APPENDIX

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 22-2340

LARRY TRENT ROBERTS

v.

DAVID LAU, Detective; JOHN C. BAER, Assistant District Attorney; CITY OF HARRISBURG

John C. Baer,

Appellant.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 1-21-cv-01140)
District Judge: Honorable Jennifer P. Wilson

Submitted Under Third Circuit L.A.R. 34.1(a)
May 17, 2023

Before: SHWARTZ, MONTGOMERY-REEVES, and ROTH, *Circuit Judges*

(Opinion filed January 11, 2024)

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OPINION OF THE COURT

MONTGOMERY-REEVES, *Circuit Judge*.

Larry Trent Roberts spent 13 years in prison for a murder that he did not commit. After being exonerated, Roberts sued several state actors involved in obtaining his wrongful conviction, including Assistant District Attorney John C. Baer.

According to the complaint, a hole developed in the prosecution's already weak case after a detective tried and failed to fabricate evidence of a conflict between Roberts and the victim. In response, the Assistant District Attorney took matters into his own hands by joining the police investigation and looking for a new witness to establish a motive for the killing. That search led Baer to Layton Potter, a known jailhouse snitch who had been convicted for making false reports to law enforcement in the past. Baer approached Potter and got him to concoct a story that Roberts had a dispute with the victim over unpaid drug debts. Potter repeated that story at trial, and his false testimony was integral to Roberts's conviction.

Baer moved to dismiss the claims against him, arguing that he was absolutely immune from liability under 42 U.S.C. § 1983 because his alleged conduct, locating a new jailhouse snitch, occurred post-charge and

was designed to produce inculpatory evidence for trial. The District Court denied the motion, explaining that the doctrine of absolute immunity for prosecutors did not apply because Baer's search for a new witness served an investigatory function. Baer appealed.

We agree with the District Court. When deciding whether absolute immunity applies, "we examine 'the nature of the function performed, not the identity of the actor who performed it.'" *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)). Thus, prosecutors are not entitled to absolute immunity when they "perform[] the investigative functions normally performed by a detective or police officer." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). Taking the complaint's well-pleaded factual allegations as true, which we must do at the motion-to-dismiss stage, Baer engaged in quintessential "police investigative work" when he affirmatively searched for and approached a new witness to establish motive. *Id.* at 274 n.5. Discovery may reveal that these allegations are false and that Baer's role was limited to interviewing a witness in preparation for trial. If so, he may yet be entitled to absolute immunity. But those are not things that we can say at this early stage of the proceedings when we must accept the well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of Roberts. Thus, we will affirm because Baer has failed to show that he is entitled to absolute immunity on the face of the complaint.

I. BACKGROUND

Because Baer challenges the District Court's denial of his motion to dismiss, we take the facts from the complaint.

A. Duwan Stern Is Murdered

In December 2005, someone shot and killed Duwan Stern while he was sitting in his car. There were no eyewitnesses to the murder, but two neighborhood residents saw the aftermath. The residents saw two male figures lean into the car from the passenger door. One of the figures was Thomas Mullen, who admitted to pushing Stern's body onto the street and rummaging through the car for money or drugs. The other figure has not been identified.

About an hour after the shooting, David Lau, a detective with the Harrisburg Police Department, arrived at the scene. While Lau was at the scene, Stern's cellphone received three calls from the same phone number in a matter of minutes. The caller was Roberts, who was seeking to refute a rumor that Stern had been killed. Lau recognized Roberts's name or phone number because they had a history. In 1994, Lau struck Roberts with a firearm while arresting him. Roberts went to the hospital after the arrest. To justify his actions, Lau charged Roberts with assault. A court dismissed the charge. Nonetheless, this interaction led Lau to believe—without cause—that Roberts was capable of murder. So Lau decided to include Roberts's picture in photo arrays in this case even though he was approximately 100 pounds heavier and 20 years older than the unidentified male figure that the witnesses described.

Lau showed the photo arrays to both residents and Mullen. None identified Roberts. To the contrary, one of the residents selected someone other than Roberts, and the other resident "favor[ed]" someone other than Roberts but stopped short of making a positive identification. App. 44.

B. Lau and Baer Fabricate Evidence

Although police found no evidence inculpating Roberts, Lau zeroed in on him as the prime suspect. To that end, Lau took Roberts into custody under the pretense that he was addressing a separate matter and then persuaded Roberts to participate in a flawed, coercive, and unreliable suspect lineup for one of the neighborhood residents. The resident—who was influenced by the defective lineup Lau orchestrated—identified Roberts as the unknown male figure that she saw near Stern's car on the night of the murder. Lau used the resident's contaminated identification to support an affidavit of probable cause to arrest Roberts for the false charge of murdering Stern.

After arresting Roberts for a murder that he did not commit, Lau decided to shore up the state's case by fabricating evidence. Lau's first stop was Mullen, who was near the scene at the time of the shooting and gave self-serving statements that did not inculpate Roberts. Lau encouraged Mullen to provide a false statement that Roberts confessed to the murder, and Mullen obliged.

Next, Lau approached an associate of Roberts to manufacture a motive for Stern's murder. Lau claimed that Roberts and Stern had a conflict related to the sale of a car and attempted to coerce the associate to provide false testimony supporting that narrative. The associate refused to cooperate, and Lau abandoned the "car-conflict" motive.

After the car-conflict motive fell through, Lau turned to Baer for help devising a new motive. Baer was an assistant district attorney assigned to prosecute the case. The complaint alleges that "Baer joined . . . Lau's investigation and began affirmatively seeking a jailhouse snitch who would testify as to a motive." App. 52. In other

words, the complaint alleges that Baer's actions were not taken in response to leads already identified by Lau, but rather, that he was a joint actor with Lau in locating additional evidence.

For instance, the complaint alleges that "[i]n October 2007, nearly [two] years after the murder . . . and just one month before trial, . . . Baer and . . . Lau's investigation led them to Layton Potter, a known jailhouse snitch." *Id.* Baer knew that Potter lacked any credibility because he had been convicted of making false reports to law enforcement and regularly used crack cocaine. But Baer "approached" Potter anyway and "asked him if he 'wanted a piece' of the case against . . . Roberts." *Id.* Potter wanted a piece "to gain favor related to hi[s] own pending criminal charges" and "fabricated a story . . . out of whole cloth . . . that . . . Roberts and . . . Stern were both in the drug business and had a dispute over unpaid drug debts." App. 52–53.

The value of Potter's statement "was made clear at trial when . . . Baer told the jury . . . that . . . Potter would 'help them understand how and why' the killing occurred." App. 53. All of Potter's testimony was false. But because of the unlawful actions by Lau, Baer, and the City of Harrisburg Police Department, Roberts was wrongfully convicted of murder and sentenced to life in prison without the possibility of parole.

C. The District Court Denies Baer's Motion to Dismiss

In 2018, a Pennsylvania appellate court held that Roberts was entitled to a new trial. The state retried Roberts, and a jury acquitted him of all charges. Afterward, Roberts filed a complaint in the District Court alleging six claims related to his wrongful conviction. The

complaint named as defendants Lau, Baer, and the City of Harrisburg ("City").

Relevant here were Counts II and IV, which brought claims against Baer under 42 U.S.C. § 1983 for fabricating and conspiring to fabricate evidence, in violation of the Fourth and Fourteenth Amendments. Both Counts focused on Baer's alleged search for a new witness. Count II alleged that Baer "fabricated evidence by way of [k]nowingly influencing, enticing, and coercing an inculpatory statement from Layton Potter: a jailhouse snitch, who lacked any credibility, whose statement could not be corroborated, and was only concerned with benefiting himself." App. 61.

Count IV alleged that "Lau and . . . Baer conspired to fabricate evidence for the purpose of convicting an actually innocent man . . . ." App. 63. As overt acts, Count IV alleged that Lau and Baer "[k]nowingly sought out, influenced, enticed, and coerced an inculpatory statement from . . . Potter: a jailhouse snitch, who lacked any credibility, whose statement could not be corroborated, and was only concerned with benefiting himself." *Id.*

In September 2021, Baer moved to dismiss Counts II and IV, arguing that he was entitled to absolute immunity as a prosecutor for his alleged conduct obtaining Potter's false testimony. The District Court held that Baer's alleged conduct served an investigative function and denied his motion to dismiss. Baer appealed.[1]

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[1] While this appeal was pending, Roberts filed an amended complaint revising his allegations against the City. Because Roberts did not change his allegations against Baer, this appeal will "resolve [the] disputed question" of whether Baer is entitled to absolute immunity on the face of the operative complaint. *Cf. Saint-Jean v. Palisades Interstate Park Comm'n*, 49 F.4th 830, 835 (3d Cir. 2022).

II. DISCUSSION[2]

The sole issue on appeal is whether Baer functioned as an advocate or an investigator when he allegedly went looking for a new witness to fabricate a motive for Roberts to kill Stern. If this alleged conduct served a prosecutorial function, Baer is absolutely immune from liability under § 1983. But if Baer's alleged search for a new witness went beyond his role as a quasi-judicial advocate and served an investigative function, absolute immunity does not attach because that defense only shields "actions [that are] intimately associated with the judicial phases of litigation." *Weimer v. County of Fayette*, 972 F.3d 177, 187 (3d Cir. 2020) (quoting *Odd v. Malone*, 538 F.3d 202, 208 (3d Cir. 2008)).

We conclude that Baer is not entitled to absolute immunity on the face of the complaint. This conclusion is based on our reading of two relevant cases from our

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[2] The District Court had subject-matter jurisdiction over Roberts's claims against Baer under 28 U.S.C. § 1331. We have appellate jurisdiction under 28 U.S.C. § 1291 because whether the District Court erred by denying Baer's motion to dismiss based on absolute immunity is a purely legal question appealable under the collateral order doctrine. *See, e.g.*, *Fogle v. Sokol*, 957 F.3d 148, 155 (3d Cir. 2020) ("[W]e may review an 'interlocutory appeal of the District Court's order denying absolute . . . immunity . . . to the extent that the order turns on issues of law.'" (some alterations in original) (quoting *Yarris v. County of Delaware*, 465 F.3d 129, 134 (3d Cir. 2006)) (citing *Oliver v. Roquet*, 858 F.3d 180, 187–88 (3d Cir. 2017))).

"Review of a district court's order denying a motion to dismiss on absolute immunity grounds is plenary." *Fogle*, 957 F.3d at 156 (citing *Yarris*, 465 F.3d at 134). "[W]e apply the same standard as the District Court, accepting as true the factual allegations in the complaint and drawing all reasonable inferences in [the plaintiff's] favor . . . ." *Odd v. Malone*, 538 F.3d 202, 207 (3d Cir. 2008) (first citing *Yarris*, 465 F.3d at 134; and then citing *Giuffre v. Bissell*, 31 F.3d 1241, 1251 (3d Cir. 1994)).

Court: *Yarris*, 465 F.3d at 129, and *Fogle*, 957 F.3d at 148. These cases compel the conclusion that Baer functioned as an investigator, not an advocate, when he identified and tracked down Potter and solicited Potter's false testimony as to motive in return for favorable treatment of the criminal charges pending against him. As we held in *Fogle*, "the 'key to the absolute immunity determination is not the timing of the investigation relative to a judicial proceeding, but rather the underlying function that the investigation serves and the role the [prosecutor] occupies in carrying it out.'" 957 F.3d at 163 (second alteration in original) (quoting *B.S. v. Somerset County*, 704 F.3d 250, 270 (3d Cir. 2013)). Baer engaged in "police investigative work" when he allegedly embarked on a post-charge search for a new witness to plug a hole in the prosecution's case. *See Buckley*, 509 U.S. at 274 n.5. Thus, Baer is not entitled to absolute immunity at the motion-to-dismiss stage because his alleged conduct served an investigative function.[3]

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[3] The dissent reads the complaint to allege that "[Lau] identified [Potter] as a potential witness." Dissent 4 n.3. The relevant paragraph from the complaint alleges, "It was only after it became clear to Detective Lau that Mr. Gibson [*i.e.*, the car-conflict witness] did not intend to cooperate in his scheme to present fabricated evidence that Detective Lau abandoned the 'car conflict' motive, that he began to conspire with ADA Baer to use Layton Potter to create a new motive." App. 52 ¶ 83. None of these words say that Lau identified Potter as a potential witness. Further, the next paragraph alleges that "[i]n order to fabricate evidence of motive, ADA Baer joined Detective Lau's investigation and began affirmatively seeking a jailhouse snitch who would testify as to a motive." App. 52 ¶ 84. It is unclear whom Baer could have been "affirmatively seeking" if Lau had already identified Potter—*i.e.*, a "jailhouse snitch"—as a potential witness.

The dissent also states that the majority opinion "mix[es] the allegations against [Lau] and [Baer]" when it "suggests that [Baer]

To explain our analysis, we begin by summarizing the doctrine of absolute immunity for prosecutors. We then

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allegedly determined that the case was weak, initiated and conducted a search, and identified [Potter]." Dissent 4 n.3. Paragraph 84 of the complaint alleges that "[i]n order to fabricate evidence of motive, ADA Baer joined Detective Lau's investigation and began affirmatively seeking a jailhouse snitch who would testify as to a motive." App. 52. The next paragraph alleges, "In October 2007, nearly [two] years after the murder of Mr. Stern and just one month before trial, ADA Baer and Detective Lau's investigation led them to Layton Potter, a known jailhouse snitch." *Id.* ¶ 85. And paragraph 86 alleges, "ADA Baer approached Mr. Potter and asked him if he 'wanted a piece' of the case against Mr. Roberts." *Id.* Thus, we read the complaint to state, clearly, that Baer determined that the case was weak without evidence of motive and went looking—with Lau—for a new witness, whom *Baer* approached and persuaded to provide false testimony. And we would have to draw an inference against Roberts—the plaintiff and non-moving party—to conclude that Lau identified Potter as a potential witness. *Cf. Yarris*, 465 F.3d at 134 ("[I]n order to determine whether [a state actor is] entitled to absolute . . . immunity from any claims based on their alleged conduct," "[w]e must construe the facts in the manner most favorable to [the plaintiff].").

