UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHARLES WILHITE, Plaintiff, v. ANTHONY PIOGGIA, *et al.*, Defendants.	)	Civil Action No. 14-30023-MAP

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendants are not entitled to summary judgment on any claim. Their motion is untimely, not in compliance with the Local Rules, and based on disputed facts. Defendants ask the Court to view the facts most favorably to them. In addition, Defendants' motion omits most of the evidence in this case, relying instead on their expert's disputed opinions about the Defendants' investigation.

Viewed in Plaintiff's favor, the evidence paints a picture significantly more disturbing than the one portrayed by Defendants' expert. Based on evidence in the record, a jury could find that Defendants Pioggia and Tatro deliberately framed Plaintiff Charles Wilhite for murder; that Defendants manufactured evidence by threatening, pressuring, and coercing witnesses to falsely implicate Mr. Wilhite in the crime; that Defendants used grossly improper and suggestive eyewitness identification techniques; and that Defendants ignored obvious inconsistencies in their case when it suited them. As a result of this outrageous misconduct, Mr. Wilhite was arrested, prosecuted, convicted, and imprisoned for a crime he did not commit. The Court should deny Defendants' motion in its entirety.

FACTS[1]

I. The Crime

Alberto Rodriguez was shot and killed outside of the Pine Street Market in Springfield on October 14, 2008. He was shot once in the back while sitting in his car. Immediately after the shooting, two witnesses told police that they had seen a Hispanic man in a gray hooded sweatshirt flee from the scene just after the shots had been fired. One of these witnesses, Maria Torres, told police she saw the light-skinned Hispanic man holding a handgun as he ran. An anonymous 911 caller provided the same physical description of the shooter. PSOF ¶¶ 1-5.

Defendants Anthony Pioggia and Steven Tatro, both Springfield Police Department homicide detectives, were the lead detectives in the Alberto Rodriguez murder investigation. They quickly suspected that the Pine Street Market's owner, Angel Hernandez, had been involved in the crime due to a feud and history of violence between Hernandez and the victim. Defendants did not identify the second, Hispanic male suspect. PSOF ¶¶ 7-8.

II. The Improper Focus on Charles Wilhite

At some point, Defendants decided to focus on Plaintiff Charles Wilhite, an African-American man,[2] as the second suspect. There is no documentation indicating how, when, or why Mr. Wilhite became a suspect. Defendants have offered inconsistent explanations for how Mr. Wilhite became a suspect; a jury could find that Defendants' conflicting testimony is untruthful. PSOF ¶ 14-15. Defendants Pioggia and Tatro had a history with Mr. Wilhite. A few years before the

[1] Pursuant to Local Rule 56.1, Plaintiff has filed a response to Defendants' statement of facts setting forth the facts that are genuinely in dispute and for which a trial is necessary. Because Defendants' statement of facts omits most of the evidence in this case, Plaintiff has also submitted his own statement of facts ("Plaintiff's Statement of Facts" or "PSOF") so that the Court can more fully understand the issues and evidence in this case.

[2] Springfield Police Department records describe Mr. Wilhite as a "dark brown," "non-Hispanic" male. PSOF ¶ 9.

murder of Alberto Rodriguez, the detectives had pressured Mr. Wilhite to claim falsely that he was an eyewitness to a different murder. Mr. Wilhite initially went along with Defendants' plan, but eventually testified truthfully in that case, revealing Defendants' misconduct. PSOF ¶ 10.

In the Alberto Rodriguez murder investigation, Defendants Pioggia and Tatro did not attempt to learn the truth about what happened. They focused on building a case against Charles Wilhite. PSOF ¶ 16. Standard police practice when developing a suspect is to look for motive, opportunity, and physical evidence. Defendants did not do this for Mr. Wilhite. They admit never questioning whether Mr. Wilhite had a motive to kill Alberto Rodriguez. They admit never investigating whether there was any connection between Mr. Wilhite and the Pine Street Market or Angel Hernandez. They admit there was no physical evidence connecting Mr. Wilhite to the crime. PSOF ¶¶ 21-24.

Rather than probe these basic questions, Defendants began showing potential witnesses photo arrays targeting Mr. Wilhite. However, Defendants did not follow up with the multiple eyewitnesses who had reported seeing the suspect—consistently described as a Hispanic man—fleeing the scene. Defendants never contacted two of these eyewitnesses and waited nearly five months before contacting the third witness, Maria Torres. PSOF ¶ 17. Nor did Defendants investigate leads from two separate confidential sources that a Hispanic man named Abinel Zayas, also known as "Pito," may have been responsible for the murder.[3] PSOF ¶¶ 18-20. Instead, Defendants found purported witnesses who had not described the shooter as a Hispanic male and began showing them photo arrays of black men. Mr. Wilhite was the target of these arrays. PSOF ¶ 25.

