APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

APPENDIX A

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LISA PRICE, Personal Representative of the Estate of Nickie Miller, *Plaintiff - Appellant,* *v.* MONTGOMERY COUNTY, KENTUCKY, et al., *Defendants-Appellees.*	No. 21-6076

Appeal from the United States District Court for the
Eastern District of Kentucky at Lexington.
No. 5:18-cv-00619—Danny C. Reeves,
Chief District Judge.

Argued: October 27, 2022

Decided and Filed: July 5, 2023

Before: SILER, NALBANDIAN, and READLER,

Circuit Judges.

COUNSEL

ARGUED: Debra Loevy, LOEVY & LOEVY, Chicago, Illinois, for Appellant. Lynn Sowards Zellen, KINKEAD & STILZ, PLLC, Lexington, Kentucky, for Appellees Montgomery County, Fred Shortridge, Ralph Charles, Jr., Mark Collier, and Eric Jones. Michael R. Wajda, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee Keith Craycraft. Brenn O. Combs, KENTUCKY STATE POLICE, Frankfort, Kentucky, for Appellee John Fyffe. **ON BRIEF:** Debra Loevy, Elliot Slosar, Amy Robinson Staples, Margaret E. Campbell, LOEVY & LOEVY, Chicago, Illinois, for Appellant. Lynn Sowards Zellen, D. Barry Stilz, KINKEAD & STILZ, PLLC, Lexington, Kentucky, for Appellees Montgomery County, Fred Shortridge, Ralph Charles, Jr., Mark Collier, and Eric Jones. Michael R. Wajda, Matthew F. Kuhn, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee Keith Craycraft. Brenn O. Combs, KENTUCKY STATE POLICE, Frankfort, Kentucky, for Appellee John Fyffe.

READLER, J., delivered the opinion of the court in which SILER, J., joined. NALBANDIAN, J. (pp. 18-30), delivered a separate opinion concurring in part and in the judgment.

OPINION

CHAD A. READLER, Circuit Judge. Paul Brewer was found blindfolded and tied to his bed with two bullet holes in him. Brewer's death went unexplained for years, until Natasha Martin confessed to being part of a scheme to rob Brewer in his home. According to Martin, Nickie Miller and others killed Brewer after Martin left the scene. But Martin would later recant and re-confess, and would do so more than once. Despite the back and forth, Miller was arrested and charged with murder based primarily on Martin's confession.

Miller believed that Martin's shifting story was the product of official misconduct. So he brought this action under 42 U.S.C. § 1983 against the prosecutor, polygrapher, and investigating officers, as well as Montgomery County. While couched under the umbrella of numerous causes of action, the crux of Miller's argument is that he was illegally detained without nonfabricated probable cause. The district court granted a mix of absolute and qualified immunity to defendants. We agree and affirm.

I.

The facts tell a tale worthy of the silver screen. Upon arriving at Paul Brewer's home to conduct a welfare check, Montgomery County officers discovered Brewer was deceased. Detective Sergeant Ralph Charles was called to the scene. When he arrived, he found Brewer's naked body tied to his bed frame and sprawled out in a pool of blood. A twice-punctured pillow was laid atop Brewer's head. Men's underwear and black fishnet stockings lay on the floor beside him. After removing the pillow, Charles

discovered that Brewer was blindfolded, and that he had been shot twice by a .45 caliber revolver.

Charles began investigating Brewer's death. He first contacted Brewer's daughter. She told Charles that Brewer was having a threesome that night and that she believed Brewer's girlfriend was responsible for the murder. But other people Charles contacted believed the culprit was someone else, offering their own theories of the crime. In the end, the investigation made little progress.

The case went cold for nearly four years. Then, Kennie Helton, an inmate in a local prison, reached out to Charles, indicating she had information about Brewer's murder. Charles had spoken to Helton during his initial investigation. The story she told Charles this time was markedly different than the one she told years earlier. Now, she claimed that three men—including Nickie Miller and Cody Hall—and two women were responsible for Brewer's death. According to Helton, the men had the two women set up a threesome with Brewer in an effort to rob him. The DNA found at the scene, however, did not implicate either of the women Helton identified.

Nonetheless, Charles interviewed the two women. The story they told Charles implicated Natasha Martin in the purported *ménage à trois*. Charles knew the story he had just heard was false. Yet he, along with Montgomery County Sheriff Fred Shortridge and Deputy Mark Collier, acted on the lead anyway and interviewed Martin in late 2015. Contrary to Sheriff's Office policy, the interview was not recorded. During the interview, Martin waffled between denying any

involvement in the murder and equivocating on the issue. She first provided an impossible alibi. Later, officers told her that her DNA was found at the crime scene; in truth, the DNA testing results were inconclusive and merely failed to exclude Martin. Next, they confronted Martin with information from other witnesses. Martin eventually backtracked, saying that, if she had been with Hall and Miller that night and "something happened," she "really didn't know it was going to happen."

After the interview, Charles brought Martin to take a polygraph examination with John Fyffe of the Kentucky State Police. Charles and Collier gave Fyffe some general background information as well as their theory of the case, including potential suspects. Fyffe began his pre-examination interview by asking Martin some personal questions. In so doing, he told Martin (without knowing if the information was public) some of the facts relayed to him by Charles and Collier. Namely, Fyffe noted that the murder occurred on Natalie Drive in Mount Sterling, Kentucky, detectives believed two women tied Brewer to his bed before Hall and another man killed him, and Martin's DNA was found on one of the wrist restraints used to tie down Brewer. He then conducted the examination. When he finished, he told Martin and Charles the results: Martin failed. Yet Martin continued to deny involvement.

Fyffe changed his approach. He turned to seeking Martin's cooperation by minimizing her role, telling her that this was a "robbery gone bad" and that they only wanted the trigger man, not her. More to the point, Fyffe went beyond implication in telling Martin

that "she'[d] walk" if she told the officers who killed Brewer, despite lacking the authority to make such a decision and not knowing if it was true. And the flip side: if she did not implicate anybody else, Fyffe told her, she would "go down by herself." Martin asked to speak with Charles. He told Martin that she needed to clear her conscience and think of her children, who Fyffe implied could be taken away if she remained a suspect rather than a witness. At this point, Martin asked for a lawyer, but she continued to answer questions without one.

Charles and Collier eventually took Martin back to Shortridge's office, where they again interrogated her until she once more asked for a lawyer. Shortridge contacted attorney James Davis. After speaking privately with Martin for 20 minutes, Davis promptly called the Commonwealth Attorney to work out a deal. They agreed that Martin would get a diversionary deal in exchange for her truthful statement, meaning she would plead guilty, serve no jail time, and no longer be a felon in five years' time.

With the deal struck and her attorney present, Martin continued the interview with Charles, Collier, and Shortridge. Martin explained that her memory was not "100 percent" because she was "very, very high" the night Brewer was killed. R.118-33, PageID# 3018, 3020-21. She was unsure if the other woman there that night was Kennie Helton or Kyla Walters. She did, however, recall tying Brewer to his bed with Velcro straps. She said that she and the other woman radioed to Miller after Brewer was tied down. She heard one gunshot after leaving the house (two bullets were recovered). And, she added, Hall later

told her that Miller killed Brewer, and that she was to tell nobody about the robbery.

Martin went home to her grandmother. At this point she broke into tears, knowing the in-station confession was false. The next morning, Martin went to recant her confession. But the officers did not believe her—despite knowing that some of the information she originally provided was incorrect. Martin stepped out to speak with her attorney. When she re-emerged, she took the position that her original confession was accurate. Armed with Martin's confession, Charles testified before a grand jury and secured indictments against Hall, Miller, and Martin for Brewer's robbery and murder.

Martin would recant her confession yet again. In jailhouse letters, Martin told Hall that her confession was obtained through "coercive interrogation techniques, threats, and undisclosed promises of consideration." Complaint, R.1, PageID# 24, ¶ 156. Hall responded, indicating that they were both innocent of Brewer's murder. Miller's defense team sought and obtained a state court order directing jail personnel to grant them access to these letters. But when they tried to contact Martin, they were told she had been released on bond and was no longer in their custody. Jail personnel contacted Martin, who in turn contacted the prosecutor assigned to take lead on the case, Assistant Commonwealth Attorney Keith Craycraft, to ask about the order. Craycraft told Martin to get rid of the letters rather than turn them over, so she did.

Kentucky eventually dropped its charges against Miller. But that would not be the end of things. Miller filed this § 1983 action for malicious prosecution, fabrication of evidence, destruction of exculpatory evidence, due process violations, conspiracy, and related Kentucky law claims. Named as defendants were Charles, Collier, Craycraft, Fyffe, jailer Eric Jones, Shortridge, and Montgomery County. The district court dismissed Miller's claims against Craycraft on account of his absolute immunity as a prosecutor. The remaining defendants were later awarded summary judgment on the § 1983 claims on the basis of qualified immunity. The state claims, the district court explained, likewise failed because Miller did not raise a genuine issue of material fact, and his claims failed as a matter of law.

Miller timely appealed. But he passed away soon thereafter. His daughter, representing his estate, was substituted for him as plaintiff, and the case has proceeded accordingly. For convenience, we will continue to refer to the plaintiff as Miller.

II.

Miller's appeal raises one jurisdictional issue. By way of background, the district court had subject matter jurisdiction over this case at the time Miller filed his complaint. Jurisdiction over Miller's constitutional claims was authorized by 28 U.S.C. § 1331, as those claims arose under federal law. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). And the court had supplemental jurisdiction over Miller's Kentucky law claims under 28 U.S.C. § 1367, as those claims share

a "common nucleus of operative fact" with Miller's constitutional claims. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165 (1997) (citation omitted).

Miller also properly invoked our jurisdiction, as he appealed from the entry of final judgment in defendants' favor. *See* 28 U.S.C. § 1291. But while his appeal was pending, Miller passed away, at which point his estate was substituted for him as plaintiff. Defendants filed a joint motion to dismiss for lack of jurisdiction. They maintained that Kentucky's survivorship statute, Ky. Rev. Stat. § 411.140, precludes malicious prosecution and related claims following Miller's death. Defendants' argument, however, confuses traditional state law malicious prosecution claims with Fourth Amendment-inspired claims, also referred to as "malicious prosecution." *See Sykes v. Anderson*, 625 F.3d 294, 308-10 (6th Cir. 2010) ("[D]esignating the constitutional claim as one for 'malicious prosecution' is both unfortunate and confusing. A better name that would perhaps grasp the essence of this cause of action under applicable Fourth Amendment principles might be 'unreasonable prosecutorial seizure.'" (quoting *Frantz v. Village of Bradford*, 245 F.3d 869, 881 (6th Cir. 2001) (Gilman, J., dissenting), *abrogated on other grounds by Darrah v. City of Oak Park*, 255 F.3d 301, 311-12 (6th Cir. 2001)); *see also Thompson v. Clark*, 142 S. Ct. 1332, 1337 (2022) (recognizing a Fourth Amendment malicious prosecution claim may be brought for "unreasonable seizure pursuant to legal process"). These latter claims are in effect false arrest claims, arising out of the Fourth Amendment's prohibition on unreasonable seizures. *Sykes*, 625 F.3d at 308-10. And for determining survival of § 1983

claims, we do not break them out individually. *Jackson v. City of Cleveland*, 925 F.3d 793, 811 (6th Cir. 2019). The level of generality at which we view those claims is that of basic personal injury actions, which, under Kentucky law, do not abate. Ky. Rev. Stat. § 411.140. In that way, malicious prosecution claims under § 1983 are not the types of malicious prosecution tort claims that might abate under Kentucky law. Defendants' motion to dismiss for lack of jurisdiction is accordingly denied.

III.

A. Turning to the merits, we begin with Miller's contention that the district court erred in holding that prosecutor Craycraft was entitled to absolute prosecutorial immunity. On that basis, the district court dismissed the claims against Craycraft in accordance with Federal Rule of Civil Procedure 12(b)(6). We review the district court's determination de novo, accepting the complaint's allegations as true and drawing all reasonable inferences in Miller's favor. *Leech v. DeWeese*, 689 F.3d 538, 541-42 (6th Cir. 2012). Because Craycraft is the party claiming immunity, he has the burden of establishing that his challenged behavior was prosecutorial in nature. *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993).

"American law has long recognized 'absolute immunity' for those 'whose special functions or constitutional status requires complete protection from suit.'" *Barnett v. Smithwick*, 835 F. App'x 31, 35-36 (6th Cir. 2020) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982)). "That brand of immunity extends to government officers like prosecutors whose

activities are 'intimately associated' with the judicial process." *Id.* (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). Prosecutors, alongside defense counsel, are tasked with equipping judges and juries to accurately determine a defendant's guilt. That task necessarily entails making judgment calls as to how pre-trial matters are handled, trials are conducted, witnesses are used, and evidence is presented. *Imbler*, 424 U.S. at 426. Conduct of that ilk traditionally is accompanied by absolute immunity from civil liability. *Id.* at 426-27. In fact, prosecutorial immunity has a long reach—it extends even to "unquestionably illegal or improper conduct," including instances where a defendant is genuinely wronged. *Cady v. Arenac County*, 574 F.3d 334, 340 (6th Cir. 2009). Why? To serve "the broader public interest" in preventing retaliatory lawsuits against prosecutors from gumming up the wheels of justice. *Imbler*, 424 U.S. at 427. That said, immunity from suit does not immunize badly behaving prosecutors from other forms of accountability—they can be subjected to court sanctions, removal from office, and criminal charges, among other ramifications. *Id.* at 428-29.

Prosecutorial immunity's reach, however, has its limits. *Buckley*, 509 U.S. at 273. Conduct that falls outside the cloak of absolute immunity includes instances where the prosecutor's actions are not intimately associated with the judicial process. *Id.* That could include, for example, investigative efforts to obtain an arrest warrant, authorize wiretaps, or advise the police. *Spurlock v. Thompson*, 330 F.3d 791, 798 (6th Cir. 2003) (discussing *Kalina v. Fletcher*, 522 U.S. 118, 130-31 (1997); *Burns v. Reed*, 500 U.S.

478, 496 (1991); *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985); and *Holloway v. Brush*, 220 F.3d 767, 775 (6th Cir. 2000) (en banc)). It could also include other acts committed before or after the criminal proceeding. *Id.* at 798-99. In those and similar settings, prosecutors receive only qualified immunity. *Buckley*, 509 U.S. at 269.

Which camp, then, does Craycraft's conduct best represent? Recall that Miller's claim against Craycraft is centered on his successful pressuring of Martin to destroy her jailhouse correspondence with Hall. The behavior Miller describes in his complaint is difficult to justify and seemingly unbecoming of an official entrusted with enforcing the criminal law. At the same time, Craycraft has met his burden of establishing that the conduct at issue was committed in his role as prosecutor, rendering him immune from suit.

1. Because the conduct at issue was in furtherance of genuine prosecutorial interests, Craycraft has absolute immunity for his actions. *Rouse v. Stacy*, 478 F. App'x 945, 954 (6th Cir. 2012). Start with Craycraft advising Martin to destroy evidence, advice she acted upon. "Preparation of witnesses for trial is protected by absolute immunity." *Spurlock*, 330 F.3d at 797 (citing *Higgason v. Stephens*, 288 F.3d 868, 878 (6th Cir. 2002)). Martin was the key witness in Miller's ongoing prosecution. Communication with Martin itself was thus plainly within the prosecutorial role. True, as Miller notes, prosecutors do not receive absolute immunity when giving legal advice to police investigators, as in that capacity they act as investigators rather than

prosecutors. *Watkins v. Healy*, 986 F.3d 648, 661 (6th Cir. 2021). But here, Craycraft was addressing matters related to Miller's prosecution with Martin, not telling police whether he believed their investigative techniques were satisfactory. *Compare Spurlock*, 330 F.3d at 798 (absolute immunity for directing witnesses to falsify testimony at trial), *with Burns*, 500 U.S. at 482 (no absolute immunity for advising police officers that evidence gathered from hypnosis "probably" supported a decision to arrest).