At bottom, the question we must answer is whether Baer functioned as an investigator or an advocate when he went looking, post-charge, for a new witness to establish motive. We read controlling precedent to compel the conclusion that this alleged conduct served an investigative function. The dissent reads the same precedent to compel the opposite result. Perhaps that divergence suggests that this case presents a tough question with no clear answer. This does not mean, however, that we ought to tip the scales in favor of absolute immunity by drawing inferences against the plaintiff when evaluating a motion to dismiss. To the contrary, Baer has the burden to "show that the conduct triggering absolute immunity 'clearly appear[s] on the face of the complaint.'" *Fogle*, 957 F.3d at 161 (citing *Wilson v. Rackmill*, 878 F.2d 772, 776 (3d Cir. 1989)). Thus, to the extent that this case presents a difficult question, it should be unsurprising that the party who has the burden to show that they are clearly entitled to absolute immunity on the face of the complaint has failed to prevail on a motion to dismiss.

identify the particular conduct that Roberts challenges in his complaint and explain why Baer is not entitled to absolute immunity for allegedly engaging in that conduct under the appropriate framework.

A. The Doctrine of Absolute Immunity for Prosecutors

Prosecutors like Baer are absolutely immune from liability under § 1983 for engaging in conduct that serves a quasi-judicial function. *See, e.g.*, *Kulwicki v. Dawson*, 969 F.2d 1454, 1463 (3d Cir. 1992) ("Absolute immunity attaches to all actions" that a prosecutor "perform[s] in a 'quasi- judicial' role." (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976))). To serve a quasi-judicial function, conduct must be "intimately associated with the judicial phase of the criminal process" or an analogous judicial proceeding. *See Imbler*, 424 U.S. at 430. Thus, absolute immunity does not shield "administrative or investigatory actions unrelated to initiating and conducting judicial proceedings." *Weimer*, 972 F.3d at 187 (quoting *Odd*, 538 F.3d at 208).

Our analysis of whether a prosecutor is entitled to absolute immunity "has two basic steps, though they tend to overlap." *Fogle*, 957 F.3d at 161 (quoting *Schneyder v. Smith*, 653 F.3d 313, 332 (3d Cir. 2011)). "First, we 'ascertain just what conduct forms the basis for the plaintiff's cause of action.' Then, we 'determine what function (prosecutorial, administrative, investigative, or something else entirely) that act served . . . ." *Id.* (quoting *Schneyder*, 653 F.3d at 332). "To earn the protections of absolute immunity at the motion-to-dismiss stage, a [prosecutor] must show that the conduct triggering absolute immunity clearly appears on the face of the complaint." *Weimer*, 972 F.3d at 187 (cleaned up) (quoting *Fogle*, 957 F.3d at 161).

B. Whether Baer Is Entitled to Absolute Immunity

The complaint alleges that "after it became clear" that an associate of Roberts's "did not intend to cooperate in [Lau's] scheme to present fabricated evidence" supporting the car-conflict motive, "Baer joined . . . Lau's investigation and began affirmatively seeking a jailhouse snitch who would testify as to a motive." App. 52. "[O]ne month before trial, . . . Baer and . . . Lau's investigation led them to . . . Potter, a known jailhouse snitch." *Id.* Baer knew that Potter lacked any credibility because he had been convicted of making false reports to law enforcement in the past. But Baer "approached . . . Potter" anyway, *id.*; "asked [Potter] if he 'wanted a piece' of the case against . . . Roberts," *id.*; and "[k]nowingly . . . influenced, enticed, and coerced" Potter to provide false testimony establishing motive. App. 63.

Baer argues that his alleged conduct served a prosecutorial function because it "occurred only one month prior to trial and for the purpose of getting Potter to testify at trial." Opening Br. 22. For support, Baer primarily relies on this Court's opinion in *Yarris*, which held that prosecutors were entitled to absolute immunity for allegedly using "'stick and carrot' treatment to elicit . . . false testimony" from a jailhouse informant. 465 F.3d at 139.

Roberts responds that this alleged conduct served an investigative function because "Baer sought out, influenced, enticed, and coerced a jailhouse snitch into giving a statement for the purpose of formulating a motive." Response Br. 11. For support, Roberts primarily relies on this Court's opinion in *Fogle*, which held that prosecutors were not entitled to absolute immunity for "solicit[ing] false statements from jailhouse informants"

and "deliberately encourag[ing] . . . State Troopers to do the same." 957 F.3d at 164.

While it is a close call, we conclude that Roberts has the better argument. The allegations that Baer went looking for a new witness to provide false testimony describe an investigator's work "seeking to generate evidence in support of a prosecution," not an advocate's work "interviewing witnesses as he prepare[s] for trial." *Fogle*, 957 F.3d at 163–64 (quoting *Buckley*, 509 U.S. at 273). As such, the District Court did not err by denying Baer's motion to dismiss because his alleged conduct served an investigative function. We reach this conclusion for two reasons: (1) Baer relies on a bright-line rule inconsistent with the functional approach to absolute immunity; and (2) *Fogle* provides a closer match than *Yarris* to Baer's alleged conduct, and its reasoning dictates that Baer is not entitled to absolute immunity on the face of the complaint. We expound on both reasons below.

1. The fact-specific nature of absolute immunity

Baer argues that his alleged search for a new witness served a prosecutorial function because it occurred post-charge and was designed to produce inculpatory evidence for trial. Neither reason carries the day.

The first part of this equation cannot be enough. The Supreme Court has explained that "a determination of probable cause [for an arrest] does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination, . . . a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." *Buckley*, 509 U.S. at 274 n.5. And while the fact that conduct occurred pre-charge might establish that it did not serve a prosecutorial

function, *id.* at 274 ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."), the inverse is not true. Detectives can continue to investigate a crime and generate evidence after charges have been filed. Thus, the fact that a prosecutor sought to generate evidence post-charge cannot be enough to show that their conduct served a prosecutorial function.

The second part fares no better. Prosecutors who seek to generate evidence post-charge almost always can describe their conduct as an effort to produce inculpatory evidence for trial. So, absent unusual circumstances, holding that a prosecutor's effort to generate evidence for an ongoing judicial proceeding always serves a quasi-judicial function is really just a bright-line rule based on timing. And while the absence of a link to a judicial proceeding might establish that conduct did not serve a prosecutorial function, *Giuffre*, 31 F.3d at 1254 ("[A]ctions [that] 'have no functional tie to the judicial process' . . . are not entitled to absolute immunity merely because they were actions undertaken by a prosecutor." (quoting *Buckley*, 509 U.S. at 277)), the inverse is not true. Detectives generate inculpatory evidence for trial. But they are not quasi-judicial advocates entitled to absolute immunity. Thus, the fact that a prosecutor generated evidence for an ongoing judicial proceeding cannot per se be enough to show that their conduct served a prosecutorial function.[4]

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[4] Baer argues that this Court's opinion in *Rose v. Bartle*, 871 F.2d 331 (3d Cir. 1989), supports a bright-line rule that "soliciting perjured testimony in preparation of and for use in judicial proceedings is protected by absolute immunity." Reply Br. 5. *Rose* predates *Buckley* and thus did not have the benefit of the Supreme Court's guidance that tying evidence to a judicial proceeding is not enough to show that

This leaves the possibility that a combination of post-charge timing and link to an ongoing judicial proceeding, without more, is enough to show that a prosecutor's generation of evidence served a prosecutorial function. But that bright-line rule cannot be the answer either, as *Fogle* and *Yarris* both dealt with post-charge efforts by prosecutors to fabricate evidence for trial. *See Yarris*, 465 F.3d at 139 ("As the Amended Complaint makes clear, Yarris had already been charged . . . before [a jailhouse informant] made any statements about what Yarris told him while they were held in adjacent prison cells." (citation omitted)); *Fogle*, 957 F.3d at 163–64 (rejecting the argument that "absolute immunity protect[ed]" prosecutors' search for new jailhouse informants because it "occurred after the initiation of criminal charges" (citation omitted)).[5] Moreover, our case law has cautioned

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its fabrication served a prosecutorial function. 509 U.S. at 276; *see also Karns v. Shanahan,* 879 F.3d 504, 514 (3d Cir. 2018) ("[A] panel may revisit a prior holding of the Court 'which conflicts with intervening Supreme Court precedent.'" (quoting *In re Krebs,* 527 F.3d 82, 84 (3d Cir. 2008)) (citing *Council of Alt. Pol. Parties v. Hooks,* 179 F.3d 64, 69 (3d Cir. 1999))).

In any event, *Rose* is distinguishable because that plaintiff provided "no elaboration in the pleadings regarding the circumstances in which the alleged solicitations of perjury took place," except that a prosecutor "asked[] or coerced [a witness] to testify perjuriously before the grand jury." 871 F.2d at 344 (citations omitted). Roberts provided detailed allegations describing the actions that Baer took to affirmatively search for a new jailhouse informant and coerce him to provide false testimony. *See infra* Section II.B.2. Thus, his complaint does not lack "elaboration . . . regarding the circumstances in which the alleged solicitations of perjury took place." *Rose*, 871 F.2d at 344.

[5] The dissent argues that "this case is more like *Yarris* than *Fogle* . . . [because] the complaint clearly states that [Baer] solicited the witness's statement for the purpose of gathering testimony, and the temporal proximity to the trial shows this testimony was intended to be used for trial rather than for an investigative purpose." Dissent

that determining whether a prosecutor is entitled to absolute immunity requires a fact-intensive inquiry that generally cannot be reduced to bright-line rules.[6] And this would be a two-part inquiry in name only, as the connection-to-a-judicial-proceeding prong would collapse into the post-charge-timing prong in nearly all cases for the reasons provided above.

Accordingly, this line of argument leads us back to where we started. "Following the Supreme Court's guidance, our prosecutorial immunity analysis focuses on the unique facts of each case and requires careful dissection of the prosecutor's actions." *Odd*, 538 F.3d at 210 (first citing *Yarris*, 465 F.3d at 136; and then citing *Kulwicki*, 969 F.2d at 1463). The timing of conduct as pre- or post-indictment and the presence or absence of a connection to a judicial proceeding are "relevant" "considerations . . . to the extent that they bear upon the

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10–11. But the complaint from *Fogle* also alleged that prosecutors solicited false testimony post-charge to shore up the state's case at trial. *See, e.g.*, 957 F.3d at 154 ("The case quickly began to unravel as the defendants discovered [a witness's] wandering and inconsistent theories had largely powered the criminal complaints. Timely support soon arrived from jailhouse informants recruited and counseled by the State Troopers."); *id.* at 164 ("Prosecutors not only solicited false statements from jailhouse informants, but deliberately encouraged the State Troopers to do the same '[k]nowing their evidence was weak' . . . ." (first alteration in original)). So neither the timing of alleged conduct as post-charge nor a connection to trial distinguishes *Yarris* from *Fogle*.

[6] *See, e.g.*, *Odd*, 538 F.3d at 210 ("We have rejected bright-line rules that would treat the timing of the prosecutor's action (*e.g.* pre- or post[-]indictment), or its location (*i.e.* in- or out-of-court), as dispositive." (first citing *Rose*, 871 F.2d at 346; and then citing *Kulwicki*, 969 F.2d at 1463)); *Fogle*, 957 F.3d at 164 ("Our role is not to look at the 'timing of the prosecutor's action (*e.g.* pre- or post-indictment),' but at the function being performed." (quoting *Odd*, 538 F.3d at 210)).

nature of the function the prosecutor is performing." *Id.* (first citing *Yarris*, 465 F.3d at 138–39; and then citing *Kulwicki*, 969 F.2d at 1467). But they are not enough to establish that a prosecutor's post-charge effort to fabricate evidence for trial served a quasi-judicial function, alone or combined. And the ultimate question is whether Baer has established—on the face of the complaint—that he "was functioning as the state's 'advocate'" when he affirmatively sought a new witness and coerced him to provide false testimony. *Yarris*, 465 F.3d at 136 (citing *Buckley*, 509 U.S. at 274).

Having dispensed with bright-line rules, we turn to the nuanced inquiry of whether *Fogle* or *Yarris* provides a closer fit to Baer's alleged conduct and assess whether he is entitled to absolute immunity under the proper comparator.

2. Applying precedent to Baer's alleged fabrication

As we noted above, we recognize that this is a close call. Ultimately, we conclude that the allegations and reasoning from *Fogle* dictate the conclusion that Baer is not entitled to absolute immunity on the face of the complaint for three reasons.

First, Baer's alleged conduct, identifying Potter to solicit false testimony, is nearly identical to the prosecutors' alleged conduct in *Fogle*, recruiting jailhouse informants. In both cases, a hole developed in the prosecution's case post-charge after a witness refused to testify or lost credibility. *Compare Fogle*, 957 F.3d at 154 ("The case quickly began to unravel as the defendants discovered [a witness's] wandering and inconsistent theories had largely powered the criminal complaints."), *with* App. 52 (alleging that Lau "began to conspire with . . . Baer to use . . . Potter to create a new motive" after the

car-conflict motive fell through). And in both cases, "[t]imely support soon arrived" from new "jailhouse informants," whom prosecutors "recruited" to provide false testimony "[k]nowing their evidence was weak." *Compare Fogle*, 957 F.3d at 154, 164, *with* App. 52–53 (alleging that Baer found Potter "just one month before trial" and persuaded him to provide false testimony implicating Roberts). Finally, both complaints alleged that prosecutors collaborated with police officers to find new witnesses willing to provide false testimony. *Compare Fogle*, 957 F.3d at 164 ("Fogle alleges that the Prosecutors not only solicited false statements from jailhouse informants, but deliberately encouraged the State Troopers to do the same . . . ."), *with* App. 52 (alleging that "Baer joined . . . Lau's investigation and began affirmatively seeking a jailhouse snitch who would testify as to a motive"). Given these similarities, we agree with the District Court that Baer's alleged search for a new witness involved conduct that *Fogle* "plainly stated . . . 'do[es] not enjoy absolute immunity.'" *Roberts v. Lau*, No. 1:21-CV-01140, 2022 WL 2677473, at *3 (M.D. Pa. July 11, 2022) (quoting *Fogle*, 957 F.3d at 162).[7] This is an investigatory function and distinguishable, for instance, from a similar but different situation where a prosecutor might interview and meet a previously unknown witness who has been located and identified by investigators.