[3] Indeed, Defendants never considered Mr. Zayas a suspect even though he fit the physical description provided by eyewitnesses and gave a statement placing himself at the scene of the crime. PSOF ¶ 20.

III. The Manufactured Evidence

The first witness to view the photo array targeting Mr. Wilhite was a woman named Giselle Albelo. Defendants Pioggia and Tatro interviewed her on November 5, 2008, about three weeks after the murder.[4] Defendants did not document why they wanted to speak to Ms. Albelo or why they believed she was a potential witness. PSOF ¶ 26. During the interview, Ms. Albelo provided a statement that was so obviously contrary to the physical evidence that Pioggia and Tatro should have immediately questioned her credibility.[5] PSOF ¶ 27.

When a police officer is faced with a statement that contradicts the physical evidence, it is improper for him to show a photo array to the witness because of the risk of falsely implicating an innocent person. PSOF ¶ 30. Despite this, Defendants showed Ms. Albelo a photo array targeting Charles Wilhite. Ms. Albelo purportedly identified Mr. Wilhite as the person who shot Alberto Rodriguez and signed a written statement to that effect. However, on November 3, 2009, shortly after testifying to a grand jury about her witness statement, Ms. Albelo recanted her identification. In an affidavit, Ms. Albelo stated that she had not witnessed any part of the crime and had only identified Charles Wilhite as the shooter because she was "in fear and [feeling] extreme pressure from police" to provide that information. PSOF ¶¶ 31-32.

On November 6, 2008, the day after interviewing Ms. Albelo, Defendants interviewed Patryce Archie. Ms. Archie had given a statement to another detective two days after the murder in which she reported being inside the Pine Street Market at the time of the shooting, but not

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[4] Although Defendants had the ability to do so, they did not audio or video record any witness interviews or photo array presentations during their investigation. PSOF ¶ 31.

[5] Ms. Albelo claimed to have seen Mr. Rodriguez get shot in the back while standing outside the Pine Street Market, then run to his car and drive off. The physical evidence established that Mr. Rodriguez had been sitting in his car when he was shot. Defendant Pioggia knew Ms. Albelo's statement contradicted the physical evidence. Defendant Tatro testified that he did not know whether her statement contradicted the physical evidence because he did not know what the physical evidence showed. *See* PSOF ¶¶ 28-29.

witnessing the shooting itself. After Pioggia and Tatro interviewed Ms. Archie almost a month later, she provided an additional statement. In this second statement, Ms. Archie reported that, in addition to the "ten or more people in front of the store," she had seen "a guy" "with a gray hoodie" standing off to the side of the store near Angel Hernandez's house. Ms. Archie did not claim that this man had been involved in the shooting. She told Defendants Pioggia and Tatro that she could not see the man's face because it was dark and he had a hood over his face. PSOF ¶¶ 34-35.

Despite Ms. Archie's saying she would be unable to make an identification, Pioggia and Tatro showed her a photo array targeting Charles Wilhite. When Ms. Archie reiterated that she had not seen the man's face, Defendants instructed her to cover the faces in the photo array so that only the nose and lips in each picture were showing. Ms. Archie eventually told Defendants that she thought Mr. Wilhite's lips "looked familiar," but clarified, "I don't know if that's him or not." PSOF ¶ 36.

After showing the photo array, Defendants drafted a new witness statement for Ms. Archie to sign. They omitted from this statement that Ms. Archie had covered portions of the faces or announced that she had selected the picture because the "lips looked familiar." Instead, Defendants falsely suggested in the statement that Ms. Archie had identified Mr. Wilhite, writing that she had "picked out photo #7 [Mr. Wilhite] and told the detectives that this guy may have been the guy that was out in front of the store when I went in with the gray hoodie on." Defendant Pioggia now admits that Ms. Archie did not positively identify Charles Wilhite during that interview. Both Defendants admit they did not disclose this information to prosecutors. PSOF ¶¶ 37-38.

The next witness to view the array targeting Mr. Wilhite was Maria Torres. On the night of the shooting, Ms. Torres gave a statement to police stating that she had seen a Hispanic male flee the scene on foot carrying a handgun. She provided a detailed physical description, including

approximate age, height, build, and clothing. Despite this, Defendants waited nearly five months before interviewing Ms. Torres. PSOF ¶¶ 40-42.

