buie. [Stellato dep., 118:19-119:24; Sampson, dep. 80:17-81:1; Sealey dep. II, 69:22-70:12]

61. Other than to Miss Buie in some instances, DNA testing of the other items of physical evidence did not result in a match to any known individuals, to include Plaintiffs or Roscoe Artis. [Stellato dep., 130:14-133:19; Ex 27, 57:23-69:4]

62. The NCIIC advised the attorneys representing the Plaintiffs (not the counsel representing Plaintiffs in this civil matter), as well as the Robeson County District Attorney, regarding the DNA match to Roscoe Artis on the cigarette butt. However, the NCIIC did not advise the District Attorney regarding McCollum's additional confessions that it had had uncovered. [Stellato dep., 232:20-234:10]

63. Counsel for the plaintiffs (again, not the counsel representing Plaintiffs in this civil matter) subpoenaed Ms. Stellato was to testify at a hearing on a Motion for Appropriate Relief (MAR) held in

Robeson County Superior Court on September 2, 2014. [Stellato dep., 92:11-17]

64. Ms. Stellato testified at the MAR hearing regarding the DNA match to Roscoe Artis on the cigarette butt. Notwithstanding the NCIIC's charter as a neutral fact finding agency [Stellato dep., 14:18-20, 16:18-20], Stellato also testified regarding her subjective perceptions of inconsistencies within the Plaintiffs' confessions and her theories regarding Roscoe Artis' potential involvement in the murder of Sabrina Buie. [Stellato dep., 103:5-116:23] However, she remained silent regarding the additional confessions by McCollum to his brother, sister and mother that she had uncovered, even in response to the question: "Is there any evidence that has been developed during the course of the [NCIIC] investigation that linked Mr. McCollum and Mr. Brown to the rape and murder of Sabrina Buie?" [Stellato dep., 134:11-140:7, 148:21-152:10, 154:9; transcript of the September 2, 2014 MAR hearing, 115:20-24]

65. None of the law enforcement officers involved in the investigation of the murder of Sabrina Buie were ever interviewed by the NCIIC. [Stellato, dep., 146:22-148:20; Snead dep., 99:21-100:10, 156:17-24; Sealey dep. II, 72:17-73:12; Sampson dep., 79:7-79:19]

66. Ms. Stellato was the only witness called to testify at the MAR hearing. [Transcript of the September 2, 2014 MAR hearing] None of the law enforcement officers involved in the investigation of the murder of Sabrina Buie were notified of the MAR hearing or asked to testify in it. [Stellato, dep.,

146:22-148:20; Snead dep., 99:21-100:10, 156:17-24; Sealey dep., 72:17-73:12; Sampson dep., 79:7-79:19] However, Sheriff Sealey did attend portions of the hearing. [Sealey dep., 72:17-73:12]

67. The Motion for Appropriate Relief was based solely on the cigarette butt. [Stellato dep., 135:23-25; Transcript of the September 2, 2014 MAR] Based solely upon the DNA match on the cigarette butt to Roscoe Artis and a lack of opposition from the District Attorney,[2] Superior Court Judge Douglas B. Sasser entered an Order vacating the Plaintiffs' convictions and ordered their immediate discharge from prison. [September 2, 2014 Order for Relief]

68. The September 2, 2014 Order for Relief does not determine or state that the Plaintiffs' arrests were not based upon probable cause, does not impeach the constitutionality of Plaintiffs' confessions, and does not impugn the conduct of law enforcement officers, including defendants Sealey and Locklear, in any way. The Order does not find that the Plaintiffs' rights were violated in any manner [September 2, 2014 Order for Relief]

69. After the September 2, 2014, MAR hearing, the NCIIC terminated its investigation, which was largely unfinished. [Stellato dep., 235:5-235:25]

70. On June 5, 2015, Governor Pat McCrory issued Pardons of Innocence to the Plaintiffs. The

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[2] It would seem doubtful that the District Attorney would have joined the motion for appropriate relief had he been apprised of all of the results of the North Carolina Innocence Inquiry Commission's investigation, such as McCollum's ongoing confessions of his involvement in the crime.

Pardons of Innocence in no way impeach the constitutionality of the Plaintiffs' confessions, suggest improper conduct on the part of law enforcement officers, or establish that the Plaintiffs' rights were violated in any manner. [June 5, 2015 Pardons of Innocence]

71. Roscoe Artis has not been charged in the murder of Sabrina Buie. [Luther Johnson Britt, III Aff., ¶ 10]

72. During the investigation of the murder of Sabrina Buie 1983 and the Plaintiffs' criminal trials in 1984, 1991 and 1992, it was the policy of the Robeson County Sheriff's Office that all deputies and Sheriff's Office personnel would at all times comply with and follow the Constitution of the United States Constitution and the North Carolina Constitution, and would comply with all state and federal laws and regulations in effect at that time, to include authority relating to the questioning of criminal suspects and the disclosure of exculpatory evidence. It would have been contrary to the policies and practices of the Sheriff of Robeson County for a deputy to have violated the United States Constitution, the North Carolina Constitution, or the laws and regulations of the United States or the State of North Carolina. [Sealey, Aff., ¶ 7] That policy remains the case today. [Sealey, Aff., ¶ 5]

73. During its more than four year investigation, the NCIIC found no evidence of any coercion, improper conduct or wrongdoing on the part of any law enforcement officers involved in the Plaintiffs' cases, to include the withholding of any evidence or information by any member of Robeson

County Sheriff's Office, including defendants Sealey and Locklear. [Stellato dep., 185:18-186:10; 277:14-16; 286:15-286:20]

74. The current Robeson County District Attorney cannot account for what was and was not contained in the District Attorney's files at the time of the plaintiffs' criminal trials. [Luther Johnson Britt, III Aff., ¶ 9] As determined by the NCIIC, after more than twenty years following the plaintiffs' trials, the Robeson County District Attorney's files regarding these matters no longer existed to a large extent. [NCIIC Journal; 113, 116] As set forth in the NCIIC's activity journal, November 19, 2011, District Attorney Johnson Britt reported to Ms. Stellato that he "has not been able to 'put his hands on any matters related to Leon Brown' – he has 'just a few matters related to the codefendant McCollum' and if we need that, he will copy. He has been in touch with his predecessor and the ADA that tried the Brown case and none of them know where the file could be." [NCIIC Journal; 113] Mr. Britt subsequently reported on February 15, 2011 that he had found "part" of the file. [NCIIC Journal; 110]

75. After obtaining and reviewing documents and information from many sources, including information compiled by the North Carolina Actual Innocence Commission, the Robeson County District Attorney cannot say that any of the defendants withheld information from the Robeson County District Attorney's office of failed to produce any information to it. [Luther Johnson Britt, III Aff., ¶ 9]

Respectfully submitted, this 3rd day of April, 2017.

/s/ BRADLEY O. WOOD
James R. Morgan, Jr.
N.C. State Bar No.: 12496
Bradley O. Wood
N.C. State Bar No.: 22392
WOMBLE CARLYLE SANDRIDGE & RICE,
A Limited Liability Partnership
One West Fourth Street
Winston-Salem, NC 27101
Telephone: (336) 721-3600
Facsimile: (336) 721-3660
E-mail: jmorgan@wcsr.com
E-mail: bwood@wcsr.com
Counsel for Defendants Kenneth Sealey and Robert E. Price, Administrator C.T.A. of the Estate of Joel Garth Locklear, Sr.