Second, like the plaintiff in *Fogle*, Roberts provided detailed allegations describing the actions that Baer took

[7] Our dissenting colleague argues that "a prosecutor's choice to offer motive evidence and to speak with a witness about the topic, as [Baer] did here, constitutes an advocacy function." Dissent 7 n.6. We agree. But that does not change our analysis because it was Baer's alleged search for a new witness that served an investigative function, not Baer's decision to speak with the witness and present his false testimony at trial.

to find a new jailhouse informant and coerce him to provide false testimony. *See, e.g.*, *Fogle*, 957 F.3d at 164 ("Fogle alleges that the Prosecutors not only solicited false statements from jailhouse informants, but deliberately encouraged the State Troopers to do the same knowing their evidence was weak . . . ." (cleaned up)). Contrastingly, the plaintiff in *Yarris* vaguely alleged that prosecutors used "stick and carrot treatment to elicit . . . false testimony" and "did not describe in detail when or how the prosecutors obtained a false statement from a jailhouse informant." 465 F.3d at 139 (cleaned up). The more detailed allegations present here and in *Fogle* provide more support to conclude, at the motion-to-dismiss stage, that the prosecutors functioned as investigators by searching for a new witness to provide false testimony. This level of detail also helps to reduce the risk of vexatious litigation, as it is more difficult for a plaintiff with a frivolous claim to provide in a complaint detailed allegations of prosecutorial misconduct than vague ones. *See generally Van de Kamp v. Goldstein*, 555 U.S. 335, 341 (2009) (explaining that one reason why the Supreme Court extended absolute immunity to prosecutors was "the general common-law concern that harassment by unfounded litigation could both cause a deflection of the prosecutor's energies from his public duties and also lead the prosecutor to shade his decisions instead of exercising the independence of judgment required by his public trust." (cleaned up) (quoting *Imbler*, 424 U.S. at 423)).[8]

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[8] The dissent argues that "*Fogle*'s reasoning that 'generating evidence' to support a prosecution constitutes an investigative function conflicts with our earlier cases holding that collecting evidence in preparation for trial or grand jury proceedings is an advocacy function." Dissent 9 (first citing *Yarris*, 465 F.3d at 139;

Third and finally, Baer places too much weight on the allegation from *Fogle* that prosecutors participated in "a

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then citing *Rose*, 871 F.2d at 244; and then citing *Buckley*, 509 U.S. at 273). We disagree as this seems to bring us back to a bright-line rule. Holding that a prosecutor's effort to fabricate evidence for a judicial proceeding always serves a quasi-judicial function would grant prosecutors carte blanche to investigate their theory of the case post-charge. *See supra* Section II.B.1. That result cannot be squared with the Supreme Court's direction in *Buckley* that, "[o]f course, a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination . . ., a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." 509 U.S. at 274 n.5. Considering that *Yarris* cited *Buckley* with approval, 465 F.3d at 135–36, we are reluctant to adopt an interpretation of this Court's holding that conflicts with the Supreme Court's direction, especially when doing so means endorsing a bright-line rule that would undermine the functional approach to absolute immunity, *see id.* at 136 ("As the Supreme Court explained in *Kalina* . . ., 'in determining immunity, we examine the nature of the function performed, not the identity of the actor who performed it.'" (quoting 522 U.S. at 127)).

The dissent also argues that "[a] review of [*Yarris* and *Fogle*] reveals that *the crux* of the allegations regarding the solicitation of false testimony was nearly identical." Dissent 10 n.8 (emphasis added). Maybe so. But the functional approach to absolute immunity requires that courts carefully parse the allegations a plaintiff makes in their complaint. And only the complaint from *Fogle* described what prosecutors did to find a new witness able to provide false testimony. *Compare Fogle*, 957 F.3d at 164 ("Fogle alleges that the Prosecutors not only solicited false statements from jailhouse informants, but deliberately encouraged the State Troopers to do the same '[k]nowing their evidence was weak' . . . ." (first alteration in original)), *with Yarris*, 465 F.3d at 139 ("Yarris . . . claims that the [prosecutors] used a 'stick and carrot' treatment to elicit . . . false testimony, . . . although he . . . does not describe in detail when or how the [prosecutors] obtained a false statement from a jailhouse informant." (cleaned up)). Thus, *Fogle* is consistent with *Yarris*. And we see no reason to read *Yarris* as standing for the overbroad proposition that prosecutors always are entitled to absolute immunity when they seek to generate evidence for an ongoing judicial proceeding.

long chain of investigative events" stretching back before there was probable cause to bring charges. *See* 957 F.3d at 163. This Court groups related conduct together when identifying its function. Consistent with that approach, *Fogle* analyzed prosecutors' alleged efforts to solicit false statements from new jailhouse informants separately from the other conduct in that long chain of investigative events. *See* 957 F.3d at 161–64; *see also Yarris*, 465 F.3d 136–39 (analyzing prosecutor's alleged effort to obtain a false statement from a jailhouse informant separately from other types of challenged conduct). True, *Fogle* referred to other conduct in that chain of events while discussing whether prosecutors were entitled to absolute immunity for soliciting false testimony from jailhouse informants. 957 F.3d at 164. But it did so to explain how prosecutors knew that the state's case was weakened and would benefit from fabricated evidence. *Id.* Identifying a motive to fabricate does not change the Court's conclusion that the fabrication served an investigative function because prosecutors sought "to generate evidence in support of a prosecution." *Id.* And neither does the fact that prosecutors engaged in *other* conduct before bringing charges.[9]

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[9] Baer notes that *Fogle* "held that absolute immunity did apply with regard to . . . [prosecutors'] alleged conduct . . . using [another witness's] false statement in the probable cause affidavit presented to the magistrate judge and failing to report [the witness's] past inconsistent statements." Opening Br. 29 (citing *Fogle*, 957 F.3d at 162). That distinction makes no difference because using false evidence in an affidavit—or failing to disclose exculpatory evidence—does not involve generating evidence. And like in *Fogle*, it is Baer's alleged effort to generate new evidence by searching for a new jailhouse informant that served an investigative function. *See* 957 F.3d at 164 ("[T]he Prosecutors were functioning not as advocates, but as investigators seeking to generate evidence in support of a prosecution.").

For the reasons provided above, *Fogle* provides a closer fit to Baer's alleged conduct than *Yarris*. And its reasoning compels the result that Baer is not entitled to absolute immunity on the face of the complaint. Baer "played 'the detective's role' to 'search[] for . . . clues and corroboration'" when he went looking for a new jailhouse informant, found Potter, approached Potter, and knowingly influenced, enticed, and coerced Potter to provide false testimony. 957 F.3d at 162 (alteration in original) (quoting *Buckley*, 509 U.S. at 273). "[W]hen the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same." *Id.* at 164 (quoting *Buckley*, 509 U.S. at 276). Thus, Baer is not entitled to absolute immunity because his alleged conduct served an investigative function.[10] [11]

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[10] Baer cites a handful of unpublished and out-of-circuit cases to support his arguments. *See Annapparedy v. Pascale*, 996 F.3d 120 (4th Cir. 2021); *Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003); *Neptune v. Carey*, 2021 WL 5632077 (3d Cir. Dec. 1, 2021) (not precedential); *Jacobs v. City of Philadelphia*, 2022 WL 1772989 (3d Cir. June 1, 2022) (not precedential); *Kroemer v. Tantillo*, 758 Fed. App'x 84 (2d Cir. 2018) (summary order). Because this Court's precedential opinion in *Fogle* resolves whether Baer is entitled to absolute immunity on the face of the complaint, we need not address this non-binding authority. *See generally United States v. Maury*, 695 F.3d 227, 259 n.27 (3d Cir. 2012) ("Of course, the decisions of other circuits, while persuasive, are not binding on the district courts in this Circuit."); 3d Cir. I.O.P 5.7 ("The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court . . . ."); 2d Cir. L.R. 32.1.1(a) ("Rulings by summary order do not have precedential effect.").

[11] The dissent argues that denying Baer's motion to dismiss "means that every time a prosecutor prepares for trial and determines that an additional piece of evidence is needed to prove the crime beyond a reasonable doubt, he is acting in an investigative role." Dissent 8. Not so. The complaint alleges that Baer went looking for a new witness to

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To prevail, Baer "must show that the conduct triggering absolute immunity clearly appears on the face of the complaint." *Weimer*, 972 F.3d at 187 (cleaned up) (quoting *Fogle*, 957 F.3d at 161). "[T]hat burden is uniquely heavy" at the motion-to-dismiss stage "because . . . 'it is the [prosecutor's] conduct *as alleged in the complaint* that is scrutinized." *Fogle*, 957 F.3d at 160 (emphasis in original) (quoting *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996)) (citing *Odd*, 538 F.3d at 207).

Baer has failed to carry that burden for the reasons provided above. This does not mean, however, that Baer is precluded from asserting an absolute immunity defense at later stages of this litigation. For example, Baer can test Roberts's allegations in discovery. As the record develops, Baer may be able to establish that his conduct served a quasi-judicial function. If so, he may yet be entitled to absolute immunity. *See generally Kalina*, 522 U.S. at 121 (assessing whether a prosecutor was entitled to absolute immunity at summary judgment). But that is a question for another day. And accepting as true all of the well-pleaded factual allegations that Roberts included in his complaint, as we must when considering a motion to dismiss, *see, e.g.*, *Odd*, 538 F.3d at 207, Baer is not entitled to absolute immunity because his alleged search for a new witness served an investigative function. Thus, the

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establish motive. Holding that this alleged conduct served an investigatory function does not mean that prosecutors who identify a hole in the state's case ahead of trial—but do not attempt to fill that hole by affirmatively searching for a new witness—will lose the protection of absolute immunity. And we fail to see how a prosecutor's alleged search for a new witness constitutes an "out-of-court 'effort to control the presentation of [a] witness'[s] testimony.'" *Buckley*, 509 U.S. at 272–73 (alteration in original) (quoting *Imbler*, 424 U.S. at 430 n.32).

District Court did not err by denying Baer's motion to dismiss.

III. CONCLUSION

For the reasons discussed above, we will affirm the District Court's order denying Baer's motion to dismiss.

SHWARTZ, J., dissenting.

My colleagues have concluded that the Assistant District Attorney's ("ADA") interview of a potential trial witness constituted an investigative act that is not shielded by absolute prosecutorial immunity. Because the ADA was acting as an advocate rather than an investigator when he allegedly solicited false testimony one month before trial, I would reverse the District Court's order denying him absolute immunity and direct that the Court dismiss the complaint against him.

A prosecutor is absolutely "immune from a civil suit for damages" for "activities [] intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976). To determine whether an activity is associated with the judicial phase, we "focus upon the functional nature of the activities rather than [the prosecutor's] status." *Fogle v. Sokol*, 957 F.3d 148, 159 (3d Cir. 2020) (quotations omitted). This functional test "separates advocacy from everything else." *Id.* at 159-60 (citations omitted). Protected tasks include "initiating a prosecution and [] presenting the State's case," *Imbler*, 424 U.S. at 431, interviewing witnesses and soliciting testimony in preparation for grand jury proceedings, *Rose v. Bartle*, 871 F.2d 331, 344-45 (3d Cir. 1989), obtaining witness statements in connection with a prosecution, *Yarris v. County of Delaware*, 465 F.3d 129, 139 (3d Cir. 2006), and presenting evidence to a judge, *Burns v. Reed*, 500 U.S. 478, 479, 491-92 (1991).[1]

[1] The immunity is not limited to in-court conduct. Instead, "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom," since "an out-of-court effort to control the

Conversely, "absolute immunity does not extend to '[a] prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings.'" *Yarris*, 465 F.3d at 135 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993)). Thus, we must distinguish "the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand." *Buckley*, 509 U.S. at 273. We have generally held that a prosecutor's conduct "[b]efore probable cause for an arrest . . . [i]s entirely investigative in character," but noted that even after a determination of probable case, "a prosecutor may engage in police investigative work that is entitled to only qualified immunity." *Fogle*, 957 F.3d at 160 (quoting *Buckley*, 509 at 274 n.5).[2] Ultimately, determining the precise function of a prosecutor's action is "fact-specific," and we have cautioned against creating bright-line rules or applying "categorical reasoning" to this analysis. *Id.; see also Odd v. Malone,* 538 F.3d 202, 210 (3d Cir. 2008) (rejecting "bright-line rules that would treat the timing of the prosecutor's action (e.g. pre-or post[-]indictment), or its location (i.e. in-or out-of-court), as dispositive").

Here, Roberts alleges that "after it became clear to Detective Lau" that Robert's associate "did not intend to cooperate in his scheme . . . [Lau] began to conspire with

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presentation of [a] witness' testimony . . . [is] fairly within [the prosecutor's] function as an advocate." *Buckley v. Fitzsimmons,* 509 U.S. 259, 272-73 (1993) (quotations and citation omitted).

[2] As an example of such investigative work, *Buckley* noted that "if a prosecutor plans and executes a raid on a suspected weapons cache," he is not entitled to absolute prosecutorial immunity. 509 U.S. at 274.

[the] ADA [] to use Layton Potter to create a new motive." App. 52 (Compl. ¶ 83).[3] Roberts continues that one month

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[3] The primary difference between the dissent and majority is our view of the complaint. The majority characterizes the allegations as saying that the ADA looked for and identified the witness, and concludes, as a result, that the ADA performed an investigatory function. *See* Majority Op. at 10 ("[The ADA] functioned as an investigator, not an advocate, when he identified and tracked down Potter and solicited Potter's false testimony."); Majority Op. at 14 ("The allegations that [the ADA] went looking for a new witness . . . describe an investigator's work seeking to generate evidence in support of a prosecution, not an advocate's work interviewing witnesses as he prepares for trial." (internal quotation marks and citations omitted)); Majority Op. at 25 ("[The ADA] played the detective's role . . . when he went looking for a new jailhouse informant [and] found Potter[.]" (quotations omitted)).

The majority emphasizes that a different conclusion would be warranted if the ADA had interviewed a witness who Lau had identified. *See* Majority Op. at 6 ("The complaint alleges that [the ADA's] actions were not taken in response to leads already identified by Lau, but rather, that he was a joint actor with Lau in locating additional evidence."); Majority Op. at 21 ("This is an investigatory function and distinguishable, for instance, from a similar but different situation where a prosecutor might interview and meet a previously unknown witness who has been located and identified by investigators."). As indicated above, that is precisely what the complaint alleges: that the Detective identified the individual as a potential witness. **App. 52 (Compl. ¶ 83).** Although the majority relies on the allegation that the ADA "joined [] [the Detective's] investigation and began affirmatively seeking a jailhouse snitch who would testify as to a motive," Majority Op. at 21 (citing App. 52 (Compl. ¶ 84)), this does not account for the fact that this allegedly happened only after Lau identified the individual as a witness. ***See* App. 52 (Compl. ¶ 83).** Thus, the Majority and I have different views about this critical reference to the witness.

