23-0503-CV(L)
23-0652-CV(CON)

In the
United States Court of Appeals
For the Second Circuit

CALVIN HARRIS,

Plaintiff-Appellee,

– v. –

TIOGA COUNTY, GERALD KEENE, Former Tioga County District Attorney, STEVEN ANDERSON, New York State Police Investigator and SUSAN MULVEY, New York State Police Investigator,

Defendants-Appellants.

– and –

TIOGA COUNTY DISTRICT ATTORNEY'S OFFICE, Unidentified JANE/JOHN DOE #1-10 Tioga County Employees, UNIDENTIFIED LESTER, New York State Police Investigator and UNIDENTIFIED JANE/JOHN DOE #11-20 New York State Police Employees and BARBARA THAYER,

Defendants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK (SYRACUSE)

BRIEF FOR PLAINTIFF-APPELLEE

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STATEMENT OF JURISDICTION

The Eastern District of New York had federal question jurisdiction over the federal Malicious Prosecution, Fabrication of Evidence, Conspiracy, and *Monell* causes of action in this case against because they were brought pursuant to Title 42 of the United States Code, Section 1983 -- a federal statute. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the … laws … of the United States"). Moreover, the court had supplemental jurisdiction over the state law claims because those claims arose from matters "so related to [the federal civil rights causes of action] … that they formed part of the same case or controversy ...." *See* 28 U.S.C. § 1367.

However, for the reasons set forth below, this Court lacks jurisdiction over the present appeal, as its "appellate jurisdiction is limited generally to appeals from final judgments of the district courts." *See also Kamerling v. Massanari*, 295 F.3d 206, 212-13 (2d Cir. 2002) (internal references omitted). Because the appeals here are from a non-final decision from the Northern District of New York, which denied summary judgment and certified the case for trial, this Court does not yet have jurisdiction over this action.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Circuit courts generally lack jurisdiction over District Court decisions denying summary judgment. An exception to this jurisdictional rule exists for decisions based upon questions of qualified or absolute immunity, but only when the District Court's decision is based solely upon questions of pure law rather than material disputes of fact. Where the District Court in this case denied summary judgment based in part upon material disputes of fact, does this Court lack jurisdiction to hear this interlocutory appeal.

II. Evidence in the record indicates that the defendants worked individually and collectively to fabricate probable cause against Calvin Harris in the investigation into his wife's murder. This included evidence of them admitting that they doctored photographs of blood, adulterated blood evidence before photographing it, knowingly relied upon junk science to link miniscule blood droplets to an alleged bludgeoning, tampered with two critical witnesses, and withheld material exculpatory information. Based upon this evidence and the requirement to construe all favorable inferences in favor of the non-movant, the District Court denied the defendants' summary judgment plea for qualified immunity over the pending claims for malicious

prosecution, evidence-fabrication, and conspiracy to violate 42 U.S.C. §1983. Should the District Court's denial of summary judgment be affirmed?

III. The availability of absolute immunity for a prosecutor depends upon whether the complained-of conduct was prosecutorial rather than investigative. Construing all inferences in Plaintiff's favor, the complained-of conduct by District Attorney Keene occurred during the investigative phase of the criminal case, before the establishment of probable cause, before an indictment, and before the prosecutorial phase of the case had begun. Should the District Court's refusal to make a pretrial adjudication of absolute immunity be affirmed?

IV. *Monell* liability may attach against a municipality based upon a single act of a policymaking employee. Here, the District Court denied summary judgment over Plaintiff's *Monell* claim against Tioga County, recognizing that its liability would be based upon the wrongdoing of its District Attorney -- an official policymaker. Should the District Court's denial of summary judgment over this *Monell* claim be affirmed?

STATEMENT OF THE CASE

Introduction

Michele Harris was reported missing on September 12, 2001; yet years of investigation by the State Police and District Attorney yielded no body, no murder weapon, and no eyewitness to her suspected homicide. Run by Senior Investigator Susan Mulvey, the investigation myopically and doggedly focused on Calvin Harris -- a prominent local businessman who had previously employed, and fired, Mulvey's father. At the time of Michele's disappearance, Calvin and Michele had been married for ten years, with four young children, and after several months of contentious divorce proceedings, they had finally calmed and were finalizing a divorce settlement while still sharing the family home and responsibilities. Despite searching Calvin's home, lake, cars, business, computers, and more, however, using every technology and resource available, the only physical "evidence" Mulvey's team observed were tiny droplets of blood in the family garage and entry to the kitchen -- together aggregating no more than an eighth of a teaspoon of blood. As the miniscule quantity of this blood was inconsistent with evidence of a violent assault or murder, Mulvey's team tested the one theory that could potentially reconcile and link such a small amount of blood with a murder committed inside the home: a cleanup; yet this, too, proved unavailing. Tests on mops and areas of the floor near the observed droplets yielded negative results for blood, and technology

so sensitive that it could detect one millionth of a part of blood to one part of water yielded negative results in the home's sink traps, where evidence of any cleanup attempt would be found.

Thus, taken in totality, the evidence available to the State Police was simply not consistent with a murder in the home or any cleanup effort. To the contrary, based upon information given to the State Police only a day after Michele went missing, the tiny blood droplets were entirely consistent with a much more innocent explanation: Michele had cut her hand when she fell on the ice in the driveway outside the garage -- significantly, in an area where she might have then dripped blood as she walked through the garage, into the kitchen to tend to her hand. In short, given its location, miniscule quantity, and the surrounding facts known to police at the time, their discovery of tiny blood droplets in the garage and kitchen-entry of the Harris family home was merely proof that Michele had lived in the house -- not that she had died there.

Knowing that they lacked probable cause to arrest the prime initial target of their investigation, law enforcement nevertheless did not pivot to another suspect, Stacy Stewart, against whom there was a growing body of inculpatory evidence -- including that he was out with Michele late into the evening on the night she disappeared, that he was possessive of her, and that he burned bloody clothes in his firepit the day after her disappearance. Instead, they pressed forward with their

attempt to indict Calvin Harris, now with evidence that they began to manufacture against him in order to fill the void left by their investigation.

The evidence fabrication included color-altering the photographs of the dark blood droplets observed in the Harris family home to make them appear bright red, and then falsely suggesting to the grand jury that this was indicative of the freshness of the blood -- even though the age of blood is forensically incapable of being determined by its color. It included swabbing the blood droplets with wet cotton *before* photographing them, and then relying upon the corrupted droplets' elongated shape in the photographs to suggest force was involved in their deposit. It included the manufacturing of junk science to link miniscule blood droplets to a bludgeoning event when, as law enforcement knew, the blood's shape was equally or more consistent with a sneeze, cough, or reaction to water or surface varnish. It included District Attorney Keene presenting multiple witnesses to falsely suggest that Michele had not suffered any injuries that might have innocently explained the blood -- even though he *knew* that she had -- consistent with the strategy he discussed with expert Henry Lee. And it included Investigator Mulvey and District Attorney Keene co-opting witnesses to modify their renditions of events; most egregiously the Harris family's babysitter, Barbara Thayer, who falsely took credit for exculpatory acts actually performed by Calvin -- like making a phone call to Michele on the morning of her disappearance -- and who also, as Thayer admitted in her diary, falsely blamed

Calvin for acts that she had performed herself, like disposing of Michele's belongings.

Ultimately, this case is not about the difficult strategic decisions that police and prosecutors undertake in determining what evidence to present to a grand jury. This case is about a concerted and demonstrable conspiracy to manufacture evidence that did not exist, to bury exculpatory evidence, and to thereby frame an innocent man for murder. Our civil rights laws do not allow for this behavior, and the District Court correctly certified this case for trial.

As Michele and Calvin's Marriage Comes to a Close, Michele Begins a Relationship with Stacy Stewart

Michele and Calvin Harris married on September 29, 1990,[1] and they lived together at 381 Hagedorn Hill Road in Tioga County, New York, along with their four children. *See* A1051. Their house was on a large property, set between the banks of Empire Lake, on one side, and a long and winding driveway the approximate length of three football fields on the other. *See* Supplemental Appendix of New York State ("SA") at 157. *See also* A1062 at 46. After ten years of marriage, however, Michele and Calvin's relationship ran its course, culminating in an action for divorce on January 17, 2001. *See* A1046.

[1] *See* Appendix filed by Tioga County Appellants ("A") at A1047.

To assist her in the divorce, Michele hired Robert Miller, an accomplished lawyer with more than thirty years of experience. *See* A1151 at 9-10. Mr. Miller, in turn, obtained legal assistance from attorney Betty Keene, the wife of then-District Attorney Gerald Keene. In this capacity, Ms. Keene met with Michele, talked with her about the fallout of her marriage, and helped prepare a petition filed in connection with the divorce proceedings. *See* A1297-1299. While Ms. Keene was working for Michele, she took notes of a particular conversation they shared on April 5, 2001 -- notes describing an incident less than three weeks before -- in which Michele "cut her hand on the ice when she fell causing it to bleed." *See* A1305. *See also* A1308-09 (confirming authorship). These notes proved to be important for developments that followed.

As Michele and Calvin's lives began to grow apart, Michele got a job at Lefty's bar and restaurant, and began staying out late at night, leading to one incident in particular when she was out partying until the early hours of the morning -- an event that led to particular strife at home. *See* A1047-48. Relatedly, she entered into a series of romantic relationships with other men. *See* A1313-1315; A1341; A1346-47. *See also* A1363; A1461. One of them was a man named Stacy Stewart.