CERTIFICATE OF SERVICE

On April 3, 2017, the undersigned electronically filed the foregoing **STATEMENT OF UNDISPUTED MATERIAL FACTS PURSUANT TO LOCAL CIVIL RULE 56.1 OF DEFENDANTS KENNETH SEALEY AND ROBERT E. PRICE, AS ADMINISTRATOR C.T.A. OF THE ESTATE OF JOEL GARTH LOCKLEAR, SR.** with the Clerk of Court using CM/ECF system, which will send notification of such filing to the following:

Jaime T. Halscott
Patrick M. Megaro
Halscott Megaro, P.A.
33 East Robinson Street
Suite 220

Orlando, FL 32801
Email: jhalscott@halscottmegaro.com
Email: pmegaro@appealslawgroup.com

Scott Brettschneider
118-35 Queens Boulevard, Suite 400
Forest Hills, NY 11375
Email: scottfreelaw@aol.com
Counsel for Plaintiffs

Garris Neil Yarborough
Timothy C. Smith, Jr.
Yarborough Winters & Neville, P.A.
P. O. Box 705
Fayetteville, NC 28302-0705
Email: gnyesq@ywnlaw.com
Email: timsmith@ywnlaw.com

John Stewart Butler , III
Anderson, Johnson, Lawrence & Butler, LLP
P. O. Box 53945
Fayetteville, NC 28305-3945
jsbutler@andersonjohnson.com
Counsel for Defendants Town of Red Springs, Larry Floyd, and Paul Canady, Administrator of the Estate of Luther Haggins

Hal F. Askins
Special Deputy Attorney General
J. Joy Strickland
Assistant Attorney General
N.C. Department of Justice
P. O. Box 629
Raleigh, NC 27602-0629
Email: haskins@ncdoj.com
Email: jstrickland@ncdoj.com

Counsel for Defendants Kenneth Snead and Leroy Allen

Dan M. Hartzog
Dan M. Hartzog, Jr.
Katherine M. Barber-Jones
Cranfill Sumner & Hartzog, LLP
Post Office Box 2708
Raleigh, NC 27611
Email: dmh@cshlaw.com
Email: dhartzogjr@cshlaw.com
Email: kbarber-jones@cshlaw.com
Counsel for Defendant Town of Red Springs

/s/ BRADLEY O. WOOD
Bradley O. Wood
N.C. State Bar No.: 22392
WOMBLE CARLYLE SANDRIDGE & RICE,
A Limited Liability Partnership
One West Fourth Street
Winston-Salem, NC 27101
Telephone: (336) 728-7012
Facsimile: (336) 726-6913
E-mail: bwood@wcsr.com
Counsel for Defendants Kenneth Sealey, and Robert E. Price, Administrator C.T.A. of the Estate of Joel Garth Locklear, Sr.

[ENTERED: May 5, 2017]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA WESTERN DIVISION
Case No. 5:15-cv-00451-BO

HENRY LEE MCCOLLUM and J. DUANE GILLIAM, as Guardian of the Estate of LEON BROWN, Plaintiffs, v. TOWN OF RED SPRINGS, et al., Defendants.	**REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (ON BEHALF OF DEFENDANTS KENNETH SEALEY AND ROBERT E. PRICE, AS ADMINISTRATOR C.T.A. OF THE ESTATE OF JOEL GARTH LOCKLEAR)**

Many of the arguments made by plaintiffs in Plaintiffs' Response to Defendants Sealey and Locklear's Motion for Summary Judgment (D.E. 185) (hereafter "plaintiffs' response") are the same arguments made by plaintiffs in their summary judgment motion/brief. (D.E. 127). Therefore, the defendants incorporate by reference "Defendants Sealey and Locklear's Response in Opposition to 'Plaintiffs' Motion for Summary Judgment as to Plaintiffs' Claims and Summary Judgment as to Defendants' Affirmative Defenses with Incorporated Memorandum of Law.'" (D.E. 177) (hereafter "defendants' response"), and further incorporate by

reference Sealey and Locklear's response to plaintiffs' motion for sanctions. (D.E. 153).

I. PLAINTIFFS' FIRST AND THIRD CAUSES OF ACTION, FOR "FALSE ARREST" AND "MALICIOUS PROSECUTION" UNDER SECTION 1983, FAIL AS A MATTER OF LAW BECAUSE PROBABLE CAUSE EXISTED

As plaintiffs concede, if probable cause existed, plaintiffs' Section 1983 claims for "false arrest" and "malicious prosecution" fail as a matter of law. (Plaintiffs' response, pp. 8, 13).

A. This Court Must Apply the North Carolina Law of Collateral Estoppel

At pages 13-14 of defendants' summary judgment brief, defendants demonstrate that this Court is obligated to apply the North Carolina law of collateral estoppel to determine whether collateral estoppel bars plaintiffs from relitigating any issues in this case. Plaintiffs have cited no contrary authority. See, e.g., Feldman v. Law Enforcement Associates, Inc., 955 F. Supp. 2d 528, 536 (E.D.N.C. 2013) aff'd, 752 F.3d 339 (4th Cir. 2014) ("[W]hen a party does not address arguments made by a movant, the Court may treat those arguments as conceded.").

B. Under the North Carolina Law of Collateral Estoppel, the Plaintiffs' Convictions Conclusively Establish the Existence of Probable Cause, and, Moreover, the State Judges' Rulings on Plaintiffs' Motions to Suppress Establish that Plaintiffs Voluntarily

Came to the Police Station, Voluntarily Waived Any Miranda Rights, and that Their Confessions Were Voluntary

A large portion of plaintiffs' response is devoted to an attempt to relitigate whether plaintiffs voluntarily came to the police station, voluntarily spoke with officers, and voluntarily confessed. (Plaintiffs' response, pp. 1, 5-17, 21-22; pars. 8-9, 16-55, 64-69). However, as shown in defendants' summary judgment brief at pages 13-20 and defendants' response at pages 3-14, under North Carolina collateral estoppel law, plaintiffs' convictions conclusively establish the existence of probable cause, and, moreover, the state judges' rulings on plaintiffs' motions to suppress establish that plaintiffs voluntarily came to the police station and spoke to officers, voluntarily waived any Miranda rights, and that their confessions were voluntary.

At pages 14-20 of their summary judgment brief, defendants Sealey and Locklear cite longstanding, well established North Carolina case authority demonstrating that issues litigated and decided in a criminal case are entitled to collateral estoppel effect in a later civil case in situations where the elements of collateral estoppel are satisfied, even if the judgment is later reversed, vacated, or set aside. Plaintiffs do not contest defendants' recitations or interpretations of these cases, and do not argue that defendants misstate the holdings of these cases. Therefore, this Court should treat defendants' statements of the interpretations and holdings of these cases as being conceded by plaintiffs. See Feldman, supra. Instead, plaintiffs assert, without analysis, that the cases cited by defendants at pages

14-20 of their summary judgment brief are "inapposite." (Plaintiffs' response, p. 18). In fact, the authority cited by defendants is directly relevant and on point, and shows that under the North Carolina law of collateral estoppel, the plaintiffs' convictions establish the existence of probable cause, and, moreover, the state judges' rulings on plaintiffs' motions to suppress establish that plaintiffs voluntarily came to the police station, voluntarily spoke with officers, voluntarily waived any Miranda rights, and voluntarily confessed.

C. The Arguments Made at Pages 6-8 of Plaintiffs' Response are Fatally Flawed

At page 6 of their response, plaintiffs are apparently arguing that under United States Supreme Court precedent, a judgment that has been "vacated, set aside, or otherwise invalidated may not be used for…collateral estoppel purposes." However, as shown below, the cases cited by plaintiffs do not support plaintiffs' argument on this point.