That Craycraft's advice prompted Martin to destroy exculpatory evidence does not change our conclusion. As a starting point, consider that prosecutors maintain their immunity when intentionally failing to disclose exculpatory evidence. *Koubriti v. Convertino*, 593 F.3d 459, 467 (6th Cir. 2010). Allowing such cases to proceed, the Supreme Court has explained, "would 'weaken the adversary system at the same time it interfered seriously with the legitimate exercise of prosecutorial discretion.'" *Id.* (quoting *Imbler*, 424 U.S. at 431 n.34). And withholding and destroying evidence "often will be two sides of the same coin." *Annappareddy v. Pascale*, 996 F.3d 120, 142 (4th Cir. 2021) (citing *Imbler*, 424 U.S. at 431 n.34); *see also Ybarra v. Reno Thunderbird Mobile Home Vill.*, 723 F.2d 675, 679 (9th Cir. 1984) (prosecutors absolutely immune from suits for failing to preserve evidence). In the end, "what matters is the decision to withhold exculpatory evidence from a defendant and the judicial process," either by failing to disclose the evidence or failing to preserve it. *Annappareddy*, 996 F.3d at 142. In both instances, the "decision is made in an 'advocative' capacity." *Id.* Craycraft's role in the destruction of

evidence thus did not exceed the scope of his immunity as a prosecutor. *See Heidelberg v. Hammer*, 577 F.2d 429, 432 (7th Cir. 1978) (prosecutors entitled to absolute immunity for destruction of evidence).

Resisting this conclusion, Miller points us to the Third Circuit's decision in *Yarris v. County of Delaware*, 465 F.3d 129 (3d Cir. 2006). There, prosecutors "deliberately destroyed … highly exculpatory information" that led to an innocent man being convicted. *Id.* at 132-33 & 136-37. "[D]estroying exculpatory evidence," the Third Circuit held, "is not related to a prosecutor's prosecutorial function." *Id.* at 136. In reaching that conclusion, our sister circuit distinguished the admittedly "well settled [precedent] that prosecutors are entitled to absolute immunity from claims based on their failure to disclose exculpatory evidence." *Id.* at 137. "[W]hile deciding not to furnish the prosecution's evidence to the defense may be an act of advocacy, throwing the evidence away is not such an act." *Id.* (quoting *Wilkinson v. Ellis*, 484 F. Supp. 1072, 1083 (E.D. Pa. 1980)). This dichotomy, however, pays little heed to the understanding that decisions regarding "the sufficiency of available evidence" or what to do with that evidence "cannot be characterized as merely administrative or … merely investigative." *Ybarra*, 723 F.2d at 679. That calculus, rather, "goes to the heart of the advocate's role 'in initiating a prosecution and in presenting the State's case.'" *Id.* (internal citation omitted). Holding otherwise seemingly would make actionable every good-faith decision by a prosecutor that evidence is immaterial and disposable, transforming criminal defendants into civil plaintiffs whenever evidence is destroyed. *See*

Imbler, 424 U.S. at 431 n.34. We need not tie the hands of prosecutors by requiring them to maintain and preserve everything collected as evidence, regardless of relevance to a criminal case and regardless of the burden such maintenance and preservation imposes.

2. We reach the same conclusion with respect to Craycraft's purported thwarting of a court order. Look back to Miller's complaint to frame the issue. There, Miller alleged that Craycraft "facilitate[ed] the destruction of exculpatory evidence" by advising a witness to frustrate a valid court order. That allegation is troubling, as the purported conduct is not something we condone or encourage. Nevertheless, it is not conduct so outside the prosecutorial role that it loses its cloak of absolute immunity. By definition, matters related to a court order in a criminal case are naturally part of the prosecutorial process. The order was set to govern procedures related to the prosecution. It was sought by Miller for purposes of defending himself in the prosecution. And the destroyed evidence was believed to be highly relevant to the defense Miller would present at trial.

In similar circumstances, the Eighth Circuit affirmed an award of absolute immunity to a prosecutor who held a detainee without probable cause in violation of an order to either file an information or release him. *Webster v. Gibson*, 913 F.2d 510, 513-14 (8th Cir. 1990). Immunity was appropriate, the appeals court explained, because "disregard[ing] a court order to file an information would not place him outside the scope of his prosecutorial duties." *Id.* (footnote omitted). In many

respects, *Webster* sweeps more broadly than our holding today: it established a rule that prosecutors maintain absolute immunity in directly violating court orders presented to and directed at them. As Craycraft did not violate a court order directed to him, we leave a question of that manner for resolution in a future case. *See, e.g.*, *Odd v. Malone*, 538 F.3d 202, 214 (3d Cir. 2008) ("We can imagine few circumstances under which we would consider the act of disobeying a court order or directive to be advocative, and we are loath to grant a prosecutor absolute immunity for such disobedience.").

Here, Craycraft's actions are better described as advising a witness to act in unethical ways regarding evidence relevant to an ongoing prosecution. This is related enough to the prosecutorial function to accord Craycraft absolute immunity. We note that our concurring colleague describes Craycraft as "receiv[ing] and violat[ing]" an order "that eliminated nearly all his discretion." Concurrence at 26 & 28 n.10. Miller's complaint, however, tells a somewhat different story. According to Miller, he secured an order requiring "any and all personnel of the Montgomery County Detention Center," "upon presentation of th[e] order," to "immediately go to Natasha Martin and retrieve from her all correspondence, letters and emails written to her [or] by her to Co-defendant Cody Hall," and to then produce those documents to Miller. Miller presented the order to a jail employee. The employee called Martin to inform her of the court's order. Martin then called Craycraft, who, according to the complaint, was aware of the order. Craycraft then "participated in the tampering and destruction of exculpatory physical

evidence by encouraging" Martin to destroy those items. Only later, in responsive briefing, did Miller claim that Craycraft himself "violated" the order. That appears to be an implausible reframing of the complaint's allegations that Craycraft was never presented with or made subject to the order.

Miller cites a handful of cases he says warrant a different outcome. But in none of them was there an active prosecution at the time of the prosecutor's misdeed. The Third Circuit, for instance, concluded that holding a witness "in state custody *after the termination of the proceeding* in which he was to testify" was extraprosecutorial because there was no longer a prosecution to conduct when the prosecutor decided to hold the witness. *Odd*, 538 F.3d at 215 (emphasis added). The Fifth Circuit denied absolute immunity to a Mississippi district attorney who allowed a girl's father to see her after promising a California court that he would enforce its protective order; the district attorney was not prosecuting a case involving either the father or his daughter. *Chrissy F. ex rel. Medley v. Miss. Dep't of Pub. Welfare*, 925 F.2d 844, 847, 850-51 (5th Cir. 1991). And the Tenth Circuit found it "difficult to see how a prosecutor's actions in contravening the authority of the judicial branch of state government *in regard to the defense of a civil action* constitute the kind of advocacy related to the initiation and prosecution of criminal proceedings, even under the most generous interpretation of that phrase." *Gagan v. Norton*, 35 F.3d 1473, 1476 (10th Cir. 1994) (emphasis added).

In sum, we agree with the district court that Craycraft was absolutely immune from suit.

B. As to the remaining defendants, the district court granted them summary judgment on the basis of qualified immunity. Our standard of review on appeal is de novo. *Barton v. Martin*, 949 F.3d 938, 946 (6th Cir. 2020). Drawing all reasonable inferences in the light most favorable to the non-moving party, we ask whether a reasonable jury could return a verdict for Miller as to his claims for violations of the Fourth Amendment, which encompass fabrication of evidence, malicious prosecution, and related § 1983 claims. *Id.*

Qualified immunity is a different brand of immunity than absolute prosecutorial immunity. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Qualified immunity protects government officials who make mistakes while reasonably performing their duties, but allows for accountability when those officials "exercise power irresponsibly." *Id.* The legal test for determining whether qualified immunity applies is familiar. Officials are immune from suit when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). That formulation requires us to answer two questions in the affirmative before letting a suit against a government official proceed to discovery—did the official violate a plaintiff's constitutional right, and was that right clearly established at the time? *Id.* at 232. If the plaintiff fails either one of these questions, we need not consider the other. *Id.* at 236.

1. Miller first claims that defendants committed a Fourth Amendment violation by fabricating Martin's

testimony implicating Miller. Fabrication of evidence claims require two showings: one, that evidence was knowingly fabricated; and two, that it is reasonably likely that the fabricated evidence affected the jury's decision. *Jackson*, 925 F.3d at 815 (citation omitted). As to the latter element, the relevant jury "decision" includes when fabricated evidence prompts the state to empanel a grand jury. *Id.* at 816-17. As Martin's testimony doubtlessly affected the decision to empanel a grand jury, Miller only needs to show that the evidence was fabricated.

Turning, then, to fabrication, Miller takes issue with defendants failing to record large segments of the interrogation, misleading Martin about her DNA being a match and other people implicating her, telling Martin information that she would need to sound plausible in her confession, threatening her and her children, promising her that she would go free if she cooperated, and telling her that she failed the polygraph test. Miller argues that, had a prosecutor known all the problems with the defendants' case against Miller, Kentucky would not have brought charges against him.

We are not persuaded that the evidence was plausibly fabricated. From a review of the record, it is difficult to agree with Miller's description of Martin's statement as entirely comprised of either facts fed to her or objectively wrong statements. For example, Martin confirmed, without prompting, the suspected use of radios by the perpetrators, the design of the stockings found at the scene, and which doors the perpetrators entered and exited through. Martin was also able to explain—apparently without knowledge

that another witness had said the gun was thrown into a pond—why the divers were unable to find the gun in the pond. Miller is right that certain things were fed to Martin, either wittingly or unwittingly, that may have allowed her to believably make up a confession. But there is nothing to indicate that Charles, Fyffe, Shortridge, or anyone else knew that she had blatantly lied (if she in fact did) when the decision to empanel a grand jury was made.

Miller further speculates that defendants intentionally failed to record part of the interrogation to allow them to offer "more explicit promises" and conduct "witness coaching." While it is possible that the unrecorded parts of the interrogation involved witness coaching, that is always the case with anything conducted off the record. It seems equally likely that any one of an infinite number of explanations for the failure to record the interrogation could apply, such as it being genuinely accidental, for example. Without more, any such conclusion is beyond what a jury's reasonable inferences would allow.

Miller next points to the coercive tactics that defendants used to try to get Martin to fabricate her statement. Undoubtedly, defendants were trying to pressure Martin to speak out. Yet even then, there is not enough evidence to say that Martin's confession was coerced, never mind fabricated. *See Stroble v. California*, 343 U.S. 181, 191 (1952) ("His willingness to confess … after he had been arraigned and counsel had been appointed, and in circumstances free of coercion, suggests strongly that" the confession was not "the result of coercion, either physical or

psychological."). Miller suggests that Martin "cav[ed] to" defendants' threats when she offered to "make something up" if that is what they wanted. Opening Br. at 36 (quoting R.118-30, PageID# 2957). Fyffe, however, told Martin otherwise: "You start talking, and you tell me the truth. That's what—that's all he wants is the truth. You know about the truth." R.118-30, PageID# 2957. It is exceedingly difficult to read that statement as "knowingly fabricating" Martin's testimony, even if Fyffe knew he was exerting pressure on her. All told, Miller's fabrication of evidence claim cannot survive summary judgment.

2. In the district court, Miller also claimed that defendants Charles, Collier, Fyffe, Jones, and Shortridge prosecuted him without probable cause in violation of his Fourth Amendment right to be free from unreasonable seizure. On appeal, he renews those claims of malicious prosecution as to Charles, Fyffe, and Shortridge. To prove a § 1983-based malicious prosecution claim, Miller must establish four elements for each defendant: (1) the defendant made, influenced, or participated in the decision to initiate a prosecution against him; (2) there was not probable cause for the prosecution; (3) the legal proceeding caused a deprivation of liberty beyond the initial seizure; and (4) the criminal proceeding against him was resolved in his favor. *Johnson v. Moseley*, 790 F.3d 649, 654 (6th Cir. 2015).

Beginning with the sheriff, Shortridge prevails on the first element, as he neither influenced nor participated in the decision to prosecute Martin. The governing standard sets a high bar for Miller to clear. "Providing reports, affidavits, or other investigative

materials containing falsehoods, omissions, or misstatements to a prosecutor can constitute participation when (1) those materials formed the basis for the charge," and (2) "were made deliberately or with reckless disregard for the truth." *Tlapanco v. Elges*, 969 F.3d 638, 655 (6th Cir. 2020) (citation omitted). The second element has a gatekeeping effect, as "[a]llegations of negligence or innocent mistake are insufficient." *Moseley*, 790 F.3d at 655 (citing *Robertson v. Lucas*, 753 F.3d 606, 617 n.7 (6th Cir. 2014)). As to Shortridge, however, Miller points to no reports, affidavits, or investigative materials prepared by Shortridge that would have influenced the decision to prosecute Miller. Perhaps, as Miller claims, Shortridge was aware of arguably exculpatory information that he failed to ensure was known by the prosecution. Yet Miller does not claim that Shortridge told prosecutors any of the supposed lies or anything else.

Now consider Fyffe, the polygrapher. Miller claims that Fyffe engaged in misinformation with the pre-polygraph reports. For support, Miller points to the pre-polygraph report's inclusion of Martin's supposed statements relating to her presence at the crime scene. By all accounts, however, Fyffe's understanding of the investigation came from Charles, who relayed to Fyffe information he was told by a witness. According to the witness, Martin said that she was present at the crime scene when Brewer was shot. No reasonable jury could conclude that Fyffe deliberately or recklessly attempted to mislead anybody in simply reporting what he was told by Charles.

Miller makes the same general allegation with respect to the information in the post-polygraph report. Specifically, Miller asserts that Fyffe lied about Martin failing the examination. But Miller rests this argument entirely on his expert's testimony that polygraphs are unscientific. That general observation does not cast doubt on the genuineness of Fyffe's belief that Martin failed her exam.

That leaves Charles, the detective. Charles's report was arguably misleading with respect to Martin's identification of the other woman and her familiarity with the location of the crime scene. But even if Miller satisfies the first element, he fails to meet his burden on the second, as there was probable cause to arrest Miller. *See Fox v. DeSoto*, 489 F.3d 227, 237 (6th Cir. 2007) (explaining that malicious prosecution claims fail "when there was probable cause to prosecute"), *abrogated on other grounds by Pearson*, 555 U.S. at 227. Begin with the recognition that Miller was indicted by a grand jury, a fact that generally serves as rebuttable "proof of probable cause." *King v. Harwood*, 852 F.3d 568, 587 (6th Cir. 2017). To rebut that presumption, Miller has to show: (1) Charles knowingly or recklessly made false statements, falsified evidence, or fabricated evidence to set a prosecution in motion; (2) the statements and evidence, along with concealments and misleading omissions, were material to the prosecution; and (3) the statements and evidence were not merely grand jury testimony or, in the broad sense, part of the preparation for such testimony. *Id.* at 587-88. The district court concluded that Miller did not rebut the presumption.

We agree. To begin, none of Charles's conceivable omissions or misstatements were false, nor did Charles falsify or fabricate evidence. Look back to the omissions and misstatements that Charles plausibly made: he reported Martin's statement that either "Keenie Helton or Kyla Walters" was the other woman; and he reported that Martin said she got out of the car in front of Brewer's house and that the car then parked "on an undeveloped street behind the property." Even if these statements are misleading, they are not false. That being the case, Miller has not shown that Charles knowingly or recklessly made false statements, falsified evidence, or fabricated evidence to set a prosecution in motion.