Stewart was approximately 5'9" with dark hair and an athletic build, and he drove a black pickup truck. *See* A1678-79. He hailed from Texas and worked at Vulcraft (A1683), and after a stint living in a hotel near the New York border with

Pennsylvania, he bought a log cabin abutting a pond in Lockwood, New York. *See* A1684-85. After first meeting Michele, he told a friend, Molly Feichner, about "liking Michele and going to Lefty's and trying to get Michele to notice him." *See* A1692. Stewart had a dark history; one of his colleagues had reported that Stewart and his friend, Chris Thomason, had burglarized his home and stolen jewelry. *See* A1691-92. *See also* A1413-14. And though Michele ultimately did not want to be with him, he was reported to be "possessive" and "acted like if he could not have her, then no one could have her." *See* A1695 at ¶7.

Toward the end of summer in 2001, the divorce court had set a trial date for October. But discovery was not remotely complete, and indeed a motion remained pending to determine whether attorney Miller could be paid $30,000 in order for an economic analysis of Calvin's businesses to begin. *See* A1699. Accordingly, attorney Miller "didn't think he was going to be ready for the October 2001 trial date…." *Id*. Nor would a trial on that date have been necessary, as over the past eight months, the tensions between Michele and Calvin had begun to cool, and a cordial settlement now appeared likely. *See* A1823 (confirming that Ms. Thayer had told the police that "things have actually calmed down over the course of the summer, that the arguments have diminished, that the two were getting along and that Michele had purchased a house and was looking forward to settling this and

moving on"). *See also* A1551 ("her friend [Nicky Burdick] thought she was going to settle the divorce").

Michele Leaves for Work on September 11, 2001, and the Following Morning Kevin Tubbs Observes a Man and Woman at the Foot of Her Driveway Fitting the Description of Michele Harris and Stacy Stewart.

Barbara Thayer was a caregiver for the Harris's four children. At approximately 3:30pm on Tuesday, September 11, 2001, she went to the Harris household because Calvin was at work and Michele was getting ready to begin a 4:30pm shift at Lefty's. *See* A1694. Thayer remained at the home until approximately 6:30pm, when Calvin returned home from work to spend the evening with his children and put them to bed. *Id.* That night after work, Michele went out drinking with Stacy Stewart and Chris Thomason. *See* A1695 at ¶9. According to Thomason, he left Stewart and Michele together at the bar (A1695 at ¶9).

At 4:30am on September 12, 2001, a farmer named Kevin Tubbs loaded and transferred bales of hay from a nearby farm to his own. As he finished loading, he hooked the hay wagon to his truck and began the drive back to his farm as the sun rose off the horizon. *See* A1970 at ¶¶6-7. His trip took him past Hagadorn Hill Road, and there, in front of the Harris driveway, he "observed a vehicle stopped or parked cockeyed, with the front of the vehicle in the end of the driveway and the rear extending into the roadway partially blocking the roadway." *See* A1971 at ¶9. It was a "Chevrolet pick-up truck, either a dark blue or back in color," and as he

attempted to pass it safely, which required slowing down, he observed two people standing outside of the truck. "One was a blonde woman who looked like the woman … I had previously seen at the Harris property … [who] appeared to be crying," he said. "The other individual, who stared directly at me as I passed, was a young white … male, who I would estimate to be early to mid-20's, with a muscular build and brown hair." *See* A1971 at ¶10.

While the exact details of the next several hours are unknown, on September 12, 2001, Chris Thomason burned bloody clothing in Stewart's firepit. *See* A1977 at ¶12. Later, through "periods of silence, tears, and general anxiety," Thomason told his wife that Stewart was involved in "the murder of Michele Harris," that her jewelry was stolen, that her body had not been found, and that Stewart "probably buried her in concrete." A1695. Stewart also generally acknowledged burning bloody clothes in his firepit but pointed the finger at Mr. Thomason and another female ("Chris and that other girl … had come up there one night with blood on their clothes"), alleging that he "didn't think twice about it." *See* A1993. *See also* A1994 (adding, "they burned it"). Years later, a forensic archeologist examined Stewart's burn pit and found several items. These included, but were not limited to, the blade of a knife, a single button, and the partial shoulder strap of a bra. *See* A2022.

On September 12, 2001, Barbara Thayer Drives to the Harris Residence after Making a 7:08am Call from Her Home; She Thereafter Becomes a Conspirator with the State Police to Frame Calvin for Michele's Murder.

Before going to the Harris family household on the morning of Wednesday, September 12, 2001, Ms. Thayer called a friend to notify him that she would be unable to go horseback riding. *See* A2037. She made that call from her home phone at 7:08am, waited as the phone rang repeatedly on the other end, waited as the answering machine picked up, and then left a message. A2036-37. *See also* A1345. This took one minute and five seconds. *See* A1854. Thereafter, she left her residence, went outside to her car, and engaged in a four to four-and-a-half minute drive down several dirt roads before reaching the foot of the Harris estate. *See* A1319; A2038.

When Ms. Thayer arrived at the entry to the long Harris driveway, she noticed Michele's van parked near the intersection of the driveway and Hagedorn Hill Road. *See* A1320; A1965; and A2044. In response, Ms. Thayer parked and exited her car to investigate. *See* A2045. She walked over to the van, peered into the window, and noticed the key was still in the ignition. *Id*. Continuing, she saw a cigarette pack, and on the floor she observed a makeup bag. *See* A2045. Knowing Michele at this point in her life, Ms. Thayer theorized that she might have gotten drunk and fallen asleep in the back of the van. *See* A503; A2050. So she opened the unlocked door to the back of the van, opened it, and looked inside the vehicle's three rows. *See*

A490. Michele was not there. *Id*. Also missing was her purse. *See* A2050. Ms. Thayer then exited the van, closed it back up, and returned to her vehicle to drive the final leg of her trip -- past the van and down the long driveway to the Harris family home. *See* A1965; A2050.

By 7:14am, as Calvin was getting ready to go to work, neither Michele nor Ms. Thayer had arrived at the Harris family home, so between 7:14am and 7:15am Calvin called Michele to see where she was. *See* A2062; A2065. *See also* A1312; A1343. She did not pick up the phone, and he did not leave a message. *See* A1846. This was notable, because, if Calvin had killed Michele, he would have no reason to call her; and, as the District Attorney later confirmed, "if Cal had killed her and he was calling as some kind of fake alibi, you would expect him to leave some kind of a message like, Michele where are you or I'm worried about you" (A1848) -- though he left no such message.

When Ms. Thayer finally arrived, she parked her car outside in front of the house and walked in through the garage after knocking. *See* A1965. On the other side of the entry door in the garage was a small foyer leading into the family's great room, containing a kitchen and a living room. *See* A2046-47. Ms. Thayer called for Calvin, and he came into the kitchen to speak with her. According to Ms. Thayer's first sworn statement pertinent to this case, the following events then transpired:

> [After] [h]e came into the kitchen … I asked him if Michelle was there and he said no. I told him that her van

> was at the end of the driveway, he said that we'd better go get it. Cal and I got in his truck and drove to the end of the driveway.

See A1965.

Notably, in this version of events, Thayer did not claim to have made the un-messaged call to Michele's phone. In fact, she did not make this claim in *any* of the early statements she gave to law enforcement. *See* A1963-67; A2050-52; A2068-70, 2071-72. And in at least one instance, she affirmatively denied making the call. *See* A2073-74 ("Q Did you give these answers to these questions at Mr. Harris' first trial-- … Q Mrs. Thayer … [y]ou did not make a phone call from the Harris residence to Michele Harris' cell phone between 7:13am and 7:15am on September 12th would you agree with that statement? Answer: I'll have to say yes. A Correct"); A2079.

From this point forward, Ms. Thayer became an important player in the scheme to incriminate Calvin, taking on a role far beyond that of an ordinary witness. She gave an interview to the State Police on September 12 and September 14, 2001. *See* A2049-51 and A2069-71. She called Calvin's father on a line she secretly recorded for the police five days later. *See* A2085-86; A2032. She secretly toured Investigator Andersen through the family household without Calvin's authority. *See* A2030-31. She took a commemorative wedding plate from the Harris household, without asking Calvin his permission, and then gave it away at a garage sale to Senior Investigator Mulvey for free. *See* A1518 (admitting she paid "nothing" for

the plate). And after the State Police claimed to be done searching through the home, she came upon a tape recorder and was nudged by the State Police to seize it on their behalf -- which she did. *See* A2033-34 ("Q When you found the tape and you called the police and said can I take this they told you well we cant tell you to take it but if you want to do it on your own you can. That's what they said to you, right? A Yes…."). In and around this time, she gave further interviews or statements to the State Police on six different occasions. *See* A2092-99.

Susan Mulvey Becomes the Leader of the Michele Harris Investigation and Devotes Extraordinary Resources to Manufacture a Case against Calvin.

In September 2001, Susan Mulvey was a high-level officer within the New York State Police, having served for more than two decades and having attained the title of "Senior Investigator." *See* A1369. She became involved in the Harris investigation on September 12, when attorney Miller contacted the State Police to report that Michele was missing (A1378) -- an act he followed with the wholesale production to law enforcement of Michele's divorce file, including her personal communications with Betty Keene. *See* A2125-35. By that time, Susan Mulvey's father had worked for Calvin in the car dealership business and had been fired. *See* A1385-86. She then became "in charge of the investigation" (A2138), was personally responsible for assigning investigators to take statements from Ms. Thayer about Calvin (A1382), and spoke with Ms. Thayer personally on at least

seventeen different occasions. *See* A2141-43. So close was her working relationship with Ms. Thayer on the case, in fact, that on at least one occasion she referred to Ms. Thayer's efforts as being "agency action" on behalf of the State Police. *See* A1572.