Likewise, by mixing the allegations against the Detective and the ADA, the majority incorrectly suggests that the ADA allegedly determined that the case was weak, initiated and conducted a search, and identified the witness. *Compare* Majority Op. at 13 (quoting App.

before trial, the ADA "joined Detective Lau's investigation and began affirmatively seeking a jailhouse snitch who would testify as to a motive." App. 52 (Compl. ¶¶ 84-85). The ADA then allegedly met with and solicited a false statement from the witness, **App. 52 (Compl. ¶ 87),** and relied on the witness's testimony at trial**, App. 53 (Compl. ¶¶ 89, 91)**. These allegations are nearly identical to the allegations in *Yarris*, where the complaint alleged that prosecutors "obtain[ed] a false statement from a jailhouse informant" after Yarris had been charged, "used a 'stick and carrot' treatment to elicit [the informant's] testimony," and that the informant then provided false testimony at trial. 465 F.3d at 139. We concluded that the *Yarris* prosecutors were "acting as advocates rather than investigators" when they solicited the false statements because their "involvement with [the informant's] statements occurred after [the] prosecution for those crimes had begun." *Id.* (emphasis omitted); *see also Rose*, 871 F.2d at 344-45 (holding that prosecutors' solicitation and preparation of perjured testimony was entitled to immunity because these actions "occurred in preparation

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52 ¶¶ 83–84) ("[A]fter it became clear" that Robert's associate "did not intend to cooperate in [the Detectives] scheme to present fabricated evidence" supporting the car-conflict motive, the ADA "joined . . . [the Detective's] investigation and began affirmatively seeking a jailhouse snitch who would testify as to a motive."); *with* App. 52 ¶¶ 83–84 ("It was only after it became clear to [] [the Detective] that [an associate of Roberts] did not intend to cooperate in his scheme to present fabricated evidence that [] [the Detective] abandoned the 'car conflict' motive, that he began to conspire with [the] ADA [] to use [the witness] to create a new motive. . . . [The ADA] joined [the Detective's] investigation and began affirmatively seeking a jailhouse snitch who would testify as to a motive."); *cf.* Majority Op. at 2-3 (stating that the ADA "took matters into his own hands by joining the police investigation and looking for a new witness," which "led [the ADA] to [] [the witness]."). By doing so, the majority incorrectly attributes the Detective's actions to the ADA.

for the grand jury proceedings, not in an investigatory capacity").[4] [5]

The ADA's solicitation of the witness's testimony is likewise entitled to absolute immunity because the ADA was acting as an advocate in preparation for trial. The alleged solicitation occurred over a year and a half after Roberts had been identified as a suspect and charged, and then only after the Detective identified the witness to the ADA one month before trial. **App. 44, 52 (Compl. ¶¶ 48, 83, 85).** While timing is not dispositive, *Fogle*, 957 F.3d at 160, the complaint also specifically alleges that the ADA

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[4] The majority suggests that the reasoning in *Rose* did not survive *Buckley's* "guidance that tying evidence to a judicial proceeding is not enough to show that its fabrication served a prosecutorial function." Majority Op. at 16 n.4. This statement overreads *Buckley*, which addressed a situation in which prosecutors sought to match a bootprint found at the scene of the crime "before they had probable cause to arrest petitioner or to initiate judicial proceedings," and well before a grand jury was empaneled. 509 U.S. at 274-75. *Buckley* cautioned that a prosecutor could not convert such acts into prosecutorial work simply because "after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial." *Id.* at 276. This guidance is thus inapplicable to *Rose*, where the alleged "solicitation and preparation of perjured testimony" was "for use in the grand jury proceedings," 871 F.2d at 344, and thus was actually tied to the judicial proceedings.

[5] *See also Annappareddy v. Pascale*, 996 F.3d 120, 140 (4th Cir. 2021) (holding that a prosecutor's fabrication of evidence was not "post-indictment police investigative work," but rather was undertaken in an "advocative" capacity to prepare for trial because (1) the conduct "occurred only after [the plaintiff] had been identified as a suspect, after probable cause had been established, and after he had been twice indicted," *id.*, and (2) the complaint alleged that the prosecutor began to take a "more hands-on approach in anticipation of trial, once she realized that the existing [evidence] was not nearly as favorable to the government as she had expected," *id.* (internal quotation marks, citations, and emphasis omitted)).

was seeking someone "who would testify as to a motive" for the murder.[6] App. 52 (Compl. ¶ 84). This statement demonstrates that the ADA was "evaluating evidence and interviewing witnesses as he prepare[d] for trial," rather than just "searching for [] clues." *Buckley*, 509 U.S. at 273. Accordingly, the timing of the conduct and its purpose show that the ADA acted as an advocate rather than an investigator when he met with Potter.[7]

To hold otherwise means that every time a prosecutor prepares for trial and determines that an additional piece of evidence is needed to prove the crime beyond a reasonable doubt, he is acting in an investigative role. Such a view essentially narrows the advocacy work protected by absolute immunity to actions in the

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[6] It is undisputed that the purpose of the witness's testimony was to show motive. Motive is not required to charge an individual with a crime, and it need not be proven to establish guilt, but it is often helpful to present motive evidence at trial to provide the jury with context. *See Commonwealth v. Shain*, 426 A.2d 589, 591 (Pa. 1981) (explaining that a prosecutor is not required to show motive, but that motive "may be relevant to prove the identity of the perpetrator and/or the degree of the offense," and that "[w]here the Commonwealth elects to prove motive . . . it must be established by legally competent evidence"). The prosecutor decides the evidence that is presented at trial, and thus a prosecutor's choice to offer motive evidence and to speak with a witness about the topic, as the ADA did here, constitutes an advocacy function.

[7] The majority asserts that this holding would create a bright-line rule based on timing, in violation of the *Buckley*. I do not suggest, however, that timing alone is dispositive. Instead, under *Buckley*, timing remains an important factor that may be considered in determining the nature of the function being performed. *See Buckley*, 509 U.S. at 273-74. Here, the act of soliciting witness testimony to prove motive at trial, along with the fact that the solicitation occurred one month before trial, demonstrate that the ADA's actions were performed as an advocate rather than an investigator. This conclusion is consistent with Buckley's functional approach. *See id.* at 273; *see also Fogle*, 957 F.3d at 159.

courtroom even though the law clearly recognizes that prosecutors engage in the work of an advocate outside the courtroom too. *See Buckley*, 509 U.S. at 272-73 (confirming that actions "apart from the courtroom" can be entitled to immunity, such as an "out-of-court effort to control the presentation of [a] witness' testimony" (quotation marks and citation omitted)). The ADA here was preparing for trial and interviewed a witness, who the Detective identified, for presentation to the jury. This is clearly the work of an advocate.

My colleagues and the District Court rely on our ruling in *Fogle* to conclude that the ADA's actions were investigatory and not advocacy. *Roberts v. Lau*, No. 1:21-CV-01140, 2022 WL 2677473 at *2-3 (M.D. Pa. July 11, 2022). In *Fogle*, we denied absolute immunity to prosecutors who encouraged or permitted State Troopers "to fabricate statements from three jailhouse informants," even though such conduct occurred after the initiation of criminal charges. 957 F.3d at 163-64. In doing so, we explained that the *Fogle* prosecutors "not only solicited false statements from jailhouse informants, but deliberately encouraged the State Troopers to do the same knowing their evidence was weak." *Id.* at 164 (quotations omitted and cleaned up). Thus, we concluded that the "prosecutors were functioning not as advocates, but as investigators seeking to generate evidence in support of a prosecution." *Id.*

Fogle's reasoning that "generating evidence" to support a prosecution constitutes an investigative function conflicts with our earlier cases holding that collecting evidence in preparation for trial or grand jury proceedings is an advocacy function. *See, e.g., Yarris*, 465 F.3d at 139 (concluding solicitation of false statements was an advocacy function); *Rose*, 871 F.2d at 244 (holding that solicitation of testimony for use in grand jury

proceedings "are encompassed within the preparations necessary to present a case and therefore are immunized" (quotations and citation omitted)); *see also Buckley*, 509 U.S. at 273 (describing "evaluating evidence and interviewing witnesses as he prepares for trial" as "the advocate's role"). Because *Yarris* and *Rose* were decided before *Fogle*, they control our analysis. *See Pardini v. Allegheny Intermediate Unit*, 524 F.3d 419, 426 (3d Cir. 2008) (observing that if two precedential "cases conflict, the earlier is the controlling authority and the latter is ineffective as precedent[]." (quoting *United States v. Rivera*, 365 F.3d 213, 213 (3d Cir. 2004))). Applying those cases, the ADA should be entitled to absolute immunity for his procurement and presentation of the witness's testimony.[8]

Furthermore, even assuming *Fogle* can be reconciled with *Yarris*, this case is more like *Yarris* than *Fogle*, and thus immunity is warranted here. First, like the prosecutors in *Yarris*, the complaint clearly states that the ADA solicited the witness's statement for the purpose of gathering testimony, and the temporal proximity to the

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[8] The majority attempts to distinguish *Fogle* and *Yarris* based on the fact that the allegations in *Fogle* were more detailed than those in *Yarris*. However, the majority does not identify the additional details in *Fogle* that made the prosecutors' actions more investigatory in nature than the prosecutors' actions in *Yarris*. A review of the two cases reveals that the crux of the allegations regarding the solicitation of false testimony was nearly identical. *Compare Fogle*, 957 F.3d at 164 ("Fogle alleges that the Prosecutors not only solicited false statements from jailhouse informants, but deliberately encouraged the State Troopers to do the same knowing their evidence was weak . . . ."), *with Yarris*, 465 F.3d at 139 ("[T]he ADAs used a 'stick and carrot' treatment to elicit[] [the] jailhouse informant['s]" false testimony" (quotations omitted)). Thus, the supposed difference in the amount of detail in the allegations in each case does not provide a basis for distinguishing them from each other.

trial shows this testimony was intended to be used for trial rather than for an investigative purpose.[9] Second, in *Fogle*, there was a "long chain of investigative events led, or supervised, by [the prosecutors]" both before and after Fogle's arrest, 957 F.3d at 163, whereas the complaint here does not allege that the ADA played any role before Roberts was charged. Thus, based on *Yarris*, the ADA's actions were taken in his capacity as an advocate for the State in preparation for trial. As a result, the ADA is entitled to absolute immunity.

While the alleged conduct is serious and of course is not condoned, the law cloaks the ADA in absolute immunity. I therefore respectfully dissent.

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[9] Roberts asserts that *Yarris* is distinguishable from this case because "[i]n contrast to the passive conduct of the prosecutor in obtaining the false statements described in *Yarris*, [the ADA here] actively approached [the witness] and asked him if he 'wanted a piece' of the prosecution for the purpose of fabricating a motive." Appellee's Br. at 16. It is not accurate, however, to characterize the prosecutors' actions in *Yarris* as "passive." Indeed, the *Yarris* complaint asserted that the prosecutors had "used a 'stick and carrot' treatment to elicit [the] false testimony." 465 F.3d at 139. This is nearly identical to the allegations here, where the complaint alleges that the witness agreed to provide a statement "to gain favor related to hi[s] own pending criminal charges." App. 52 (Compl. ¶ 87).

APPENDIX B

[FILED: JULY 11, 2022]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LARRY TRENT ROBERTS,	: Civil No. 1:21-CV-01140
Plaintiff,	:
v.	:
DAVID LAU, Detective, *et al.*,	:
Defendants.	: Judge Jennifer P. Wilson

MEMORANDUM

Before the court are two motions to dismiss the complaint filed by Defendants John Baer, Assistant District Attorney ("ADA Baer"), and the City of Harrisburg. (Docs. 27, 34.) For the following reasons, the court will deny ADA Baer's motion to dismiss, but will grant the City of Harrisburg's motion to dismiss without prejudice to Plaintiff filing an amended complaint as to Count V.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

According to the complaint, Plaintiff, Larry Trent Roberts ("Roberts"), "was unjustly targeted, arrested, and convicted for a crime he did not commit" which resulted in him serving 13 years of a life sentence before he was acquitted in 2019. (Doc. 1, ¶¶ 1, 9.) Specifically,

Roberts claims that he was unjustly convicted for the alleged murder of Duwan Stern in 2005. (*Id.* ¶¶ 9, 13.) Roberts alleges, inter alia, that in order to secure his conviction for this charge, Defendant David Lau ("Lau"), a detective with the Harrisburg City Police Department, and ADA Baer conspired to fabricate evidence against him during the investigation and prosecution of this criminal case. (*Id.* ¶¶ 116–19, 126–29.) Roberts asserts, in pertinent part, that Lau and ADA Baer fabricated evidence by "[k]nowingly influencing, enticing, and coercing an inculpatory statement from Layton Potter: a jailhouse snitch, who lacked any credibility, whose statement could not be corroborated, and was only concerned with benefiting himself." (*Id.* ¶¶ 117, 127.) In addition, Roberts contends that the City of Harrisburg failed to maintain any policy or training regarding the information required for an affidavit of probable cause, which contributed to the deprivation of Roberts' constitutional rights. (*Id.* ¶¶ 131–32.).

On the basis of these facts, Roberts filed a six-count complaint on June 28, 2021, alleging claims for fabrication of evidence, conspiracy to violate civil rights, and municipal liability as to ADA Baer and the City of Harrisburg. (*Id.*) Roberts also sets forth claims for malicious prosecution under state and federal law, fabrication of evidence, withholding of exculpatory material, and conspiracy to violate civil rights against Lau. (*Id.*) On September 13, 2021, ADA Baer filed one of the instant motions to dismiss accompanied by a supporting brief. (Docs. 27, 28.) Roberts filed a brief in opposition on October 8, 2021. (Doc. 33.) On October 18, 2021, the City of Harrisburg filed the second of the instant motions to dismiss accompanied by a supporting brief. (Docs. 34, 35.) Roberts filed a brief in opposition on November 1, 2021. (Doc. 38.) Defendants timely filed

reply briefs for their respective motions. (Docs. 37, 40.) Accordingly, the motions are ripe for disposition.[1]

JURISDICTION AND VENUE

The court has federal question jurisdiction over the complaint as it asserts claims under 42 U.S.C. § 1983. *See* 28 U.S.C. § 1331. Venue is appropriate because all actions detailed in the amended complaint occurred within the Middle District of Pennsylvania.