When Defendant Pioggia interviewed Ms. Torres on March 11, 2009, she again described the shooter as a Hispanic male. Defendant Pioggia showed her a photo array of African-American men. The target of the array was Charles Wilhite. Ms. Torres did not identify anyone in the array. PSOF ¶¶ 42-43. In a police report, Defendant Pioggia claimed that Ms. Torres had identified an African-American male other than Mr. Wilhite and said that "the skin tone is close to the subject she observed." Pioggia claimed Ms. Torres had then gone on to say Mr. Wilhite's skin tone was also "close." This was not truthful. Ms. Torres testified at Mr. Wilhite's first trial that the person she saw running with a gun that night was a "very light skinned" Hispanic man.[6] She testified at Mr. Wilhite's second trial that Mr. Wilhite's skin tone did not resemble the person she saw that night. PSOF ¶¶ 46-47.

On September 10, 2009, approximately eleven months after the murder, Defendants Pioggia and Tatro interviewed Anthony Martinez at the Hampshire County Jail. At the time, Mr. Martinez was an inmate awaiting trial for armed robbery. He had been living near the Pine Street Market at the time of the murder. PSOF ¶ 51. During the interview, Mr. Martinez claimed to have been inside the Pine Street Market on the evening of the murder. He claimed to have witnessed the store's owner, Angel Hernandez, give a handgun to a black male shortly before the shooting and say, "I'll pay you to go kill him," to which the black male allegedly responded, "Okay." PSOF ¶ 52.

[6] Defendants interviewed Ms. Torres a second time on June 5, 2009. During this interview, they showed her a photo array targeting Abinel Zayas, a Hispanic male whom confidential sources had told Pioggia was responsible for the murder. Ms. Albelo signed one of the pictures in the array for the purpose of identifying the skin tone of the person she saw fleeing the scene of the shooting. Defendant Pioggia omitted from his report that she had signed a picture. Defendants did not preserve the array and it was missing by the time of Mr. Wilhite's trial. PSOF ¶¶ 48-50.

Reasonable police officers know that inmates may attempt to offer information to investigators with the hope of receiving favorable treatment in their own cases. For this reason, reasonable police officers know that it is especially important to thoroughly vet information obtained from inmates to determine whether it is credible. PSOF ¶ 53.

Defendants did not vet the information provided by Mr. Martinez despite its obvious inconsistencies with what other witnesses had said. For example, Mr. Martinez said that, at the time of the shooting, the store had many more people in it than other witnesses had said, and he gave different descriptions of the people. And no witness described someone matching Mr. Martinez's physical appearance—a nearly 300-pound man in a Burger King uniform—in the area at the time of the shooting. PSOF ¶¶ 54-55. Nevertheless, Defendants showed Mr. Martinez a photo array targeting Mr. Wilhite. He identified Mr. Wilhite as the person he saw take the handgun from Angel Hernandez. PSOF ¶ 56. Defendants did not document this statement on September 10, 2009, however. They waited a week, until September 17 to interview Mr. Martinez again. After obtaining a written statement from Mr. Martinez during this second interview, Defendant Pioggia applied for and executed an arrest warrant for Charles Wilhite later that day. PSOF ¶ 57.

Had Defendants investigated the obvious inconsistencies in Mr. Martinez's statement, they would have learned that Mr. Martinez was not in the Pine Street Market on the night of the shooting and did not witness any of the events related to the shooting. He had been in his apartment with his girlfriend at the time of the shooting. PSOF ¶¶ 58-60. At Mr. Wilhite's second trial, Patryce Archie viewed a picture of Anthony Martinez and testified that she had not seen him in the store that night. PSOF ¶ 61.

On March 10, 2010, after Mr. Wilhite was arrested and shortly after Giselle Albelo recanted her identification, Defendant Pioggia went to the Hampden County Jail to interview Nathan Perez.

Mr. Perez had lived near the Pine Street Market at the time of the shooting. Defendants knew that Mr. Perez had been at the scene of the shooting and that he had allegedly picked up shell casings off the ground. At the time of the interview, he was in custody awaiting trial on an unrelated matter. PSOF ¶¶ 62-63.

Mr. Perez was cooperative during the March 10 interview. Defendant Pioggia asked him to identify people in five photo arrays and at least two single photographs relating to the Alberto Rodriguez murder investigation. Mr. Perez identified individuals in all of the single pictures and all of the arrays except for one. The only array in which Mr. Perez did not identify anyone was the array targeting Mr. Wilhite. PSOF ¶ 64.