Nor was Charles's report material to the prosecution. Martin was a co-defendant and accomplice who, in the presence of counsel, admitted that she, along with Miller, participated in the robbery gone wrong. While some of her statements were contradicted by the record, other parts corroborated what the investigators knew and did not share with her or the public. And her explanation for misremembering was plausible—she was "very, very high" when the murder occurred. Prosecutors were aware of all of this when they decided to prosecute Miller. From this record, there was more than enough to support probable cause to do so. *See United States v. Hayes*, 49 F.3d 178, 181 (6th Cir. 1995) ("[T]he uncorroborated testimony of an accomplice may be enough to support a conviction, thus by implication, the corroborated testimony of an accomplice or co-defendant will also suffice." (internal citation omitted)). As to Charles too, then, Miller's malicious prosecution claim fails because a reasonable jury

could not conclude there was no probable cause for his prosecution.

3. The district court also granted summary judgment to defendants on Miller's failure to supervise, failure to intervene, civil conspiracy, and municipal liability claims. The flaw in Miller's theory, the district court explained, was that he did not show an underlying constitutional violation that would have permitted recovery on these bases. To revive those arguments, Miller needed to revive either his malicious prosecution or his evidence fabrication claim. *See Griffith v. Franklin County*, 975 F.3d 554, 579 (6th Cir. 2020) ("[A] plaintiff cannot establish a claim for supervisory liability without establishing an underlying constitutional violation by a supervised employee."); *Bonner-Turner v. City of Ecorse*, 627 F. App'x 400, 413 (6th Cir. 2015) ("[B]ecause there is no underlying constitutional violation, [the officer] may not be liable for failure to intervene."); *Stricker v. Township of Cambridge*, 710 F.3d 350, 365 (6th Cir. 2013) (Conspiracy claim needs an underlying constitutional violation); *Robertson*, 753 F.3d at 622 ("There can be no liability under *Monell* without an underlying constitutional violation."). In light of the above, the district court did not err by dismissing these claims.

C. In addition to the claims under § 1983, Miller also brought Kentucky law claims for malicious prosecution against the individual defendants and for negligent supervision against Montgomery County. The district court granted summary judgment to defendants on both sets of claims. Miller's claim against Montgomery County has been abandoned on

appeal. The state malicious prosecution claims fare no better. They require what the federal claims likewise require, except that a plaintiff also needs to show that defendants acted with malice. *See Martin v. O'Daniel*, 507 S.W.3d 1, 5, 11-12 (Ky. 2016). On appeal, Miller merely argues that the claim should be reinstated for the reasons that his federal claim should be reinstated. As those claims fail, so does this one.

* * * * *

For the reasons given above, we affirm the judgment of the district court.

CONCURRING IN PART AND IN THE JUDGMENT

NALBANDIAN, Circuit Judge, concurring in part and concurring in judgment. I agree with nearly all the majority opinion. But the majority and I part ways on Part III.A, which concerns prosecutorial immunity. A prosecutor bears the burden of showing that he is entitled to absolute immunity. And he has two ways of meeting his burden. Option one: he can prove that 1871 common law and history recognized that the relevant conduct would get absolute immunity. Option two: he can prove that the challenged conduct falls within the traditional role of an advocate. If a prosecutor can't satisfy either option, his actions are not entitled to absolute immunity. And under that framework, two of Prosecutor Craycraft's actions—advising a witness and destroying evidence—warrant absolute immunity. But his third action—violating a court order—is only entitled to qualified immunity. Still, under qualified immunity, he prevails.

I.

Even though the plain language of 42 U.S.C § 1983 doesn't address immunity for state actors, the Supreme Court has held that immunity—both qualified and absolute—applies in actions under the statute.[1] The Court first addressed prosecutorial

[1] Some have argued that the justification for granting immunity in § 1983 actions—"that Congress wouldn't have abrogated

immunity under § 1983 in *Imbler v. Pachtman*. *See* 424 U.S. 409, 420 (1976). Because § 1983 didn't abrogate immunities "well grounded in history and reason," *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), *Imbler* looked to "the immunity historically accorded [to prosecutors] at common law and the interests behind it" to decide that prosecutors could receive absolute immunity in § 1983 actions, 424 U.S. at 421, 427. Extending "common-law immunity" to prosecutors was "based upon" protecting their discretion "within the scope of their duties"—the same rationale that warranted "common-law immunities of judges and grand jurors acting within the scope of their duties."[2] *Id.* at 422-23 & n.20.

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common-law immunities absent explicit language"—is "faulty because the 1871 Civil Rights Act *expressly included such language*." *Rogers v. Jarrett*, 63 F.4th 971, 980 (5th Cir. 2023) (Willett, J., concurring). Emerging scholarship suggests that the express abrogation of common-law immunities only dropped out of the statute when "[f]or reasons lost to history, [the language] was inexplicably omitted from the first compilation of federal law in 1874." *Id.* That is, "[t]he Reviser of Federal Statutes made an unauthorized alteration to Congress's language." *Id.* So, according to this recent scholarship, because the Civil Rights Act of 1871 explicitly abrogated the common-law immunities grounded in state law, those immunities are abrogated now *sub silentio* under the current version of § 1983. *Id.*; *see* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871); Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201, 235 (2023).

[2] I remain skeptical as to whether, in 1871, common-law practice recognized absolute prosecutorial immunity. As some have recognized, history suggests that "prosecutorial action would have enjoyed only qualified immunity." *Burns v. Reed*, 500 U.S. 478, 497 (1991) (Scalia, J., concurring in the judgment in part

Imbler decided that absolute immunity could apply to prosecutors and that it was a prosecutor's burden to establish entitlement to absolute immunity. But *Imbler* didn't tell us how a prosecutor meets that burden.

So after *Imbler*, the Court decided two seminal cases—*Burns v. Reed* and *Buckley v. Fitzsimmons*—that shaped how we determine whether a prosecutor is entitled to absolute immunity. A prosecutor can establish an entitlement to absolute immunity based on the approach in either case. In other words, we have two options to prove one common-law burden. I'll address each in turn.

A.

First, *Burns*. 500 U.S. 478 (1991). *Burns* identified three tools in the prosecutor's toolkit for establishing entitlement to absolute immunity. First

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and dissenting in part); *see Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring) ("There was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted."); Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337, 1367 (2021) ("While absolute immunity was frequently extended to government prosecutors throughout the rest of the twentieth century, the common law of 1871 had not recognized any such immunity."). Even so, other categories of immunities, as recognized by pre-1871 common-law courts, might still, as a historical matter, extend to prosecutorial functions. *Burns*, 500 U.S. at 499-501 (Scalia, J., concurring in the judgment in part and dissenting in part). Such categories include (1) judicial immunity, (2) quasi-judicial immunity, and (3) defamation immunity. *Id. But see* William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 Stan. L. Rev. Online 115, 119-20 (2022).

(and most important), the common law of 1871. *See id.* at 494. To "discern Congress' likely intent in enacting § 1983," the Court held that prosecutors should appeal "to American common law and other history" to establish a claim to absolute immunity. *Id.* at 493. So prosecutors could take the function at issue—say, participating in a probable-cause hearing—and demonstrate that the function received immunity in 1871. *See id.* at 489-90.

In doing so, prosecutors could appeal to the "several categories of immunities" that "pre-1871 common-law courts [] recognize[d]." *Id.* at 499 (Scalia, J., concurring in the judgment in part and dissenting in part); *see id.* at 499-501 (laying out (1) judicial immunity, (2) quasi-judicial immunity, and (3) defamation immunity); *supra* n.2. And now, unlike in 1991 when *Burns* was decided, we have more tools available to see whether prosecutors have met their burden. *See, e.g.*, William Baude & Jud Campbell, *Early American Constitutional History: A Source Guide*, SSRN (last updated March 13, 2023).

On the policy front, *Burns* listed two concerns. First, prosecutors should strive to show that there is a "risk of vexatious litigation" if the action only received qualified immunity. *Burns*, 500 U.S. at 494. That's because absolute immunity was "designed to free the *judicial process* from the harassment and intimidation associated with litigation." *Id.* And second, a prosecutor could argue that "several checks other than civil litigation" existed to combat prosecutorial abuse, so granting absolute immunity would not pose an accountability concern. *Id.* at 496. To sum it up, *Burns* held that prosecutors could use

the common law in 1871 plus two policy justifications to establish an entitlement to qualified immunity.

B.

Then came *Buckley*. *Buckley* didn't change *Burns*'s burden. Instead, *Buckley* gave prosecutors a shortcut to meeting that burden—an alternative to showing that the common law supported a finding of absolute immunity. *Buckley* categorized one specific function as having received common-law immunity in 1871. It labeled this function: the "role as an advocate for the State." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) ("[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the state, are entitled to the protections of absolute immunity.").

So post-*Buckley*, rather than go through the trouble of finding common-law support through independent historical research in each case per *Burns*, prosecutors could meet the "burden of establishing that they were functioning as 'advocates' when" committing the conduct alleged to meet the *necessary* (but not sufficient) condition for finding absolute immunity. *Id.* at 274.

To do the *Buckley* analysis, the Court necessarily had to define what it meant to function as an advocate. The Court suggested that we should evaluate (1) when the alleged conduct occurred, and (2) whether that conduct would have traditionally fallen within an advocate's discretion (or someone else's). *Id.* at 273, 278. I'll tackle each of these.

First, we look at *when* the alleged conduct occurred. If the conduct occurred while "preparing for the initiation of judicial proceedings or for trial" or "presenting the State's case," that timing favors granting absolute immunity. *Id.* at 270, 273 (citation omitted). But "where the role as advocate has not yet begun, namely prior to indictment, or where it has concluded, absolute immunity does not apply." *Spurlock v. Thompson*, 330 F.3d 791, 799 (6th Cir. 2003).

So we can reject an absolute immunity defense if "no adversarial judicial proceeding [was] taking place" when the challenged conduct occurred. *Jackson v. City of Cleveland*, 64 F.4th 736, 745 (6th Cir. 2023). And we will do the same if the challenged conduct takes place "before any probable cause hearing," "before any arrest warrant was sought," "before a grand jury was convened," *Watkins v. Healy*, 986 F.3d 648, 662 (6th Cir. 2021), or more generally, "during [a] preliminary investigation of an unsolved crime," *Buckley*, 509 U.S. at 275.

But even if a prosecutor's conduct occurs in preparation for or perhaps while the trial is ongoing, that does not mean that absolute immunity will apply. That's because some "acts in preparing for those functions … would be absolutely immune," while others—such as those of "investigation" or "administration"—typically "would not." *Id.* at 270, 273 (citation omitted); *see Imbler*, 424 U.S. at 431 n.33.

So we turn to the second factor in *Buckley*: whether the conduct would have traditionally fallen

within an advocate's discretion or someone else's. *See Buckley*, 509 U.S. at 268-69 (explaining that "some officials," like prosecutors, perform "special functions," so "absolute protection from damages liability" is necessary to "protect … their discretion"); *id.* at 278 (explaining that absolute immunity doesn't cover prosecutorial conduct that serves a purpose other than advocacy, even if it's a "vital public function"); *Kalina v. Fletcher*, 522 U.S. 118, 131 (1997) (explaining that absolute immunity fully protects "the traditional functions of an advocate"); *see generally Westfall v. Erwin*, 484 U.S. 292, 297 (1988), *superseded by statute as recognized in Juide v. City of Ann Arbor*, 107 F.3d 870, at *3 (6th Cir. 1997) (unpublished table decision) (noting Congress could provide absolute immunity for nondiscretionary functions that the common law never traditionally protected).[3]

To determine whether conduct constitutes a traditional function, we can first ask "whether the actions in question are those of an advocate" or someone else. *Cady v. Arenac County*, 574 F.3d 334, 340 (6th Cir. 2009) (quoting *Skinner v. Govorchin*, 463

[3] The Supreme Court's decision in *Westfall v. Erwin* was superseded by statute, but the analysis stands. Indeed, the Court found that "absolute immunity for nondiscretionary functions finds no support in the traditional justification for official immunity." 484 U.S. at 297. After that, Congress acted. And it provided what the common law didn't—absolute immunity for nondiscretionary functions for federal employees. *See Juide*, 107 F.3d at *3. By contrast here, Congress has yet to provide what the common law doesn't—absolute immunity for state prosecutors' nondiscretionary actions in the § 1983 context.

F.3d 518, 525 (6th Cir. 2006)); *see Holloway v. Brush*, 220 F.3d 767, 775 (6th Cir. 2000) (looking at a prosecutor's "*capacity as a legal advocate*").[4] It's simple. An advocate's role is advocacy. He must act within the "scope of" his advocative "duties"—and that scope usually involves the exercise of discretion. *Kalina*, 522 U.S. at 124 (citation omitted); *see Imbler*, 424 U.S. at 420; *Higgason v. Stephens*, 288 F.3d 868, 877 (6th Cir. 2002). So if a prosecutor can perform the conduct within his discretion as an advocate for the state—such as "the professional evaluation of the evidence assembled by the police" or the "preparation for its presentation at trial or before a grand jury"—that conduct gets absolute immunity for falling within the function of advocacy. *Buckley*, 509 U.S. at 273.

And what's critical in thinking about the traditional function of an advocate is the discretion the advocate is exercising—because again, common law absolute immunity was grounded in the discretion afforded to juries and judges at trial. *Imbler*, 424 U.S. at 422-23 & n.20; *Kalina*, 522 U.S. at 129-30 (reasoning that absolute immunity doesn't extend to just anyone "exercis[ing] [] professional judgment"—it extends only to the "exercise of [] judgment of the *advocate*" (emphasis added)). And there's good reason to focus on a prosecutor's lack of

[4] Our analysis looks at "the nature of the function performed, not the identity of the actor who performed it." *Buckley*, 509 U.S. at 269 (citation omitted). That means, for the sake of the analysis, we don't grant a prosecutor absolute immunity just because he is in fact a prosecutor. But the question of who *actually* performed the conduct involves a different inquiry from the question of who *would have* traditionally performed the conduct.

discretion. Many actions a prosecutor might take in attempting to be an advocate could go well beyond an advocate's discretion. For example, a prosecutor could try to influence a plea negotiation by directing jailers to beat up a criminal defendant, "beating his wife, kidnapping his children, or burning a cross on his lawn." *Rouse v. Stacy*, 478 F. App'x 945, 954 (6th Cir. 2012). Each of those acts may further the state's goals of advocacy. But each fall outside an advocate's discretion. *See id.* at 954-55, 56. And each doesn't obtain absolute immunity. *Id.*

And beyond a prosecutor acting outside his discretion as an advocate, some actions a prosecutor takes may not be advocative—but rather investigative or administrative. *See Adams v. Hanson*, 656 F.3d 397, 402, 409 (6th Cir. 2011); *see Imbler*, 424 U.S. at 431 n.33 ("At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court.").[5] So, for example, when prosecutors commit acts traditionally performed by a complaining witness (like testifying in court), *see Kalina*, 522 U.S. at 127, an official dealing with the

[5] But one exception on the administrative front: administrative actions taken by a prosecutor can still receive absolute immunity if the conduct is "tied to the trial process." *Stockdale v. Helper*, 979 F.3d 498, 504 (6th Cir. 2020). "[C]ertain kind[s] of administrative obligation[s]" are "directly connected with the conduct of a trial." *Van de Kamp v. Goldstein*, 555 U.S. 335, 344 (2009). The obligations should also "necessarily require legal knowledge and the exercise of related discretion." *Id.* Only those kinds of administrative actions can receive absolute immunity without the showing of common-law protection. So this takes us back to the first *Buckley* factor—timing matters.

press (like speaking at a press conference), or a police officer (like fabricating evidence in a police investigation), they "ha[ve] no greater claim to complete immunity" than those who traditionally performed those actions, *see Buckley*, 509 U.S. at 274. Similarly, that's why the Attorney General of the United States only gets "qualified, rather than absolute, immunity when engaged in the performance of national defense functions rather than prosecutorial functions." *Kalina*, 522 U.S. at 127. So *Buckley* looks at the role of the advocate and the prosecutor's discretion within that role to determine whether absolute immunity is warranted.