The plaintiffs cite Justice Stevens' concurrence in Matsushita Electrical Industrial Co., Ltd. v. Epstein, 516 U.S. 367, 395 (1996), quoting Kremer v. Chemical Construction Corp., 456 U.S. 461, 482 (1983) for the proposition that a "constitutionally infirm judgment" is not entitled to preclusive effect. (Plaintiffs' response, p. 6). It is true that the Supreme Court has held that a "constitutionally infirm judgment" is not entitled to preclusive effect, Kremer, supra.; however, this holding has no application to this case. The transcripts of the plaintiffs' criminal proceedings show that the proceedings comported with the requirements of the Constitution, including

Due Process requirements. [D.E. 140-1, 141-1, 141-2, 142-1, 142-2, 142-3, 142-4, 143-1, 143-2, 144-1, 144-2, 147-2, 161-31, 145-1, 145-2, 146-1, 166-3]. The first conviction was overturned due to a jury instruction error, and the last two convictions were specifically held on appeal to be constitutional. See State v. McCollum, 334 N.C. 208, 433 S.E.2d 144 (1993), cert. den., 512 U.S. 1254, 114 S.Ct. 2784 (1994); State v. Brown, 112 N.C. App. 390, 436 S.E.2d 163 (1993), aff'd per curiam, 339 N.C. 606, 453 S.E.2d 165 (1995). Moreover, the state court's September 2, 2014 Order did not find that the plaintiffs' constitutional rights had been infringed. Instead, the Order was granted solely under N.C. Gen. Stat. § 15A-270(c), which authorizes a court to enter an appropriate order "[i]f the results of DNA testing…are favorable to the defendant…." [D.E. 155-7,161-25]. Thus, the plaintiffs' suggestion that plaintiffs' convictions were "constitutionally infirm" is without merit.

Similarly, plaintiffs' reliance on Heck v. Humphrey, 512 U.S. 477, 486 (1994) (See plaintiffs' response, pp. 6-7) is completely misplaced. The Heck decision held that a Section 1983 claim for damages attributable to an alleged unconstitutional conviction "does not accrue until the conviction or sentence has been invalidated." Id. at 489-90. The Heck decision does not deal with collateral estoppel issues. Accordingly, plaintiffs' reliance upon Heck is misplaced.

The plaintiffs' reliance upon Thomas M. McInnis & Associates, Inc. v. Hall, 318 N.C. 421, 349 S.E.2d 552 (1986) is also misplaced. It is true that the court in McInnis adopted the position of the Restatement (Second) of Judgments regarding

mutuality, holding that mutuality of parties is not required where defendants assert collateral estoppel defensively. Id., 318 N.C. at 433-34, 349 S.E.2d at 559-60. However, North Carolina cases decided after McInnis show that issues decided in criminal trials are entitled to collateral estoppel effect even in the situation where the judgment is later reversed or vacated. See, e.g., Burton v. City of Durham, 118 N.C. App. 676, 680 and 682-3, 457 S.E.2d 239, 331-333, disc. rev. den. and cert. den., 341 N.C. 419, 461 S.E. 2d 756 (1995) (citing McInnis case, and holding that plaintiffs' convictions established probable cause even though the convictions were later dismissed). Thus, the plaintiffs' reliance upon McInnis is misplaced.

The plaintiffs also cite the case of Stokely v. Stokely, 30 N.C. App. 351, 354, 227 S.E.2d 131, 134 (N.C. App. 1976). Stokely is irrelevant to the instant case, because it deals with a collateral attack in equity upon a divorce judgment. However, even if the Stokely decision has some relevance, it helps the defendants, not the plaintiffs. The Court in Stokely stated:

> The final judgment of a court…can be attacked…only if the alleged fraud is extrinsic rather than intrinsic. Fraud is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. If an unsuccessful party…has been prevented from fully participating therein there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an action, however, and

> who has not been prevented from full participation, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. Fraud perpetrated under such circumstances is intrinsic….It must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation;…when he has a trial he must be prepared to meet and expose perjury then and there.

30 N.C. App at 354-5, 227 S.E.2d at 134. In the instant case, plaintiffs' arguments regarding probable cause, particularly the confessions, are to the effect that the State presented false testimony and/or evidence at the plaintiffs' criminal trials. Even if Stokely is somehow relevant in this case, the rule articulated in Stokely would defeat plaintiffs' arguments: Plaintiffs had a full and fair opportunity to litigate all the issues at their criminal trials, and the alleged "fraud" was intrinsic, not extrinsic. Thus, even if Stokely were somehow relevant to this case – and it is not – the Stokely decision would defeat plaintiffs' arguments.

Plaintiffs also suggest, at page 8, paragraph 25 of their response, that this Court's ruling on Snead and Allen's motion to dismiss under Rule 12(b)(6) [D.E. 83] somehow forecloses defendants Sealey and Locklear from relying upon the doctrine of collateral

estoppel at the Rule 56 stage. However, this argument is fatally flawed. See defendants' response to plaintiffs' summary judgment motion/brief at pages 13-14, which is incorporated by reference.

D. McCollum's Attorney's Statements in Opening and Closing Arguments at McCollum's 1991 Trial (that McCollum Was Present for and Involved in Buie's Rape and Murder) Are Judicial Admissions

Sealey and Locklear have cited authority demonstrating that McCollum's attorney's statements at McCollum's 1991 trial (that McCollum was present for and involved in Buie's rape and murder) are judicial admissions, and that McCollum is therefore judicially estopped from taking a contrary position. (See defendants' summary judgment brief, p. 20 and defendants' response, pp. 15-16). In their summary judgment response, plaintiffs do not address this argument. Thus, plaintiffs should be deemed to have conceded this argument. See Feldman, supra.

II. DEFENDANTS SEALEY AND LOCKLEAR ARE ENTITLED TO SUMMARY JUDGMENT AS TO PLAINTIFFS' SECOND CAUSE OF ACTION FOR "DEPRIVATION OF DUE PROCESS"

The plaintiffs' arguments at pages 17-24 (pars. 56-71) of their response are almost identical to the arguments contained in their summary judgment motion/brief at pages 7-11 (pars. 22-32). Therefore, Sealey and Locklear incorporate by reference their response to plaintiffs' summary judgment motion/brief at pages 17-27, which shows that

defendants Sealey and Locklear are entitled to summary judgment as to plaintiffs' Second Cause of Action.

Defendants would also point out that the plaintiffs have come forward with no evidence to support their false assertions that defendants subjectively knew that Artis was the actual murderer; that defendants "sanitized their files" to exclude mention of Artis; that defendants concealed unspecified exculpatory evidence; and that defendants persuaded Sinclair and perhaps Floyd to falsely testify. (Plaintiffs' response, pp. 3, 4, 15, 17-20, 23; pars. 8, 11, 49, 56-59, 61, 69). Simply repeating false statements over and over in multiple filings, as plaintiffs have done, does not amount to evidence. Plaintiffs' speculation is not sufficient to defeat defendants' motion for summary judgment. See Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 242 (4th Cir. 1982). Plaintiff "cannot create a genuine issue of fact through mere speculation or the building of one inference upon another." Harleysville Mutual Ins. Co. v. Packer, 60 F.3d 1116, 1120 (4th Cir. 1995).[1]

Also, as shown in defendants' summary judgment brief at page 25, officers are absolutely immune under Section 1983 for their testimony at judicial proceedings. Plaintiffs have made no contrary

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[1] Also, contrary to plaintiffs' suggestion (Plaintiffs' response, pp. 20-21), there is no evidence of a "common plan or scheme" by defendants to violate plaintiffs' constitutional rights. The deposition testimony of Lee Sampson, cited by plaintiffs as evidence on this point, simply shows that officers helped the District Attorney prepare for trials. (D.E. 161-33, pp. 30-31). Plaintiffs' citation of this testimony as evidence of a "scheme" to violate constitutional rights is absurd.

argument, and have therefore conceded this point. See Feldman, supra.

As noted in defendants' response to plaintiffs' summary judgment motion/brief at pages 17-18, fn. 2, the Ninth Circuit and Fifth Circuit cases relied upon by plaintiffs – Deveraux v. Abbey, 263 F. 3d 1070 (9th Cir. 2001) and Cole v. Carson, 802 F. 3d 752 (5th Cir. 2015), vacated and remanded, 137 S.Ct. 497 (2016) – do not properly articulate the Fourth Circuit's standards for Due Process claims. However, even if these standards are applied, defendants Sealey and Locklear are nevertheless entitled to summary judgment as to plaintiffs' Due Process claims.

III. PLAINTIFFS' CLAIMS AGAINST SEALEY AND LOCKLEAR IN THEIR INDIVIDUAL CAPACITIES FAIL AS A MATTER OF LAW BECAUSE SEALEY AND LOCKLEAR ARE ENTITLED TO QUALIFIED IMMUNITY

As shown in defendants' summary judgment brief at pages 25-28, the defendants Sealey and Locklear are entitled to qualified immunity as to all claims. Defendants Sealey and Locklear incorporate by reference their response to plaintiffs' summary judgment motion/brief at pages 27-29.