When Mr. Perez did not identify Mr. Wilhite, Pioggia became angry. He took away all of the other pictures, leaving only Mr. Wilhite's picture on the table. Defendant Pioggia told Mr. Perez, "You know him." Mr. Perez insisted that he did not. Pioggia then threatened to charge Mr. Perez as an accessory after the fact to murder if he continued refusing to identify Mr. Wilhite as the shooter. Mr. Perez reiterated that he did not know who Mr. Wilhite was. Defendant Pioggia became angry, turned red in the face, and abruptly left. PSOF ¶¶ 65-66.

Defendant Pioggia did not write a report about his March 10 interview with Mr. Perez. He did not disclose to prosecutors that an eyewitness to the murder had failed to identify Mr. Wilhite. Instead, Defendant Pioggia waited until April 7, 2010, to visit Mr. Perez in jail again, this time accompanied by Defendant Tatro. They put a single photograph of Charles Wilhite on the table and demanded that Mr. Perez identify Mr. Wilhite as the shooter. Defendant Pioggia wrote "shooter" on the picture and told Mr. Perez that he could either sign the picture or be charged as an accessory after the fact to murder. PSOF ¶¶ 67-69. Mr. Perez acquiesced to the pressure. He signed the picture and a written statement drafted by Defendants falsely claiming that he had voluntarily identified Mr.

Wilhite. Mr. Perez testified consistently with this statement at Mr. Wilhite's first criminal trial.[7] PSOF ¶¶ 70, 73.

At Mr. Wilhite's first trial, the jury convicted him of first degree murder for the shooting of Alberto Rodriguez.[8] He was sentenced to life in prison. PSOF ¶ 74. After the conviction, Mr. Perez recanted his statement and identification of Mr. Wilhite. Mr. Perez said that he had lied in order to obtain a personal benefit in his own criminal case and because he feared being charged as an accessory after the fact to murder. In a sworn statement retracting his identification, Mr. Perez explained that Defendant Pioggia had shown him a single photograph of Mr. Wilhite and coerced him into implicating Mr. Wilhite in the crime. Mr. Perez said that once he agreed to go along with the detectives, "they were giving information [for him] to agree to."[9] PSOF ¶¶ 75-77.

After Mr. Perez recanted, Judge Peter Velis held an evidentiary hearing regarding the claimed coercion. As a result of that hearing, Judge Velis vacated Mr. Wilhite's conviction and ordered a new trial. In reaching this decision, the court explicitly declined to credit Defendant Pioggia's testimony in which Pioggia claimed not to have threatened or coerced Mr. Perez. PSOF ¶ 78.

Mr. Wilhite's second trial began on January 7, 2013. At the second trial, only Anthony Martinez testified that Charles Wilhite was involved in the murder. Mr. Wilhite's attorney called Mr. Martinez's girlfriend and another witness who said Mr. Martinez was at home at the time of the shooting and did not witness the murder. They jury acquitted Mr. Wilhite of all charges on January

[7] At the first trial, Mr. Wilhite was tried together with Angel Hernandez. PSOF ¶ 74.

[8] The evidence against Mr. Wilhite at the first trial was testimony from Giselle Albelo, Patryce Archie, and Nathan Perez. Anthony Martinez did not testify at the first trial. Other witnesses testified about the crime scene or Angel Hernandez's involvement, without reference to Mr. Wilhite.

[9] For example, Mr. Perez said Defendant Pioggia told him who Patryce Archie and Giselle Albelo were so that he would be able to identify the people that the prosecution claimed were in the store at the time of the murder. PSOF ¶ 72.

17, 2013. He was released from custody that day, after spending more than three years in custody for a crime he did not commit. PSOF ¶¶ 79-80, 84.

ARGUMENT

I. Summary Judgment Standard

Summary judgment is appropriate only when there are no disputes as to material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The facts must be considered in the light most favorable to the nonmoving party, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and all justifiable inferences must be drawn in his favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). "Where a qualified immunity defense is advanced by pretrial motion, normal summary judgment standards control." *Amsden v. Moran*, 904 F.2d 748, 752 (1st Cir. 1990) (quotation omitted). The Court should "first identify[] the version of events that best comports with the summary judgment standard and then ask[] whether, given that set of facts, a reasonable officer should have known that his actions were unlawful." *Morelli v. Webster*, 552 F.3d 12, 19 (1st Cir. 2009).

II. The Court Should Summarily Deny Defendants' Motion Because It Is Untimely and Fails to Comply with Local Rule 56.1

A. The motion is untimely.

This Court should deny Defendants' motion for summary judgment because it is untimely. Defendants filed their motion on May 13, 2016. The deadline for filing dispositive motions was May 6, 2016. *See* ECF Nos. 61 and 62. Defendants offer no explanation for their failure to comply with this Court's scheduling order.