II.

With that framework in mind, we can analyze whether Prosecutor Craycraft meets his common-law burden to obtain absolute immunity. Miller alleges that Craycraft committed three acts: (1) advising a witness; (2) destroying alleged exculpatory evidence; and (3) violating a court order that directed the prosecution to hand over the evidence to Miller. (Appellant Br. at 53.) Because we're at the motion-to-dismiss stage, we should credit Miller's plausible allegations as true. *Leech v. DeWeese*, 689 F.3d 538, 542 (6th Cir. 2012).

Craycraft attempts to follow the *Buckley* rationale by saying that he "is only alleged to have acted as an advocate." (Craycraft Br. at 8.) I think that absolute immunity covers the first two of his actions—advising a witness and destroying evidence—because under *Buckley* those functions involve a prosecutor's discretion in the traditional role of an advocate. But

Craycraft hasn't shown that the third action—violating a court order—meets either the *Burns* or *Buckley* rationale for establishing absolute immunity.

A.

Start with Craycraft's first two actions—advising a witness and destroying evidence—under the *Buckley* approach. First, we look at *when* the alleged conduct took place. The conduct here occurred after Miller's arrest and indictment for murder and robbery. Craycraft allegedly advised a witness to destroy evidence in the discovery phase of the criminal action. Seeing that the alleged acts occurred while "preparing for the initiation of judicial proceedings or for trial," the timing here favors granting Craycraft absolute immunity. *Buckley*, 509 U.S. at 273; *cf. Spurlock*, 330 F.3d at 799; *Watkins*, 986 F.3d at 662.

Next, we look at whether a prosecutor would have traditionally had the discretion to advise witnesses and get rid of evidence. *See Kalina*, 522 U.S. at 131; *Buckley*, 509 U.S. at 278. The short answer is that he would have. *See Imbler*, 424 U.S. at 426 (explaining that prosecutors have "wide discretion" over decisions involving "witnesses" and "presentation of evidence" to prepare and present the state's case).

First, advising a witness. Courts have long understood that a prosecutor acts as an advocate when controlling what witnesses do in preparation for trial. "Prosecutorial decisions regarding witness testimony, including what witnesses to use at trial and what questions to ask them, are activities

intimately associated with the judicial phase of a criminal trial and, therefore, are protected by absolute prosecutorial immunity." *Spurlock*, 330 F.3d at 798; *see Higgason,* 288 F.3d at 878.

Buckley recognized that prosecutors act as advocates (and get absolute immunity) when they exert "an out-of-court 'effort to control the presentation of [a] witness['s] testimony.'" 509 U.S. at 272-73 (quoting *Imbler*, 424 U.S. at 430 n.32) (first alteration in original). That's why granting absolute immunity from § 1983 suits for "eliciting false or defamatory testimony from witnesses" "accord[s] with the common-law absolute immunity of prosecutors." *Id.* at 270. Because prosecutors could traditionally advise witnesses on matters related to the state's presentation of its case, I would find that Craycraft acted within his discretion as an advocate.

Second, destroying exculpatory evidence. *Imbler* acknowledged that prosecutors retain discretion over what evidence they disclose and that absolute immunity attaches to their exercise of that discretion. 424 U.S. at 431 n.34. And since *Imbler*, we have confirmed that prosecutors receive absolute immunity for the intentional failure to disclose material exculpatory evidence at trial—i.e., committing *Brady* and *Giglio* violations. *See Koubriti v. Convertino*, 593 F.3d 459, 467, 470 (2010); *Jones v. Shankland*, 800 F.2d 77, 80 (6th Cir. 1986). Such decisions go to the heart of discretionary actions that prosecutors must make in preparing evidence for trial and presenting the state's case. Craycraft's conduct—getting rid of evidence he didn't want to use (and didn't want Miller to use) at trial—is a discretionary

action that warrants absolute immunity.[6] *See Imbler*, 424 U.S. at 431 n.34 (explaining that even

[6] To be fair, the idea that destroying exculpatory evidence is protected by absolute immunity seems incongruous with what ought to be our instincts about fairness and justice. *Imbler*, 424 U.S. at 441 (White, J., concurring in the judgment) ("It is apparent that the injury to a defendant which can be caused by an unconstitutional suppression of exculpatory evidence is substantial, particularly if the evidence is never uncovered."). But this is the natural consequence of *Imbler*'s conclusion that we look solely to whether the relevant function serves as an "integral part of the judicial process" or is "intimately associated with the judicial phase of the criminal process." *Id.* at 430 (citation omitted). As far as I can tell, *Imbler*'s purely functional approach does not ask whether the actions are an integral part of or intimately associated with a fair or just judicial process or whether the actions are consistent with the "role" of a fair "advocate" in our system. *Buckley*, 509 U.S. at 273. And even though these kinds of inquiries raise the specter of unmoored judicial decision making, they would perhaps not be out of bounds, considering that the immunity analysis itself is unmoored from the text of § 1983.

It is also a consequence of putting great weight on when the prosecutor's actions took place, i.e., pre- or post-indictment. *See id.* But that timing distinction seems odd. The most relevant timing would seem to be whether those actions or statements occur "in the course of a court proceeding." *Burns*, 500 U.S. at 501 (Scalia, J., concurring in the judgment in part and dissenting in part). Some pre-indictment actions surely result in testimony or exhibits relevant to an actual proceeding, and some post-indictment actions are surely still investigative.

These questions, of course, are not new—the Court has weighed these interests and others in deciding where to draw the "proper line." *Imbler*, 424 U.S. at 431 nn.33 & 34. But some on the Court have questioned the current state of immunity jurisprudence. And that combined with the Court's renewed focus on the common-law foundations of legal doctrine suggests

discretionary unlawful acts—like the "knowing use of perjured testimony" and the "deliberate withholding of exculpatory information"—can be cloaked in absolute immunity to protect the "adversary system"); *Koubriti*, 593 F.3d at 467, 470; *Jones*, 800 F.2d at 80.

B.

Finally, the violation of a court order. Until today, our Circuit has not decided whether a prosecutor acts within the role of an advocate when he violates a clear court order. *See also White ex rel. Swafford v. Gerbitz*, 860 F.2d 661, 665 n.4 (6th Cir. 1988) (noting in dicta that a violation of a court order does "not fall within the purview of the protections afforded by *Imbler* immunity"). And the Supreme Court has not directly answered the question.

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that the Court may want to take a fresh look at this issue. *See Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from the denial of certiorari) ("[W]e at least ought to return to the approach of asking whether immunity 'was historically accorded the relevant official in an analogous situation at common law.'" (citation omitted)); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress."); Keller, 73 Stan. L. Rev. at 1341; *see also Rehberg v. Paulk*, 566 U.S. 356, 366 (2012) (Alito, J.) (recognizing that *Imbler* "did not simply apply the scope of immunity recognized by common-law courts as of 1871"); *Kalina*, 522 U.S. at 135 (Scalia, J., joined by Thomas, J., concurring) ("*Imbler*'s principle of absolute prosecutorial immunity … make[s] faithful adherence to the common law embodied in § 1983 very difficult.").

As with the first two acts, Craycraft violated the order during the discovery phase of Miller's prosecution. So this timing supports granting absolute immunity.[7] *See Buckley*, 509 U.S. at 273. Even then, however, just because the conduct occurred in preparation for trial isn't sufficient to justify extending absolute immunity. We consider more. *Id.* at 270, 273 (citation omitted); *see Imbler*, 424 U.S. at 431 n.33.

So the next question is whether Craycraft has shown that he was acting within his discretion as an advocate when he violated a court order—one that eliminated nearly all his discretion. He hasn't made that showing. Violating a court order that leaves no room for discretion is not a function an advocate "normally perform[s]." *Id.* at 274 (citation omitted); *see Odd v. Malone*, 538 F.3d 202, 214 (3d Cir. 2008) ("We can imagine few circumstances under which we would consider the act of disobeying a court order or directive to be advocative, and we are loath to grant a prosecutor absolute immunity for such disobedience."). Such an act does "not fall within the purview of the protections afforded by *Imbler*

[7] It is worth noting that the timing here pushes the envelope of what 1871 common-law immunities protected. Craycraft's conduct, although it involved a court order, took place outside of the courtroom and the grand jury room, which would take it outside of the protection traditionally extended to defendants in defamation suits. *Burns*, 500 U.S. at 501 (Scalia, J., concurring in the judgment in part and dissenting in part) (noting that the common law afforded absolute immunity to witnesses for "all statements made in the course of a court proceeding" in later defamation suits).

immunity." *White ex rel. Swafford*, 860 F.2d at 665 n.4; *see id.* (Jones, J., concurring in part and dissenting in part) (seeking to affirm based on the denial of absolute immunity).

That's because under *Buckley*, where a prosecutor has no discretion to act in his role as an advocate, he can't get absolute immunity.[8] Again, courts give prosecutors absolute immunity to protect the "wide discretion" they have in carrying out a case. *Imbler*, 424 U.S. at 426. And we want to avoid "hamper[ing] [prosecutors] in exercising their judgment" or "prevent[ing] the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Id.* at 427-28.

But there is no wide discretion to violate an explicit court order. "Such an order—perhaps one enumerating specific documents that the prosecutor must turn over to the defendant—does not leave room for the prosecutor, fearing future liability, to 'shade his decisions[.]'" *Munchinski v. Solomon*, 747 F. App'x 52, 59 (3d Cir. 2018) (quoting *Imbler*, 424 U.S. at 423). A prosecutor may challenge the order by appropriate means or comply. *See id.* And in choosing whether to comply, "[t]he prosecutor's duties … become ministerial or administrative, rather than advocative." *Siehl v. City of Johnstown*, 365 F. Supp.

[8] Craycraft would run into the same problem under a *Burns* analysis too. My guess is that he'd have trouble showing that the common law in 1871 and its relevant policy justifications would support absolute immunity for violating a clear court order. In any event, he hasn't made that showing.

3d 587, 598 (W.D. Pa. 2019) ("When a court order, by its terms, severely limits a prosecutor's discretion, the prosecutor's duty in the face of such an order is not to advocate, but to comply.").

True, some court orders allow for discretion, such as when a court issues a broad order to disclose "exculpatory" evidence.[9] *See Reid v. New Hampshire*, 56 F.3d 332, 337 (1st Cir. 1995) (holding that an order requiring the police to turn over "any 'exculpatory' evidence" left discretion to the prosecutors to make judgments on what evidence to hand over). But "[t]he more discretion a judicial order eliminates from the prosecutor's role, the more likely it is that a violation of that order strips the prosecutor of absolute immunity." *Munchinski*, 747 F. App'x at 58-59. And "[a]n obligation to carry out a clear court order involves no exercise of discretion." *Jordan v. Sinsheimer*, 531 N.E.2d 574, 576 (Mass. 1988).

The court order in this case specified exactly what evidence Craycraft had to turn over to defense counsel.[10] The court first stated that it found the

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[9] As mentioned, prosecutors have discretion to decide what evidence is "exculpatory" and subject to disclosure. *See Koubriti*, 593 F.3d at 467, 470; *Jones*, 800 F.2d at 80.

[10] The majority states that the order was not specifically "directed to" Craycraft but to the state more generally. (Maj. Opinion at 12.) And because of that, the majority "leave[s] the question" of whether a prosecutor receives absolute immunity for violating a court order directed specifically to him "for resolution in a future case." (*Id.*) But the difference between a court order directed to the state generally or a specific prosecutor creates a distinction without a difference—especially here, where, as the

specific documentary "evidence [] exculpatory in nature and necessary to the defense of Defendant Nicki Miller." (R. 118-70, Court Order, p. 1.) The court then ordered that state officials "immediately go to [two defendants] and retrieve from [them] all correspondence, letters and emails" that they sent each other. (*Id.*) Because the order "was *ex parte*, the only persons privy to the order were Court staff, the defense team, and the prosecution team assigned to the case." (R. 1, Complaint, p. 25 ¶ 162.) Importantly, "Craycraft was one of the limited individuals privy to the … sealed order." (*Id.*) And after learning about the order, the complaint further alleges that Craycraft prompted the destruction of the evidence in violation of the order. (*Id.*, p. 26 ¶ 170-74.) So a plain reading of the complaint and the court order shows that Craycraft was presented with and made subject to the court order.

The court order had one directive—turn over the specific evidence. The order left no room for debate about whether particular evidence was exculpatory, relevant, or otherwise privileged. *See Reid*, 56 F.3d at 337. It involved no trial preparation, no strategy, no close calls on the evidence. Craycraft could either comply or challenge the order through lawful means.

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majority notes, Craycraft was "assigned to take lead on the case." (*Id.* at 6.) Either way, the court order was sent by the court to protect specific documentary "evidence [] exculpatory in nature and necessary to the defense" in Miller's prosecution. (R. 118-70, Court Order, p. 1.) And Craycraft, the "lead" prosecutor on the case, (Maj. Opinion at 6), received and violated that order, even though it also bound his discretion. (R. 1, Complaint, p. 25 ¶¶ 162, 170-74.)

Those were the only two options. But violating the order was not within his discretion as an advocate. So he has failed to establish that he is entitled to absolute immunity. *See Buckley*, 509 U.S. at 273. Further, he has not otherwise proven that he would receive absolute immunity under 1871 common law. *See Burns*, 500 U.S. at 494. In the end, Craycraft failed to meet his common-law burden under either *Buckley* or *Burns*.

Lastly, it is important to recognize why courts should treat prosecutors who violate restrictive court orders differently from those who fail to meet their obligations under *Brady* or other blanket criminal rules. Prosecutors face routine restrictions in preparation for trial. And *Brady* is a good example of that. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (restricting prosecutors from suppressing material evidence favorable to the accused upon request). But even rules like *Brady* require prosecutors to make judgment calls.

Under *Brady*, prosecutors must determine "what evidence in their possession [i]s 'exculpatory' and subject to disclosure." *Reid*, 56 F.3d at 337. *That* know-how is what makes a *Brady* violation inapposite to the court-order violation here. In exercising discretion as an advocate, prosecutors can place evidence aside that they believe is not material either to guilt or punishment. *See generally Imbler*, 424 U.S. at 425 (recognizing that prosecutors "inevitably make[] many decisions that could engender colorable claims of constitutional deprivation"). And they can do so while protected by absolute immunity. *See id.* at

431 n.34; *Koubriti*, 593 F.3d at 467, 470; *Jones*, 800 F.2d at 80.

But things change when a prosecutor is stripped of all discretion. And a court order that directs the state to turn over specific pieces of evidence does just that. When that happens, as I explained above, there is no longer any judgment call for the prosecutor to make. And for that reason, Craycraft's violation of the court order should be treated differently from destroying *Brady* evidence.

III.

Even when a prosecutor doesn't get absolute immunity under § 1983, he can get qualified immunity, which the Supreme Court has presumed will provide a sufficient shield from liability. *Burns*, 500 U.S. at 486. To overcome a defendant's qualified immunity defense, a plaintiff must plausibly allege that (1) the official violated a federal statutory or constitutional right, and (2) the right was "clearly established" at the time of the conduct. *Moderwell v. Cuyahoga County*, 997 F.3d 653, 659-60 (6th Cir. 2021). So even after a prosecutor fails to establish absolute immunity, the plaintiff must overcome the defendant's asserted qualified-immunity defense. *Compare Burns*, 500 U.S. at 493, *with Moderwell*, 997 F.3d at 659-60. And here, Miller failed to meet the burden. Miller has neither proven that violating a court order constitutes a constitutional violation, nor that such a violation is clearly established. As a

result, Craycraft is entitled to qualified immunity. And I would affirm on that basis.[11]

[11] The district court did not address qualified immunity because it found that absolute immunity applied. That said, Craycraft raised qualified immunity in his motion to dismiss, though it was not the focus of his argument.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

NICKIE MILLER,	)	
	)	
Plaintiff,	)	Civil Action
	)	No. 5: 18-619-DCR
V.	)	
	)	
MONTGOMERY,	)	**MEMORANDUM**
COUNTY et al.,	)	**OPINION**
	)	**AND ORDER**
Defendants.	)	

*** *** *** ***

Plaintiff Nickie Miller claims that the defendants framed him for murdering Paul Brewer and caused him to spend approximately two years in jail for crimes he did not commit. As a result, he asserts various causes of action against the defendants under 42 U.S.C. § 1983 including malicious prosecution, as well as related state-law claims. However, the defendants are entitled to qualified immunity with respect to the claims under § 1983 because they did not violate clearly established law. Additionally, Miller has failed to raise a genuine issue of material fact with respect to his state-law claims. As a result, summary judgment will be granted in favor of the defendants.