IV. DEFENDANTS SEALEY AND LOCKLEAR IN THEIR OFFICIAL CAPACITY ARE ENTITLED TO SUMMARY JUDGMENT AS TO PLAINTIFFS' FOURTH CAUSE OF ACTION FOR "MUNICIPAL LIABILITY"

In cases like this, where the summary judgment issues are issues on which the plaintiffs bear the

burden of proof at trial, the defendants are not required to "support [their] motion with affidavits or other similar material negating the opponent's claim." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Instead, the moving parties simply may " 'show [ ]' – that is, point [ ] out to the district court – that there is an absence of evidence to support the nonmoving part[ies'] case." Id. at 324, 106 S.Ct. at 2554. If the moving parties show the absence of a triable issue of fact, "[t]he opposing part[ies] must demonstrate that a triable issue of fact exists; they may not rest upon mere allegations or denials." Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir.), cert. denied, 513 U.S. 813, 115 S.Ct. 67, 130 L.Ed.2d 24 (1994).

In their summary judgment brief, Sealey and Locklear pointed out to this Court that "plaintiffs have brought forward no evidence that the alleged constitutional violations were caused by an official custom or policy of the Sheriff's Office. . . ." (Defendants' summary judgment brief, p. 29). Moreover, defendants went a step further, introducing evidence affirmatively showing that, assuming arguendo that plaintiffs' constitutional rights were violated, they were not violated as a result of any official policy of the Sheriff's Office. (Affidavit of Sealey). In response, plaintiffs have introduced no evidence regarding the official policies or customs of the Sheriff's Office. Thus, Sealey, and Locklear – in their official capacity – are entitled to summary judgment as to plaintiffs' claim for "Municipal Liability."

Plaintiffs appear to be arguing that because defendants Sealey and Locklear were working with Chief Haggins of Red Springs when plaintiffs

confessed, somehow Haggins could make official policy for the Sheriff's Office under Monell. (See plaintiffs' response, p. 25, pars. 75-76). The plaintiffs cite no authority for this bizarre proposition, and, indeed, no such authority exists.

Also, plaintiffs cite defendant Sealey's deposition (D.E. 139-5, pp. 33-34) for the proposition that the Sheriff's Office "did not have any policies…from 1983 through 1994/95…." (Plaintiffs' response, pp. 25-26). This is a misrepresentation of Sealey's testimony. In fact, Sealey testified that no written policy or procedure manual existed until 1994 or 1995. However, an official policy or custom under Monell need not be written. See, e.g., Pembaur v. City of Cincinnati, 475 U.S. 469, 480-1, 106 S.Ct. 1292 (1986) (stating that an "official policy" under Monell "often refers to formal rules or understandings" that are "not always committed to writing…."). Sealey's affidavit, which is uncontradicted, shows that the Sheriff's Office did in fact have policies during the relevant time period, and that, assuming arguendo that plaintiffs' constitutional rights were violated, they were not violated as a result of any official policy of the Sheriff's Office.

Plaintiffs also appear to be attempting to assert a "Municipal Liability" claim under Section 1983 for failure to train. (Plaintiffs' response, pp. 24-25, Point V and par. 77). However, such a claim by plaintiffs fails as a matter of law. As the Fourth Circuit has stated:

> [A] failure to train can constitute a "policy or custom" actionable under section 1983 only where the "municipality's failure to

> train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants." City of Canton [v. Harris, 489 U.S. 378, 388, 109 S. Ct. 1197, 1205-7, 103 L. Ed. 2d 412 (1989)]; Mitchell v. Aluisi, 872 F.2d 577, 581 (4th Cir. 1989); Spell [v. McDaniel, 824 F.2d 1380, 1390 (4th Cir. 1987)]. And only if, "in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights," can a municipality reasonably "be said to have been deliberately indifferent to that need." City of Canton, 489 U.S. at 390, 109 S. Ct. at 1205. Mere negligence is insufficient to impose section 1983 liability on a municipality for alleged failure to train. The specifically identified deficiency in training also must be shown to have in fact caused the ultimate violation. Id. at 391, 109 S. Ct. at 1206; Spell, 824 F.2d at 1390. Moreover, neither a policy or custom of deficient training nor the required causal connection can be shown by proof of a single incident of unconstitutional activity alone.

Jordan by Jordan v. Jackson, 15 F.3d 333, 341 (4th Cir. 1994). Plaintiffs have not come forward with any evidence to establish any of the above elements. In fact, Sealey's supplemental affidavit, which is attached, shows that the training was more than adequate. Thus, plaintiffs' purported Monell claim for failure to train fails as a matter of law.

The only "evidence" cited by plaintiffs regarding training is Sealey's testimony that he did not recall "receiv[ing] specific training on office policies, procedures, an employee handbook or anything like that" between 1974 and 1983. (Plaintiffs' response, p. 26, par. 78, citing D. E. 139-5, p. 34). Sealey's testimony that he did not recall being specifically trained on "office policies [or] procedures" or "an employee handbook or anything like that" does not come remotely close to the evidence plaintiffs would need to support a Section 1983 Monell claim for inadequate training.

Plaintiffs also appear to be attempting to assert a claim under 42 U.S.C. § 1983 for failure to provide proper supervision. (Plaintiffs' response, p. 25, par. 77). The elements necessary to establish supervisory liability under Section 1983 are: (1) that the supervisor had knowledge that his subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens; (2) that the supervisor's response was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices"; and (3) that there was an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiffs. See, e.g., Wilkins v. Montgomery, 751 F.3d 214, 226-27 (4th Cir. 2014). However, plaintiffs have failed to bring forward any evidence of the above elements necessary to establish a claim for inadequate supervision.

The plaintiffs appear to be arguing that their claim for inadequate supervision is "evidenced" by the fact that defendants Sealey and Locklear were working with Chief Haggins of the Red Springs Police

Department. (Plaintiffs' response, p. 25, par. 77). However, the fact that the Sheriff's Office was working in concert with the Town of Red Springs and the SBI to investigate the murder and rape of Buie does not constitute evidence of an inadequate supervision claim under Section 1983. Plaintiffs' apparent suggestion to the contrary is without merit.[2]

CONCLUSION

Based on the foregoing arguments and authorities, as well as the arguments and authorities contained in defendants' summary judgment brief and defendants' response, the defendants Sealey and Locklear respectfully submit that their motion for summary judgment should be granted.

Respectfully submitted, this 5th day of May, 2017.

/S/ James R. Morgan, Jr.
James R. Morgan, Jr.
N.C. State Bar No.: 12496
/S/ Bradley O. Wood
Bradley O. Wood
N.C. State Bar No.: 22392
WOMBLE CARLYLE SANDRIDGE & RICE,
A Limited Liability Partnership
One West Fourth Street
Winston-Salem, NC 27101

[2] Contrary to plaintiffs' argument at page 26, paragraph 81, the case of Stockton v. Wake County, 173 F. Supp. 3d 292 (E.D.N.C. 2016) does not deal with "the same issue" as the instant case. The Stockton decision does not affect the fact that, under well-established law, the defendants are entitled to summary judgment as to plaintiffs' Section 1983 claim for "Municipal Liability."

Telephone: (336) 721-3600
Facsimile: (336) 721-3660
E-mail: jmorgan@wcsr.com
E-mail: bwood@wcsr.com
Counsel for Defendants Kenneth Sealey, individually and in his official capacity as the Sheriff of Robeson County, and Robert E. Price, as Administrator C.T.A. of The Estate of Joel Garth Locklear, Sr.

CERTIFICATE OF SERVICE

This is to certify that on May 5, 2017, the undersigned caused to be served the foregoing **REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (ON BEHALF OF DEFENDANTS ROBERT E. PRICE, AS ADMINISTRATOR C.T.A. OF THE ESTATE OF JOEL GARTH LOCKLEAR, AND KENNETH SEALEY)** upon the following addressees via first-class mail.