B. Defendants' statement of facts does not comply with Local Rule 56.1.

The Court should summarily deny Defendants' motion for failure to comply with Local Rule 56.1, which requires a party moving for summary judgment to submit "a concise statement of material facts as to which the moving party contends there is no genuine issue to be tried." L.R.

56.1. Defendants' purported "Statement of Undisputed Facts" (ECF No. 80) is neither concise nor a statement of facts: it is the text of their expert's report, which is also reproduced in full in Defendants' memorandum.

"Local Rule 56.1 was adopted to expedite the process of determining which facts are genuinely in dispute, so that the court may turn quickly to the usually more difficult task of determining whether the disputed issues are material." *Brown v. Armstrong*, 957 F. Supp. 1293, 1297 (D. Mass.), *aff'd*, 129 F.3d 1252 (1st Cir. 1997). By submitting an expert report verbatim, Defendants have not complied with the letter or spirit of Local Rule 56.1. They have "generate[d] a lot of dust" but not furthered "the goal of sharply focusing areas of dispute." *Key Trust Co. of Maine v. Doherty, Wallace, Pillsbury & Murphy, P.C.*, 811 F. Supp. 733, 734 n.2 (D. Mass. 1993). Defendants' failure to comply with the rule "constitutes grounds for the denial of the motion." L.R. 56.1.

III. Mr. Wilhite's Fourth Amendment Malicious Prosecution Claim[10]

A. The claim is recognized in the First Circuit.

Defendants argue that the First Circuit has not explicitly recognized a Fourth Amendment malicious prosecution claim under 42 U.S.C. § 1983. *See Defs.' Mem.*(ECF No. 83) at 23, 33. This is incorrect. In *Hernandez-Cuevas v. Taylor*, 723 F.3d 91 (1st Cir. 2013), the court made "explicit what has long been implicit"—the Fourth Amendment right to be free from unreasonable seizure does not end when a person becomes detained pursuant to legal process. *Id.* at 100. The court determined that violations of this right can be vindicated through malicious prosecution claims under § 1983. *Id.*

[10] Defendants address Plaintiff's claim under 42 U.S.C. § 1983 only with respect to malicious prosecution. While this is the primary thrust of the claim, it is not so limited. Plaintiff also alleges that Defendants' misconduct violated the Due Process Clause of the Fourteenth Amendment. *See* Complaint [ECF No. 1] at 18 ¶ 102; *see also Limone v. Condon*, 372 F.3d 39, 45 (1st Cir. 2004) ("[W]e are unsure what due process entails if not protection against deliberate framing under color of official sanction."). Because Defendants do not make any argument on this point, Plaintiff does not address it further.

The court adopted a "purely constitutional approach" to such claims, concluding that a plaintiff must establish only that "the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in plaintiff's favor." *Id.* at 101 (citing *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012)). The record establishes that Mr. Wilhite can prove each of these elements at trial.

B. Defendants caused Mr. Wilhite to be prosecuted.

Defendants claim they did not cause Mr. Wilhite's prosecution. They portray themselves as bystanders to the criminal case, investigators who "supplied witnesses" and "provided information in good faith" to prosecutors. *Defs.' Mem.* at 26-27. This ignores the law and the facts.

Police officers are not insulated from malicious prosecution liability simply because a magistrate signs off on an arrest warrant or because a prosecutor retains the ultimate discretion to seek an indictment. Thus, even where an arrest warrant has issued or a prosecutor seeks an indictment, police officers may nevertheless be responsible for "caus[ing] the seizure and remain liable to a wrongfully indicted defendant." *Hernandez-Cuevas*, 723 F.3d at 100 (quoting *Evans*, 703 F.3d at 647). Causation can be established by "showing that the defendant distorted the process by which plaintiff was brought to trial." *Bailey v. City of New York*, 79 F. Supp. 3d 424, 449 (E.D.N.Y. 2015) (citation omitted). Police officers remain liable where, for example, they have "lied to or misled the prosecutors," "failed to disclose exculpatory evidence," or "unduly pressured the prosecutor to seek the indictment." *Hernandez-Cuevas*, 723 F.3d at 100 (internal quotations omitted).

Viewed in Mr. Wilhite's favor, the facts show that Defendants engaged in a deliberate effort to frame him for murder by fabricating false eyewitness testimony. Each piece of evidence Defendants used to secure an arrest warrant for Mr. Wilhite, and each of the witnesses who later testified against Mr. Wilhite at the grand jury and at trial, is tied to Defendants' misconduct.