One of the fruits of Ms. Thayer's cooperation with Special Investigator Mulvey was a diary that Thayer turned over to Mulvey. Shortly after Michele's disappearance, Ms. Thayer's diary explained in relevant part that she "[w]ent to Micheles at 8:00 … Cal played w/ them most of the AM. I cleaned the laundry room -- bagged Michelles clothes…." *See* A2161. *See also* A1841. This proved to be an important contrast to Ms. Thayer's description of events as her assistance with law enforcement continued, as set forth below. Her diary also recounted a yard sale through which Ms. Thayer would liquidate some of Michele's personal belongings and agreed to give fifty percent of the proceeds back to Calvin. Her sale yielded $1800, but, in her words, she "cheated" Calvin and gave him only $199. *See* A2180-81; A2166. Asked why it was okay to cheat Calvin, she said, simply, because she thought he killed Michele. *See* A2181 ("Q Why was it okay to cheat Cal? A I don't know what to say. It was Michele's stuff-- Q Because you think he killed Michele, right? A Yes"). The rules she lives by -- "you don't cheat, you don't steal, you don't lie" -- they did not apply to her dealings with Calvin. *Id.* ("you're right").

The nascent investigation, which became a homicide investigation, grew to expend extraordinary efforts to find evidence that the person responsible for

Michele's disappearance was Calvin -- the man who had fired the lead police investigator's father, and who had been the litigation adversary of the District Attorney's wife. *See* A1400. These efforts included interviewing Calvin's friends, relatives, and colleagues. *See* A1396. They included searching his home, his property, the land adjacent to his property, and his lake. *See* A1424. State police searched his computers, his truck, his driveway, his pipeline, and his trash. *See* A1425. They attached a device to his car so that Senior Investigator Mulvey "knew where he went even without having to follow him." *See* A1431 (confirming, "Yes"). Special Investigator Mulvey boarded a helicopter flown low over his property. *See* A1442-43. They resorted to chicanery, like in November 2001, when they lied to Calvin about having found additional information about his missing wife's whereabouts, attempting to see if he would have an inculpatory reaction. *See* A1432. And they attempted to garner suspicious behavior by engaging in basic harassment. *See* A1434-35 (confirming that Senior Investigator Mulvey "show[ed] up at the airport when he returned from a trip with his family," including his four young children who were between the ages of 2 and 8).

Nevertheless, aside from miniscule specks of "red staining in the house, which we'll include the carpet and the small area outside the garage, be it dog's blood or not," Senior Investigator Mulvey was asked what other evidence was found linking

Michele's disappearance to Calvin. Her answer was simple: "No other evidence." *See* A1430.

In the absence of evidence linking Michele's disappearance to Calvin, Special Investigator Mulvey's team began questioning Michele's friends about her and Calvin's relationship. One such interviewee was Michele's hairdresser, Jerome Wilczysnki. On September 25, this hairdresser gave his first interview to law enforcement less than a month removed from Michele's disappearance. And questioned about the negativity surrounding Michele and Calvin's divorce, he gave the following explanation, as reported by law enforcement:

> Over heard a conversation that Michele was having on the cell phone with Cal in which Cal was telling her to drop the divorce proceedings and come back to the Harris family fortune. If she didn't drop the divorce he would make it very difficult on her. Cal refused to give her or the kids any money for new school clothes. The kids would never live with Michele, they would stay with Cal.

See A2184.

Gerald Keene Joins in the Pre-Indictment Effort to Fabricate a Case against Calvin.

Although he held the title of District Attorney, Gerald Keene, whose wife was Michele's divorce attorney, became involved in the pre-indictment investigation into Michele's disappearance, working with the State Police to gather evidence against Calvin. This included a trip in or about May 2005 when he and Senior Investigator

Mulvey drove to Boston to interview Calvin's first wife. *See* A1916-17. It included a trip to Albany to discuss the case with the Forensic Unit to determine if there were additional investigative steps that would be necessary. *See* A1464-65. It included witness interviews that District Attorney Keene himself instigated. *See* A1919 ("Q So this is not something the State Police asked you to do. This is something you said to the State Police you wanted to do and asked them if they wanted to participate; is that right? A Yes. Q So … this is one example … where you as the attorney pre-indictment are making suggestions on the case, contacting people, trying to improve the quality of the case, right? … A Yeah"). And it included a meeting in 2006 with the prosecution's star forensic witness, Henry Lee (A1465; A2192), during which Dr. Lee advised Gerald Keene, Susan Mulvey, and Steven Andersen how to game jurors in a blood spatter case -- advice with which District Attorney Keene agreed, laughing:

Lee:	They can always say, um, you know, my wife cut her finger and start bleeding. Fine. They have to prove she in fact cut the finger.
Keene:	Of course they don't have any burden of proof, but they'll --
Lee:	Well the jury expect to have some proof.
Keene:	I think you're right. I think you're right [*laughing*].
Lee:	Even if they don't have burden to prove --
Keene:	Right [*nodding*].
Lee:	They expect to see that.
Keene:	Mm-hmm.

See A2192 at 16:29-16:56.

Four Years Into the Investigation, the State Police Inform District Attorney Keene that if He Does Not Indict Calvin then He Can Be Replaced, Leading to a Grand Jury Presentment and Dismissal of the Obtained Indictment for Prosecutorial Misconduct

By the spring of 2005, no new evidence had been obtained against Calvin for several years. *See* A1471-72. There was still no dead body, no murder weapon, and no eyewitnesses, and, as set forth below, evidence of blood in the home -- aggregating to a total miniscule amount of one eighth of one teaspoon (A2288), with no traces of blood in any of the sink traps, as would be expected following any cleanup effort (A1336-37) -- was wholly inconsistent with violence. District Attorney Keene was not comfortable that he had enough evidence to proceed with an indictment and prosecution of Calvin. *Id*. So the State Police informed him that if he was not prepared to indict, they would find someone else who was. In his words, "they indicated … that if I was not interested in presenting the case to the grand jury that in some situations State Police counsel got authority to present cases…." *See* A1922. The District Attorney relented to the pressure: "I think I indicated to him … that that would not be necessary, that, you know, if the case needed to be presented to grand jury that I could do it." *Id*.

What followed in September 2005 was a presentment of evidence to the grand jury so inappropriate and unlawful that it garnered a twelve-page decision dismissing

the indictment. *See* SA1613-1625. Included in the criminal court's findings was a base recognition of how a grand jury is supposed to be conducted: "In our State justice system, the critical functions of investigating criminal activity and protecting citizens from unfounded accusations are performed by the Grand Jury, whose proceedings are conducted by the prosecutor alone, beyond public scrutiny" (citing *People v. Huston*, 88 N.Y.2d 400 (1996). It proceeded to recognize that of twenty-seven grand jury witnesses, "[m]ost of th[em] … were permitted, improperly, to offer their opinions as to the state of defendant's marriage, Michele Harris' intent with regard to the divorce," and "personal opinions" concerning a variety of other topics. *See* SA1622. "The amount of hearsay evidence offered by itself was overwhelming," and in addition, "the prosecution improperly offered evidence of prior conduct by the defendant…." *See* SA1623. District Attorney Keene "allowed one witness to testify that he had taken a polygraph test before appearing in the Grand Jury," and he answered a question from the jury's foreperson that he personally believed that he had presented "a sufficient case to indict the defendant." *See* SA1624. From a review of the evidence, the court held, it was "clear" that "the admission into evidence of much, if not most of the inadmissible evidence … was done so intentionally." *See* SA1621.

Upon learning that the original presiding judge intended to dismiss the indictment, District Attorney Keene filed a motion seeking the judge's recusal based

upon an "appearance of impropriety here." *See* SA1616. Though Keene's gambit worked, with the judge recusing himself on the grounds that the District Attorney had made "sworn allegations in support of his application, pitting his oath of office against that of the court," it ultimately did not save the indictment. The new judge subsequently appointed noted that the District Attorney's tactics "should not be tolerated," and then re-analyzed, and reaffirmed, the decision to dismiss on January 29, 2007. *See* SA1616 and SA1620. The dismissal was issued with leave to resubmit the case. *See* SA1625.

A New Grand Jury Convenes in February 2007 and is Presented with an Array of Falsified, Misleading, and Materially Incomplete Evidence.

In February 2007, law enforcement re-presented the case in the grand jury, doubling down on evidence they fabricated to fit the only suspect they meaningfully investigated.

First, law enforcement secured the cooperation of witnesses to alter their recitation of events to better fit the quest to prosecute Calvin. On or about January 29, 2002, for example, attorney Robert Miller had told the State Police that when Michele went missing, the divorce trial was *not* imminent. The case had been "halted" and he "didn't think he was going to be ready for the October 2001 trial date that … Judge Mulvey had set." *See* A1699. Indeed, as law enforcement knew from Ms. Thayer, Michele and Calvin's cantankerous relationship had "actually

calmed down over the course of the summer, … the arguments ha[d] diminished, … the two were getting along and … Michele … was looking forward to settling this and moving on." *See* A1823 (confirming). *See also* A1551 (Michele's friend, too, believed the case would soon settle). Yet by 2005, District Attorney Keene and Senior Investigator Mulvey had fashioned a "motive" that Calvin murdered Michele to avoid an imminent trial. *See* A1819 ("that divorce proceeding was an integral part of what [the District Attorney] used to argue … to … two juries … that Mr. Harris had a motive to kill his wife and that … things were heating up for him …. And the part integral to that argument was that there was actually going to be a trial in October just six weeks from when Michele went missing") (answering, "Yes"). So they had their grand jury witness, attorney Miller in 2005 and a paralegal in 2007, provide them with altered testimony to fit this narrative: "We actually had a trial date set," Miller reported to the grand jurors, and "we were in the time frame where we would be prepared and ready to try the case from a financial standpoint." *See* A1156 at 30.[2]

A similarly manufactured rendition was secured from Michele's hairdresser, Mr. Wilczysnki. Unlike his September 25, 2001, description to law enforcement

[2] Attorney Miller died before the 2007 indictment, and thus law enforcement secured similar testimony from a replacement witness. *See* A1056, at 22 (drawing out testimony that trial was scheduled for October 22, 2001).

about the call he overheard between Calvin and Michele, during which Calvin boasted that he would exert financial pressure on Michele and keep custody of their children (A2184), by 2007 Ms. Mulvey had co-opted Wilczysnki to provide an altered version of this call in which Calvin made a threat to harm Michele physically and "make her disappear." *See* A1124 at 301. Indeed, after having given two statements to officers other than Mulvey making no mention whatsoever of this threat, Wilczysnki then spoke with Senior Investigator Mulvey once, and the changed rendition was secured on the spot. *See* A1505. In turn, this fabricated version is what was elicited in the grand jury -- not Wilczysnki original statements in which no violence was alleged at all. *See* A1874-75 ("I don't make it a practice to impeach my own witnesses").