Jaime T. Halscott
Patrick M. Megaro
Halscott Megaro, P.A.
33 East Robinson Street
Suite 220
Orlando, FL 32801
Email: jhalscott@halscottmegaro.com
Email: pmegaro@appealslawgroup.com

Scott Brettschneider
118-35 Queens Boulevard, Suite 400
Forest Hills, NY 11375
Email: scottfreelaw@aol.com

Counsel for Plaintiffs

Hal F. Askins
Special Deputy Attorney General
J. Joy Strickland
Assistant Attorney General
N.C. Department of Justice
P. O. Box 629
Raleigh, NC 27602-0629
Email: haskins@ncdoj.com
Email: jstrickland@ncdoj.com

Counsel for Defendants Kenneth Snead and Leroy Allen

Garris Neil Yarborough
Timothy C. Smith, Jr.
Yarborough Winters & Neville, P.A.
P. O. Box 705
Fayetteville, NC 28302-0705
Email: gnyesq@ywnlaw.com
Email: timsmith@ywnlaw.com

Counsel for Defendants Town of Red Springs, Larry Floyd, and Paul Canady, Administrator of the Estate of Luther Haggins

Dan M. Hartzog
Dan M. Hartzog, Jr.
Katherine M. Barber-Jones
Cranfill Sumner & Hartzog, LLP
Post Office Box 2708
Raleigh, NC 27611
Email: dmh@cshlaw.com
Email: dhartzogjr@cshlaw.com
Email: kbarber-jones@cshlaw.com

Counsel for Defendant Town of Red Springs

John Stewart Butler , III
Anderson, Johnson, Lawrence & Butler, LLP
P. O. Box 53945
Fayetteville, NC 28305-3945
Email: jsbutler@andersonjohnson.com

Counsel for Defendants Town of Red Springs, Larry Floyd, and Paul Canady, Administrator of the Estate of Luther Haggins

/S/ Bradley O. Wood
Bradley O. Wood
N.C. State Bar No.: 22392
WOMBLE CARLYLE SANDRIDGE & RICE,
A Limited Liability Partnership
One West Fourth Street
Winston-Salem, NC 27101
Telephone: (336) 728-7012
Facsimile: (336) 726-6913
E-mail: bwood@wcsr.com
Counsel for Defendants Kenneth Sealey, individually and in his official capacity as the Sheriff of Robeson County, and Robert E. Price, as Administrator C.T.A. of The Estate of Joel Garth Locklear, Sr.

ATTACHMENT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA WESTERN DIVISION
Case No. 5:15-cv-00451-BO

HENRY LEE MCCOLLUM and J. DUANE GILLIAM, as Guardian of the Estate of LEON BROWN,	)	
Plaintiffs,	)	**SUPPLEMENTAL AFFIDAVIT OF KENNETH SEALEY**
v.	)	
TOWN OF RED SPRINGS, et al.,	)	
Defendants.	)	

The undersigned, Kenneth Sealey, hereby states the following:

1. My name is Kenneth Sealey. I am over 18 years of age, suffer from no legal disability, and have personal knowledge of the information set forth in this Affidavit. I am a named defendant in this matter, having been sued in my official capacity as the Sheriff of Robeson County, North Carolina, and also in my individual capacity. This Supplemental Affidavit does not contradict my deposition testimony or my prior affidavit, but merely provides supplementary information regarding the training

and certification of Robeson County Sheriff's Deputies in the early 1980s.

2. Beginning in 1980, the North Carolina Criminal Justice Education and Training Standards Commission held authority over the minimum employment, training and retention standards for all law enforcement officers in North Carolina, including Sheriffs and their deputies. The Robeson County Sheriff's Office fell under the jurisdiction of the North Carolina Criminal Justice Education and Training Standard Commission. All deputies, including myself, undertook and completed the mandatory training required by the North Carolina Criminal Justice Education and Training Standard Commission, including annual in-service training. Sheriff's deputies, including myself, completed the training curriculum mandated by the North Carolina Criminal Justice Education and Training Standard Commission, doing soat various locations, including the Robeson County Sheriff's Office in Lumberton, at Robeson Community College, at the North Carolina Justice Academy, and at other locations throughout the State. I am not aware of any time in which my training and certifications, or that of any other Robeson County Deputy Sheriff that I can recall, was determined to be deficient either by the North Carolina Criminal Justice Education and Training Standard Commission or by any other authority.

3. In 1983, the North Carolina General Assembly established the North Carolina Sheriffs' Education and Training StandardsCommission to govern the employment, training and certification of Sheriffs personnel. As the North Carolina Criminal Justice Education and Training Standards Commission

had done before it, the North Carolina Sheriffs' Education and Training StandardsCommission promulgates and oversees statewide standards for the employment, training, certification and retention of Sheriffs personnel across North Carolina, including Robeson County. As we had done before, Sheriff's deputies, including myself, continued to undergoboth an initial entry training curriculum as well as an annual training curriculum propounded by the North Carolina Sheriffs' Education and Training StandardsCommission, doing so at the Robeson County Sheriff's Office, Robeson Community College, the North Carolina Justice Academy, and in other locations throughout the State. Again, I am not aware of any time in which my training and certifications, or that of any other Robeson County Deputy Sheriff that I can recall, was determined to be deficient either by the North Carolina Sheriffs' Education and Training StandardsCommission or by any other authority.

4. North Carolina Sheriffs' Education and Training StandardsCommission continues to certify all Sheriff's personnel across the State of North Carolina, including those of the Sheriff of Robeson County, and oversees the establishment, maintenance and revision of the training curriculum.

5. According to personnel records, at no time has there ever been any Robeson County Deputy Sheriff named Herman Leon Oxendine. In my more than forty years with the Robeson County Sheriff's Office, I do not recall any Deputy named Herman Leon Oxendine. This individual may have been a Red Springs Police Officer, or with some other law enforcement agency, but he was not a Robeson County Deputy Sheriff.

/s/
KENNETH SEALEY

SUBSCRIBED and SWORN to before me

This 5th day of MAY, 2017.

/s/
Notary Public
My Commission Expires 2/13/2018

[ENTERED: August 13, 2019]

RECORD NOS. 18-1366(L); 18-1402

In The
United States Court of Appeals
For The Fourth Circuit

J. DUANE GILLIAM, Guardian of the Estate of Leon Brown; RAYMOND C. TARLTON, Guardian Ad Litem for Henry Lee McCollum,

***Plaintiffs – Appellees*,**

and

HENRY LEE MCCOLLUM; LEON BROWN; GERALDINE BROWN RANSOM, Guardian of Leon Brown; KIMBERLY PINCHBECK, as limited guardian and conservator of the Estate of Henry Lee McCollum,

***Plaintiffs*,**

v.

KENNETH SEALEY, both individually and in his official capacity as the Sheriff of Robeson County; ROBERT E. PRICE, Administrator C.T.A. of the Estate of Joel Garth Locklear, Sr.; KENNETH SNEAD; LEROY ALLEN,

***Defendants – Appellants*,**

and

ROBESON COUNTY; TOWN OF RED SPRINGS; JOEL GARTH LOCKLEAR; LARRY FLOYD; ESTATE OF LUTHER HAGGINS; GERALDINE BRITT HAGGINS, as Administratix/Executrix

of the Estate of Luther Haggins; PAUL CANADY, Administrator C.T.A of the Estate of Luther Haggins; FAYETTEVILLE OBSERVER-TIMES; ASSOCIATED PRESS; WTVD TELEVISION LLC; CHARLOTTE OBSERVER,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT RALEIGH

APPELLANTS KENNETH SEALEY AND ROBERT E. PRICE, ADMINISTRATOR C.T.A. OF THE ESTATE OF JOEL GARTH LOCKLEAR, SR.'S PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

James R. Morgan, Jr.
Bradley O. Wood
WOMBLE BOND DICKINSON (US) LLP
1 West 4th Street
Winston-Salem, North Carolina 27101
(336) 721-3600

Counsel for Appellants K. Sealey & R. Price

THE LEX GROUP
♦ 1108 East Main Street ♦ Suite 1400 ♦
Richmond, VA 23219 ♦ (800) 856-4419 ♦
Fax: (804) 644-3660 ♦ www.thelexgroup.com

* * *

Appellants Kenneth Sealey and Robert E. Price, Administrator C.T.A. of the Estate of Joe Garth Locklear, Sr., through counsel, hereby file this Petition for Rehearing and Petition for Rehearing En Banc, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure.