STANDARD OF REVIEW

In order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 556). "Conclusory allegations of liability are insufficient" to survive a motion to dismiss. *Garrett v. Wexford Health*, 938 F.3d 69, 92 (3d Cir. 2019) (quoting *Iqbal*, 556 U.S. at 678–79). To determine whether a complaint survives a motion to dismiss, a court identifies "the elements a plaintiff must plead to state a claim for relief," disregards the allegations "that are no more than conclusions and thus not entitled to the assumption of truth," and determines whether the remaining factual allegations "plausibly give rise to an entitlement to relief." *Bistrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2012).

[1] Lau filed an answer to the complaint on October 18, 2021. (Doc. 36.).

DISCUSSION

ADA Baer and the City of Harrisburg's motions to dismiss seek dismissal of all claims against them in the complaint; specifically, Counts II, IV, and V for fabrication of evidence, civil rights conspiracy to violate Roberts' Fourth and Fourteenth Amendment rights, and municipal liability, respectively. Counts II and IV are asserted against ADA Baer and Lau, and Count V is asserted against the City of Harrisburg. (*See* Doc. 1.).

A. ADA Baer's Motion to Dismiss Will be Denied. (Doc. 27.)

ADA Baer seeks to have Roberts' claims for fabrication of evidence and conspiracy to violate civil rights dismissed because he asserts that he is entitled to absolute immunity from suit under 42 U.S.C. § 1983. (Doc. 28, pp. 10–15.)[2]

Section 1983 "provides that every person who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (cleaned up). However, the statute does not "abolish wholesale all common-law immunities[.]" *Burns v. Reed*, 500 U.S. 478, 484 (1991). Instead, certain officials are entitled to "absolute protection from damages liability" as a result of the "special functions" they perform. *Fogle v. Sokol*, 957 F.3d 148, 158 (3d Cir. 2020). State prosecutors are one such category of officials due to their function within the judicial process. *See Imbler*, 424 U.S. at 430–31.

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[2] For ease of reference, the court utilizes the page numbers from the CM/ECF header.

However, "[a] prosecutor bears the 'heavy burden' of establishing entitlement to absolute immunity." *Odd v. Malone*, 538 F.3d 202, 207 (3d Cir. 2008) (quoting *Light v. Haws*, 472 F.3d 74, 80–81 (3d Cir. 2007)). As a general rule, "[m]ost public officials[, such as prosecutors,] are entitled only to qualified immunity." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982)); *see also Burns*, 500 U.S. at 486–87 ("The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties."); *Odd*, 538 F.3d at 207–08 ("In light of the Supreme Court's 'quite sparing' recognition of absolute immunity to § 1983 liability, we begin with the presumption that qualified rather than absolute immunity is appropriate.") (quoting *Carter v. City of Philadelphia*, 181 F.3d 339, 355 (3d Cir. 1999)). Prosecutors may nevertheless qualify for absolute immunity when he or she functions as the state's advocate when performing the action in question. *Yarris v. County of Delaware*, 465 F.3d 129, 136 (3d Cir. 2006). This inquiry is concerned with "the nature of the function performed, not the identity of the actor who performed it." *Light*, 472 F.3d at 78.

The Supreme Court has explained that prosecutors are absolutely "immune from a civil suit for damages" for "activities [] intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430–31 (1976). In other words, a prosecutor enjoys absolute immunity for "all actions performed in a quasi-judicial role," such as "soliciting . . . testimony from witnesses in grand jury proceedings and probable cause hearings," "initiating a prosecution," "preparing for the initiation of judicial proceedings or for trial, conducting a trial, and presenting evidence to a judge." *Burns*, 500 U.S. at 479, 491–92; *Light*, 472 F.3d at 77; *Kulwicki v. Dawson*, 969

F.2d 1454, 1463, 1465 (3d Cir. 1992); *Imbler*, 424 U.S. at 431; *see also Fogle*, 957 F.3d at 159 ("Th[e] functional test separates advocacy from everything else[.]"). In contrast, absolute immunity does not apply "to administrative or investigatory actions unrelated to initiating and conducting judicial proceedings." *Odd*, 538 F.3d at 208. Indeed, the Court has explained that: "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." *Kalina v. Fletcher*, 522 U.S. 118, 126 (1997) (internal quotation marks and citations omitted).

The Court of Appeals for the Third Circuit has firmly rejected the notion that bright-line rules can be drawn regarding the prosecutor's role. *Fogle*, 957 F.3d at 160 ("[W]hile it is tempting to derive bright-line rules from [precedent], we have cautioned against such categorical reasoning to preserve the fact-based nature of the inquiry."); *see also Odd*, 538 F.3d at 210 (rejecting "bright-line rules that would treat the timing of the prosecutor's action (e.g. pre-or post[-]indictment), or its location (i.e. in-or out-of-court), as dispositive"). Thus, the applicability of absolute immunity turns on the specific facts in the case. *Weimer v. County of Fayette*, 972 F.3d 177, 187 (3d Cir. 2020). While courts "tend to discuss prosecutorial immunity based on alleged acts, our ultimate analysis is whether a defendant has established absolute prosecutorial immunity from a given claim." *Id.* (quoting *Fogle*, 957 F.3d at 161).

Roberts' claims against ADA Baer stem from a single act, which Roberts characterizes as follows: seeking out, "[k]nowingly influencing, enticing, and coercing an inculpatory statement from Layton Potter: a jailhouse snitch, who lacked any credibility, whose statement could

not be corroborated, and was only concerned with benefiting himself." (Doc. 1, ¶ 117; *see also* ¶ 127.) Rather than merely preparing Potter for trial, the complaint asserts that ADA Baer took steps to seek out, influence, and coerce Potter to make a statement that could be used against Roberts to formulate a motive for Roberts' alleged actions. Thus, Roberts alleges that ADA Baer "played 'the detective's role' to 'search[] for the clues and corroboration'" necessary to convict Roberts. *Fogle*, 957 F.3d at 162 (quoting *Buckley*, 509 U.S. at 273). The Third Circuit has plainly stated that these acts "do not enjoy absolute immunity." *Id.* at 162–63 (a prosecutor who "investigat[es] the theory of his case by 'searching for . . . clues[]'" is not entitled to absolute immunity) (quoting *Buckley*, 509 U.S. at 273). Accepting the facts alleged as true and drawing all inferences in favor of Roberts, ADA Baer has not carried his burden to demonstrate that he is entitled to absolute immunity for his alleged conduct at this stage.[3] Therefore, the court will deny his motion to dismiss.

B. The City of Harrisburg's Motion to Dismiss Will be Granted Without Prejudice to Roberts Amending his Complaint as to Count V. (Doc. 34.)

Roberts asserts a claim for municipal liability based on both a "deliberate indifference theory" and a "failure to train" theory. (Doc. 1, ¶¶ 131–32.) The City of

[3] In making this finding, the court does not opine on the question of whether qualified immunity would shield ADA Baer from liability in this case. *See Yarris*, 465 F.3d at 139 ("Prosecutors who are not entitled to absolute immunity from a plaintiff's claims may nonetheless be entitled to qualified immunity from those same claims.") (citing *Imbler*, 424 U.S. at 430–31). Indeed, ADA Baer has not argued in his motion to dismiss that qualified immunity would be appropriate in this case.

Harrisburg asserts that Roberts has failed to state a viable claim under *Monell*[4] because Roberts' allegations are conclusory and do not include the necessary factual predicates to support the claim.[5] (Doc. 35, pp. 7–8.).

A municipality can be liable for constitutional injuries under § 1983 when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978). The plaintiff must show that the municipality was the "moving force behind the alleged injury. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Board of the County Comm'rs v. Brown*, 520 U.S. 397, 404 (1997).

A plaintiff can proceed with a § 1983 claim against a municipality in two ways. First, he can allege that a policy or custom caused his injury. Second, he can allege that a failure by the municipality that reflects a "deliberate or conscious choice" caused his injury. *Forrest v. Parry*, 930

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[4] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

[5] In response, Roberts asserts that the factual allegations in the complaint were based on certain discovery responses from the City of Harrisburg, namely, the Harrisburg Police Department "Criminal Investigation Division Standard Operational Manual," the Harrisburg Police Department "Field Training and Evaluation Manual," and the City's representation to Roberts' counsel that it did not have any "record of investigative reports, commissioner memorandums, or executive summaries related to the suppression of evidence." (Doc. 38, pp. 6–7.) Roberts attached these discovery documents to his opposition to the City's motion to dismiss. (*See* Doc. 38-1; Doc. 38-2; Doc. 38-3.) Since these documents were not attached to the complaint, the court does not consider them in ruling on the instant motion to dismiss.

F.3d 93, 105 (3d Cir. 2019). These two avenues are distinct, and require different evidentiary showings.

On this score, the Third Circuit has explained that:

> Plaintiffs that proceed under a municipal policy or custom theory must make showings that are not required of those who proceed under a failure or inadequacy theory, and vice versa. Notably, an unconstitutional municipal policy or custom is necessary for the former theory, but not for the latter, failure or inadequacy theory. This difference can be significant because a plaintiff presenting an unconstitutional policy must point to an official proclamation, policy or edict by a decisionmaker possessing final authority to establish municipal policy on the relevant subject. And, if alleging a custom, the plaintiff must evince a given course of conduct so well-settled and permanent as to virtually constitute law. On the other hand, one whose claim is predicated on a failure or inadequacy has the separate, but equally demanding requirement of demonstrating a failure or inadequacy amounting to deliberate indifference on the part of the municipality. This consists of a showing as to whether (1) municipal policymakers know that employees will confront a particular situation, (2) the situation involves a difficult choice or a history of employees mishandling, and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights.

Id. at 105–06 (internal citations omitted).

In this case, Roberts alleges that the City of Harrisburg failed to maintain a policy or audit its detectives regarding information that should be included in affidavits of probable cause. (Doc. 1, ¶¶ 64, 66.) Thus,

Roberts proceeds on a "deliberate or conscious choice" theory.

A municipality can also be held liable for constitutional torts if there exists a "failure to train [that] amounts to deliberate indifference to the rights of persons with whom the municipal employees come into contact." *Reitz v. Cty. of Bucks*, 125 F.3d 139, 145 (3d Cir. 1997). To succeed on a failure to train claim, a plaintiff "must identify a failure to provide specific training that has a causal nexus with their injuries and must demonstrate that the absence of that specific training can reasonably be said to reflect a deliberate indifference to whether the alleged constitutional deprivations occurred." *Id.*

The Third Circuit has adopted a three-prong test to determine when a municipality's failure to train amounts to deliberate indifference:

> [I]n order for a municipality's failure to train or supervise to amount to deliberate indifference, it must be shown that (1) municipal policymakers know that employees will confront a particular situation; (2) the situation involves a difficult choice or a history of employees mishandling; and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights.

Carter, 181 F.3d at 357.

Regardless of which theory of recovery a plaintiff pursues for municipal liability, courts have held that

> A plaintiff claiming a constitutional violation against a municipality under § 1983 must demonstrate a "showing" of entitlement to relief, more than a mere "blanket assertion" or conclusory allegation. *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008). Plaintiffs must plead facts which demonstrate that

> Defendants are responsible either for enacting, implementing, or widespreadly engaging in a practice which constitutes or causes a constitutional violation. *See id.* We have previously held that a complaint that merely states the standard for municipal liability under § 1983, without more, is insufficient to survive a *Monell* challenge. *See Heilman v. T.W. Ponessa & Assocs.*, No. 4:07-cv-1308, 2008 U.S. Dist. LEXIS 6875, at *42–43 (M.D. Pa. Jan. 30, 2008).

Kennedy v. Sch. Dist. of Leb., No. 1:11-cv-382, 2011 U.S. Dist. LEXIS 157416, at *25 (M.D. Pa. Dec. 21, 2011).

In his complaint, Roberts alleges the following, which he asserts supports his claim for municipal liability against the City of Harrisburg:

> 131. The City of Harrisburg, by and through its policymakers operated the Harrisburg Police Department without a policy which instructs its detectives regarding the information which must be included within Affidavits of Probable Cause.
>
> 132. The City of Harrisburg, by and through its policymakers operated the Harrisburg Police Department without any training regarding the constitutional obligations of detectives when completing Affidavits of Probable Cause.
>
> 133. The need for policies and training related to the creation of affidavits of probable cause is obvious because it is a request to use state authority to deny citizens of their liberty.
>
> 134. The risk of constitutional violations occurring where a city maintains no policies or training related to the creation of affidavits of probable cause is obvious and severe.

> 135. The ongoing failure [of] the City of Harrisburg, by and through its policymakers, to implement policies to protect the constitutional rights of its citizens constitutes deliberate indifference.
>
> 136. The ongoing failure of the City of Harrisburg, by and through its policymakers, to implement policies or training related to the creation of affidavits of probable cause was a moving force behind the deprivation of Mr. Roberts' constitutional rights.

(Doc. 1, ¶¶ 131–36; *see also id.* ¶¶ 64–66.)

The court finds that Roberts has done nothing more than insert the City of Harrisburg into a formulaic recitation of the elements for municipal liability based on deliberate indifference and failure to train theories, resulting in conclusory allegations that are factually unsupported.[6] Since it is clear that "a complaint that merely states the standard for municipal liability under § 1983, without more, is insufficient to survive a *Monell* challenge," the court will grant the motion to dismiss without prejudice to Roberts filing an amended complaint as to Count V. *Kennedy*, 2011 U.S. Dist. LEXIS 157416, at *25.

CONCLUSION

For the foregoing reasons, the court will deny ADA Baer's motion to dismiss, but will grant the City of Harrisburg's motion to dismiss without prejudice to

[6] The court makes this conclusion without considering the discovery that Roberts has received since none of the information in these documents was included in the complaint.

Plaintiff filing an amended complaint as to Count V. (Docs. 27, 34.) An appropriate order follows.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Court Judge
Middle District of Pennsylvania

Dated: July 11, 2022

APPENDIX C

[FILED: JULY 11, 2022]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LARRY TRENT ROBERTS,	: Civil No. 1:21-CV-01140
Plaintiff,	:
v.	:
DAVID LAU, Detective, *et al.*,	:
Defendants.	: Judge Jennifer P. Wilson

ORDER

AND NOW, on this 11th day of July, 2022, for the reasons set forth in the accompanying memorandum, **IT IS ORDERED THAT:**

1. Defendant Baer's motion to dismiss, Doc. 27, is **DENIED**. Defendant Baer shall file a response to the complaint in accordance with the Federal Rules of Civil Procedure.