I.

Paul Brewer's sister asked police to perform a welfare check at his home after he failed to attend a medical appointment on the morning of December 22, 2011. Officers located Brewer in his bed deceased. He had been shot once in the head and once in the neck. Brewer's wrists were secured to the bed frame and he was blindfolded.

Montgomery County Sheriff's Deputy, Detective Sergeant Ralph Charles, Jr., was assigned as the lead investigator regarding the murder. Charles went to Brewer's residence at 418 Natalie Drive in Mount Sterling, Kentucky, the morning of December 22, where he recovered various items of evidence. This included two straps that were used to secure Brewer's wrists to the bed frame, the blindfold that had been placed over Brewer's eyes, a pair of men's underwear, a pair of black fishnet stockings, a bloodied bedsheet, and Brewer's computer and cell phone. [Record No. 118-3, p. 20] An autopsy revealed that Brewer had been shot twice with a .45 caliber gun. A police canine tracked a scent around the back of the property and over an embankment to an undeveloped cul-de-sac. There, officers discovered a set of tire tracks in mud. Detective Charles photographed the tracks and attempted to mold the impressions but was unsuccessful because the casting compound did not harden. [Record No. 103-2, p. 5]

Charles immediately sought to interview those closest to Brewer, including his girlfriend, daughter, and brother. Brewer's girlfriend, Karen, did not have any relevant information but advised Charles that

she and Brewer "did not engage in any type of sexual activity that included being tied up or anything of that nature." [Record No. 118-3, p. 21] Brewer's daughter, Tianna Blankenship, told Charles that she had spoken to her father on December 17, 2011, and he told her that he had met someone in Richmond and was "planning on having a threesome at some point that night." *Id. See also* Record No. 103-2, p. 12. Charles thought this was unusual information for a father to share with his daughter, but Blankenship advised him that they had just recently reconnected and that they "were more friends than anything."

On February 2, 2012, Charles went to see Brewer's brother, John Carl Brewer, at his place of business "to see if he had heard any other information." [Record No. 118-3, p. 23] John Carl was a retired state trooper, a realtor, and "sort of a political figure over there," so he "hear[d] things." While Charles was talking to John Carl, Kentucky State Police Trooper Kenny Yarbrough and Powell County Sheriff's Deputy Robert "Rog" Matthews saw Charles' cruiser in the parking lot and asked to speak with him.

Yarbrough and Matthews informed Charles that they were investigating a burglary ring spanning several counties, including Montgomery. According to the officers, Bobby Mize ("Bobby") had informed them that Plaintiff Miller and Cody Hall were two of the individuals responsible for the burglaries. Further, Bobby had told the officers that Miller confessed to him that he "just had to put one down." *Id.* p. 24. When asked what he meant, Miller reportedly stated that "sometimes you just have to do stuff like that. We

just had to put him down." *Id.* Bobby had also stated that Hall confessed regarding his involvement and that both men indicated the event took place in Mount Sterling. According to Bobby, Miller and Hall indicated that the man they had "put down" lived in Mount Sterling but was originally from Powell County which, according to Charles, was accurate for Paul Brewer. Bobby also reported that Michelle Lawson was present with Hall and Miller at the time of the murder.

After receiving this information, Charles questioned Bobby, who was in custody at the Three Forks Regional Jail. According to Charles, Bobby, his brother Rick Mize ("Rick"), and Plaintiff Miller, were "known criminals" within the Powell County Community. *Id.* pp. 24-25. Accordingly, Charles believed that Rick may have information about Brewer's murder. Bobby agreed to wear a recording device while speaking with Rick about the murder but, according to Charles, it "failed miserably" and did not produce any useful information. *Id.* p. 27.

Charles and Montgomery County Sheriff's Deputy Detective Mark Collier interviewed Michelle Lawson at the Montgomery County Sheriff's Office on February 10, 2012. *Id.* p. 29. Lawson denied having knowledge of any burglaries or familiarity with Paul Brewer. *Id.* p. 30. She provided Detective Charles with Hall's telephone number.

Using the number provided by Lawson, Charles began exchanging text messages with Hall. Charles, Collier, and Deputy Matthews questioned Hall at the Powell County Sheriff's Office on February 14, 2012.

Hall was familiar with Brewer because Brewer had worked with Hall's father in the past. However, Hall stated that he had nothing to do with the robbery and murder. He also stated that, to his knowledge, Nickie Miller had nothing to do with the crimes. *Id.* p. 34.

Hall told Charles that he did "not run with Nick," but it was clear the two had been close in the past. He further advised Charles that Rick and Miller had left together earlier "that day" and when Rick came back alone that night, he was driving Miller's car. Additionally, he had a revolver that he stuffed in some drawers under his bed. Within the next few days, Rick refused to drive into Mount Sterling, stating: "Some stuff went down the other night and I don't want to be in Mount Sterling in this car." Hall also reported that he overheard Rick talking about "hitting a lick with Nick" and that Rick said that he had to "hurt somebody." Hall advised the officers that he believed Rick Mize and Misty Dehart were involved in the murder.

Charles and Collier met with Dehart on February 15, 2012. Dehart denied any knowledge of the murder. However, according to Charles, she reported that, at some point, Rick Mize informed her that Plaintiff Miller wanted him to "do a job." Rick had then asked her to tell Miller that he was not afraid to kill someone. [Record No. 118-3, p. 36] Dehart told officers that she believed Rick was actually capable of killing someone. It was at this point in the investigation that officers learned that Bobby Mize, Rick Mize, Cody Hall, and Plaintiff Miller all "hung around each other." Additionally, Miller and Rick Mize lived together "most of the time." *Id.* p. 35.

Charles, Collier, and Matthews interviewed Kennie Helton on August 24, 2012.[1] *Id.* p. 39. She also denied involvement in the robbery and murder. She admitted knowing Rick Mize and Nickie Miller, stating that she used to hang out and use drugs with them. Helton stated that she had heard that Rick Mize and Cody Hall were involved in the murder. Helton agreed to provide officers a DNA sample.

Charles and Collier went to the Woodford County Detention Center to meet with Cody Hall again on August 27, 2012. *Id.* p. 40. Hall's statement was largely consistent with the one he provided on February 14, 2012. Hall indicated that on the night of the murder, a car pulled up outside "the camper."[2] He expected it to be Rick Mize and Nickie Miller and went outside to confront Miller about a disagreement they had earlier in the evening. However, Rick was alone. Rick stated that Miller was not in the car and that "they had a bad night and had to put someone down in Montgomery County." Hall then saw Rick go into the camper and put a handgun under the bed.

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[1] Neither Charles nor Collier could recall who brought up Helton as someone who should be interviewed. [*See* Record Nos. 118-3, p. 40; 118-11, p. 27.]

[2] While the camper is referenced several times throughout parties' exhibits and briefs, the owner of the camper is never expressly identified. However, it appears that Hall, Miller, and Rick Mize all spent significant time at the camper. [*See* Record No. 118-3, p. 35.]

Detective Charles interviewed Natasha Martin outside her apartment on September 4, 2012.[3] Charles advised her that he was working a case in Montgomery County that she might be able to help him. Martin asked, "Is this about Cody and all of them?" Charles responded in the affirmative. Martin agreed to answer Charles' questions after telling Charles that she was legally married to Hall but had not been with him since 2010.

> Detective Charles: … What—what do you—what—what case you think I'm talking about?
>
> Natasha Martin: I hear they got murder, and I hear he's got indictments—
>
> Detective Charles: Okay.
>
> Natasha Martin: —over there, like…
>
> Detective Charles: What do you know about the murder?
>
> Natasha Martin: All I know is what I hear.
>
> Detective Charles: What do you hear?
>
> Natasha Martin: I hear that they've been questioned over a—a Brewer man got shot.

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[3] Officers also could not recall which witnesses implicated Natasha Martin but knew that her name came up during the investigation. [*See* Record No. 118-3, p. 40.]

Detective Charles: Uh huh.

Natasha Martin: And I heard people say that there wasn't no forced entry, and I've heard people say that—the Mizes say that they done it. I mean, I've heard everything in the world.

Detective Charles: Who—who's telling you the Mizes are—have done it?

Natasha Martin: Well, not really the Mizes done it, but supposedly Bobby was there, just—I've just heard that Bobby and Cody's names in—in with it.…

Detective Charles: Okay. What all—what all have you heard?

Natasha Martin: Just that that man got shot. I don't even know when it's supposed to be. I guess it was a home invasion. I mean, I'm not dumb. I know what Nick and Cody do.

Detective Charles: What's—what's Nick and Cody do?

Natasha Martin: Always, like, breaking into houses and stuff. I mean, they've been doing it for years, you know. But, I mean, it's a scary thought to think that—you know, that they're capable of murdering somebody. That's—I mean, that's a little different than breaking into somebody's house and just taking their belongings, which is never good anyway, but …

…

Detective Charles: … Do you know the Brewer?

Natasha Martin: Uh.

Detective Charles: Never met him, never been in the house, never …?

Natasha Martin: No, I couldn't tell you—I just know it happened in Mount Sterling. I don't even know when. I don't even know when this supposedly happened. … Gossip is—well, I got told—you know, some people said they done it. You know Rick Mize, Bobby Mize's brother? He told me one day that they come in—I guess they'd been doing their thing, breaking in houses, whatever, and he said Cody had a gun in his hand, and Nick told him he better get—get rid of it because that'll get him life in the pen. You know, Rick told me that. That's been back in the summer and …

Detective Charles: Why would Rick tell you this? I mean, what was your all's conversation that led up to it?

Natasha Martin: I think we was probably just talking about, like, just them two and—I mean, it's been—I've had a lot of conversations with people being, like, do you think they done it, you know. And then I've heard people say that they—that supposedly

> there was no forced entry to the house, the man was shot in his bed, that they don't think they would have done it because they would have kicked in the door and went in to rob him and wouldn't have killed him, would have tied him up. And then I heard that [Hall's] little girlfriend was there. I guess—I've heard people put—like, I guess his girlfriend, Michelle, is driving, and then Cody and Nick went in the house. Then I hear no, it was Bobby driving. I don't—I mean, gossip around here is—everybody speculating to do it. It ain't all what do you think, you know.

[Record No. 103-7]

Officers gathered DNA samples from several individuals, including Martin, Lawson, Helton, and Dehart. [*See* Record No. 103-8.] A November 26, 2012 report from the Kentucky State Police forensic laboratory indicated that Natasha Martin could be included as a contributor to the mixture of DNA profiles from the left wrist restrain located at the crime scene. *Id.* pp. 7-8. All other individuals that were tested were excluded, with the exception of Brewer and his girlfriend. However, when Melissa Brown, Forensic Scientist Specialist II, issued her final report on December 15, 2016, she indicated that the DNA mixture on the left wrist restraint was "too complex for meaningful comparisons." *Id.* p. 12.

Charles met with Shelly Poe on December 23, 2014. [Record Nos. 103-2, p. 40; 118-3, p. 50] Poe advised that Rick Mize told her that there was a female and three males in Brewer's home the night of

the robbery and "things went bad." Poe thought the woman had been arrested for a felony previously and that her DNA would match evidence at the scene. She also said that as soon as investigators "talked to this woman and dangled the idea of losing her kids she would sing like a canary." Poe clarified that she was in Rick Mize's home with Rick and another male when Rick told her that he and some friends went into Brewer's residence and "things got out of hand and he ended up dying."

Kennie Helton reached out to Charles from the Montgomery County Jail where she was being held on October 29, 2015. [Record No. 118-3, p. 51] She advised Charles that she was afraid to speak freely about the murder previously, but she was willing to do so at that time. She stated that she actually had been at Rick Mize's camper when he, Miller, and Hall returned from doing some burglaries and Miller put a gun in a vent in the camper. According to Helton, Rick told her that "they had two girls set up a threesome with a guy and once they got him tied up, they were going to rob him. Something went wrong and they killed the guy." [Record No. 103-2, p. 41] Helton stated that Rick told her that the incident occurred in Mount Sterling and was boasting that "they had just killed a cop's brother." [Record Nos. 103-2, p. 40; 118-3 p. 51]

Approximately one week later, Helton advised Montgomery County Sheriff Fred Shortridge that officers should speak with Christina Larrison and Jessica Richmond. Charles interviewed them on November 11, 2015. Larrison provided a written statement indicating that, around the time of

Brewer's murder, Martin came to her house, "really upset." When Larrison asked what was wrong, Martin told her that she, Hall, Miller, and another woman had gone to a house or motel room to meet a man that had thousands of dollars and "they had told the man they would sleep with him for some money." [Record No. 103-10] According to Larrison's statement, Martin reported that the real plan was to tie him up and "have a code word" so that Hall and Miller could come in and rob him.

Larrison further reported that the "plan went through" and the women tied the man up, said the code word, and left the room. When the men came out of Brewer's residence, Hall reportedly asked Miller "why he did what he did." Larrison recalled Martin telling her that Miller said, "don't worry about it. It's finished and there is no witness." Martin also reportedly told Larrison that Hall hit the victim over the head and Miller killed the man when Hall "went to get the money." *Id.*

A deputy picked up Martin at her place of work and brought her to Sheriff Shortridge's office where she voluntarily submitted to questioning again on November 12, 2015.[4] [Record No. 118-28] She advised

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[4] While the beginning of the interview was not recorded, it appears that recording began before questioning began. [Record No. 118-28, p. 7 (As Sheriff Shortridge entered the room, Detective Charles explained, "We've been talking about work … filling in … I wanted to wait 'till you get here so …." Sheriff Shortridge advised Martin of her *Miranda* rights at that point.)] The recorded portion of the interview was approximately 52 minutes in length.

Detective Charles that her knowledge of the crime was the same as at the last interview—that she had heard around town that a Brewer man had been shot and that Miller and Hall did it with the help of a woman, possibly Kennie Helton. Martin emphatically denied any involvement in the crime—repeatedly stating that she did not know the victim, had never met him, and had no reason to be associated with him. She further stated that she had not talked to Cody or Nick for years prior to her September 2012 interview.

Charles and Shortridge told Martin that they had evidence showing that she was involved in Brewer's murder—specifically, DNA found at the crime scene that matched the sample she had provided and witness statements implicating her. [*See* Record No. 118-4, p. 14.] Martin continued to deny her involvement and offered to take a polygraph examination. One of the officers advised Martin that they already knew who the players were, they just needed to "get enough to . . . do what we have to do as far as court proceedings." *Id.* 36. Further, they told her, they believed she did not "take part" and they wanted to give her "an advantage on top of everybody else."

Detectives Charles and Mark Collier drove Martin to Frankfort, Kentucky for the examination. The detectives first spoke with Kentucky State Police polygraph examiner John Fyffe and provided him background information about the case. They told him the time, place, and location of the murder, as well as their theory of the crime, including potential suspects Miller, Hall, and Rick Mize. [Record No. 118-12, p. 19, 35] Fyffe then performed a pre-polygraph

interview with Martin during which he eventually began asking her questions about Brewer's death. *Id.* 21.