Defendants pressured Giselle Albelo to implicate Mr. Wilhite and falsely claim to be a witness. They drafted a misleading statement for Patryce Archie falsely suggesting she had identified Mr. Wilhite when she had not. They relied on Anthony Martinez despite his obviously false—and likely coerced—account of the shooting.[11] Then, after Giselle Albelo recanted and revealed police misconduct, Defendants coerced Nathan Perez into identifying Mr. Wilhite by, among other things, threatening to charge Perez as an accessory to murder if he did not implicate Mr. Wilhite.

Causation is not a close question here. "[I]f any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit." *Limone v. Condon*, 372 F.3d 39, 44-45 (1st Cir. 2004). There is no evidence connecting Mr. Wilhite to the murder of Alberto Rodriguez other than the testimony Defendants manufactured. But for Defendants' misconduct, he would not have been a suspect in this crime. His entire ordeal—his arrest, prosecution, and multiyear incarceration—is a direct result of Defendants' efforts to frame him for a crime he did not commit.

C. Mr. Wilhite was seized pursuant to legal process unsupported by probable cause.

"Where an individual is arrested pursuant to a judicial warrant . . . he becomes held pursuant to legal process at the moment of arrest." *Hernandez-Cuevas*, 723 F.3d at 100 n.9. To establish a viable malicious prosecution claim, "the plaintiff must demonstrate that law enforcement officers made statements in the warrant affidavit which amounted to deliberate falsehood or . . . reckless disregard

[11] The inference that Defendants coerced Mr. Martinez into implicating Mr. Wilhite is supported by the fact that Defendants interviewed Mr. Martinez twice before documenting his statement or identification. This is exactly what happened with Nathan Perez; he refused to identify Mr. Wilhite at the first (undocumented) interview, but relented to Defendants' pressure at the second interview and agreed to sign a statement. *See* PSOF ¶¶ 62-75. The inference is further supported by evidence that neither Mr. Martinez nor Mr. Wilhite was present at the scene that night. Someone had to tell Mr. Martinez which picture to select.

for the truth, *and* that those deliberate falsehoods were necessary to the magistrate's probable cause determination." *Id.* at 102 (internal quotation omitted).

Defendants offer a circular argument on the probable cause issue. They contend that "there was probable cause as shown by the issuance of an arrest warrant by a magistrate and a grand jury indictment." *Defs.' Mem.* at 28. This reasoning misses the point. There is no dispute that Charles Wilhite was arrested pursuant to a warrant that Defendant Pioggia both applied for and executed. Nor is there any dispute that a grand jury later indicted him for murder. The issue is whether Defendants fabricated the evidence used to arrest and indict Mr. Wilhite in order to frame him for a crime he did not commit.

Once again, this is not a close question. Defendant Pioggia's affidavit contains only three pieces of evidence implicating Charles Wilhite in the murder: the statements of Giselle Albelo, Patryce Archie, and Anthony Martinez.[12] *See Ex. 41*, *Pioggia Warrant Report*.[13] Defendants obtained each of these statements as part of their efforts to manufacture evidence against Mr. Wilhite. Each one is tainted. But for Defendants' falsehoods, it would not have been possible for a magistrate to find probable cause for Mr. Wilhite's arrest. *See Burke v. Town of Walpole*, 405 F.3d 66, 82 (1st Cir. 2005) (no magistrate would issue arrest warrant "where officers procuring a warrant have deliberately misled the magistrate about relevant information") (quotation omitted).

Defendants' misconduct continued after Mr. Wilhite was in custody. Defendants did not coerce Nathan Perez's testimony until after the grand jury had indicted Mr. Wilhite and after Giselle Albelo recanted. Thus, this is not a case where police officers simply applied for an arrest warrant

[12] The affidavit also describes other evidence connecting Angel Hernandez to the crime.

[13] The fact that Defendant Pioggia applied for the warrant does not affect Defendant Tatro's liability. Defendants both describe themselves as partners in this investigation, both acting as co-lead detectives. PSOF ¶ 7. "[A] person need not swear out a criminal complaint in order to be held answerable for malicious prosecution." *Goddard v. Kelley*, 629 F. Supp. 2d 115, 130 (D. Mass. 2009).

and then turned the case over to prosecutors. Mr. Wilhite's malicious prosecution claim involves continuing misconduct, including actions after Defendants' warrant application and after the grand jury proceedings.