2. Defendant City of Harrisburg's motion to dismiss, Doc. 34, is **GRANTED** without prejudice to Plaintiff filing an amended complaint as to Count V. Such amended complaint may be filed within **21 days**, on or before **August 2, 2022**. Plaintiff's failure to file an amended complaint by this date

shall result in the forfeiture of all claims against the City of Harrisburg.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Court Judge
Middle District of Pennsylvania

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2340

LARRY TRENT ROBERTS

v.

DAVID LAU, Detective; JOHN C. BAER, Assistant District Attorney; CITY OF HARRISBURG

John C. Baer,

Appellant

(D.C. Civil No. 1:21-cv-01140)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTFOMERY-REEVES, CHUNG, and ROTH[*] Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges

[*] Judge Roth's vote is limited to panel rehearing.

of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Judge Shwartz voted to grant the petition for rehearing en banc.

BY THE COURT,
s/ Tamika R. Montgomery-Reeves
Circuit Judge

Dated: February 5, 2024
PDB/cc: All Counsel of Record

APPENDIX E

Amend. XIV.

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any

State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX F

Section 1983 of Title 42, United States Code, provides:

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

APPENDIX G

[FILED: AUGUST 2, 2022]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LARRY TRENT ROBERTS, Plaintiff	:	
v.	:	Civil Action No. 21-1140
DETECTIVE DAVID LAU and ASSISTANT DISTRICT ATTORNEY JOHN BAER and CITY OF HARRISBURG,	:	(Honorable Jennifer P. Wilson)
Defendants.	:	Jury Trial Demanded

PLAINTIFF'S FIRST AMENDED COMPLAINT

NOW COMES Larry Trent Roberts, by and through Arthur Larkin, Esquire of Hale & Monico, and Mark V. Maguire, Esquire, and John J. Coyle, Esquire of McEldrew, Young, Purtell & Merritt complaining of Defendants, Detective David Lau, Assistant District Attorney John Baer, and the City of Harrisburg. In support thereof, Plaintiff avers as follows:

NATURE OF THE COMPLAINT

1. Larry Trent Roberts is a lifelong resident of Harrisburg Pennsylvania, a father, provider, and a business owner who was unjustly targeted, arrested, and convicted for a crime he did not commit. As a result, Mr. Roberts was sentenced to life in prison without the

possibility of parole and suffered in a maximum-security prison for 13 years.

2. This miscarriage of justice was directly caused by the unconstitutional and unconscionable misconduct of Harrisburg Police Detective David Lau and Assistant District Attorney John Baer, as well as the customs and policies of the Harrisburg Police Department.

3. Detective Lau and ADA Baer fabricated evidence, withheld evidence, misrepresented evidence, and disregarded evidence in order to attain a conviction despite Mr. Roberts' innocence.

4. Mr. Roberts now brings this matter before the court seeking damages for the tragic and devastating loss of liberty he has suffered.

JURISDICTION AND VENUE

5. Jurisdiction exists in this Court pursuant to 28 U.S.C. §§ 1331 and 1343 as this action is brought pursuant to 42 U.S.C. § 1983 to redress a deprivation of Plaintiff's rights secured by the United States Constitution.

6. This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 to adjudicate pendent state law claims.

7. Venue is proper in the Middle District of Pennsylvania under 28 U.S.C. § 1391(b) in that this is the District where the claims arose.

JURY DEMAND

8. Plaintiff demands a jury on all issues and claims set forth in this Complaint pursuant to the Seventh Amendment of the United States Constitution and Federal Rule of Civil Procedure 38(b).

PARTIES

9. Plaintiff Larry Trent Roberts is, and at all times relevant to this Complaint was, a resident of the State of Pennsylvania. On November 14, 2007 Mr. Roberts was wrongfully convicted of the murder Duwan Stern and sentenced to life in prison without the possibility of parole. Mr. Roberts suffered in prison for 13 years until he was ultimately acquitted of all crimes on September 17, 2019.

10. Defendant Detective David Lau, at all times relevant to this Complaint was an officer of the Harrisburg Police Department acting under color of law and within the scope of his employment pursuant to the statutes, ordinances, regulations, policies, customs, and practices of the City of Harrisburg and the Harrisburg Police Department.

11. Defendant City of Harrisburg is, and at all times relevant to this Complaint, was a municipality located in the Commonwealth of Pennsylvania. The City of Harrisburg is, and at all times relevant to this Complaint, was officially responsible for the policies, customs, and practices of the Harrisburg Police Department. The City of Harrisburg was at all times relevant to this Complaint the employer of Defendant Detective David Lau.

12. Defendant Assistant District Attorney, at all times relevant to this Complaint was an Assistant District Attorney in the Dauphin County District Attorney's Office acting under color of law and within the scope of his employment.

OPERATIVE FACTS

The Murder of Duwan Stern

13. Duwan Stern was shot and killed at 20th and Swatara Streets in Harrisburg, Pennsylvania on December 21, 2005 at approximately10:00 p.m.

14. Mr. Stern had spent the majority of the day with a girlfriend named Denise Warden. At approximately 9:00-9:30 p.m., while at Ms. Warden's house, Mr. Stern received a few phone calls and left her home. He would never return.

15. While sitting in the driver's seat of his car on 20th street, someone shot Mr. Stern in the head. The sounds of the gunshots and the squealing tires, spinning interminably on the ice, drew the attention of many in the area.

16. There are no eyewitnesses Mr. Stern's murder but there are two residents from the neighborhood, Jackie Wright and Lisa Starr who witnessed the aftermath.

17. Ms. Wright and Ms. Stern described seeing two men leaning into Mr. Stern's car from the passenger door and pushing his dead body out onto the street.

18. We know that one of those men is Thomas Mullen. He eventually admitted to not only pushing Mr. Stern into the street but also to rummaging through his car for drugs.

19. The other man is unknown. Ms. Wright and Ms. Starr Mr. Mullen all gave statements on the night of the murder that there was a second man. Their descriptions of the man varied substantially but they all agreed that he was a black male wearing a hood.

20. While Mr. Stern was being murdered and robbed by Mr. Mullen and an unknown man, Mr. Roberts was miles away shopping with his loved ones.

21. Mr. Roberts' location is established and corroborated not just by his own statements but also the testimony of his girlfriend Tyisha Williams, but also cell phone data and a receipt from the store where he was shopping.

22. At approximately 9:30 on that night, Tony Ebersole and Tom Mullen arrived 20th and Swatara Streets to buy illicit drugs from a man named "Los". Mr. Ebersole had arranged to meet with Los alone, so he dropped Mr. Mullen off at an alley on 20th street prior to reaching the intersection with Sawarta Street.

23. Mr. Ebersole sat in his vehicle waiting for Los for approximately 25 minutes when Mr. Mullen approached the vehicle and asked him if he wanted to buy drugs from someone that Mr. Mullen knew as opposed to continuing to wait for Los.

24. Mr. Ebersole declined and told Mr. Mullen to return to the alley because Los was expecting him to be alone and would not sell him drugs if Mr. Mullen was present.

25. Approximately 30 to sixty seconds later Mr. Stern was shot and killed as he sat in his driver's seat.

26. Mr. Mullen and another unknown black male then pushed Mr. Stern's lifeless body out of the car and into the street.

27. Mr. Mullen then attempted to rob Mr. Stern of drugs or money.

28. Mr. Ebersole heard gunshots coming from the area where Mr. Mullen was walking. Mr. Ebersole claims

that he looked in the direction of the gunshots, but he did not see anything.

29. Mr. Mullen returned to Mr. Ebersole's vehicle moments later and told him that his boy- Mr. Stern- had been shot.

30. Physical evidence corroborates that Mr. Stern was shot and killed while sitting in the driver's seat of his vehicle and that his body was pushed out of the vehicle into the street.

Initial Descriptions and Identifications

31. Multiple witnesses provided statements to police in the aftermath of the murder of Mr. Stern. None of the witnesses initially identified Mr. Roberts as the person involved in the shooting.

a. Thomas Mullen

32. Mr. Mullen was in the area of 20th and Swatara Streets to attain drugs at the time of Mr. Stern's murder. He admits to pushing Mr. Stern's dead body out a car and attempting to rob him. Throughout the investigation and prosecution of Mr. Roberts, Mr. Mullen gave several statements, evolving at every turn to aid Detective Lau and benefit himself.

33. In Mr. Mullen's first statement to police, given to Detective Lau at approximately 3:33 am on December 22, 2005, he stated as follows:

a. At approximately 9:30 on that night, Tony Ebersole and Tom Mullen arrived 20th and Swatara Streets to buy illicit drugs from a man named "Los". Mr. Ebersole had arranged to meet with Los alone, so he dropped Mr. Mullen off at an alley on 20th

street prior to reaching the intersection with Sawarta Street.

b. While waiting, Mr. Stern drove up and asked him if he wanted to buy drugs from him.

c. Mr. Mullen went to ask Mr. Ebersole if he wanted to but drugs from Mr. Stern. Mr. Ebersole declined and Mr. Mullen began walking back to Mr. Stern to decline his offer.

d. While he was talking to Mr. Ebersole, he heard gunshots coming from the area of Mr. Stern's car.

e. He then walked towards Mr. Stern's car and when he arrived he saw that Mr. Stern had been shot.

f. While at Mr. Stern's car, he had a brief conversation with an armed man about what happened to Mr. Stern then left to go back to Mr. Ebersole's car.

34. Mr. Mullen would change the facts of this self-serving statement over the course of Mr. Roberts' prosecution, but it provided the starting point of Detective Lau's investigation.

35. Mr. Mullen described the armed man he spoke with as being in his 20s, having a medium to dark complexion, 5'8" to 5'10" weighing 160-175 lbs. wearing a dark colored hoodie jacket possibly with white fringe that looked like fur.

36. Based upon Mr. Mullen's statement, Detective Lau created a phot array that included a known drug dealer named Carlos "Los" Torres in an attempt to determine whether Los was the armed man that Mr. Mullen spoke with at Mr. Stern's car.

37. In compiling this photo array, Detective Lau included a photo of Mr. Roberts.

i. Creation of Suggestive Photo array

38. There was no valid reason to include Mr. Roberts in this photo array.

39. Detective Lau included a photo of Mr. Roberts because Detective Lau personal negative history with Mr. Roberts and baselessly believed that Mr. Roberts was a criminal capable of murder; and

40. Specifically, Detective Lau arrested Mr. Roberts in 1994. During the course of the arrest Detective Lau assaulted Mr. Roberts by striking him with his firearm. Mr. Roberts had to be taken to the hospital after this assault.

41. In order to justify his assault of Mr. Roberts, Detective Lau accused and charged Mr. Roberts with assault.

42. The charges against Mr. Roberts were eventually dismissed by the court.

43. Detective Lau included a photo of Mr. Roberts because saw that Mr. Roberts called Mr. Stern's phone while Lau was at the crime scene and saw an opportunity to drag Mr. Roberts into his investigation.

44. Specifically, Detective Lau was on the crime scene from at least 11:03p.m. through 11:47 during which time he was in close proximity to Mr. Stern and Mr. Stern's cell phone.

45. Mr. Roberts called Mr. Stern's phone 3 times between 11:03 and 11:47.

46. Upon information and belief, Detective Lau either saw Mr. Roberts' name or phone number come up on Mr. Stern's phone as the incoming calls hit his phone.

47. Immediately upon learning that Mr. Roberts was an associate of Mr. Stern, he decided to drag Mr. Roberts into the investigation by including him in a photo array.

48. The baselessness of Detective Lau's inclusion of Mr. Roberts in the photo array is confirmed by the disparity of his physical appearance and Mr. Mullen's description of the armed man. Mr. Mullen claimed the man weighed 160-175 pounds while it is undisputed that Mr. Roberts weighed 287 pounds.

49. Mr. Mullen was shown the photo array and asked if he could identify the armed man he had encountered at Mr. Stern's car.

50. Mr. Mullen did not identify Mr. Roberts the armed man he had encountered at Mr. Stern's car.

b. Jacquelyn Wright

37. Jacquelyn Wright, a resident of the neighborhood where Mr. Stern was shot called 911 to report the shooting. Ms. Wright first stated that she did not see who shot Mr. Stern. Later in the call, she described two individuals who pushed Mr. Stern out of his car as "boys" in their early 20s.

38. Ms. Wright also provided multiple statements in the early morning hours following the shooting. During her first statement at 1:43 a.m. on December 22, 2005 Ms. Wright she provided greater detail of what she had observed.

39. Ms. Wight stated that after hearing gunshots, she ran to her window, looked out the window, and saw two men near Mr. Stern's car; one was light and thin with a

knit hat, the other was a black guy, taller than him, with a hood on.

40. During Ms. Wright's second statement at 2:25 a.m. on December 22, 2005 she described how these two men pushed Mr. Stern out of his vehicle after he had been shot. Ms. Wright did not provide any further description of the black man near Mr. Stern's car.

41. That same day, Detective Lau presented his photo array to Ms. Wright. And asked her if any of the men in the photos were the black man she saw near Mr. Stern's vehicle.

42. Ms. Wright did not identify Mr. Roberts as the black man she saw near Mr. Stern's vehicle. In fact, Ms. Wright selected another person from the photo array.

a. Lisa Starr

43. Lisa Starr is also a resident of the neighborhood where Mr. Stern was shot. Ms. Starr heard the gunshots that killed Mr. Stern and ran to her window to observe what was happening.

44. On December 22, 2005 at 1:35 a.m. Ms. Starr provided a statement where she described seeing a black man with his head in Mr. Stern's car. She described the man as wearing a white shirt, white pants, and a black jacket with a hood that looked too small for the man's large belly.

45. That same day, Detective Lau presented his photo array to Ms. Ms. Starr and asked if any of the men in the photos were the man she saw with his head in Mr. Stern's vehicle.

46. Ms. Starr did not identify Mr. Roberts as the man she saw with his head in Mr. Stern's vehicle.

47. On January 7, 2006, Ms. Starr was shown another photo array. On that occasion Ms. Starr identified a suspect other than Mr. Roberts as "favoring" the man who she saw with his head in Mr. Stern's vehicle but stopped short of making a positive identification.