During the pre-polygraph interview which lasted nearly an hour, Martin consistently denied having any personal knowledge regarding Brewer's murder. Martin reiterated that she did not know Brewer and did not know where the crime occurred. Fyffe advised her that it occurred on Natalie Drive in Mount Sterling, Kentucky. *Id.* 22. He then told her the detectives' theory of the case—that two women had gone in and restrained Brewer and that "Cody and two other guys" then came in and killed him. Fyffe went on to tell Martin that DNA matching hers was located on one of the straps securing Brewer's wrist to the bed frame. At the time, Fyffe did not know which details were public and which were not. *Id.* 23, 28.

Fyffe proceeded with the polygraph examination during which he asked Martin the following questions: Were you in the house when that man was shot? Did you shoot that man? Did anyone tell you they shot that man? Did you tie that man to the bed the day he was shot? She answered "no" to each question. [Record No. 103-14] Following conclusion of the polygraph examination, Fyffe left the room for several minutes. When he returned, he pulled his chair directly in front of Martin so that he was facing her and told her that she had failed the test. He then applied interrogation techniques he explained he had learned during his training to try and obtain a confession. This including sitting close to Martin, holding her hand, and touching her knee to gain her trust. [Record No. 118-12, p. 26] He also attempted to

minimize her involvement by suggesting that someone else was responsible for the murder and that she simply possessed information.

At one point, Fyffe told Martin if she would tell him who pulled the trigger she would "walk." [Record No. 118-30, pp. 106-110] During Fyffe's deposition, he could not recall whether this statement was true, but he conceded he did not have authority to make such a decision. [Record No. 118-12, p. 29] When Martin did not provide a name, Fyffe told her that if she did not cooperate, she would carry the burden by herself. He told her that if she cooperated and identified the shooter, however, he would have no problem standing up in front of a judge and saying that she had told the truth. *Id.* 30. Fyffe also told Martin that he would tell the judge that she had been tricked and did not know that the murder was going to occur. Against this backdrop, Fyffe demanded numerous times that Martin tell the truth. Eventually, she asked to speak with Detective Charles.

Fyffe left the interrogation room. Charles entered and questioned Martin alone for several minutes. Martin told Charles that she was "having a real hard time" and asked whether he could tell her some things to help her remember. Like Fyffe, Charles insisted that Martin *did* remember the events surrounding Brewer's murder or she would not have failed the polygraph test. When Martin stated, "I have three babies at home," Charles told her to think about her children and not "carry all this weight with [her]." When Charles then asked her again who the shooter was, Martin answered, "Nickie Miller." When asked how she knew, she stated, "because he's the only one

who would do something like that." However, when asked how she knew that, she said, "I don't."

Defendant Fyffe reentered the interview room and advised Martin she would be much better as a witness as opposed to taking the fall for Brewer's murder. Both officers told Martin repeatedly that she had to be truthful. Fyffe advised her that, if she carried the blame herself, and if the DNA evidence was used against her, she would likely lose her children for a long time. At that point, Martin asked, "Can I have my lawyer or somebody? Because I don't know what I'm supposed to do here." When asked whether she wanted an attorney, however, Martin did not answer. Instead, she continued talking with the detectives—denying any knowledge of the crime. [Record No. 118-30, p. 121]

Charles and Collier drove Martin back to the Montgomery County Sheriff's Department.[5] [Record No. 118-3, p. 70] Upon arrival, Charles left to attend to a personal matter and left Martin in the presence of Collier and Shortridge. They "talked with her some more and then she requested to speak with an attorney."[6] [Record No. 118-11, p. 46] Martin advised that she had used attorney James Davis' office for

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[5] Collier was present during the initial interrogation, polygraph, and post-polygraph interrogation, but it does not appear that he asked Martin any questions. [*See* Record No. 118-11, p. 14 (noting that Collier observed Martin's pre and post-polygraph interview).]

[6] It does not appear that this portion of Martin's interrogation was recorded.

other matters and indicated that is who she wanted Collier to call.

Davis spoke with Martin privately for about twenty minutes after he arrived at the Sheriff's office. [Record No. 118-32, p. 14] Immediately following the conversation, Davis called Commonwealth's Attorney Ronnie Goldy and secured a diversionary plea in exchange for Martin's truthful testimony. *Id.* 13. Less than an hour after having brought her back to Montgomery County, Charles received a telephone call from Sheriff Shortridge stating that Martin was ready to give a statement.

At 7:09 p.m., and in the presence of attorney Davis, Martin stated that Nickie Miller approached her about assisting him and Hall with a robbery. [Record No. 118-33] The plan was to make the victim believe that two women were coming to have a sexual encounter with him. The women would "go in there … be sweet, love on him, [and] get him tied up" so that Miller and Hall could come in. Martin had difficulty remembering the identity of the other woman involved—stating that it was either Kennie Helton or Kayla Walters. She recalled that the other woman was the one who called Brewer and set up the meeting.

Martin initially could not remember how she got to Brewer's residence because she was "wilder than hell" from taking various pills. However, she eventually recalled that Miller drove them in his Volkswagen station wagon. After they arrived, Martin strapped Brewer to the bed and the other woman blindfolded him. At that point, Martin stated

that she went into another room and radioed to Miller who "was right around waiting somewhere" with Hall. She went and unlocked the front door so that the men could come in. The women exited the front door and Martin heard a shot. After the men came out and everyone got in the car, Martin asked about the gunshot. The men said, "sometimes you got to scare people." Hall told her to never tell anyone and Miller told her if she said anything to anyone, he would kill her. [Record No. 118-33]

One of the detectives asked Martin who she confided in after the fact or whether she told anyone she could not remember the events. She stated:

> I was so wild. I mean, honestly, it's probably in town. Like, that's what I'm trying to tell you all. I get flashes and pieces. I'm trying to remember. That's why I asked you all what was said. That way, I would, you know—you ever—you ever forget something, and whenever somebody starts talking about it, the more—and then you start—shit starts coming back to you?

Charles told her that one does not forget something as important as this. At that point, Davis asked to speak with Martin privately. Martin and Davis left the room after which the interview resumed. [*See* Record No. 118-3, p. 72.]

Martin described her clothing on the night of the murder as follows: "really tight pants and hooker boots … a real low cut shirt, and … a winter coat." The other woman had on a black jacket with fur around

the hood, tall boots, and black stockings with lace around the top. When the detective pointed out that she remembered all of these details, he asked again for the identity of the other woman. Martin stated, "I think it was Kennie Jean. She has real long black hair." Within moments, Martin confirmed she was "positive" that the other woman was Helton. Martin stated that Miller had told her he would pay her $200 for her part in the robbery. Ultimately, she reported, he gave her "a couple of pills," and $140 in cash.

Charles showed Martin an aerial view of Brewer's neighborhood using Google Earth and asked her to show him Brewer's residence and where the group had parked. *Id.* p. 32. Shortridge described Natalie Drive as a "highly populated residential section of [the] community [with] [s]everal, several duplexes there." [Record No. 118-4, p. 24]

Although Martin previously denied knowing where Natalie Drive was located, Charles, Shortridge, and Davis testified during their depositions that Martin provided the officers turn-by-turn directions to Natalie Drive and correctly identified Brewer's residence. [Record Nos. 118-3, p. 62; 103-2, p. 47; 118-32, pp. 17, 21; 118-4, p. 24] After that, the officers drove Martin back to her place of work and released her.

Martin's grandmother, Jewell Combs, testified in her deposition that Martin came home that night crying, stating that everything she had told the police was a lie. [Record No. 118-5, p. 10] They both agreed that Martin would go back the following day and tell officers that she had lied. Martin and Davis met with

Detectives Charles and Collier at the Montgomery County Court Annex on November 18, 2015. [Record No. 118-32, pp. 18-19] Martin told Charles and Collier that her previous statement had been a lie. [Record No. 118-3, p. 75] She first stated that Kennie Helton did not participate in the murder but, instead, it was Shelly Poe. *Id.* 74. Charles told Martin that he believed she was lying because Poe had been excluded based on DNA evidence.

Martin then told Charles that everything she said in her original statement had been false and she was not present for the robbery and murder. Charles again told Martin he believed she was lying because she had provided information about the crime scene and taken officers to the crime scene. *Id.* Attorney Davis took Martin outside to speak to her privately. When they returned, Charles was informed that Martin "was going to stick to her [original] statement." Martin was arrested the following day and held at the Montgomery County Jail. [Record No. 118-32, p. 20]

Charles testified before a Montgomery County grand jury on November 24, 2015. [Record No. 118-37] Charles advised the grand jury that Martin had confessed to murdering and robbing Brewer and that her statements had been corroborated by cooperating witnesses. Charles testified that it had been known in the community for some time that Nickie Miller and Cody Hall were suspected of committing the robbery and murder. Further, he testified that DNA evidence collected from a restraint used to tie Brewer to the bed came back as a match to Martin. Charles then described Martin's confession wherein she stated that

she and another woman set up a meeting with Brewer under the pretense of a sexual encounter. Once she and the other woman had Brewer tied to the bed, they radioed to Miller and Hall who would come in and rob Brewer.

Charles advised the grand jury that Martin had provided details that had not been released to the public. Additionally, he stated that Martin identified the general location of Brewer's residence and where the group had parked the night of the murder when he pulled up the decedent's residence on Google Earth. Then, he stated, she got in the vehicle with officers and provided step-by-step directions to the residence and identified the location where they parked.

The grand jury returned an indictment charging Miller, Hall, and Martin with Brewer's murder and first-degree robbery. [Record Nos. 103-20; 103-21] Miller and Hall were both arrested. Miller was held at the Montgomery County Jail, while Hall was held at the Eastern Kentucky Correctional Complex. According to Sheriff Shortridge, Martin's statement was critical when it came to finding probable cause to initiate charges against Miller. [Record No. 118-4, pp. 10-11]

Martin retained attorney Alex Rowady in December 2015 and he quickly began working to have her bond reduced. The Montgomery County Circuit Court scheduled a bond reduction hearing, but it was postponed repeatedly. [*See* Record No. 118-68.] According to the plaintiff, Montgomery County Jailer Eric Jones befriended Martin while she was in

custody and gave her preferential treatment among the inmates. During phone calls to various individuals, Martin suggested that Jones was helping her get her bond reduced so that she could be released from custody. During his deposition, Jones testified that he had no recollection of making any efforts to secure a bond for Martin. However, Rowady testified that he recalled speaking to Jones about Martin and that the two had conversations about getting Martin's bond lowered. [Record No. 118-48, p. 18]

In the meantime, Martin and Hall, apparently on improved terms, exchanged letters discussing various topics. Relevant here, Martin wrote to Hall that her confession was a lie and that attorney Davis had instructed her to "tell [the detectives] something."[7]

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[7] The following are relevant excerpts of the letters from Martin to Hall:

I know you told me they'd file that but it still sucks about the directions to the apt. the polygraph man told me it was on Natalie Dr. and the Det. showed me it on Google maps and they didn't record it which Alex says is fishy.… (Dec. 20, 2015) [Record No. 118-34]

As for evil looks in the courtroom, what did you expect? This is bullshit I felt I got drug into by being married to you [and] the way I got done by the detectives and my [first] lawyer is why I'm here now…. Mama has spent $38,000 on this shit. Trying to correct the lie I told. But I've got Alex now and I trust him. (Aug. 1, 2016) [Record No. 118-61]

Here's something I wonder too. I would hope not but do you write me just to make nice [be]cause of the case? Rather [sic] we get

along or not I still would've done what was right. I can't stand Nick and I'm trying to right it there too. [Record No. 118-62]

I know you've got to be stressed out with the trial coming up, but they're desperate right now so I hope that makes you feel better the Commonwealth is sweating. Craycraft told Alex that they'll give me instant release and probation IF I help them—which I'm not, like I told Alex I did not do this and I can't testify to shit. They done me dirty in the beginning—well that B/S lawyer Davis had a hand in that, all I can do to correct it is stand on the truth, so I know my statement is what done this and if you need me to come to your trial and tell the jury why I said what I did I will. I'll do what I can to fix it. I know it's all scary, I'm scared we're pretty much gambling with our lives. It's gonna be OK. I don't see God punishing people for things they didn't do. (Sept. 28, 2016) [Record No. 118-63]

Craycraft wanted to meet with me and I told Alex no [three] times before he got it thru [sic] his head that I got nothing to say to him. Offering probation on facilitation. I told Alex I got nothing to say to em [sic], they've done enough already. It's f--ed up had I been there they're willing to let me go to tell it but since I wasn't I'll have to stay. I told Alex to tell Keith to get f--ed. I been here a year already [and] I'll stay a little longer [and] fight. I'm sure he picked nicer words to tell him. So I don't know what happens next. But they was wanting to use me to pressure you into taking a plea. Guess we'll see what they pull out next. I told you I was gonna do what's right [and] stand by the truth and I mean it. 100%. It's real shitty sitting here for some shit we didn't do. I want the truth too, I feel I deserve that much as much as I don't like Nickie, what they're saying happened don't make sense, I don't see him doing things the way were done. That's all I gotta say about that. I just believe that if God's real he won't let me, you or Nick go down for this if we didn't do it. I been praying for 11 months so we will see. I just figured if my words are all they have you on then I should be able to tell the jury why I said that and what happened. I don't know how all this works. But I'll do what I can to fix it. [Record No. 118-64]

The Montgomery County Circuit Court docket sheet reflects that an unsecured bond in the amount of $50,000.00 was set and posted by Martin on June 14, 2017. [Record No. 118-68] That same day, the Montgomery Circuit Court entered a sealed *ex parte* order directing detention center personnel to turn over to Miller's defense team all correspondence exchanged between Martin and Hall. [Record No. 118-70] By the time Miller's attorney arrived at MCDC to retrieve the correspondence, however, Martin had been released and had taken with her any correspondence in her possession.

Hall and Martin began corresponding via telephone shortly after her release from custody. Hall called Martin on June 15, 2017, asking for an update on his case. He stated that he was willing to help and

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But Alex filed a motion to have bond heard the 22nd. And he's gonna argue that B/S DNA is shit! And the fact that there was 9 [hours] of interview [and] they erased most of it—a lot of crucial things to my defense got erased. There's only like 2 1/2 hours in discovery when there was 9 in all. Pretty much the whole 8 hours I told them I didn't know anything, I didn't do it until that lawyer—Davis told me to tell them something. He's the reason I told them what I did. I told him, I didn't do it, he said well they got your DNA and if you don't tell them something they'll arrest you [and] they say I failed a polygraph too. (Nov. 2, 2016) [Record No. 118-65]

All the missing hours to my interrogation is 7 1/2 [hours] of me telling them I didn't do it and don't know anything about it. And what I told them is what they and the polygraph man told me. Everything I said was told to me that day. I didn't know what all Christina said then. It was a straight up led statement. I knew nothing when I walked in there they told me everything. (Dec. 9, 2016) [Record No. 118-67

expressed frustration that the prosecution was not helping him the way it had helped Martin. Hall indicated that he wanted to avoid any conflict of interest by speaking to Martin, but he believed there was none since they were "on the same side now." [Record No. 118-53, p. 37] Hall also told Martin that the police came in and took all of his property, including his mail from Martin.

Hall and Martin spoke the following day. She advised that she knew why "they" had come and taken his mail. [Record No. 118-53, p. 28] According to Martin, Miller's attorney, Bridget Hofler, had "subpoenaed" both Hall and Martin's mail. Martin told Hall that Hofler had come to get hers as well, but she had already been released. Martin stated that Hofler "threw ten kinds of hell" because Martin's friend LaDonna, who worked in the jail's laundry department, was present when she came to collect the items. Hall asked Martin where her mail was now. Martin responded: "She went in the office and called me. Not here. I got rid of it. It's burnt."[8] *Id.* Hall stated, "I had all those letters you wrote me." When Martin insisted "there ain't nothing in them," Hall

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[8] The record also indicates that Martin had two telephone conversations with prosecutor Craycraft that day, outside the presence of her attorney. At his deposition, Craycraft acknowledged having had two conversations—the first with Alex Rowady's permission. During the first conversation, Craycraft told Martin that he expected her to abide by her bond conditions and "not get in any trouble." [Record No. 118-39, p. 22] During the second, Martin called him and reported that "they" had come to the jail to get items of hers. Craycraft advised her, "You need to call Alex." *Id.* p. 23.

said, "there's a few things you know … you said you lied in those letters. You know what I'm saying? Those letters are bad." Martin questioned, "Who wouldn't have said that?" The two then agreed not to discuss the topic any further because they believed the content of their phone calls would likely be disclosed, as well.