Beyond the circumstances of the Harris divorce, law enforcement also contrived the circumstances surrounding Michele's disappearance. As the State Police and District Attorney knew from a detailed September 16, 2001, statement from Ms. Thayer, she had not placed a 7:15am phone call to Michele from the Harris family household on September 12, 2001. *See* A1963-67 (making no mention of such a call). Indeed, she had taken no credit for this call on her statement from September 16, and affirmatively denied making the call in sworn testimony. *See* A2073-74. This was logical, as the defendants knew, because she had placed a phone call from her own house at 7:08am (A2036-37; A1345), which, given the

distances, road conditions, and the search through the van at the foot of the Harris driveway, rendered it impossible for her to have made a phone call from inside the Harris residence only seven minutes later. *See* A2038 (describing walk from home to car and 4 to 4.5 minute drive; A2044-45 (stopping at foot of driveway to inspect van); A2050-51 (driving down driveway). *See also* A1319-20; A1852-54; A1965.

Nevertheless, the existence of this call was extremely strong exculpatory evidence for Calvin -- because if he had killed Michele, there would be no reason to call her; and if the only purpose of the call was to create a false impression that he was worried, then he would leave a concerned message and then highlight the call to the police -- which, significantly, he did not do. *See* A1848 (District Attorney Keene conceding this point). So Senior Investigator Mulvey persuaded Ms. Thayer to take credit for the call: after regular communications with Mulvey (A2141-43; A1655-56), by the time Ms. Thayer testified in the grand jury in 2005 and 2007, she changed her account, claiming to have made the call. *See* A1064 at 56 ("I called thinking maybe she was there and -- but nobody answered. I didn't leave a message…. I just called looking for her" using the phone "in the kitchen"). *See also* A1165 at 67 ("I called one time on her cell phone to try to find her" when Calvin "was not around"); A1256 at 431 (the 7:15 call has been "attributed to Barb Thayer").

Ms. Thayer agreed to lie about the disposition of Michele's belongings, too. While in her diary she had taken personal credit for having "bagged Michel[e']s clothes" in the "laundry room" (A2161; A1841), in her grand jury testimony she attributed this act to Calvin, thus bolstering law enforcement's theory that Calvin knew Michele would never return -- that, a week after she disappeared, he was "standing in the laundry room with great big cardboard boxes…." *See* A1068 at 71. *See also* A1169 ("Cal said he wanted everything of Michele's removed from the house. And he was starting to get rid of stuff himself"). Thayer's contradictory diary entries taking personal credit for this act were not presented to the grand jury. *See* A1842-43.

Beyond altering witness accounts, the State Police and District Attorney also manufactured a knowingly false explanation for microscopic stains of blood found in the family garage and entry to the kitchen. As the police and District Attorney had known since 2001, the likely source of this blood was a cut hand that Michele had sustained months before her disappearance -- leaving less than one eighth of one teaspoon of blood in the household. *See* A2288. *See also* A1305; A1308-09; A2124-2135. Indeed, the miniscule quantity of blood in the home was not only not probative, but affirmatively inconsistent with a bludgeoning or other violent murder -- especially in view of the absence of evidence that any blood had been cleaned up or removed from the scene.

Using "fluorescein," for example, the State Police had searched for presumptive blood removal in both the garage and its abutting alcove -- and then they tested anything that was presumptive blood to determine whether it was indeed blood. Yet none of the fluorescein results from the family garage or its alcove tested positive for blood. *See* A2198 ("Q So the thing that you are looking for, areas where you can't see blood, fluorescein lights it up, presumptive blood, you submit it to a lab, and all of those came back negative in the garage; correct? A Yes. And from the alcove"). *See also* A1332-33, A1349-50 ("Q They came back negative for blood, is that correct? A Yes"). The State Police also examined sink traps in the home, finding no blood (A1336-37; A2216), using tests so sensitive that they yield a positive result for blood whenever there is the equivalent of one drop of blood per one million drops of water -- a critical fact they withheld from the grand jury. *See* A1337; A2216. *See also* A1194 (implying the opposite in response to a grand juror inquiry on this exact point: "[Q] … If someone were to clean up blood …, what are the chances that there would be residue in the sink…? [A] … [I]f you dump blood down a sink and it stuck in the trap, I mean, if you run water through that sink so you get that flow of water through the trap, then you would, you know, conceivably then purge what fluid was in the trap and replace it with the fresher water"). So problematic was the theory of a "cleanup," in fact, that when the prosecution's expert

initially included the word in his expert report it was peer-reviewed and then removed. *See* A2205-06

Without any evidence to show an in-home murder either in terms of blood quantity or cleanup, Mulvey, Andersen and Keene created evidence to fill the void without regard to science or Calvin's constitutional rights. After photographs were distributed to the grand jury (A1088 at 150), and prompted by District Attorney Keene, State Police Investigator Andersen told the grand jury in 2007 that the redness of the stains in the photographs indicated recency in the blood deposits -- a powerful temporal link to Michele's disappearance, suggesting violence in the home. A1100 at 199-200 ("So, this blood appeared to me to be fresher in nature -- rather than older," characterizing certain stains as having a "vibrant red"). *See also* 1193 at 178-79 ("if you have blood that's an older stain, you get a little different coloration. … These here did not show that color change"). Yet as Senior Investigator Mulvey admitted in 2006 -- in an unaired segment of a *48 Hours* program not recovered by the defense until 2014 -- they manipulated the color of the photographs to make them appear lighter than they were:

> D.A. Keene: Doctor, another thing that they did with these photographs …, they, um, exposed and they somehow treated them, and --
> S.I. Mulvey: Exposure correction.
> D.A. Keene: What did they do, Sue?
> S.I. Mulvey: Exposure correction. They corrected the exposure.
> D.A. Keene: And it actually lightened it up.

See A2192 at 26:56 to 27:26. *See also* A1580 (admitting there should be a "second set" but claiming she does not know where it is). This enhancement of red was all done despite a scientific inability to age blood in the first place. *See* A1358 ("A It is darker. Q Appears to be older? A There, again, I can't age that, either. Q Okay. A Can't age blood").

Additionally, the State Police and District Attorney Keene attempted to reinforce the altered photographs by deploying junk science. In particular, in 2005 and 2007, Investigator Andersen testified in the grand jury about the pattern of the blood stains and why they were so small -- stating forensically that such blood spatter indicated blunt force. "When you have a blood source and you're not just dripping blood on the floor, you can have then a force applied to that blood," he said. "But when you have smaller stains than a blood drop, then … there's been a force applied to that blood to break it up into smaller droplets…." *See* A1093 at 172, 173 ("to get those circular stains of that size and of that shape on that door, you would have to have a force applied to your blood source"). *See also* A1187 at 153 ("To propel blood horizontally … and to break it from the normal blood drop size into smaller, somewhat defined as medium velocity blood stains, some force has to be applied to that blood"). Thus, twisting this miniscule amount of blood into a theory of murder required tracing these tiny droplets of blood into a theorized high velocity or high impact event -- using science that Andersen himself later admitted was "obsolete."

See A2196-97. *See also* A1334 ("Q … that could be from a variety of sources other than cleaning up, is that correct? A Well, cleanup could be one, but as you indicate, there could be other explanations for it, yes").

Indeed, "you can actually recreate these very, very, tiny stains in a number of innocent ways," like by "blood dropping into blood," "blood striking an object [rather than the other way around]" (A2196-97) (confirming), such that the ability for experts to correctly explain the provenance of bloodstain patterns approximates 25%. *See* A2202-04. *See also* A1354-55. One cannot even say that the blood stains found in the Harris residence all stemmed from the same event, or were deposited at the same time. *See* A1327; A2210. And as confirmed by prosecution-expert Henry Lee, whom Andersen met in 2006 (A2199; A2290), the trajectory of blood stains in the Harris household could have been due not to trauma but, say, a cough; flaking of the blood; or, most likely of all, the type of surface the blood was deposited on. *See* A2214-15.

As Andersen knew, the very shape of the photographed blood that he had been relying upon had been adulterated -- because the blood itself had been touched *before* it was photographed. *See, e.g.,* State Br. at 7-8 (admitting use of LMG testing before photography of the blood, where the testing involves touching the blood with a "moisten[ed] … swab"). This procedure was a clear violation of protocol, because

the pre-photograph swabbing "could alter the stain." *See* A2207 (prosecution expert Patrick Laturnus confirming, "Yes, it could").