INTRODUCTION AND STATEMENT OF COUNSEL

As explained in detail below, in the professional judgment of the undersigned counsel, the July 30, 2019 panel opinion issued in this case (hereafter "panel opinion") is in conflict with binding Supreme Court and Fourth Circuit precedent on issues of critical importance; therefore, consideration by the full court is necessary to ensure that the Fourth Circuit decision in this case does not conflict with binding Supreme Court authority, and secure and maintain uniformity of this Circuit's decisions.

STATEMENT OF THE COURSE OF PROCEEDINGS

Plaintiffs filed suit against a number of defendants, including Kenneth Sealey and Joel Garth Locklear, Sr., arising out of the alleged wrongful arrests and convictions of plaintiffs. [1]

Plaintiffs asserted the following claims: (1) a claim under 42 U.S.C. § 1983 for "false arrest" (JA

[1] Shortly after being served, Officer Locklear passed away. Thereafter, Robert E. Price, as Administrator C.T.A. of the Estate of Joel Garth Locklear, Sr., was substituted as a party. In an attempt to avoid confusion, this Petition will refer to this defendant as "Locklear."

134-136); (2) a claim under 42 U.S.C. § 1983 for "malicious prosecution" (JA 140-142); and (3) a claim under 42 U.S.C. § 1983 for "deprivation of due process" (JA 136-140).

Defendants moved for summary judgment on all claims. In an Order dated March 1, 2018, the district court denied the motions for summary judgment of Sealey and Locklear in their individual capacities as to all claims, rejecting the officers' claims of entitlement to qualified immunity. In so ruling, the district court failed to fulfill its duty to analyze each claim of plaintiffs as to each individual defendant. Instead, the district court stated that, "in light of plaintiffs' allegations that defendants worked in concert to deny the plaintiffs their constitutional rights, as well as the specifics regarding the grouping of SBI and Robeson County defendants to engage in different aspects of plaintiffs' interrogations, arrests, and investigations, the Court will not at this time attempt to parse the liability of each officer as it relates to each claim." (JA 330). In other words, the district court declined to apply the qualified immunity analysis to the specific actions of Sealey and Locklear at the Rule 56 stage; instead, the district court postponed a ruling on Sealey and Locklear's qualified immunity claims until trial. This was clear error under binding Supreme Court and Fourth Circuit authority.

The panel opinion issued its decision on July 30, 2019. The panel opinion erroneously held that it was permissible for a district court to fail to fulfill its duty to analyze each individual defendant's entitlement to qualified immunity as to each claim

at the Rule 56 stage. (Panel opinion, p. 21). More particularly, the panel opinion held that the district court could disregard its duty to analyze each individual defendant's entitlement to qualified immunity at the Rule 56 stage – and, therefore, postpone ruling on each officer's entitlement to qualified immunity until trial – because (1) the facts were "convoluted"; (2) the facts "have yet to be resolved" at trial; (3) the plaintiffs "alleged" that the officers acted in concert to violate their constitutional rights; and (4) the panel opinion mistakenly stated that Sealey and Locklear did not argue to the district court that these officers were entitled to qualified immunity based on each officer's individual actions. (Panel opinion, pp. 20-21).

The panel opinion's holding that a district court can disregard its duty to analyze each individual officer's entitlement to qualified immunity at the Rule 56 stage is clearly erroneous. Under binding Supreme Court and Fourth Circuit precedent, a district court (and a Circuit Court hearing the appeal de novo): (1) must rule upon the qualified immunity issue at the earliest possible stage of the proceeding; (2) must not postpone a ruling on qualified immunity until after the Rule 56 stage; (3) must hold plaintiffs to their burden of showing that each officer, through his own personal actions, violated the Constitution; and (4) must properly apply the qualified immunity test at the Rule 56 stage by analyzing whether each individual officer is entitled to qualified immunity as to each claim. This is explained in more detail below.

REASONS WHY A REHEARING EN BANC SHOULD BE GRANTED

I. THE PANEL OPINION IS IN CONFLICT WITH BINDING SUPREME COURT PRECEDENT IN ITS RULING THAT THE DISTRICT COURT WAS NOT REQUIRED TO PROPERLY APPLY THE QUALIFIED IMMUNITY ANALYSIS AT THE RULE 56 STAGE AS TO EACH OFFICER AND EACH CLAIM

A. A District Court Must Rule Upon the Qualified Immunity Issue, As to Each Individual Officer and Each Claim, at the Rule 56 Stage And Cannot Postpone the Ruling Until Trial

Under binding United States Supreme Court precedent, when an officer seeks a ruling from a district court that he or she is entitled to qualified immunity, the court is "required to rule upon the qualified immunity issue" at the earliest possible stage of the proceedings. See Saucier v. Katz, 533 U.S. 194, 200-201, 121 S.Ct. 2151, 2156 (2001). This is because qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation," Mitchell v. Forsyth, 472 U.S. 511, 526 (1985), and it is therefore important to "resolv[e] immunity questions at the earliest possible stage of litigation." Hunter v. Bryant, 502 U.S. 224, 227, 112 S.Ct. 534 (1991) (per curiam). See also, e.g., Ashcroft v. Iqbal, 556 U.S. 662, 672 and 684-5 (2009); Saucier, 533 U.S. at 201; Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Indeed, this Circuit has specifically held that the failure of a district court to rule on the question of qualified immunity raised by an officer's dispositive motion is error, and immediately appealable. See, e.g., District of Columbia v. Trump, ___ F.3d ___ (4th Cir. 2019); Nero v. Mosby, 890 F.3d 106, 125 (4th Cir. 2018); Jenkins v. Medford, 119 F.3d 1156, 1159 (4th Cir. 1977).

Thus, it was error for the panel opinion to hold that a district court does not have to analyze each individual defendant's entitlement to qualified immunity at the Rule 56 stage, but instead can postpone such a ruling until later.

1. The duty of the district court and the Fourth Circuit panel to properly apply the qualified immunity analysis at the Rule 56 stage as to each officer and each claim is not excused because the facts are "convoluted"

The district court was not excused from properly applying the qualified immunity analysis to Sealey and Locklear as to each claim because the facts are "convoluted" or because the facts have yet to be fully resolved. Instead, the district court and the panel must analyze Sealey and Locklear's entitlement to qualified immunity at the Rule 56 stage by viewing the evidence in the light most favorable to plaintiffs. See, e.g., Danser v. Stansberry, 772 F.3d 340, 345 (4th Cir. 2014); Brown v. Gilmore, 278 F.3d 362, 266 fn. 2 (4th Cir. 2002).

Thus, the panel opinion's holding that a district court need not apply the qualified immunity test as to each officer and each claim if the facts are

"convoluted" is in conflict with binding Supreme Court and Fourth Circuit precedent.

2. The duty of the district court and the Fourth Circuit to properly apply the qualified immunity analysis at the Rule 56 stage as to each officer and each claim is not excused in cases where plaintiffs "allege" that officers acted in concert

Under binding Supreme Court precedent, in order to hold any individual liable under Section 1983, plaintiffs must "prove that each Government-official defendant, through the official's own individual actions, has violated the Constitution . . . . [E]ach Government official . . . is only liable for his or her own misconduct." Ashcroft v. Iqbal, 556 U.S. 676-77 (2009). This is relevant to the first prong of the Saucier qualified immunity analysis. Saucier v. Katz, 533 U.S. 194, 201 (2001).