D. The criminal proceedings terminated in Mr. Wilhite's favor.

The outcome of Mr. Wilhite's criminal case is not in dispute. The parties agree that Mr. Wilhite was initially convicted, granted a new trial after an evidentiary hearing, and ultimately acquitted after a second trial. Defendants agree that this satisfies the favorable termination requirement. *Defs.' Mem.* at 28 ("[I]t is undisputed that, ultimately, the prosecution terminated in favor of Mr. Wilhite."); *see also Limone v. United States*, 271 F. Supp. 345, 361 n.18 (D. Mass. 2003) ("[T]he plaintiff's criminal proceedings had favorably terminated in acquittal.").[14]

IV. Mr. Wilhite's State Law Malicious Prosecution Claim

Mr. Wilhite's state law malicious prosecution claim largely mirrors the constitutional claim discussed above. In Massachusetts, the tort of malicious prosecution requires proof of four elements: "1) that the defendant initiated a criminal action against [the plaintiff]; 2) that the criminal prosecution ended in [the plaintiff's] favor; 3) that there was no probable cause to initiate the criminal charge; and 4) that the defendant acted maliciously." *Miller v. City of Boston*, 297 F. Supp. 2d 361, 366 (D. Mass. 2003).

Although there is an additional element in the tort claim—that the defendant must have acted maliciously— where, as here, "the lack of probable cause is so obvious … an inference of malice is warranted." *Goddard v. Kelley*, 629 F. Supp. 2d 115, 130 (D. Mass. 2009) (citing *Foley v.*

[14] Defendants' suggestion that *Heck v. Humphrey,* 512 U.S. 477 (1994), bars Mr. Wilhite's malicious prosecution claim is misguided. *Heck* bars claims under § 1983 only when the conviction or sentence implicated by the civil suit has not been overturned and when a judgment in the plaintiff's favor would "necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487. Heck has no applicability where, as here, the conviction has been vacated.

Polaroid Corp., 400 Mass. 82, 101 (1987)). The required showing for the tort claim is thus "almost indistinguishable" from "the showing required to prove a Fourth Amendment malicious prosecution claim under a purely constitutional theory." *Hernandez-Cuevas*, 723 F.3d at 101. Defendants make the same arguments for summary judgment on Plaintiff's state law claim as they do with respect to Plaintiff's constitutional claim. The Court should deny Defendants' motion as to their state law claim for the same reasons set forth above.

V. Intentional Infliction of Emotional Distress

A. The evidence supports Mr. Wilhite's IIED claim.

In Massachusetts, the tort of intentional infliction of emotional distress requires a plaintiff to prove the following:

> (1) that the [defendant] intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was 'extreme and outrageous,' was 'beyond all possible bounds of decency' and was 'utterly intolerable in a civilized community'; (3) that the actions of the defendant were the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was 'severe' and of a nature 'that no reasonable man could be expected to endure it.'

Limone v. United States, 336 F. Supp. 2d 18, 43-44 (D. Mass. 2004) (quoting *Agis v. Howard Johnson Co.*, 371 Mass. 140, 144-45 (1976)).

Defendants make two arguments about this claim. First, they contend that they "did not act with the requisite intent to rise to the level of 'extreme and outrageous' conduct." *Defs.' Mem.* at 31. The evidence refutes this claim. Defendants Pioggia and Tatro engaged in a deliberate effort to manufacture evidence against Charles Wilhite in order to convict him for a crime he did not commit. It is beyond dispute that, if proven, "knowingly participat[ing] in the events leading to the wrongful indictment, prosecution, conviction, and continued

incarceration" of an innocent person is extreme and outrageous. *Limone v. United States*, 579 F.3d 79, 94 (1st Cir. 2009). Indeed, this conclusion is "rock-solid." *Id.*

Defendants' second argument is that "the cause of [Mr. Wilhite's] incarceration was not related to any wrongdoing of the officers." *Defs. Mem.* at 32. Defendants support this assertion by citing to their own expert's opinion that Defendants' investigation was consistent with generally accepted police practices. This opinion is disputed. *See*, *e.g.*, PSOF ¶ 16. Viewing the evidence in Plaintiff's favor, Defendants' manufacturing of evidence against him was the *sole* cause of his arrest, prosecution, conviction, and incarceration. Because this factual dispute must be resolved by a jury, summary judgment is inappropriate on this claim.