Investigation Prior to Arrest

48. Between the Murder of Mr. Stern on December 21, 2005 and Detective Lau's submission of his Affidavit of Probable Cause on January 12, 2006, Detective Lau had not uncovered any evidence that implicated Mr. Roberts as the man who killed Mr. Stern.

49. To the contrary, Detective Lau uncovered critical evidence that exculpated Mr. Roberts but he disregarded and withheld that evidence in his rush to see Mr. Roberts unjustly convicted.

a. On December 23, 2005 Detective Lau received information that two men named James Cousin and Fred Jackson were heard bragging about having killed Mr. Stern. Detective Lau did not compile and present photo arrays of these men to Ms. Wright, Ms. Starr, or Mr. Mullen.

b. On January 5, 2006, Mr. Stern's girlfriend Denise Warden provided Detective Lau with the identity of a suspect, "Chase", who had a violent record and a motive to harm Mr. Stern. Detective Lau showed a photo array of "Chase" to Ms. Starr who said he "favored" the person who killed Stern. Detective Lau did not show the photo array to any other witnesses.

c. By January 10, 2006 Detective Lau had obtained Mr. Roberts' cell phone records and

learned that his cell provider would be able to track his location to within 1-3 miles. Rather than attaining this tracking information for its evidentiary value, Detective Lau told the cell provider to disregard the inquiry.

d. On January 11, 2006, Detective Lau received the phone number of the caller who called Mr. Stern multiple times in the hour before the murder that caused Mr. Stern to leave Ms. Warden's house. Detective Lau did nothing to investigate this information or determine the identity of the caller.

50. Rather than following the evidence to determine the true killer of Mr. Stern, Detective Lau doubled down on his unjustified determination to convict Mr. Roberts.

51. Despite a total lack of reliable evidence that implicated Mr. Roberts in this crime, Detective Lau took extraordinary steps to focus the investigation on him.

52. On January 12, 2006 Detective Lau took Mr. Roberts into custody under the pretense that he was addressing a separate legal matter.

53. Detective Lau lied to Mr. Roberts regarding why he had taken him into custody and asked him about multiple unrelated crimes that had occurred throughout Harrisburg.

54. Detective Lau then informed Mr. Roberts that there were eyewitnesses to the aftermath of Mr. Stern's shooting who would be able to identify the shooter and requested that Mr. Roberts allow them to view him "one on one".

55. Mr. Roberts, being confident of his innocence and unaware of the fundamentally coercive and unreliable

nature of the viewing process he was being asked to engage in agreed.

56. Detective Lau then brought Ms. Wright to the police station to view Mr. Roberts for purposes of identification.

57. Detective Lau knew that this viewing was coercive and unreliable, but he proceeded because he was determined to convict Mr. Roberts of a crime he had not committed.

58. The viewing of Mr. Roberts by Ms. Wright was flawed, coercive unreliable, unconstitutional, and designed not find the true killer of Mr. Stern but rather to assure that Mr. Roberts would be prosecuted. This is supported by the following defects.

a. There was no basis or justification to not follow standard lineup procedures that are designed to minimize false identifications.

b. Ms. Wright had previously been shown a photo of Mr. Roberts and she was unable to identify him.

c. Ms. Wright stated on January 10, 2006 that with the time that had passed she would not be able to identify the person she saw on December 21, 2005.

d. Ms. Wright was aware that she had been shown a phot of Mr. Roberts previously and was therefore the target of Detective Lau's investigation.

e. Detective Lau initiated the process by requesting that Ms. Wright come down to make an ID.

f. Ms. Wright viewed Mr. Roberts while he was in an interrogation room with a uniformed police officer.

g. The uniformed officer compelled Mr. Roberts to turn his head from right to left as if his mug shot were being taken.

h. Ms. Wright believe that she would not be able to leave the police station unless she participated in this viewing.

i. Ms. Wright believed Detective Lau wanted her to positively identify Mr. Roberts as the man who killed Mr. Stern.

59. Through this litany of deceptive conduct and coercive procedure, Detective Lau achieved his objective of Ms. Wright identifying Mr. Roberts as the man she saw near Mr. Sterns' car on December 21, 2005.

Affidavit of Probable Cause

60. The next step in Detective Lau's scheme to prosecute Mr. Roberts for a crime he didn't commit was to draft an intentionally deceptive Affidavit of Probable Cause that was sparse on facts but riddled with fabrications and reckless omissions.

61. Detective Lau's Affidavit of Probable Cause contained the following fabrication

a. "Mullen and Wright both provided a consistent physical description of the suspect"

i. Mr. Mullen described a man weighing 160-175 pounds

ii. Ms. Wright described seeing two "young boys"

iii. Mr. Roberts was a 35 year old man weighing 287 pounds

62. Detective Lau's Affidavit of Probable Cause contained the following Reckless Omissions:

a. James Cousin and Fred Jackson had bragged about killing Mr. Stern.

b. Mr. Mullen was shown a photo of Mr. Roberts and did not identify him.

c. Ms. Wright was shown a photo of Mr. Roberts and did not identify him.

d. Ms. Starr was shown a photo of Mr. Roberts and did not identify him.

e. Ms. Starr identified another man as favoring the person she saw at the scene.

f. Ms. Wrights identification of Mr. Roberts occurred under extremely coercive conditions and was not reliable.

g. Detective Lau had a history of personal animus against Mr. Roberts.

63. The omission of the circumstances of Ms. Wrights identification is of critical importance because it was inconsistent with all other attempts at identification and because there was a total lack of physical or circumstantial evidence that implicated Mr. Roberts.

Lack of policy or training

64. The City of Harrisburg Police Department does not have a policy which instructs detectives that relevant information must be included in affidavits of probable cause, even if it is exculpatory.

65. The City of Harrisburg Police Department does not have a policy which informs detectives that, when creating affidavits of probable cause, they may not withhold facts that a reasonable person would know is the kind of thing the judge would wish to know when determining probable cause.

66. The City of Harrisburg Police Department's lack of a policy related to the obligations of a detective when creating affidavits of probable cause is established by its absence from the "Harrisburg Bureau of Police Criminal Investigation Division Standard Operational Manual" attached hereto as Exhibit A.

67. The City of Harrisburg Police Department does not provide detectives any training regarding the obligation of detectives to include relevant information in affidavits of probable cause, even if it is exculpatory.

68. The City of Harrisburg Police Department does not inform detectives during training that, when creating affidavits of probable cause, they may not withhold facts that a reasonable person would know is the kind of thing the judge would wish to know when determining probable cause.

69. The City of Harrisburg Police Department's lack of a training related to the obligations of a detective when creating affidavits of probable cause is established by its absence from the "Harrisburg Bureau of Police Field Training and Evaluation Manual" attached hereto as Exhibit B.

70. The City of Harrisburg does not conduct any audits to determine whether its detectives are complying with their duty to include relevant information in affidavits of probable cause, even if it is exculpatory.

71. The City of Harrisburg does not conduct any audits to determine whether its detectives are complying with their duty, when creating affidavits of probable cause, to not withhold facts that a reasonable person would know is the kind of thing the judge would wish to know when determining probable cause.

72. The City of Harrisburg Police Department's failure conduct any audits to determine whether its detectives are complying with their obligations related to the creation of affidavits of probable cause is established by the letter attached hereto as Exhibit C which states "based on a thorough examination of the records in possession, custody and control of the City of Harrisburg" records do not exist related to "commissioner memorandums and executive summaries related to investigations into Due Process violations and evidence suppression"

Fabrication of evidence post arrest

73. After seeing Mr. Roberts through was arrested through means of an affidavit with falsified and withheld evidence, Detective Lau compounded injustice by intentionally conforming evidence to his goal of convicting Mr. Roberts of a crime he did not commit.

a. Thomas Mullen

74. On January 20, 2006 Detective Lau met again with Mr. Mullen.

75. Mr. Mullen was in custody at the time and facing charges related to his involvement in the killing of Mr. Stern and other criminal matters.

76. Mr. Mullen knew at the time that Mr. Roberts had been arrested for the murder of Mr. Stern and had seen Mr. Roberts in the county jail after he was arrested.

77. Mr. Mullen gave a second self-serving statement to Detective Lau wherein he stated the armed man he encountered at Mr. Stern's car on December 21, 2005 was in the photo array he viewed on December 22, 2005.

78. Detective Lau knew that this identification was not reliable because it was inconsistent with Mr. Mullen's previous description of the armed man, because he was unable to identify Mr. Roberts prior to Mr. Roberts' arrest, and because he knew that the identification was made in pursuit of self-preservation.

79. Mr. Mullen changed his story and gave a third self-serving statement on February 22, 2006 when he admitted that he had pushed Mr. Stern out of his vehicle and searched for drugs after an armed man shot him.

80. Despite the inherent unreliability of these self-serving and contradictory statements Detective Lau was more than willing to use Mr. Mullen for the purpose of seeing that Mr. Roberts was convicted.

81. Despite the fact that Mr. Mullen was the only person positively identified as being in the area when Mr. Stern was shot, and the fact that Mr. Mullen lied repeatedly to minimize his criminal culpability, and the fact that he believed charges would be dropped if he testified against Mr. Roberts, he was permitted to testify against Mr. Roberts.

82. Detective Lau was the driving force in fabricating Mr. Mullen's self-serving identification of Mr. Roberts.

83. Detective Lau met and spoke with Mr. Mullen prior to him giving a statement on January 20, 2006 and intentionally influenced his testimony.

84. Detective Lau knew that Mr. Mullen's identification of Mr. Roberts was false, but he submitted

it as part of his investigation for the purpose of convicting Mr. Roberts of a crime he did not commit.

85. Mr. Mullen was the sole witness at Mr. Roberts' preliminary hearing on March 13, 2006 and the court found that the prosecution had made out a prima facia case based on his self-serving fabricated identification.

86. Following the preliminary hearing and heading toward trial, the investigation had not produced any inculpatory evidence except inherently unreliable witness testimony. There was no physical, circumstantial evidence and no evidence of motive.

b. Tyrone Gibson

87. Detective Lau then threatened an associate of Mr. Roberts, Tyrone Gibson, in order to fabricate a motive for Mr. Stern's murder.

88. Detective Lau fabricated a conflict between Mr. Roberts and Mr. Stern related to the sale of a car and threatened Mr. Gibson if he did not adopt this fabricated narrative.

89. It was only after it became clear to Detective Lau that Mr. Gibson did not intend to cooperate in his scheme to present fabricated evidence that Detective Lau abandoned the "car conflict" motive, that he conspired with ADA Baer to use Layton Potter to create a new motive.

c. Layton Potter

90. In order to fabricate evidence of motive, ADA Baer joined Detective Lau's investigation and began affirmatively seeking a jailhouse snitch who would testify as to motive.

91. In October of 2007, nearly 2 years after the murder of Mr. Stern and just one month before Mr.

Porter's trial ADA and Detective Lau's investigation led them to Layton Potter, a known jailhouse snitch.

92. ADA Baer approached Mr. Layton and asked him if he "wanted a piece" of the case against Mr. Roberts.

93. Mr. Layton did, in fact want a piece of the case in order to gain favor related to charges that were pending against him. Accordingly, Mr. Potter crafted a false statement for ADA Baer and Detective Lau which purported to establish motive for Mr. Roberts to kill Mr. Stern.

94. Mr. Potter fabricated a story of conflict between Mr. Roberts and Mr. Stern out of whole cloth. Specifically, he claimed that Mr. Roberts and Mr. Stern were both in the drug business and had a dispute over unpaid drug debts.

95. The utility of this statement to ADA Baer and Detective Lau was made clear at trial when ADA Baer told the jury at trial that Mr. Potter would "help them understand how and why" the killing occurred.

96. ADA Baer and Detective Lau knew that Mr. Potter, who was convicted in 1998 of making false reports to law enforcement and was a regular crack cocaine user, lacked any credibility. Regardless, he was used for the purpose of convicting Mr. Roberts through false testimony.

97. Mr. Potter testified to the following facts that are objectively and undisputedly false:

a. Mr. Potter testified that he had known Mr. Roberts since the early 1990s when he tried to trade in his car at Mr. Roberts car lot. However, Mr. Potter was only 10 years old in 1990 and Mr. Roberts was not living in

Harrisburg during the 1990s except for one period of 9 months.

b. Mr. Potter claimed that Mr. Roberts expressed anger about Mr. Stern during a conversation around Halloween of 2005 but Mr. Potter was incarcerated from October 10, 2005 through November 11, 2005.

c. Mr. Potter claims that he spoke to Mr. Roberts and Mr. Roberts' brother on their cell phones between February 2005 and Mr. Roberts' arrest on January 12, 2006 however it is undisputed that no such calls ever occurred.

98. These objective and undisputed lies demonstrate that neither ADA Baer nor Detective Lau were concerned with the truth or veracity of Mr. Potters testimony.

99. There is no longer any doubt that the remainder of Mr. Potters testimony was false. On November 4, 2013 Mr. Potter admitted that he had no knowledge of any dispute between Mr. Roberts and Mr. Stern. Rather, he was used by ADA Baer and Detective Lau to ensure a conviction.

c. Sonya Anderson

100. On October 22, 2007 Sonya Anderson gave a statement to Detective Lau wherein she stated the following:

a. On the night of Mr. Stern's murder, her friend Quinta Samuel received a phone call from Joseph "Chase" Baldwin who stated that he had just shot a man and asked her to go to the scene to see if the person was dead.

b. Baldwin informed Samuel of the precise location on Sawarta Street where Mr. Stern was killed.

c. Baldwin stated that he could not go himself because he was on the run for robbing people.

101. The exculpatory statement provided by Ms. Anderson was not consistent with Detective Lau's goal of convicting Mr. Roberts regardless of his actual innocence.

102. Shortly after Ms. Anderson provided her statement Detective Lau took her from her home to a police station.

103. Ms. Anderson was taken into a room with detective Lau and currently unidentified Assistant District Attorneys where she was pressured, intimidated, lied to, and coerced into providing a false recantation of her statement.

104. Ms. Anderson did not want to falsely recant her statement and did so only because Detective Lau "scared the life out of her" and told her to do so because Mr. Roberts had killed Mr. Stern.

105. Ms. Anderson felt so intimidated and coerced by Detective Lau's efforts to attain a false recantation that she wanted to "plead the fifth" because she believed she was in jeopardy of being charged with a crime if she did not comply with Detective Lau.