Correspondingly, under binding Fourth Circuit precedent, in order to hold any officer liable under Section 1983, plaintiffs must show that each officer "acted personally in the deprivation of plaintiff's rights." Wright v. Collins, 766 F.2d 841, 850 (4th Cir. 1985), quoting Vinnedge v. Gibbs, 550 F.2d 926, 928 (4th Cir. 1977). This is because "liability is personal, based upon each defendant's own constitutional violations." Trulock v. Freeh, 275 F.3d 391, 402 (4th Cir. 2001).

The Tenth Circuit's decision in Pahls v. Thomas, 718 F.3d 1210 (10th Cir. 2013) contains an instructive articulation of how the binding Supreme Court authority must be applied in cases involving multiple individual defendants:

> But common to all § 1983 . . . claims is the requirement that liability be predicated on a violation traceable to a defendant-official's "own individual actions." Iqbal, 556 U.S. at 676 . . . .
>
> . . . . To make out viable § 1983 . . . claims and to overcome defendants' assertions of qualified immunity, plaintiffs here must establish that each defendant – whether by direct participation or by virtue of a policy over which he possessed supervisory responsibility – caused a violation of plaintiffs' clearly established constitutional rights . . . . Plaintiffs must do more than show that their rights "were violated" or that "defendants," as a collective and undifferentiated whole, were responsible for those violations . . . . They must identify specific actions taken by particular defendants . . . that violated their clearly established constitutional rights . . . . Failure to make this showing . . . dooms plaintiffs' § 1983 . . . claims and entitles defendants to qualified immunity.

718 F.3d at 1225-26, 28.

Thus, the panel opinion's holding, that a court need not apply a qualified immunity analysis as to each individual officer and each claim if a plaintiff "alleges" that defendants acted in concert, is in direct conflict with binding Supreme Court and Fourth Circuit authority. To hold otherwise would mean that a plaintiff could defeat an individual

officer's entitlement to qualified immunity simply by alleging that the officer "acted in concert" with other defendants.

The district court and the panel opinion's error in this regard is significant to Sealey and Locklear, because plaintiffs have not shown that Sealey and Locklear acted personally with regard to a number of plaintiffs' claims.

As noted by the district court, Locklear did not participate in the interview of McCollum. (JA 319). Thus, Locklear is entitled to qualified immunity for any claim relating to McCollum's confession.

It is undisputed that Sealey was not present for the questioning of Brown. (JA 548, 555-556, 660-661). Therefore, Sealey cannot be held liable for any claims arising out of Brown's confession.

As to plaintiffs' due process claim regarding Sinclair changing his story on October 5, 1984, there is absolutely no evidence that Sealey or Locklear had anything to do with that. (JA 354, 807-813, 1177). Therefore, Sealey and Locklear are entitled to qualified immunity as to this claim.

The panel opinion held that officers violated Brady because "once officers identified Artis as a suspect [in the Buie rape and murder], they were obligated to disclose this exculpatory information." (Panel opinion, pp. 39-40). However, there is no evidence that Sealey or Locklear ever considered Artis to be a suspect in the Buie case.

The panel opinion states that the plaintiffs' due process claim for failure to adequately

investigate included the failure to test Artis or Sinclair's fingerprints. (Panel opinion, p. 43). However, neither Sealey nor Locklear had any involvement or responsibility whatsoever in processing the physical evidence, including fingerprints. (JA 1560). Therefore, Sealey and Locklear are entitled to qualified immunity regarding this claim.[2]

In short, the panel opinion's holding, that a court need not apply the qualified immunity analysis as to each officer and each claim in cases where a plaintiff "alleges" the officers acted in concert, is in direct conflict with binding Supreme Court and Fourth Circuit authority.

3. The duty of the district court and the Fourth Circuit panel to properly apply the qualified immunity analysis at the Rule 56 stage as to Sealey and Locklear is not excused where, as here, Sealey and Locklear properly raised the qualified immunity defense

The panel opinion erroneously states that the defendants "did not raise individualized qualified immunity arguments before the district court, but instead asserted collective qualified immunity defenses," and that the defendants "did not argue before the district court that individual officers were entitled to qualified immunity based on the officers' individual actions. . . ." (Panel opinion, pp. 20-21)

[2] Also, as Judge Richardson's dissenting opinion correctly stated, Sealey and Locklear are entitled to qualified immunity as to plaintiffs' due process claims regarding the alleged failure to investigate, Sinclair changing his story, and alleged failure to disclose that Roscoe was a suspect because "these alleged due process rights were not clearly established in 1983."

(emphasis in original). This is simply not true. In Sealey and Locklear's summary judgment brief, the undersigned counsel explained the law of qualified immunity, and argued that Sealey and Locklear, in their individual capacities, were entitled to qualified immunity, explaining that the qualified immunity analysis "must be particularized to the facts of the case," and that "reasonable officers in the specific factual scenario faced by Sealey and Locklear could have believed that their conduct was lawful." (See D.E. 167, pp. 25-28, attached as Exhibit A). Similarly, in defendants Sealey and Locklear's response in opposition to plaintiffs' motion for summary judgment, defendants Sealey and Locklear made the following points:

> Thus, the inquiry into whether the right was clearly established must "be undertaken of the specific context of the case" and "not as a broad general proposition. . . ." Saucier v. Katz, U.S. 194, 201, 121 S.Ct. 2151, 2156 (2001). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, supra. If the right was not "'clearly established" in the "specific context of the case," that is, if it was not "clear to a reasonable officer" that the conduct in which he allegedly engaged "was unlawful in the situation he confronted," then the law affords immunity from suit. Saucier, supra. In other words, officers are

> entitled to qualified immunity "if a reasonable officer possessing the same information could have believed that his conduct was lawful." Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991) (emphasis added).
>
> In the instant case, . . . the facts establish that Sealey and Locklear did not violate the plaintiffs' constitutional rights. However, even assuming arguendo that plaintiffs' rights may have been violated, it was not clearly established, at the time of the officers' actions, that the officers' specific actions violated the Constitution. Thus, under the circumstances, defendants Sealey and Locklear in their individual capacities are entitled to qualified immunity . . . .

(D.E. 177, pp. 27-29, attached as Exhibit B). The above was also incorporated into the reply brief of Sealey and Locklear in support of their motion for summary judgment. (D.E. 199, p. 7, attached as Exhibit C).

Moreover, as this Court well knows, the qualified immunity defense applies solely to individual liability, not "collective" liability. Therefore, the defendants Sealey and Locklear, in asking the district court to grant summary judgment on the basis of qualified immunity as to each and every claim, were necessarily asking the district court to apply the qualified immunity analyses to individual defendants based on each defendant's specific actions.

In short, a review of the summary judgment briefs of defendants Sealey and Locklear reveals that they did in fact raise individualized qualified immunity arguments before the district court. Thus, the statement in the panel opinion that the defendants "did not raise individualized qualified immunity arguments" before the district court is not an accurate statement.[3]

Moreover, even if it were true that Sealey and Locklear could have somehow made their argument even more clear to the district court, the district court nevertheless had a duty to analyze the qualified immunity issues as to each defendant and each claim. The panel opinion's ruling to the contrary is in direct conflict with binding Supreme Court authority and Fourth Circuit precedent.

II. THE PANEL OPINION'S HOLDING THAT MARY RICHARDS' ALLEGED STATEMENT WAS "SUPPRESSED" UNDER BRADY IS IN CONFLICT WITH FOURTH CIRCUIT PRECEDENT

The panel opinion held that officers violated Brady requirements by failing to turn over an alleged statement of Mary Richards. (Panel opinion,

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[3] As this Court can well understand, it is insulting and demeaning to the undersigned attorneys to be accused of "not rais[ing] individualized qualified immunity arguments before the district court" when, in fact, the undersigned attorneys did properly raise the qualified immunity defense before the district court. Therefore, the undersigned attorneys respectfully request that, at a minimum, this Court correct the opinion of the Fourth Circuit so that it does not erroneously state that the defendants "did not raise individualized qualified immunity arguments before the district court."

pp. 40-41). This holding is in direct conflict with a number of Fourth Circuit decisions.