Miller was released on bond on April 11, 2017, and the charges against him were dismissed, without prejudice, on November 21, 2017. [Record Nos. 118-2, p. 57; 1, ¶ 204] The charges against Hall were dismissed, without prejudice, on October 19, 2016. On January 30, 2020, Martin pleaded guilty to facilitation of murder and complicity to second-degree robbery. On June 8, 2020, she was sentenced to five years on the facilitation charge and ten years on the complicity charge, but her sentences were probated for five years. [Record No. 118-72] The contents of Martin's plea agreement were not revealed on the record. [Record No. 118-48, p. 15] Martin was deposed in this matter but did not provide any substantive responses, instead invoking a right not to answer questions under the Fifth Amendment to United States Constitution. [*See* Record No. 118-6.]

Miller filed suit in this Court on November 20, 2018, alleging a host of claims under 42 U.S.C. § 1983, including malicious prosecution against Defendants Jones, Fyffe, and the Defendant Officers; fabrication of evidence against Defendants Fyffe and the Defendant Officers; destruction of evidence against Defendant Craycraft; supervisory liability against Defendant Shortridge; failure to intervene against Defendants Fyffe, Jones, and "one or more Defendant

Officers;" conspiracy to deprive constitutional rights against all defendants; and a *Monell* claim against Montgomery County. Additionally, Miller asserts state-law claims of malicious prosecution against all defendants; negligent supervision against Defendant Shortridge; and respondeat superior against Montgomery County. The Court previously granted Defendant Craycraft's motion to dismiss the claims asserted against him. [Record No. 23] Defendant Fyffe and the remaining defendants have now filed separate motions for summary judgment. [Record Nos. 99, 103] Additionally, Defendant Jones and the Defendant Officers have filed a motion to exclude the expert testimony of Dr. Richard Leo. [Record No. 112]

II. Standard of Review

"Summary judgment is appropriate when no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law." *Saunders v. Ford Motor Co.*, 879 F.3d 742, 748 (6th Cir. 2018) (citing Fed. R. Civ. P. 56(a)). The moving party initially bears the burden of demonstrating that "there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "Once the moving party has met the initial burden of showing the absence of a genuine dispute of material fact, the non-moving party must then come forward with specific facts showing that there is a genuine issue for trial." *McGee v. Armstrong*, 941 F.3d 859, 868 (6th Cir. 2019). The Court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Lindsay v.*

Yates, 578 F.3d 407, 414 (6th Cir. 2009). A "genuine" issue exists if "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

When a defense of qualified immunity is asserted, the analysis is somewhat altered. Specifically, the existence of a disputed, material fact does not preclude summary judgment if the defendants cannot be shown to have violated clearly-established law. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *Dickerson v. McClellan*, 101 F.3d 1151, 1158 (6th Cir. 1996).

III. Discussion

To prevail under 42 U.S.C. § 1983, the plaintiff must show that he was deprived of a right secured by the Constitution or laws of the United States and the deprivation was caused by a person acting under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970); *Mills v. City of Barbourville*, 389 F.3d 568, 574 (6th Cir. 2004). There is no dispute that the defendants were acting under color of state law during the events alleged in the Complaint.

A. Malicious Prosecution—42 U.S.C. § 1983

Plaintiff Miller contends that Defendants Charles, Fyffe, Shortridge, Collier, and Jones maliciously prosecuted him for Brewer's murder and for robbery. "The Sixth Circuit recognize[s] a separate constitutionally cognizable claim of malicious prosecution under the Fourth Amendment, which

encompasses wrongful investigation, prosecution, conviction, and incarceration." *Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir. 2010). To establish a claim for malicious prosecution under 42 U.S.C. § 1983, the plaintiff must prove four elements: "(1) a criminal prosecution was initiated against the plaintiff and the defendant made, influenced, or participated in the decision to prosecute; (2) there was a lack of probable cause for the criminal prosecution; (3) the plaintiff suffered a deprivation of liberty, as understood under Fourth Amendment jurisprudence, apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor." *King v. Harwood*, 852 F.3d 568, 580 (6th Cir. 2017).

1. Probable Cause

A grand jury indictment creates a presumption of probable cause in malicious prosecution cases. *King*, 852 F.3d at 587-88. Accordingly, Miller's claims of malicious prosecution necessarily fail unless he is able to rebut the presumption of probable cause established by the return of a grand jury indictment against him. The presumption of probable cause does not apply where:

> (1) a law-enforcement officer, in the course of setting a prosecution in motion, either knowingly or recklessly makes false statements (such as in affidavits or investigative reports) or falsifies or fabricates evidence; (2) the false statements and evidence, together with any concomitant misleading omissions, are material to the ultimate prosecution of the plaintiff; and (3)

> the false statements, evidence, and omissions do not consist solely of grand-jury testimony or preparation for that testimony (where preparation has a meaning broad enough to encompass conspiring to commit perjury before the grand jury)…

Id.

In attempting to rebut the presumption of probable cause, the plaintiff relies on what he contends is false testimony Detective Charles made before the grand jury. [*See* Record No. 118, p. 90.] However, a grand jury witness has absolute immunity from any § 1983 claim based on the witness's testimony. *Rehberg v. Paulk*, 566 U.S. 356, 369 (2012); *Jones v. Clark Cnty. Ky.*, 690 F. App'x 334, 335 (6th Cir. 2017) (observing that "a plaintiff cannot base a malicious prosecution claim solely on grand-jury testimony, even false or perjured testimony.") Absolute immunity does "not cover actions that are prior to, and independent of, the defendant's grand-jury testimony." *Jones*, 690 F. App'x at 335 (citing *King*, 852 F.3d at 586) (internal quotation marks and alterations omitted). Accordingly, to determine whether the plaintiff has overcome the presumption of probable cause, the Court looks to the officers' alleged actions outside of Charles' grand jury testimony.

In responding to the defendants' motion for summary judgment, the plaintiff acknowledges the three-factor test set forth in *King*. [Record No. 118, p. 90] Miller makes the conclusory allegation that Detective Charles "made knowing or reckless

statements in warrants and investigative letters and fabricated statements ...." [Record No. 118, p. 92] However, he does not point to any specific actions, statements, or omissions other than Charles' grand jury testimony, which, as explained, cannot be considered, at least in isolation. *See Tinney v. Richland Cnty.*, 678 F. App'x 362, 366-67 (6th Cir. Feb. 6, 2017) (superseded on other grounds by *Crabbs v. Scott*, 880 F.3d 292 (6th Cir. 2018)).

Miller finds many faults with the officer defendants' investigation of Brewer's murder, including their alleged failure to focus on Rick Mize as a suspect and Detective Charles' erroneous characterization of Martin's DNA as "matching" that found at the crime scene. However, there is no suggestion that any particular facts were falsified or omitted in Charles' affidavits or reports or that any officer knowingly or recklessly misled a judge or prosecutor. Accordingly, summary judgment in favor of the defendants is appropriate on this basis.

2. Qualified Immunity

Although Miller does not make an explicit argument with respect to his malicious prosecution claim, he also contends that Charles, Fyffe, Collier, and Shortridge fabricated Martin's confession, which led to his prosecution. The defendants contend that they are entitled to qualified immunity. Qualified immunity shields government officials from liability for civil damages if their actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Chappell v. City of Cleveland*, 585 F.3d 901, 907 (6th Cir. 2009)

(citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)). The doctrine "gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Id.* (quoting *Hunter v. Bryant*, 502 U.S. 224, 229 (1991)). Qualified immunity applies regardless of whether the officer's error was a mistake of law, a mistake of fact, or a mistake based on a mixed question of law and fact. *Id.* (citing *Pearson*, 555 U.S. at 231).

The qualified immunity analysis involves two steps: (1) whether the officer's conduct violated a constitutional right and (2) whether the right was clearly established at the time of the injury. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Pearson*, 555 U.S. at 236. Once a defendant raises the qualified immunity defense, the plaintiff has the burden of demonstrating that the official is not entitled to qualified immunity. *Binay v. Bettendorf*, 601 F.3d 640, 647 (6th Cir. 2010).

In evaluating whether the defendants violated Miller's clearly established rights, clearly established law is not defined at a high level of generality. *King*, 852 F.3d at 582 (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)). Instead, "the rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*.'" *Saucier*, 533 U.S. at 202 (emphasis added). While the plaintiff does not have to identify a case directly on point to demonstrate clearly established law, "the fact pattern of the prior case must be similar enough to have given fair and clear warning to officers about what the law requires." *Beck v. Hamblen Cnty., Tenn.*, 969 F.3d 592, 599 (6th Cir.

2020) (quoting *Carroll v. Carman*, 574 U.S. 13, 16 (2014)).

The United States Supreme Court recently reaffirmed this conclusion in two excessive-force cases, finding that qualified immunity applied when no sufficiently similar case gave fair notice to police officers that their conduct was unconstitutional. *See Rivas-Villegas v. Cortesluna*, --S. Ct.--, 2021 WL 4822662 (Oct. 18, 2021); *City of Tahlequah, Ok. v. Bond*, --S. Ct.--, 2021 WL 4822664 (Oct. 18, 2021). The Court in *Bond* explained that specificity is "especially important in the Fourth Amendment context, where it is sometimes difficult for an officer to determine how the relevant legal doctrine … will apply to the factual situation the officer confronts." 2021 WL 4822664, at *2 (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (cleaned up)).

The Court has reviewed each of the cases Miller cites in response to the defendants' claim of qualified immunity and none of them are factually similar to the case at bar. *See, e.g., Gregory v. City of Louisville*, 444 F.3d 725 (6th Cir. 2006) (pre-*Rehberg* opinion in which officer omitted from preliminary hearing testimony that witness picked another suspect out of photopak); *Rieves v. Town of Smyrna, Tn.*, 959 F.3d 678 (6th Cir. 2020) (prosecutors erroneously advised law enforcement that the plaintiffs were selling illegal CBD products, resulting in their arrest); *Hinchman v. Moore*, 312 F.3d 198 (6th Cir. 2002) (plaintiff alleged that defendant officer fabricated story that she hit him with her car, resulting in her prosecution for felonious assault). Likewise, the Court has reviewed the relevant case law and has identified

no such authority. Accordingly, the defendants are entitled to qualified immunity with respect to Miller's claims of malicious prosecution.

B. Fabrication of False Evidence

Miller makes a separate claim under § 1983 that Charles, Shortridge, Collier, and Fyffe fabricated Martin's November 12, 2015, confession implicating him and leading to his prosecution. [Record No. 118, p. 105] The basis of a fabrication-of-evidence claim under § 1983 is an allegation that a defendant "knowingly fabricated evidence against a plaintiff, and that there is a reasonable likelihood that the false evidence could have affected the judgment of the jury." *Mills v. Barnard*, 869 F.3d 473, 485 (6th Cir. 2017) (quoting *Stemler v. City of Florence*, 126 F.3d 856, 872 (6th Cir. 1997)). The plaintiff points out several perceived flaws in the officers' interrogation techniques including the failure to record portions of the questioning, threats and overly aggressive tactics, and feeding Martin non-public details regarding the crime. Although there is no direct proof of it, Miller contends that officers concocted a false theory of the case in which he and Cody Hall were Brewer's killers and that officers then caused Martin to "confess" this same story.

The defendants contend that they are entitled to qualified immunity with respect to the fabrication-of-evidence claim. The Sixth Circuit has observed that it is clearly established that fabricating evidence to create probable cause to detain a suspect would violate the suspect's Fourth Amendment right to be free from unreasonable seizure. *See Ricks v. Pauch*,

2021 WL 4775145, at *4 (6th Cir. Oct. 13, 2021) (citing *Spurlock v. Satterfield*, 167 F.3d 995, 1005-07 (6th Cir. 1999)). However, the plaintiff has not pointed to any authority indicating that aggressive interrogation techniques cross the line from coercion to the unconstitutional fabrication of evidence.

While the Sixth Circuit does not appear to have addressed the issue directly, the Seventh Circuit has explained how fabricated evidence differs from a coerced confession.

> Coerced testimony is testimony that a witness is forced by improper means to give; the testimony may be true or false. Fabricated testimony is testimony that is made up; it is invariably false. False testimony is the equivalent; it is testimony known to be untrue by the witness and whoever cajoled or coerced the witness to give it.

Fields v. Wharrie, 740 F.3d 1107, 1110 (7th Cir. 2014). In other words, an officer fabricating evidence that he knows to be false is different that "getting a reluctant witness to say what may be true." *Petty v. City of Chicago*, 754 F.3d 416, 422 (7th Cir. 2014) (quoting *Fields,* 740 F.3d at 1112).

It is notable that Martin was given *Miranda* warnings at the outset of the interview and agreed to speak with officers without an attorney. She is a high school graduate and, as evidenced in the interrogation recordings, is an intelligent individual who understood the nature of the proceedings. While the interrogation was several hours long, she never asked

to stop the questioning. She expressed an ambivalent desire to have an attorney at one point during the interrogation but abandoned the request and voluntarily continued speaking with the officers. And while the officers' references to losing her children could be viewed as coercive, the Sixth Circuit has explained that the police are not forbidden "from conveying to suspects the seriousness of the crime for which they are being investigated." *McCalvin v. Yukins*, 444 F.3d 713, 721 (6th Cir. 2006).

Miller has the burden of demonstrating that qualified immunity does not apply. As explained, one prong of that analysis requires him to show that the defendants violated clearly established law. However, the cases upon which he relies present vastly different factual scenarios than that before the Court. *Spurlock v. Satterfield*, 167 F.3d 995 (6th Cir. 1999), bears some similarities, but it is so factually distinguishable that it cannot be said to have put the officers in this case on notice that their alleged actions would violate the plaintiff's constitutional rights.

In *Spurlock*, officers were investigating the murder of Lonnie Malone. Spurlock alleged that authorities immediately focused the investigation on him. Coarsey, a Tennessee police officer, falsely claimed to have received information regarding the crime from an informant, Apple, who he knew to be a drug user. Coarsey and Satterfield, a deputy investigating the case, went to the jail where Apple was incarcerated to interrogate him. Apple initially denied any knowledge of the crime but after Coarsey and Satterfield threated, pressured, and made promises to him, he agreed to implicate Spurlock for

the murder. Coarsey and Satterfield allegedly informed Apple of all details of the crime. Then, Coarsey, Satterfield, and Whitley, the district attorney, arranged a videotaped interview with Apple. However, they were not satisfied with the videotape after viewing it and put additional pressure on Apple to include a statement that he had actually witnessed the murder.

Apple eventually became concerned that the prosecutor was going to renege on his promises to secure Apple's release in exchange for falsely implicating Spurlock. He discussed his concerns with a guard at the jail, who recorded the conversation. Aware of Apple's concerns, Satterfield and the other defendants decided not to have Apple say that he actually witnesses the murder. Instead, they created a second recorded interview in which they instructed Apple to state that that date was the first time he had spoken with law enforcement officials regarding Malone's murder. Apple was released from jail after making the second recording. Apple's statement was presented to a grand jury, which indicted Spurlock for first degree murder. *Id.* at 999.