And to close the loop, the witnesses gathered and the testimony elicited by law enforcement in the grand jury conveyed the false impression that Michele had *not* previously suffered any cuts or bleeding injuries -- an obvious and knowing falsehood, in view of the divorce papers in law enforcement's possession detailing Michele's cut hand. *See* A1061 at 42 ("Q. During the time that you knew her did you ever become aware of her receiving a cut or an injury that caused her to bleed? A. No."); A1073 at 91 ("Q. As far as a cut that would require like -- that would bleed and require stitches or bandage being on it for a period of time, did you ever observe anything like that? A. No"); A1081 ("Q Do you know if Michele had any injuries or occurrences that would have resulted in blood being left in her garage and her kitchen? A. No."). *See also* A1161 at 50; A1197 at 196; A1265 at 470.

Evidence Against Stacy Stewart Continues to Amass, but is Ignored in Lieu of the Focus on Calvin.

Despite the evidence in law enforcement's possession that Stewart was the culprit, Senior Investigator Mulvey made no follow-up to Ms. Feichner's claim -- because, she said, "we had already polygraphed him." *See* A1415. That is, she had "somebody who knew Stewart pretty well, had seen him and Michele together, indicated to [Mulvey] that Stewart had an interest in her[,] … there was some kind

of relationship[,] and she thought that he knew more about her disappearance than he was letting on," and Mulvey "didn't follow-up on him because at some point [she] th[ought] he passed a polygraph." *See* A1417 (conceding, "Yes"). Indeed, contrary to the efforts to find a link between Calvin and Michele's disappearance, Senior Investigator Mulvey's team did not even conduct a forensic examination of Stacy Stewart's car or property. *See* A2244.

After the Reversal of Two Convictions and a Hung Jury, Calvin is Acquitted.

Calvin was convicted of murder on June 7, 2007, and his conviction was thereafter vacated upon the discovery of Kevin Tubbs's account. He was convicted a second time on August 5, 2009, and this time his conviction was vacated by the New York Court of Appeals, which went on record to describe the limited nature of the direct evidence against him and the overwhelming degree of prejudice against Calvin in the community. "[T]here was no body or weapon, and the evidence against defendant was purely circumstantial," it reported. *People v. Harris*, 19 N.Y.3d 679, 686 (2012). Moreover, the court was "not unsympathetic to defendant's claim that prejudicial and inflammatory pretrial publicity saturated the community from which the jury was drawn and effectively deprived defendant of a fair trial by an impartial jury. A significantly high percentage of prospective jurors admitted to having heard about the case and nearly half had formed a preexisting opinion as to defendant's guilt or innocence." *Id.*

After being granted the extraordinary relief of a pre-trial change of venue, Calvin's third trial ended with a hung jury on May 15, 2015, and, finally, he was acquitted after a fourth trial on May 24, 2016.

After Calvin Harris Brings a Federal Civil Rights Case the Defendants Move for Summary Judgment, Which the District Court Denies.

On August 27, 2017, Calvin initiated the present civil rights action against State Police Senior Investigator Susan Mulvey, Investigator Steven Andersen, District Attorney Gerald Keene, Tioga County, civilian Barbara Thayer, and others, alleging claims of, *inter alia*, evidence-fabrication, malicious prosecution, conspiracy, and municipal liability under *Monell*. At the close of discovery, all defendants moved for summary judgment, arguing that there was insufficient evidence of wrongdoing to create a genuine dispute worthy of trial. In addition, Ms. Thayer argued that there was insufficient evidence that she was a "state actor" for federal civil rights purposes; and the individual Tioga and State defendants argued that they were, respectively, entitled to prosecutorial or qualified immunity.

On March 23, 2023, the United States District Court for the Northern District of New York (Hurd, J.) denied the motions for summary judgment as to Calvin's claims against defendants Mulvey, Andersen, Keene, Thayer and Tioga County, for evidence-fabrication, malicious prosecution, conspiracy, and *Monell*. *See Harris v. Tioga County*, 2023 WL 2604125 (N.D.N.Y. 2023). *See also* Special Appendix of

New York State Appellants ("SPA") at SPA61-63. In the process, it denied the request for immunity from Mulvey, Andersen, and Keene.

As to Mulvey and Andersen, the District Court found there to be a colorable dispute that they engaged in witness-coercion, the manipulation of photographs, and the tampering of physical evidence. *See* SPA43 ("There is … some evidence tending to show that Senior Investigator Mulvey instigated or possibly coerced witnesses into changing their stories"); *id*. ("Plaintiff has identified evidence tending to show that Investigator Andersen, with the involvement of Senior Investigator Mulvey, generated false or misleading forensic evidence related to the blood spatter … and staged misleading photographs of this forensic evidence"). The prohibition on such illegal conduct was "clearly established" and, thus, not subject to qualified immunity. SPA61. The subject of these "live disputes" was whether the defendants engaged in this coercion and fabrication, not whether it would be protected conduct. *Id*.

As to District Attorney Keene, where the central question was whether he acted in an investigative or prosecutorial capacity, the District Court recognized that the "investigative" phase of the criminal case "dragged on for four years before DA Keene even attempted to seek the first indictment." SPA48. During that time, the record evidence permitted an inference that he engaged in a series of known investigative steps, like traveling with State Police to Albany to meet with a Forensic

Unit to evaluate the need for further investigations, traveling to Boston to meet with Calvin's ex-wife, instigating witness-interviews independent from police, and, "participa[ting] in the manipulation or fabrication of material blood evidence and of certain key witness testimony." *Id*. Additionally, the record permitted an inference that Keene "participated in or directed the fabrication or manipulation of material blood evidence and engaged in or led an effort to coerce key witnesses into modifying or falsifying their stories prior to giving their testimony at grand jury or at trial." SPA60.

Between April 5 and April 19, 2023, the defendants from Tioga County and the New York State Police filed notices of appeal from the District Court's order denying summary judgment, and between October 27 and October 31, 2023, they filed their Appellants' Briefs. For the reasons set forth below, the Appellants' Briefs lack merit and the District Court's order should be affirmed.

SUMMARY OF THE ARGUMENT

After an extensive presentation of the evidence on motions for summary judgment by all of the defendants, the District Court certified for trial a variety of claims against members of the State Police, a civilian but "state actor" witness, the District Attorney, and the County of Tioga. These claims included fabrication of evidence, malicious prosecution, conspiracy, and municipal liability arising under *Monell*. In the process, the District Court denied the State and District Attorney's

requests for pre-trial immunity, because, it held, their entitlement to qualified or absolute immunity would depend upon the resolution of certain factual questions about their conduct. If a jury found that they had not engaged in the alleged conduct, or if it found that the District Attorney's conduct was performed only after probable cause had been established, then they could plausibly rest in the shadow of immunity. But, the court recognized, if a jury found that they had indeed engaged in the pre-indictment fabrications and coercions that were alleged, then neither qualified nor prosecutorial immunity would apply.

Nevertheless, the State Police and County defendants have appealed the District Court's adjudication. These appeals are procedurally and substantively flawed. Procedurally, the general rule in federal court is that a decision denying summary judgment, like the District Court's decision here, is a non-final, non-appealable, interlocutory order, over which this Court lacks jurisdiction. Because there has been no final judgment in this action, and because it does not fit within any cognizable exceptions to this rule, the appeals are procedurally dead on arrival.

Substantively, the Appellants' pleas for reversal are, in any event, unfounded. The most notable quality of both of the Appellants' briefs, and the responsive brief here, is that they require a highly detailed factual analysis of the evidence in the record. This very exercise of parsing the meaning behind admissions, statements,

timelines, and other evidence, yields a discussion that is less attuned to a legal dispute or interlocutory appeal than to a closing statement after trial.

As set forth below, the evidence in the record gives rise to a long series of factual disputes about the conduct undertaken by the appealing (and non-appealing) parties, including whether they fabricated critical photographs of blood to make the blood appear lighter and thus allegedly fresher; why multiple witnesses all changed their narratives of events after speaking with the head of the homicide investigation, Ms. Mulvey, to make demonstrably false but incriminating allegations about Calvin; why the State Police used science they later acknowledged to be "obsolete" in building the alleged picture of probable cause against Calvin; whether they intentionally altered the shape of blood before photographing it; and whether the District Attorney, whose wife was a litigation adversary of Calvin's in divorce court, and who took multiple investigative steps in the four-year-long odyssey between Michele Harris's death and the decision to indict Calvin, participated in joint action with the State Police and Barbara Thayer to "solve" an open case by prosecuting someone -- rather than waiting longer to prosecute the right person.

Nearly twenty-five years since Michele went missing, nearly twenty years since he was first indicted, and nearly ten years since he was acquitted, Calvin seeks his day in court for the extraordinary damages he suffered by virtue of the demonstrably false and fabricated charges that he murdered the mother of his four

children. After an extensive discussion of the record evidence, the District Court denied defendants' motions for summary judgment, allowing the case to proceed to trial. Now, we respectfully request that defendants' appeals be dismissed or denied so that Calvin Harris can finally have his day in court.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER THE PRESENT APPEAL.

An "order that denies summary judgment cannot by itself be the basis for an appeal, since it is nonfinal." *See Hemmings v. Norko*, 181 F.3d 82 (2d Cir. 1999); *Demonchaux v. Unitedhealthcare Oxford*, 2014 WL 1273772 at *2 (S.D.N.Y. 2014) ("district court's denial of a motion for summary judgment is generally a non-appealable interlocutory order"). *See also Kamerling v. Massanari*, 295 F.3d 206, 212-13 (2d Cir. 2002) ("Our appellate jurisdiction is limited generally to appeals from final judgments of the district courts," and a "judgment is not considered final unless it disposes of all claims against all parties and ends the litigation on the merits, leaving nothing for the court to do but execute the judgment") (internal references and ellipses omitted).