Under well established Fourth Circuit authority, undisclosed evidence is not considered to be "suppressed" under Brady when the criminal defendant or his attorney could have obtained the evidence with any reasonable diligence. See Lynn v. Tanney, 405 Fed.Appx. 753, 762 (4th Cir. 2010). Therefore, the Brady rule is not violated when evidence that is not disclosed is "available to the defendant from other sources, including diligent investigation by the defense." Fullwood v. Lee, 290 F.3d 663, 686 (4th Cir. 2002), quoting Stockton v. Murray, 41 F.3d 920, 927 (4th Cir. 1994). See United States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990) (the alleged failure to turn over an exculpatory witness statement did not violate Brady because the criminal defense "was free to question" the witness); Hoke v. Netherland, 92 F.3d 1350, 1355-56 (4th Cir. 1996) (the State's failure to disclose interviews of three witnesses did not violate Brady where the attorney would have discovered the witnesses if he had conducted a "reasonable and diligent investigation"); Barnes v. Thompson, 58 F.3d 971, 975 fn. 4 (4th Cir. 1995) ("Nondisclosure, therefore, does not denote that no exculpatory evidence exists, but that the government possesses no exculpatory evidence that would be unavailable to a reasonably diligent defendant . . . .").

The cases of Fullwood, Stockton, Wilson, Hoke, and Barnes are directly on point, and compel a holding that any failure to turn over Richards' statement did not violate Brady, because Richards was identified by the State as an important witness;

the criminal defense "was free to question" Richards; and it would have been natural for the criminal defense attorneys to question Richards. Thus, the panel opinion is contrary to the Fourth Circuit authority cited above.

With all due respect, if the Fourth Circuit panel intended to overrule the above cases, it should have said so. If the panel believes theses cases are somehow distinguishable, it should explain why. Instead, the panel completely ignored them. Either way, Sealey and Locklear are entitled to qualified immunity as to the Mary Richards due process claim because a reasonable officer could have believed that Richards' statement was not "suppressed" under Brady because Richards was a witness known to the defense; the criminal defense was free to question Richards; and any reasonable attorney would have questioned her.

III. THE PANEL OPINION'S HOLDING, THAT OFFICERS WERE NOT ENTITLED TO QUALIFIED IMMUNITY AS TO PLAINTIFFS' CONFESSIONS, IS IN CONFLICT WITH BINDING SUPREME COURT PRECEDENT

The panel opinion held that, in the light most favorable to plaintiffs, the plaintiffs' verbal confessions were involuntary, and that Sealey and Locklear were not entitled to qualified immunity as to plaintiffs' alleged involuntary confessions. (Panel opinion, pp. 31-36). This holding is in direct conflict with binding Supreme Court precedent.

The Supreme Court has mandated that in cases such as the instant case, "in which the result depends very much" on the specific facts, an officer

will be entitled to qualified immunity "unless existing precedent 'squarely governs' the specific facts at issue." Kisela v. Hughes, ___ U.S. ___, 138 S.Ct. 1148, 1153 (2018) (per curiam). See also, e.g., District of Columbia v. Wesby, 138 S.Ct. 577, 589-90 (2018) ("It is not enough that the rule is suggested by then-existing precedent" – it must be "beyond debate" and "settled law."). In the instant case, the numerous cases cited by defendants conclusively show that Sealey and Locklear are entitled to qualified immunity because it was not "beyond debate" or "settled law" in 1983 that Sealey's and Locklear's specific actions, in connection with plaintiffs' verbal confessions, violated the Constitution. To be sure, the cases cited in the panel opinion suggest that plaintiffs' confessions might be involuntary; however, the numerous cases cited by defendants suggest otherwise. (See Appellants' brief, pp. 40-47, 51-54). In particular, in the case of United States v. Wertz, 625 F.2d 1128 (4th Cir. 1980), the Fourth Circuit, explaining the facts in the Supreme Court decision of Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138 (1969), stated as follows:

> [In] Boulden v. Holman, . . . [t]he accused was arrested and one of the arresting officers, in demanding that the accused confess, told him that "he had been wanting to kill a nigger a long time" and he "throwed the rifle up like he was getting ready to shoot." When he did not confess under these circumstances, he was handcuffed and put in a police car, surrounded by a large number of white officers and an angry, threatening crowed, all white.

> The chief of police then asked him to confess, telling him that if he didn't confess, he (the chief) would not stop the officer who had earlier expressed his desire "to kill a nigger."

Wertz, 625 F.2d at 1136. Given the extremely coercive nature of the actions described in Wertz, a reasonable officer could easily have believed that the far less coercive actions alleged by plaintiffs did not render their confessions involuntary. Put another way, it cannot honestly be stated that Sealey and Locklear transgressed "bright lines" or that some precedent made it "beyond debate" in 1983 that Sealey and Locklear's specific actions violated the Constitution with regard to plaintiffs' confessions.

IV. THE IMPORTANT ISSUES RAISED IN THIS PETITION SHOULD BE DECIDED BY THE FOURTH CIRCUIT JUDGES SITTING EN BANC

As the United States Supreme Court and the Fourth Circuit have recognized, the doctrine of qualified immunity is an important doctrine, which deals with important interests, see, e.g., Pearson v. Callahan, 555 U.S. 223, 231 (2009), and "protects important values." Fields v. Prater, 566 F.3d 381, 390 (4th Cir. 2009).

Consequently, the issues involved in this case are of great importance to Fourth Circuit jurisprudence. Thus, this appeal should be reheard en banc in order to ensure that the Fourth Circuit decision in this case does not conflict with binding Supreme Court authority, and to secure and maintain uniformity of decisions in this Court.

CONCLUSION

Based on the foregoing discussion, arguments, and authorities, the Appellants Kenneth Sealey and Robert E. Price, Administrator C.T.A. of the Estate of Joe Garth Locklear, Sr., respectfully submit that their petition for rehearing and petition for rehearing en banc should be granted.

Respectfully submitted, this the 13th day of August, 2019.

/s/ James R. Morgan, Jr.
James R. Morgan, Jr.
N.C. State Bar No. 12496
Bradley O. Wood
N.C. State Bar No. 22392
WOMBLE BOND DICKINSON (US) LLP
One West Fourth Street
Winston-Salem, NC 27101
Telephone: (336) 721-3600
Facsimile: (336) 721-3660
E-mail: Jim.Morgan@wbd-us.com
E-mail: Brad.Wood@wbd-us.com

Counsel for Defendant-Appellants Kenneth Sealey and Robert E. Price, Administrator C.T.A. of the Estate of Joel Garth Locklear, Sr.

CERTIFICATE OF COMPLIANCE

1. This petition complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

   [X] this brief contains [*3,900*] words.

   [ ] this brief uses a monospaced type and contains [*state the number of*] lines of text.

2. This brief document complies with the typeface and type style requirements because:

   [X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2016*] in [*14pt Times New Roman*]; *or*

   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: August 13, 2019

/s/ James R. Morgan, Jr.
Counsel for Appellants
K. Sealey & R. Price

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 13th day of August, 2019, I caused this Petition for Rehearing and Rehearing En Banc to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Catherine E. Stetson
Kirti Datla
Mathew J. Higgins
Hogan Levells US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004
Email: cate.stetson@hoganlovells.com
Email: kirti.datla@hoganlovells.com
Email: matthew.higgins@hoganlovells.com

Counsel for Plaintiffs-Appellees

Joshua H. Stein
Matthew W. Sawchak
Brian D. Rabinovitz
Amar Majmundar
NORTH CAROLINA DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, North Carolina 27602
Email: msawchak@ncdoj.gov
Email: brabinovitz@ncdoj.gov

Counsel for Defendants-Appellants
Kenneth Snead and Leroy Allen

/s/ James R. Morgan, Jr.
Counsel for Appellants
K. Sealey & R. Price