106. Detective Lau's coercive tactics were successful to the extent that Ms. Anderson signed a one paragraph recantation on November 11, 2007.

Evidence of Mr. Roberts' Actual Innocence

107. The following facts undisputedly establish Mr. Roberts' total and actual innocence in relation to the death

of Mr. Stern. All of these facts are supported by telephone records, cell tower data, and sworn statements:

a. On December 21, 2005 Mr. Roberts drove himself and Bilal Watts to Bernard Lyde's home to pick him up.

b. Mr. Roberts, Mr. Watts, and Mr. Lyde then drove to Mr. Roberts' car shop located at 1720 South Cameron Street in Harrisburg where they remained until 7:00p.m.

c. After closing the shop, the three men went to a Vietnamese restaurant on 29th Street where they remained for approximately forty minutes. While at the restaurant, Mr. Roberts made and received multiple phone calls.

d. After leaving the restaurant, Mr. Roberts dropped off Mr. Watts at his home at approximately 8:30p.m. then dropped off Mr. Lyde at his home at approximately 9:00p.m.

e. Mr. Roberts then went to his father's home at 3225 Willows Lane in Harrisburg, where Mr. Roberts was living at the time.

f. At 9:14p.m. Mr. Roberts spoke by phone with Danielle McCullom for approximately twenty minutes.

g. At 9:53p.m. and 10:08p.m. Mr. Roberts received phone calls from a phone number belonging to Ernest and Charlene Dykes.

h. At approximately 10:10p.m. Mr. Roberts made a brief phone call to Liz Bradley.

i. At. 10:26p.m. Mr. Roberts received a phone call from his daughter's mother, Tyisha

Williams. She asked Mr. Roberts to take her to Target to return a comforter for their daughter. Mr. Roberts agreed.

j. Mr. Roberts drove to pick up Ms. Williams at the Quail Run Apartments and called her at 10:34p.m. to report that he was outside.

k. Mr. Roberts then drove to the target located at 5125 Jonestown Road in Harrisburg. Ms. Williams returned the comforter and received a refund directly to her credit card.

l. Mr. Roberts and Ms. Williams then went across the street to a store called Media Play where Mr. Roberts purchased two movies.

m. At 11:02p.m. Mr. Roberts received a phone call from Ernest "Boobie" Frye who informed him that he was near 20th and Sawarta Streets and believed that Mr. Stern had been shot and possibly killed.

n. At 11:17 Mr. Roberts called his brother, Kareem Trollinger to relay the information he had just received from Mr. Frye.

o. At 11:23 Mr. Roberts received another call from Mr. Frye who asked him to call Mr. Stern to see if he could answer in the hopes of confirming or refuting his suspicion that it was Mr. Stern who had been shot.

p. Mr. Roberts agreed and called Mr. Stern three times between 11:25p.m. and 11:29 p.m.

q. At 11:26p.m. Mr. Roberts called Mr. Frye back to inform him that Mr. Stern did not answer any of his calls.

r. Mr. Roberts then drove himself and Ms. Williams to her home at Quail Run Apartments.

s. At 11:33p.m. Mr. Roberts received another call from Mr. Frye who informed Mr. Roberts that he was still at the scene of Mr. Stern's murder at 20th and Sawarta Streets.

t. Following this phone call, Mr. Roberts left Ms. Williams' home and went to the scene. After confirming the tragic death of Mr. Stern and conferring briefly met with Mr. Frye and another man named Robert Cooke, Mr. Roberts drove back to his father's home at 3225 Willows Lane in Harrisburg.

u. Mr. Roberts remained in his father's home for the remainder of the evening.

108. Mr. Roberts' location at the time that he made all of the above-described phone calls can be placed by identifying the cell phone tower that facilitated the call.

109. The cell phone tower that facilitated the phone calls that Mr. Roberts received at 9:53p.m. and 10:08p.m. was in a location far away from the area where Mr. Stern was murdered.

110. It was known to Detective Lau, and stipulated to by ADA Baer, that if Mr. Roberts was in possession of his phone at the time that those calls came in, it would have been impossible for him to have killed Mr. Stern.

111. Detective Lau did not acquire any evidence that supported a theory that someone else was in possession of Mr. Roberts' phone on December 21, 2005.

112. Despite the overwhelming exculpatory evidence complete lack of physical evidence, Detective Lau pushed

forward in furtherance of his goal to see Mr. Roberts convicted.

COUNT I: 42 U.S.C. § 1983 MALICIOUS PROSECUTION VIOLATION OF THE FOURTH AMENDMENT

Detective David Lau

113. The preceding paragraphs are incorporated by reference as though laid out fully herein.

114. Detective David Lau initiated criminal proceedings against Mr. Roberts by concealing and misrepresenting facts in his affidavit of probable cause seeking an arrest warrant.

115. Detective David Lau initiated criminal proceedings against Mr. Roberts without probable cause and was only able to attain an arrest warrant by submitting an affidavit of probable cause that intentionally misrepresented facts, included fabricated evidence, and recklessly omitted exculpatory evidence.

116. Detective David Lau acted maliciously against Mr. Roberts due to personal animus stemming from prior contact with Mr. Roberts.

117. Detective David Lau acted maliciously against Mr. Roberts such that his purpose was not to see that justice was done but rather to see that Mr. Roberts was made to suffer.

118. Detective David Lau's malice is demonstrated in the following conduct:

a. Knowingly creating and relying upon a false identification by conducting a coercive and unreliable identification procedure with Jacqueline Wright.

b. Knowingly creating and relying upon a false identification by influencing, enticing, and coercing Thomas Mullen to make a self-serving identification that contradicted previous statements.

c. Knowingly influencing, enticing, and coercing an inculpatory statement from Layton Potter: a jailhouse snitch, who lacked any credibility, whose statement could not be corroborated, and was only concerned with benefiting himself.

d. Intentionally withholding exculpatory information from his affidavit of probable cause.

e. Including fabricated evidence within his affidavit of probable cause.

f. Failing to investigate alternative suspects including two men who bragged about committing the crime.

g. Intimidating and coercing Sonya Anderson to falsely recant her exculpatory statement.

119. Mr. Roberts suffered a deprivation of his liberty by way of serving 13 years in prison for a crime he did not commit as a consequence of the legal proceedings initiated by Detective David Lau.

120. The legal proceedings initiated by Detective Lau terminated in Mr. Roberts' favor when he was exonerated on September 17, 2019.

WHEREFORE, Plaintiff demands judgment in his favor, and against all Defendants jointly and severally pursuant to 42 U.S.C. § 1983 including interest, delay damages, costs of suit, compensatory and punitive damages, and

attorneys' fees under U.S.C. §1985 and §1988, and any other remedies legally appropriate.

COUNT II: 42 U.S.C. § 1983 FABRICATION OF EVIDENCE VIOLATION OF THE FOURTEENTH AMENDMENT

Detective David Lau and ADA John Baer

121. The preceding paragraphs are incorporated by reference as though laid out fully herein.

122. Detective David Lau fabricated evidence by way of:

a. Knowingly creating and relying upon a false identification by conducting a coercive and unreliable identification procedure with Jacqueline Wright.

b. Knowingly creating and relying upon a false identification by influencing, enticing, and coercing Thomas Mullen to make a self-serving identification that contradicted previous statements.

c. Knowingly influencing, enticing, and coercing an inculpatory statement from Layton Potter: a jailhouse snitch, who lacked any credibility, whose statement could not be corroborated, and was only concerned with benefiting himself.

d. Knowingly intimidating, influencing, and coercing and coercing Sonya Anderson to falsely recant her exculpatory statement.

123. ADA John Baer fabricated evidence by way of:

a. Knowingly influencing, enticing, and coercing an inculpatory statement from Layton Potter: a jailhouse snitch, who lacked any

credibility, whose statement could not be corroborated, and was only concerned with benefiting himself.

124. The evidence fabricated by Detective David Lau and John Baer was used against Mr. Roberts during his criminal trial in 2007.

125. Mr. Roberts would not have been convicted but for the use of this fabricated evidence. Without it the only evidence presented was exculpatory data related to Mr. Roberts' alibi.

WHEREFORE, Plaintiff demands judgment in his favor, and against all Defendants jointly and severally pursuant to 42 U.S.C. § 1983 including interest, delay damages, costs of suit, compensatory and punitive damages, and attorneys' fees under U.S.C. §1985 and §1988, and any other remedies legally appropriate.

COUNT III: 42 U.S.C. § 1983 WITHHOLDING EXCULPATORY MATERIAL VIOLATION OF THE FOURTEENTH AMENDMENT

Detective David Lau

126. The preceding paragraphs are incorporated by reference as though laid out fully herein.

127. Detective Lau withheld the following information from the prosecutor and ultimately the defense:

a. Failure to inform the prosecutor that there was a history of personal animus between himself and Mr. Roberts.

b. Failure to inform the prosecutor that he threatened Tyrone Gibson in order to attain motive evidence.

c. Failure to inform the prosecutor of the baseless and suggestive basis to include Mr. Roberts in a photo array.

128. The information that Detective Lau withheld was exculpatory and impeaching.

129. Mr. Roberts was prejudiced and did not receive a fair trial due to the withholding of this exculpatory and impeaching information.

130. If Detective Lau had not withheld this exculpatory and impeaching information, Mr. Roberts would not have been convicted and spent 13 years in prison.

WHEREFORE, Plaintiff demands judgment in his favor, and against all Defendants jointly and severally pursuant to 42 U.S.C. § 1983 including interest, delay damages, costs of suit, compensatory and punitive damages, and attorneys' fees under U.S.C. §1985 and §1988, and any other remedies legally appropriate.

COUNT IV: 42 U.S.C. CIVIL RIGHTS CONSPIRACY VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS

Detective David Lau and ADA John Baer

131. The preceding paragraphs are incorporated by reference as though laid out fully herein.

132. Detective David Lau and ADA John Baer conspired to fabricate evidence for the purpose of convicting an actually innocent man, Mr. Roberts, in violation of his 14th Amendment rights.

133. In furtherance of the conspiracy to deprive Mr. Roberts of his 14th Amendment rights, Detective David Lau and ADA John Baer Knowingly sought out, influenced, enticed, and coerced an inculpatory statement

from Layton Potter: a jailhouse snitch, who lacked any credibility, whose statement could not be corroborated, and was only concerned with benefiting himself.

134. The period of the conspiracy extended from the time that ADA John Baer sought out Mr. Potter seeking for the purpose of fabricating a motive in the prosecution of Mr. Roberts through the entirety of the prosecution.

135. The conspiracy deprived Mr. Roberts of his 14th Amendment rights and ultimately caused him to be deprived of his liberty for 13 years.

WHEREFORE, Plaintiff demands judgment in his favor, and against all Defendants jointly and severally pursuant to 42 U.S.C. § 1983 including interest, delay damages, costs of suit, compensatory and punitive damages, and attorneys' fees under U.S.C. §1985 and §1988, and any other remedies legally appropriate.

COUNT V: 42 U.S.C. § 1983 MUNICIPAL LIABILITY

City of Harrisburg

136. The preceding paragraphs are incorporated by reference as though laid out fully herein.

137. The City of Harrisburg, by and through its policymakers operated the Harrisburg Police Department without a policy which instructs its detectives regarding the information which must be included within Affidavits of Probable Cause.

138. The City of Harrisburg, by and through its policymakers operated the Harrisburg Police Department without any training regarding the constitutional obligations of detectives when completing Affidavits of Probable Cause.

139. The need for policies and training related to the creation of affidavits of probable cause is obvious because

it is a request to use state authority to deny citizens of their liberty.

140. The risk of constitutional violations occurring where a city maintains no policies or training related to the creation of affidavits of probable cause is obvious and severe.

141. The ongoing failure the City of Harrisburg, by and through its policymakers to implement policies to protect the constitutional rights of its citizens constitutes deliberate indifference.

142. The ongoing failure of the City of Harrisburg, by and through its policymakers to implement policies or training related to the creation of affidavits of probable cause is a moving force behind Mr. Roberts' deprivation of his constitutional rights.

WHEREFORE, Plaintiff demands judgment in his favor, and against all Defendants jointly and severally pursuant to 42 U.S.C. § 1983 including interest, delay damages, costs of suit, compensatory and punitive damages, and attorneys' fees under U.S.C. §1985 and §1988, and any

COUNT VI: STATE LAW MALICIOUS PROSECUTION

Detective David Lau

143. The preceding paragraphs are incorporated by reference as though laid out fully herein.

144. Detective David Lau initiated criminal proceedings against Mr. Roberts by concealing and misrepresenting facts in his affidavit of probable cause seeking an arrest warrant.

145. Detective David Lau initiated criminal proceedings against Mr. Roberts without probable cause and was only able to attain an arrest warrant by

submitting an affidavit of probable cause that intentionally misrepresented facts, included fabricated evidence, and recklessly omitted exculpatory evidence.

146. Detective David Lau acted maliciously against Mr. Roberts due to personal animus stemming from prior contact with Mr. Roberts.

147. Detective David Lau's acted maliciously against Mr. Roberts such that his purpose was not to see that justice was done but rather to see that Mr. Roberts was made to suffer.

148. Detective David Lau's malice is demonstrated in the following conduct:

a. Knowingly conducting a coercive and unreliable identification procedure with Jacqueline Wright.

b. Knowingly enticing an inculpatory statement from Layton Potter, a person who lacked any credibility and whose statement could not be corroborated.

c. Intentionally withholding exculpatory information from his affidavit of probable cause.

d. Including fabricated evidence within his affidavit of probable cause.

e. Failing to investigate alternative suspects including two men who bragged about committing the crime.

f. Intimidating and coercing Sonya Anderson to falsely recant her exculpatory statement.

149. Mr. Roberts suffered a deprivation of his liberty by way of serving 13 years in prison for a crime he did not

commit as a consequence of the legal proceedings initiated by Detective David Lau.

150. The legal proceedings initiated by Detective Lau terminated in Mr. Roberts' favor when he was exonerated on September 17, 2019.

WHEREFORE, Plaintiffs demands judgment in their favor, and against Defendants in excess of One Million Dollars ($1,000,000.00), including interest, delay damages, costs of suit, general and specific damages, including both survival and wrongful death damages, punitive and exemplary damages as provided by law.

Respectfully Submitted,

//s// Mark V. Maguire
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