B. There is no statute of limitations issue in this case.

Although not raised in the context of Defendants' argument about intentional infliction of emotional distress, Defendants contend that all "non-malicious prosecution claim[s]" in this case are time barred. *Defs.' Mem.* at 23, 25-26.[15] This is not correct. "Massachusetts is a 'discovery' State; as such, the statute of limitations begins to run when a plaintiff 'knows or reasonably should know that he or she has sustained appreciable harm as a result of the [defendant's] conduct.'" *Kennedy v. Goffstein*, 62 Mass. App. Ct. 230, 232 (2004) (quoting *Lyons v. Nutt*, 436 Mass. 244, 247 (2002)); *see also Limone v. United States*, 336 F. Supp. 2d 18, 47 (D. Mass. 2004) ("Under the [discovery] rule, a claim accrues once a plaintiff knows, or in the exercise of reasonable diligence should have known, the factual basis of the

[15] Defendants argue that "the Fourth Amendment claims asserting false arrest, imprisonment, or other procedural irregularities" are time barred. *Defs.' Mem.* at 26. There are no such claims in this case. Plaintiff's § 1983 claim (Count I) is a malicious prosecution and due process claim.

cause of action, including the fact of the injury and the injury's causal connection to the government.") (quotation omitted).

Although Mr. Wilhite knew from the moment of his arrest that he was innocent, this is not the same thing as knowing that Defendants' misconduct was the cause of the false identifications. Plaintiff's claim accrued once the causal connection between his wrongful incarceration and Defendants' misconduct became apparent. This occurred on August 17, 2011, when Nathan Perez signed a sworn statement retracting his testimony and identification of Charles Wilhite, and revealing for the first time the extent to which Defendants Pioggia and Tatro had threatened and coerced witnesses in order to manufacture evidence against Mr. Wilhite. It was this recantation that earned Mr. Wilhite a second trial and ultimately his freedom. After his acquittal, Mr. Wilhite filed this lawsuit on January 29, 2014, less than three years after Mr. Perez recanted. This was within the statute of limitations for tort claims. *See* M.G.L. c. 260, § 2A.[16]

VI. Qualified Immunity Is Inappropriate

In evaluating a claim of qualified immunity, the Court considers "(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right, and (2) if so, whether the right was 'clearly established' at the time of the defendant's alleged violation." *Glik v. Cunniffe*, 655 F.3d 78, 81 (1st Cir. 2011) (quotation omitted). The second prong, in turn, requires the Court to consider "(a) whether the legal contours of the right in question were sufficiently clear that a reasonable officer would have understood that what he was doing violated the right, and (b) whether

[16] Even if the claim had accrued earlier, it would not be time barred. Because Defendants' misconduct caused the delay in Mr. Wilhite discovering his cause of action, the doctrines of equitable tolling and equitable estoppel would apply. *See, e.g.*, *Bailey v. City of New York*, 79 F. Supp. 3d 424, 440-41 (E.D.N.Y. 2015).

in the particular factual context of the case, a reasonable officer would have understood that his conduct violated the right." *Stamps v. Town of Framingham*, 813 F.3d 27, 34 (1st Cir. 2016).

Defendants rely on both prongs. Defendants claim, on the basis of their expert's report, that no constitutional violation occurred. *See Defs.' Mem.* at 33. As discussed above, material factual disputes preclude summary judgment on this question.

Defendants also argue that Mr. Wilhite's Fourth Amendment right to be free from malicious prosecution is not clearly established. They make this argument despite conceding elsewhere in their brief that this right *is* clearly established. *See Defs.' Mem.* at 29 ("[T]he right of the individual to be free from arrest or prosecution upon a charge of which he is innocent has been clearly established."). In any event, Defendants are incorrect that the First Circuit has yet to recognize a malicious prosecution claim under the Fourth Amendment. *See Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 100 (1st Cir. 2013). In *Hernandez-Cuevas*, the First Circuit "[made] explicit what has long been implicit in our case law," concluding that the right to be free from malicious prosecution was not only clearly established, but also "self-evident." *Id.* (citing *Limone v. Condon*, 372 F.3d 39, 44-45 (1st Cir. 2004)). Defendants are not entitled to qualified immunity on any claim.[17]

CONCLUSION

For the reasons set forth above, this Court should deny Defendants' Motion for Summary Judgment in its entirety.

[17] Defendants suggest that qualified immunity is also available as a defense to Plaintiff's state tort claims. *See Defs.' Mem.* at 34 (citing *Gildea v. Ellershaw*, 363 Mass 800 (1972)). It is not. *Gildea* concerns immunity for public officials sued individually for negligence; it is inapposite here. Qualified immunity is not a defense to intentional torts. *See Spencer v. Roche*, 755 F. Supp. 2d 250, 264-65 (D. Mass. 2010), *aff'd*, 659 F.3d 142 (1st Cir. 2011).

RESPECTFULLY SUBMITTED,
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By his attorneys,

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Dated: June 1, 2016

CERTIFICATE OF SERVICE

I certify that on this day I caused a true copy of the above document to be served upon the attorney of record for all parties via CM/ECF.

Date: June 1, 2016 /s/ Drew Glassroth
Drew Glassroth