When Spurlock sued various officials under § 1983 for claims arising out of his prosecution, Satterfield argued that he was entitled to qualified immunity regarding the malicious prosecution and fabrication of evidence claims. *Id.* at 1005-06. However, the court observed, that "a reasonable police officer would know that fabricating probable cause, thereby effectuating a seizure, would violate a suspect's clearly established Fourth Amendment right to be free from unreasonable seizures." The

court added that the defendant could not "seriously contend that a reasonable officer would not know that such actions were inappropriate and performed in violation of an individual's constitutional and/or statutory rights." *Id.*

The Sixth Circuit has stated, "[s]ome violations of constitutional rights are so obvious that a materially similar case is not required for the right to be clearly established." *Hearring v. Sliwowski*, 712 F.3d 275, 280 (6th Cir. 2013). While *Satterfield* may very well be such a case, the instant one is not. *See also Jackson v. City of Cleveland*, 925 F.3d 793, 825-26 (6th Cir. 2019) (qualified immunity did not apply when officers coerced 12-year old to falsely implicate three men in murder charges). Neither *Satterfield* nor any other case the plaintiff has identified is sufficient to put the defendants on notice that their use of interrogation techniques violates the constitutional rights of third persons. *See Hope v. Pelzer*, 536 U.S. 730, 743 (2002) (observing that the law must be sufficiently clear to provide fair warning to officials that their conduct "crossed the line of what is constitutionally permissible."). Accordingly, the defendants are entitled to qualified immunity.

C. Remaining Claims Under 42 U.S.C. § 1983

Miller has asserted several other claims under § 1983, including failure to supervise, failure to intervene, civil conspiracy, and a claim against Montgomery County under *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658 (1978). But each requires him to establish the existence of an underlying constitutional violation, which he has

failed to do. *See Griffith v. Franklin Cnty., Ky.*, 975 F.3d 554 (2020) (underlying violation required for § 1983 claim for supervisory liability); *Bonner-Turner v. City of Ecorse*, 627 F. App'x 400, 413 (6th Cir. 2015) (same with respect to failure to intervene); *Umani v. Mich. Dep't of Corrs.*, 432 F. App'x 453, 462 (6th Cir. 2011) (same with respect to civil conspiracy); *Robertson v. Lucas*, 753 F.3d 606, 622 (6th Cir. 2014) (same with respect to *Monell* violation). Accordingly, the defendants are entitled to summary judgment regarding the remaining claims under § 1983.

D. State-Law Claims

1. Malicious Prosecution

Miller also brings a claim of malicious prosecution under Kentucky law. Kentucky's requirements for establishing malicious prosecution are similar to those under Sixth Circuit precedent, but the plaintiff also is required to show that the plaintiff acted with malice. *Martin v. O'Daniel*, 507 S.W.3d 1, 11-12 (Ky. 2016). Consistent with federal law, "where there is a specific finding of probable cause in the underlying criminal action … a malicious prosecution action cannot be maintained." *Broaddus v. Campbell*, 911 S.W.2d 281, 283 (Ky. Ct. App. 1995). A grand jury indictment raises a presumption of probable cause that must be rebutted by the plaintiff. *Davidson v. Castner-Knott Dy Goods Co.*, 202 S.W.3d 597, 607 (Ky. Ct. App. 2006).

For the reasons explained previously, Miller failed to rebut the presumption of probable cause and

the defendants are therefore entitled to summary judgment with respect to this claim.

2. Negligent Supervision and Respondeat Superior

Miller alleges in his Complaint that the "municipal defendants as well as the supervisory defendants, including Defendant Shortridge" had a duty to properly train and supervise officers, detectives, and supervisor employees of the Montgomery County Sheriff's Office and to provide adequate policies. To the extent Miller seeks to hold Montgomery County liable under these theories, the county is entitled to absolute sovereign immunity. *See Schwindel v. Meade Cnty.*, 113 S.W.3d 159, 163 (Ky. 2003). And to impose liability for negligent supervision against Defendant Shortridge, the plaintiff must prove an underlying tort by a subordinate, which he has not done. *See Roth v. City of Newport*, 2008 WL 5264314, at *3 (Ky. Ct. App. Dec. 19, 2008).

The Court also notes Miller did not respond to the portion of the defendants' motion for summary judgment seeking summary judgment on these claims. [*See* Record No. 118, p. 121 (addressing state-law malicious prosecution claim only).] *See Brown v. VHS of Mich., Inc.*, 545 F. App'x 368, 372 (6th Cir. 2013) (plaintiff deemed to have abandoned claim when he failed to address it in response to motion for summary judgment). Accordingly, summary judgment in favor of the defendants is appropriate on this issue.

E. Motion to Exclude Testimony of Dr. Richard Leo

The defendants have filed a motion to exclude the testimony of Miller's proposed expert witness, Dr. Richard Leo, who purports to be an expert regarding police interviewing and interrogation methods, as well as false confessions. However, because the defendants are entitled to summary judgment regardless of Leo's opinions, the motion to exclude will be denied as moot.

IV.

Based on the foregoing analysis and discussion, it is hereby

ORDERED as follows:

1. Defendant John Fyffe's motion for summary judgment [Record No. 99] is **GRANTED**.

2. The motion for summary judgment filed by Ralph Charles, Jr., Mark Collier, Eric Jones, Montgomery County, Montgomery County Sheriff's Department Officers, and Fred Shortridge [Record No. 103] is **GRANTED**.

3. The motion to exclude testimony of Dr. Richard Leo filed by Ralph Charles, Jr., Mark Collier, Eric Jones, and Montgomery County Sheriff's Department Officers [Record No. 112] is **DENIED**, as moot.

Dated: November 5, 2021.

/s/ Danny C. Reeves, Chief Judge
Danny C. Reeves, Chief Judge
United States District Court
Eastern District of Kentucky

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

NICKIE MILLER,	)	
	)	
Plaintiff,	)	Civil Action
	)	No. 5: 18-619-DCR
V.	)	
	)	
MONTGOMERY,	)	**MEMORANDUM**
COUNTY et al.,	)	**OPINION**
	)	**AND ORDER**
Defendant.	)	

*** *** *** ***

Plaintiff Nickie Miller alleges that various state and county law enforcement officers framed him for the murder of Paul Brewer. Miller claims that, while he was awaiting trial, Defendant Keith Craycraft (the prosecutor in his case) participated in the destruction of exculpatory evidence. Craycraft has filed a motion to dismiss, which will be granted because he enjoys absolute immunity with respect to this claim.

I.

Paul Brewer was found dead in his home in Mount Sterling, Kentucky, on December 22, 2011. [Record No. 1, ¶ 21] Brewer's arms were strapped to a bed frame, and he had been shot twice in the head.

Natasha Martin eventually told officers with the Montgomery County Sheriff's Office that she, Cody Hall (Martin's husband at the time), and Defendant Miller were involved in Brewer's murder. *Id.* ¶ 121. Martin reported that she, Miller, Hall and another woman went to Brewer's home. The women went inside and lured Brewer to a bedroom, where they tied him to the bed frame. According to Martin's statement, the women left the residence as Miller and Hall entered. Martin, who was apparently waiting outside, heard a gunshot before the men exited. *Id.* ¶ 122. She advised law enforcement that she and the others went to Brewer's home to rob him and that she and the other woman were paid $340.00 for their participation. Miller maintains that that Martin's statements were coerced and that law enforcement knew at the time that the statements were false.

Miller was arrested on a criminal complaint for Brewer's murder on November 12, 2015. *Id.* ¶ 127. A grand jury returned an indictment against him approximately two weeks later, charging him with murder and being a persistent felony offender. *Id.* at ¶ 132. Hall and Martin were also indicted for the robbery and murder of Brewer, and were taken into custody.

While being held in the Montgomery County Detention Center, Hall and Martin exchanged correspondence in which Martin allegedly revealed that the police forced her to lie about Miller's involvement in Brewer's murder. *Id.* ¶ 156. Miller's defense attorney made a motion to obtain the correspondence between Hall and Martin. *Id.* ¶ 160. The Montgomery County Circuit Court issued a

sealed order on June 15, 2017, requiring personnel of the Montgomery County Detention Center to retrieve the correspondence and produce it to the defense.

An investigator from the defense team arrived at the Montgomery County Detention Center around noon on June 15, 2017. *Id.* ¶ 164. The investigator informed jail staff of the court order and requested the correspondence between Martin and Hall. However, a jail staff member informed the investigator that Martin had already been released from custody. Miller alleges that a detention center employee called Martin the following day and advised her that an investigator had been there to retrieve her correspondence *via* a court order. *Id.* ¶ 169.

Miller contends that, after receiving the call advising her of the court order, Martin sought advice from Craycraft, who encouraged her to destroy the correspondence. *Id.* ¶ 170. Telephone records confirm that Martin and Craycraft participated in a series of telephone calls on the afternoon of June 16, 2017. Hall, who was still in custody, placed a recorded call to Martin at on June 16, 2017, at 8:52 p.m. Martin advised Hall that the defense team "subpoenaed your mail and my mail …. I guess she went up to the Montgomery County Jail today to get mine and I wasn't there, so you know she threw ten kinds of hell, because my friend LaDonna was there. She works laundry." *Id.* ¶ 185. Hall then asked Martin where the letters were located. Martin responded: "Not here. I got rid of it. It's burnt." *Id.* ¶ 186.

Miller contends that Craycraft's alleged role in the destruction of exculpatory evidence caused him to

remain in jail until charges against him were dismissed on November 21, 2017. *Id.* ¶ 204. Accordingly, Miller asserts, Craycraft's conduct amounted to a violation of his due process rights under the Fourth Amendment, for which he seeks compensatory and punitive damages under 42 U.S.C. § 1983.

II.

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), it 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). While the court makes all reasonable inferences in favor of the non-moving party, the plaintiff must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged. *Id.* (citing *Bell Atlantic Co. v. Twombly*, 550 U.S. 544, 556 (2007)). A district court may not grant a motion to dismiss because it does not believe the complaint's factual allegations, but conclusory allegations or legal conclusions "masquerading as factual allegations" will not suffice. *Nwanguma v. Trump*, 903 F.3d 604, 611 (6th Cir. 2018) (citing *Twombly*, 550 U.S. at 555).

III.

"State prosecutors are absolutely immune from civil liability when acting within the scope of their prosecutorial duties." *Howell v. Sanders*, 668 F.3d

344, 349 (6th Cir. 2012) (citing *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976)). This is true even when the allegations involve "unquestionably illegal or improper conduct," as long as the general nature of the action in question is part of a prosecutor's normal duties. *Cady v. Arenac Cnty.*, 574 F.3d 334, 340 (6th Cir. 2009) (citing *Imbler*, 424 U.S. at 413). Although absolute immunity may leave a genuinely-wronged defendant without civil redress against a prosecutor whose malicious or dishonest actions deprives him of liberty, "the broader public interest would be disserved if defendants could retaliate against prosecutors who were doing their duties." *Adams v. Hanson*, 656 F.3d 397, 401-02 (6th Cir. 2011) (citing *Imbler*, 424 U.S. at 427).

The Supreme Court has endorsed a "functional approach" to determine whether a prosecutor is entitled to this protection. *Prince v. Hicks*, 198 F.3d 607, 611 (6th Cir. 1999) (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993)). Under this approach, the court looks to "the nature of the function performed, not the identity of the actor who performed it." *Id.* The official seeking absolute immunity has the burden of showing that such immunity is appropriate for the function in question. *Id.* (citing *Burns v. Reed*, 500 U.S. 478, 486 (1991)).

To deciding whether Craycraft is entitled to absolute immunity, the Court must determine how closely related the alleged conduct is to Craycraft's role as an advocate, "intimately associated with the judicial phase of the criminal process." *Ireland v. Tunis*, 113 F.3d 1435, 1443 (6th Cir. 1997). "[A]dministrative duties and those investigatory

functions that do not relate to an advocate's preparation for the initiation of prosecution or for judicial proceedings are not entitled to absolute immunity." *Prince*, 198 F.3d at 611 (quoting *Buckley*, 509 U.S. at 273).

The line between advocacy and investigation is sometimes difficult to draw, but courts have provided guidance on this distinction. *Koubriti v. Convertino*, 593 F.3d 459, 467 (6th Cir. 2010) (citing *Zahrey v. Coffey*, 221 F.3d 342, 347 (2d Cir. 2000)). In determining into which category a prosecutor's conduct falls, courts must consider the "difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial … 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." *Buckley*, 509 U.S. at 273.

The following prosecutorial activities have been deemed investigative or administrative in nature: "giving legal advice to police," "making out-of-court statements at a press conference," "making statements in an affidavit supporting an application for an arrest warrant," and "authorizing warrantless wiretaps in the interest of national security." *Koubriti*, 593 F.3d at 467 (citations and internal quotation marks omitted). *See also Cooper v. Parrish*, 203 F.3d 937, 946 (6th Cir. 2000) (prosecutor who searches for clues and corroboration to constitute probable cause for arrest performs an investigative function). Conversely, prosecutors have absolute immunity from suits involving inherently prosecutorial functions such as preparing for trial,

even if such actions involve the use of perjured testimony. *Koubriti*, 593 F.3d at 467.

While the Sixth Circuit has not held that a prosecutor's intentional destruction of exculpatory evidence is a protected activity, it has concluded that prosecutors are immune from claims that they withheld exculpatory evidence from the defense. *Hatchett v. City of Detroit*, 495 F. App'x 567, 571 (6th Cir. 2012); *Koubriti*, 593 F.3d at 467. *See also Cady*, 574 F.3d at 340 (citing *Heidelberg v. Hammer*, 577 F.2d 429, 432 (7th Cir. 1978) (holding that a prosecutor is absolutely immune from a suit claiming that he destroyed and falsified evidence)). Further, the court has extended absolute immunity to a prosecutor's alleged destruction of exculpatory evidence in an unpublished opinion. *Grogg v. State*, No. 18-5794, 2019 WL 386973, *4 (Jan. 7, 2019).

Here, Craycraft's alleged conduct was prosecutorial in nature. There is no suggestion that he was "investigating" anything when he allegedly advised Martin to destroy the exculpatory material. *See Rouse v. Stacy*, 478 F. App'x 945, 950 (6th Cir. 2012). While absolute immunity does not extend to prosecutorial actions performed without any "colorable claim of authority," those activities performed within a prosecutor's normal functions are protected, even if the prosecutor makes mistakes or acts with "excessive zeal." *See id.* at 955 (directing prison staff to "beat" an inmate was not protected prosecutorial activity).

Miller argues that Craycraft directed Martin to destroy the evidence because he knew probable cause

did not support the pending charges against Miller. However, a grand jury had already indicted Miller for murder, so it can hardly be argued that Craycraft was looking to establish probable cause. Regardless, the absence of probable cause is not determinative of whether absolute immunity applies. *Howell*, 668 F.3d at 350. While a prosecutor does not act as an advocate before "he has probable cause to have anyone arrested," the focus remains on the prosecutor's function. *Prince*, 198 F.3d at 613. Although the conduct plaintiff alleges is inappropriate, it clearly falls within the scope of quintessential prosecutorial functions—dealing with witnesses and preparing for trial.

Because absolute immunity provides Defendant Craycraft complete protection from suit, the Court need to consider Craycraft's remaining arguments in favor of dismissal. Based on the foregoing, it is hereby

ORDERED as follows:

1. Defendant Keith Craycraft's motion to dismiss [Record No. 17] is **GRANTED**.

2. Plaintiff Nickie Miller's claims against Craycraft are **DISMISSED**, with prejudice. The Clerk of the Court shall terminate Defendant Craycraft as a party to this action.

Dated: February 8, 2019.

Signed by: /s/ Danny C. Reeves
Danny C. Reeves
United States District Court

APPENDIX D

FILED
Aug 15, 2023
DEBORAH S. HUNT, Clerk

No. 21-6076

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LISA PRICE, PERSONAL REPRESENTATIVE OF THE ESTATE OF NICKIE MILLER, Plaintiff-Appellant, v. MONTGOMERY COUNTY, KENTUCKY, ET AL., Defendants-Appellees.	)	ORDER

BEFORE: SILER, NALBANDIAN, and READLER, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then

was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt, Clerk
Deborah S. Hunt, Clerk