While a narrow exception for appealability exists in cases involving the denial of qualified or absolute immunity, this exception is only available when "the rejection turned on an issue of law." *See Shmueli v. City of New York*, 424 F.3d 231, 236 (2d Cir. 2005). *See also Bernard v. County of Suffolk*, 356 F.3d 495, 501-02 (2d Cir. 2004); *NAACP v. E. Ramapo Cent. School Dist.*, 2019 WL 11583374, at *2 (S.D.N.Y. 2019) (the exception is limited to cases "where the decision turns on a pure question of law").

This "pure law" rule illuminates the legal defect with the pre-judgment appeals here: "Where the district court has denied summary judgment because resolution of the immunity defense requires the adjudication of issues of fact that are inseparable from the merits," as here, "the denial is not immediately appealable." *Jackson v. Johnson*¸13 F. Appx 51, 52 (2d Cir. 2001). Consequently, where "the district court [has] explicitly found that disputed issues of material fact preclude resolution of the immunity defense … [the Circuit Courts] do not have jurisdiction to consider the defendants' []appeals." *Rodriguez v. Anderson*, 633 F. Appx. 7, 11 (2d Cir. 2015).

Applied here, the appeals should be dismissed as premature because the immunity defenses rely for their adjudication on factual questions that are "inseparable from the merits." *Jackson v. Johnson*, 13 F. Appx at 52. As revealed by the Appellants' briefs and the discussion of the claims below, the District Court's adjudication of the summary judgment motions required a highly fact-intensive review of the case that cannot be unwound without implicating the factual inferences that the court drew within its adjudication.

Each Appellant underscores this problem, in fact, by relying extensively on flat denials that they committed wrongdoing or by rejecting the inferences that the District Court drew in Calvin's favor -- precisely the type of fact-intensive defenses for which an interlocutory appeal is not appropriate. These types of denials appear

repeatedly in the arguments of the State Appellants. *See, e.g.,* Brief of New York State Appellants ("State Br.") at 39 ("Andersen did not rely on 'obsolete' science"); 40 ("Andersen's testimony shows that only *uncorrected* photos were used," and Mulvey's admission to the contrary is merely "a stray statement"); 43 ("Andersen was commenting not on the bloodstain photographs, but instead on his own personal observation of blood"); 45 ("Andersen's presumptive testing would not have made the blood appear 'spattered' in 'horizontal' droplets"); 46 ("there is simply no evidence that Mulvey coerced or attempted to coerce any witness testimony"); 50 ("the district court was simply wrong to conclude that the record supports an inference that Mulvey forced Thayer to 'change her story about the fate of Michele's clothing,'" and "any minor variations in the accounts are not material"); 50 ("there is simply no evidence [that] … Mulvey coerced Thayer to take responsibility for the phone call"). And they form a steady theme within the arguments of the Tioga Appellants as well. *See, e.g.,* Brief of Tioga County Appellants ("Tioga Br.") at 33 ("Keene did not fabricate evidence or testimony"); 34 ("DA Keene was simply following the facts" and "doing his job as the people elected him to do"); 36 ("the photographs that plaintiff complains about were never used to indict"); 38-39 (the witness tampering "has nothing to do with DA Keene"); 41 ("Keene did not fabricate blood evidence or photographs"); 45 ("plaintiff's arguments about … tampered … witnesses ha[ve] nothing to do with Keene" and "[t]here were no enhanced

photographs used in the prosecution"); 50 ("He did not fabricate evidence. He simply inquired about obtaining photographs that were of better quality"); 51 ("The evidence shows that Keene did not coerce any witnesses"). The nature and substance of defendants' arguments before this Court clearly and starkly refutes their contentions that this appeal involves purely a question of law.

Nevertheless, the State Appellants hope to circumvent this jurisdictional problem by resorting to the principle that, on appellate review, courts need not rely upon factual findings that are "blatantly contradicted by the record" -- language they adopt from the Supreme Court's analysis in *Scott v. Harris*, 550 U.S. 372, 379 (2007). But *Scott* is not germane to this case and, actually, refutes rather than furthers Appellants' arguments.

In *Scott,* factual allegations about a high-speed chase were belied by uncontested video evidence of what transpired. Thus, because the court could evaluate the circumstances surrounding the chase on its own by watching the video, it was not appropriate for it to rely upon contentions or findings about that chase that the video "blatantly contradicted." *Id*. at 378-80.

As this Court has described the *Scott* rule, it emerges in only "rare cases." *Barrows v. Brinker Restaurant Corp.*, 36 F.4th 45, 51 (2d Cir. 2022). To be activated, it requires a "'version of events … so utterly discredited by the record that no reasonable jury could have believed it, constituting 'visible fiction.'" *Vette v. K-9*

Unit Deputy Sanders, 989 F.3d 1154, 1164 (10th Cir. 2021) (quoting *Scott* at 380-81). This narrow view of *Scott* is shared by *Wysong v. City of Health*, 260 Fed. Appx 848, 853-54 (6th Cir. 2008) -- cited by the Appellants[3] -- and has been recognized as the "outer limit" of summary judgment reviewability, reserved only for cases where "a district court makes a 'blatant and demonstrable error.'" *Landis v. Phalen*, 297 Fed. Appx. 400, 403 (6th Cir. 2008) (internal references omitted).

This doctrine is plainly inapplicable here. Here, there is no undisputed and incontrovertible evidence -- like *Scott*'s video -- that clearly demonstrates that the District Court's findings were inaccurate. To the contrary, as detailed below, in every area of factual dispute cited by the Appellants, the District Court's adjudication contains firm anchors in the record, any one of which is sufficient to sustain the District Court's decision to deny summary judgment. Accordingly, the present appeals are premature and should be dismissed.

[3] See State Br. at 30.

II. THE DISTRICT COURT'S ORDER DENYING SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY IS SUPPORTED BY THE RECORD; THUS, THE APPEAL SHOULD BE DISMISSED OR THE DECISION AFFIRMED.

For purposes of civil rights claims arising under Section 1983 of Title 42, "[q]ualified immunity shields government officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Zellner v. Summerlin*, 494 F.3d 152, 155 (2d Cir. 2007). In certain close cases, showing that the constitutional line was "clearly established" can require relevant case law to prove the point; but "in an obvious case, [general standards of law] can 'clearly establish' the answer, even without a body of relevant case law." *Rivas-Villegas v. Cortesluna*, 2021 WL 4822662, at *2 (2021).

However, on summary judgment, these qualified immunity standards must be evaluated through a construction of the facts that gives the non-movant the benefit of every favorable inference. *See, e.g., Simons v. Fitzgerald*, 287 Fed. Appx. 924 (2d Cir. 2008) (denying qualified immunity at summary judgment, noting "the facts we must assume to be true"); *Annan v. City of New York Police Dept.*, 2015 WL 5552271, at *7 (E.D.N.Y. 2015) (citing case law "vacating district court's award of summary judgment on qualified immunity, in part, because district court failed to view the record in the light most favorable to the nonmoving party"). After all,

"summary judgment on qualified immunity grounds is not appropriate when there are facts in dispute that are material…." *Pal v. Cipolla*, 2022 WL 766417, at *3 (2d Cir. 2022).

Granting Calvin all favorable inferences, as required, this case erected both types of bridges above qualified immunity: an "obvious" violation of Calvin's constitutional rights, and relevant case law showing that the constitutional line crossed by him was "clearly established."

In particular, this Court "has made clear that the fabrication of evidence by police officers and forwarding of such evidence to prosecutors is actionable under Section 1983 and would not be protected by qualified immunity." *See Blake v. Race*, 487 F. Supp.2d 187, 216 (E.D.N.Y. 2007) (citing *Ricciuti v. NYC Trans. Auth.*, 124 F.3d 123, 130 (2d Cir. 1997). *See also Zahrey v. Coffey*, 221 F.3d 342, 355 (2d Cir. 2000) ("It is firmly established that a constitutional right exists not to be deprived of liberty on the basis of false evidence fabricated by a government officer"). This point is not just settled, but "obvious," for if an officer believed there was probable cause to effectuate an arrest and prosecution then there would be no reason to fabricate evidence in the first place. *Bailey v. City of New York*, 79 F. Supp.3d 424, 449 (E.D.N.Y. 2015) ("it would be objectively unreasonable for an officer to believe he [or she] had probable cause to arrest … if the officer himself [or herself] fabricated the grounds for arrest").

As set forth herein, this case involved a suffocating array of law enforcement improprieties, spanning over ten years, two indictments, and four trials, with only one person relentlessly investigated for a tragic murder, despite the existence of compelling evidence implicating other suspects. If a jury agrees that the defendants engaged in the wrongdoing set forth in these papers, defendants will clearly not be entitled to the shelters of qualified immunity. For this reason, and pursuant to the analyses set forth more fully below, the District Court's order denying summary judgment on the basis of qualified immunity should be affirmed.

A. The District Court's Adjudication of the Evidence-Fabrication Claim is Supported by the Record.

"To succeed on a fabricated-evidence claim, a plaintiff must establish that an (1) investigating official (2) fabricated information (3) that [was] likely to influence a jury's verdict, (4) forwarded that information to prosecutors, and (5) the plaintiff suffered a deprivation of life, liberty, or property as a result." *Barnes v. City of New York*, 68 F.4th 123, 128 (2d Cir. 2023) (internal references and brackets omitted). *See also Garnett v. Undercover Officer C0039*, 838 F.3d 265, 278-79 (2d Cir. 2016).

The State and Tioga Appellants seek reversal of the District Court's decision sustaining this cause of action beyond summary judgment. The State argues that the record "blatantly contradicts" the prospect of fabrication, and Tioga argues both that the evidence does not support the claim against District Attorney Keene and that in any event he is protected by absolute immunity. *See* State Br. at 38-56, 60-62; Tioga

Br. at 35-40. What follows is a discussion of how the evidence in the record supports the District Court's conclusion about the existence of evidence-fabrication against the State Appellants. The relationship between that evidence and District Attorney Keene's plea for absolute immunity is then addressed in a standalone section of this brief at Section V.

1. The Evidence-Fabrication Claim against the State Defendants Raises Questions of Fact, not Law.

Appellants argue that the evidence-fabrication claim is so clearly belied by the record that it triggers a viable interlocutory appeal and reversal. As set forth below, this argument is mistaken.

In the context of evidence-fabrication claims, "fabricated" evidence includes both "made up evidence and misleading evidence." *Morse v. Fusto*, 2013 WL 4647603, at *8 (E.D.N.Y. 2013) (explaining, "evidence that has been materially altered or evidence from which material information has been omitted can be equally as 'false' as evidence that has simply been made up"), *aff'd*, 804 F.3d 538 (2d Cir. 2015). Under this rubric, the record evidence in this case creates an inference of several different instances of fabrication by the State Appellants. This includes the fabrication of photographs of blood, which were manipulated to enhance the redness of blood to make it appear new; the use of junk science to make sense of those doctored photographs; adulteration of the blood itself before it was photographed, whose shape was then relied upon to indicate blunt force; and the tampering of

several witnesses, whose accounts were then relied upon in the grand jury and at trial.

i. Appellants Lack a Viable Interlocutory Appeal to Contest the District Court's Findings Concerning Fabrication of Photographs.

One of the District Court's central reasons for denying summary judgment in this case is that record evidence permitted an inference that the State Appellants doctored photographs of small dark stains in the Harris garage and kitchen by enhancing them to appear more red, and then, with the District Attorney, relied upon the blood's redness to suggest that it was fresh, thus supporting criminal culpability. *See* SPA22. Contrary to the notion that the record contradicted this finding, the record supports precisely this inference: in his own grand jury testimony, Appellant Andersen testified about the "color of the blood stains" in the "photographs," noting that they "were still very red" with "like a vibrant red color to them" (*see* A1100 at 199-200), when, in reality, as Investigator Mulvey confirmed on a recorded video, that very hue in the photographs had been manually "lightened … up." *See* A2290 at 26:56 to 27:26.

The District Court noted this fact in adjudicating the State Appellants' summary judgment motion. *See* SPA22, 53. The notion that this finding was "blatantly contradicted by the record" (State Br. at 42) is thus ironic, because this

case, like *Scott*, does indeed include video evidence -- but it is video evidence that supports the Plaintiff's claim that evidence was doctored.

Characterizing the video admission as a "stray statement," *see* State Br. at 40, the State Appellants nevertheless argue that any altered photographs of blood were not used in the grand jury or at trial (State Br. at 40-41), that Andersen's leveraging of the blood's color was based upon his personal observations rather than the photographs (State Br. at 43), and that the record contains ample denials of wrongdoing (State Br. at 41-42). But the weakness of these defenses is readily apparent from other record evidence or from the face of the defense itself.

Initially, the single set of photographs at issue actually still had affixed to them the grand jury evidence stickers, thus clearly indicating that they are the ones that had been used in the grand jury and, subsequently, at trial. Indeed, if there had been two versions of the photographs and only one was used before the juries, then there should have been a second set available for production to prove this critical point. Yet no second set was produced, and Investigator Mulvey does not know where it is. *See* A1580 ("Q Where is the second set? [*objection*] A I don't know"); A1044 at ¶54. Indeed, if there truly had been a second and unadulterated version of the photographs shown to the juries, then one wonders why the State Appellants would have mentioned the adulterated set to their expert Henry Lee[4] at all.

[4] *See* A2290 at 26:56 -- 27:26 (videoed admission of altered photograph to expert).

Second, the notion that Andersen was testifying about "his own personal observation of the blood" and "not on the bloodstain photographs" is, again, grossly at odds with the record and not a viable basis for interlocutory reversal. In truth, Andersen was asked in the grand jury what he could tell about the blood's color, and in highlighting its "vibrant red color" his very first words were as follows: "As you noted in the photographs" (A1100 at 199). Making matters worse, by this point the photographs had been "pass[ed] … around" to the grand jurors for them to follow along with his testimony. *See* A1088 at 150. And with Andersen explicitly referencing those photographs, he distinguished blood of such a "vibrant red color" from blood "of a darker reddish, and the maybe almost a brownish color"; "this blood," he told the grand jurors, "appeared to me to be fresher in nature rather than … older." *See* A1100 at 199. What is blatantly contradicted by the record, then, is not the District Court's analysis of the evidence. It is the State's defense about its use of doctored photographs.

Third, to prove that the District Court's analysis of the photographs was belied by the record, the State cites Andersen and Mulvey's own denials of wrongdoing. *See* State Br. at 41-42. Yet this is clearly short of the "rare" "outer limit" type of evidence that "so utterly discredit[s]" a District Court's findings so as to permit interlocutory review. Instead, it falls within a sensible doctrine that finds self-serving denials of wrongdoing to constitute evidence that is particularly weak -- even

on appeals outside of the interlocutory setting. *See, e.g., Cornell University v. UAW Local 2300*, 942 F.2d 138, 141 (2d Cir. 1991) ("The union's conclusory self-serving averment does not create a genuine issue of material and specific fact necessary to avoid having summary judgment entered").

Ultimately, the State Appellants' defense in this case hinges upon a factual dispute over why they admitted to "lighten[ing]" the photographs of the blood, why they then relied upon that lighting to build a murder case against Mr. Harris, and -- apparently -- whether there is a second unadulterated set of photographs that the State Appellants claim existed and were used. The State can try to answer those questions at a trial, but, as the District Court held, not on motion practice to avoid one.

ii. Appellants Lack a Viable Interlocutory Appeal to Contest the District Court's Findings Concerning the Use of Junk Science.

In adjudicating the State Appellants' motion for summary judgment, the District Court noted that the scheme to fabricate the case against Calvin involved, among other things, a reliance upon "obsolete" science concerning the ability to attribute blood stains to blunt force trauma. *See* SPA22-23. And it highlighted that law enforcement not only doctored the photographs of blood to make them appear more red, and thus fresh, but that science had long done away with the notion that blood's color allowed its age to be discerned in the first place. In evaluating the

tranches upon tranches of fabrications in issue here, the District Court rightly noted these additional components of Calvin's evidence-fabrication claims. *See* SPA22.

Here on interlocutory appeal, the State Appellants claim that the District Court's notation of this junk science was contradicted by the record. "[I]n finding that Andersen testified that the bloodstain pattern was caused by 'blunt force trauma,' the court put words in Andersen's mouth that he never uttered," they claim. *See* State Br. at 40. Yet, once again, this argument is not up to the task of securing an interlocutory reversal, and is, instead, belied by evidence in the record.

First, while Andersen was not qualified to use the verbiage of 'blunt force trauma,' this focus on verbiage is a diversion -- for the heartbeat of the case against Calvin Harris rested upon Andersen's claim that the tiny blood spatter in the Harris home must have come from "force." The record amply demonstrated the State's attempt to link the blood's shape and size to this use of "force." *See* A1093-94 at 172-73. "When you have a blood source and you're not just dripping blood on the floor, you can have then a *force* applied to that blood," testified Andersen (emphasis added). "But when you have smaller stains than a blood drop, then … there's been a *force* applied to that blood to break it up into smaller droplets…." *Id*. (emphasis added) ("to get those circular stains of that size and of that shape on that door, you

would have to have a force applied to your blood source").[5] Yet despite the clearly inculpatory nature of this claim -- that the existence of tiny blood spatter in the Harris home indicated force rather than innocent cuts or bruises -- Andersen later admitted under the pressure of trial cross-examination that this claim required the use of science that was "obsolete." *See* A2196-97.

The State now argues that the District Court simply misunderstood what Andersen meant by "obsolete." What was obsolete was the "terminology being utilized," the State claims, not the "physical science" he was perpetrating. *See* State Br. at 39. But again this defense is refuted by the record. It is true that the terminology that once existed had become obsolete terminology like "high velocity, medium velocity, medium impact, things like that" (A2196). But the reason it had become obsolete was not because of changed attitudes to verbiage; it had become obsolete because, in reality, science could not draw a reliable link between force and blood shapes or sizes -- such that the terminology "no longer had any real *application*." *See* A2197-98 (emphasis added).

Indeed, "you can actually recreate these very, very, tiny stains in a number of innocent ways," like by "blood dropping into blood," "blood striking an object [rather than the other way around]" (A1334) (confirming), such that the ability for

[5] *See also* A1187 at 153 ("To propel blood horizontally … and to break it from the normal blood drop size into smaller, somewhat defined as medium velocity blood stains, some force has to be applied to that blood").

experts to correctly explain the provenance of bloodstain patterns approximates only 25% in a four-option multiple choice test -- in other words, statistically equal to the probability of a random guess. *See* A2202-04. In fact, one cannot even say that the blood stains found in the Harris residence all stemmed from the same event. *See* A2210. And as confirmed by prosecution-expert Henry Lee, whom Andersen met before the 2007 indictment (A2199), the trajectory of blood stains in the Harris household could have been due not to trauma but, say, a cough, flaking of the blood, or, most likely of all, the type of surface the blood was deposited on. *See* A2214-15.

Far from a nominal point about verbiage, what this shows is that the case brought to bear against Calvin -- the fifteen years of litigation, the four trials, and the unimaginable heartache and stress -- had been built upon a claim about inculpatory blood shapes that was utter nonsense.

Second, the record confirms that the State Appellants built their case against Calvin on yet another layer of junk science -- that only fresh blood is red -- notwithstanding the fact that, in reality, it is impossible to date blood based on its color. *Compare, e.g.,* A1100 at 199-200 (Andersen testifying in the grand jury: "As you noted in the photographs, the color of the blood stains that we were observing and documenting, … were still very red. … In my experience … and in the blood training courses that I went to, as the blood sits there, dries and then starts to age,

you note that the color of that blood starts to change") *with* A1358 ("Can't age blood").

Thus, here too, Appellants have failed to show that the District Court's findings about their use of junk science to fabricate their case was built on a "'version of events … so utterly discredited by the record that no reasonable jury could have believed it, constituting 'visible fiction.'" *Vette*, 989 F.3d 1154, 1164 (10th Cir. 2021) (quoting *Scott* at 380-81). To the contrary, this version of events is well supported in the record by virtue of expert testimony and the words of the Appellant witnesses themselves. The District Court's decision in this regard should, therefore, be affirmed.

iii. Appellants Lack a Viable Interlocutory Appeal to Contest the District Court's Findings Concerning the Adulteration of Blood.

Beyond altering the color of the photographs of the blood, the State Appellants also manipulated the blood itself before claiming that the droplets' shape was incriminating. As the State acknowledges here, Appellant Andersen engaged in a process that involved touching the blood with a "moisten[ed] … swab" *before* photographing it to memorialize its shape. *See* State Br. at 44-45. The State Appellants claim that the record contradicts the contention that their behavior violated protocol. *Id.* at 45. But the prosecution's own expert at Calvin's murder trial said otherwise. *See* A2207 ("Q … it would not be correct protocol, would it, to

take a damp cotton swab and rub it on a stain before you photographed it? A It would not. Q Because that could alter the stain, could it not? A Yes, it could. Q Especially minute submillimeter stains such as we have in this case; correct? A Yes") (testimony of expert Patrick Laturnus).

Once again, then, the State has the right to raise factual disputes of this nature at trial -- to claim here, for example, that it engaged in the pre-photograph touching of the blood in good faith rather than bad faith. But these are factual defenses for trial, not motion defenses for summary judgment -- where all inferences must be construed against the movant. *See, e.g., R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 58 (2d Cir. 1997). The State has clearly not demonstrated that the District Court's findings in this regard are akin to the video-evidence from *Scott* showing "blatant contradiction" or "visible fiction." What they have demonstrated through their continued focus on these factual disputes is that they are "inseparable from the merits" -- confirming that summary judgment's "denial is not immediately appealable." *Jackson v. Johnson*¸13 F. Appx 51, 52 (2d Cir. 2001).

iv. Appellants Lack a Viable Interlocutory Appeal to Contest the District Court's Findings Concerning Manipulation of Witnesses.

The District Court found sufficient evidence in the record to infer at summary judgment that Investigator Mulvey had coerced Barbara Thayer and Jerome Wilczynski into altering their witness accounts in order to be more inculpatory

against Mr. Harris. With regard to Ms. Thayer, two points were notable: one, after repeated conversations with Mulvey, Thayer changed her rendition of events in order to take credit for a phone call to Michele's phone on the morning she was discovered missing, which, if not made by her, would have been highly exculpatory for Calvin (SPA21); and two, after speaking with Mulvey, Ms. Thayer accused Calvin of coldly bagging up Michele's belongings shortly after her death when, in reality, Ms. Thayer admitted in her personal diary that she had suggested a tag sale and selected and bagged the items herself. *See* SPA21.

A similar phenomenon occurred after Mulvey spoke with Jerome Wilczynski, the District Court recognized. While he had given two prior statements to other members of the State Police, immediately after speaking with Mulvey he now made a new claim of overhearing Calvin make physical threats of violence against Michele. *See* SPA20. Through three unrelated but explosive narrative-changes, there was one and only one common thread: Investigator Mulvey.

Nevertheless, the State Appellants argue that there is "simply no evidence that Mulvey coerced or attempted to coerce any witness testimony…." *See* State Br. at 46-47. She did not coerce Ms. Thayer to blame Calvin for bagging Michele's clothes, they say, because Ms. Thayer's admission that she herself had bagged the clothes was not discovered until "nearly four years into the investigation." *See* State Br. at 48. As for taking credit for the exculpatory phone call to Michele's phone,

they contend, "there were very few people who could have made the call," Calvin had said "that he did not 'call anybody' to attempt to locate Michele that morning," so the "State Police reasonably believed plaintiff did not make that phone call." *See* State Br. at 51. And with regard to Mr. Wilczynski, the State says, he gave the changed narrative to someone different from Mulvey -- proving it was not Mulvey behind the alteration. *See* State Br. at 53.

As set forth below, these arguments suffer basic fundamental flaws, both individually and in tandem.

First, the operative question about Ms. Thayer's diary is not when Investigator Mulvey *discovered* the entry. It is when Ms. Thayer *made* the entry -- for that is the material timeline for gauging whether it was a true and contemporaneous rendition of events or one that was subject to outside pressure. Ms. Thayer made the diary entry on September 20, 2001 -- the same month that Michele went missing, and contemporaneous with her own act of bagging up Michele's clothes. *See* S2161-62 (showing admission to bagging clothes on "Thurs," followed by the next page with a marker of "Fri—21st"). It was not until three days *after* she made this private admission that she met with Mulvey and was thereafter blaming the bagging on Calvin. *See* State Br. at 48 (citing "September 23, 2001, Interview with Thayer").

Second, the same pattern followed Ms. Thayer's dealings with Mulvey concerning the exculpatory phone call. Before Thayer came into the home and

reported Michele's van on the road at the bottom of the driveway, Calvin had called Michele that morning and did not leave a message, which was a very powerful indicator of his innocence -- for there would have been no valid reason for him to call her if he had killed her, and "if Cal had killed her and he was calling as some kind of fake alibi, you would [have] expect[ed] him to leave … a message like, Michele where are you or I'm worried or something like that" -- a point to which the District Attorney himself agreed. *See* A1848 (Keene agreeing, "Yes"). The State argues that it "reasonably believed" this call was made by Thayer because Calvin said he did not "call anybody" that morning. State Br. at 51. But this strains credulity: Thayer too had taken no credit for this call on her statement from September 16, and, worse, affirmatively denied making the call in sworn testimony. *See, e.g.,* A2073, A2074 ("Q Did you give these answers to these questions at Mr. Harris' first trial-- … Q Mrs. Thayer … [y]ou did not make a phone call from the Harris residence to Michele Harris' cell phone between 7:13am and 7:15am on September 12th would you agree with that statement? Answer: I'll have to say yes. A Correct"); A2079 (same). *See also* A1963-67; A2949-59; A2071-72 (not mentioning call). And as Mulvey knew, the notion that Thayer made the phone call was preposterous -- for she had placed a phone call from her own house at 7:08am (A1345; A2036-37; A1345), which, given the distances, road conditions, and the search through the van at the foot of the Harris driveway, rendered it impossible for

her to have made a phone call from inside the Harris residence only seven minutes later. *See* A2038 (describing walk from home to car and 4 to 4.5 minute drive; A2044-45 (stopping at foot of driveway to inspect van); A2050-51 (driving down driveway). *See also* A1319-20; A1852-54; A1965.

Third, the same pattern followed again after Mr. Wilczynski's innocuous report changed to an incriminating one immediately after Mulvey spoke to him. The notion now advanced by Appellants, that Mr. Wilczynski made his false report to someone other than Mulvey, is belied by the record -- including by Mulvey's own sworn testimony:

> Q And during this phone conversation with you is the first time he indicates a threat about Michele; is that right?
>
> [*objection*]
>
> A Yes.

See A1505. *See also* SA650-51 (showing entry by "Mulvey" dated October 12, 2005, in which Wilczynski makes allegation of threat).

Fourth, the State's argument ignores the motive that Mulvey had to target Mr. Harris -- namely, that he had employed, and then fired, her father. *See* A1385-86. And it ignores the variety of other strange behaviors that Mulvey undertook against Mr. Harris during the years-long investigation that targeted him at the expense of other viable suspects, like flying a helicopter low over his property and attempting

to incite suspicious or incriminating behavior by harassing him and his children at the airport. *See* A1434, 1442-44.

Certainly, the defense can argue at trial that it was simple coincidence that both Ms. Thayer and Mr. Wilczynski changed their narratives of events after speaking with Investigator Mulvey on three independent and critical points, but her wrongdoing in this regard was a fair inference from a summary judgment posture requiring that all inferences be construed in Calvin's favor. And it was certainly supported by the evidence in the record.

* * *

Thus, for all the reasons discussed above, with respect to the evidence-fabrication claim, the interlocutory appeal lacks merit, and either the appeal should be dismissed for a lack of jurisdiction at this stage, or, alternatively, the District Court's decision denying summary judgment should be affirmed.

B. The District Court's Adjudication of the Malicious Prosecution Claim is Supported by the Record.

A malicious prosecution claim requires a plaintiff to establish "(1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions." *Jocks v. Tavernier*, 316 F.3d 128, 136 (2d Cir. 2003). *See also Boyd v. City of New York*, 336 F.3d 72, 75 (2d Cir. 2003) ("the analysis of the state and the federal claims is

identical"). In addition, for a federal §1983 claim, "there must be a post-arraignment seizure…; however, the requirements of attending criminal proceedings and obeying the conditions of bail suffice on that score." *Id*.

Here, contrary to the findings of the District Court, the defense argues that Calvin's malicious prosecution claim should have been summarily dismissed for failure to meet the essential elements of the claim. For the reasons set forth below, this argument should be rejected.

1. The Conduct of the State Police Qualifies as Initiation.

The State argues that the District Court's analysis of case-initiation was flawed,[6] but does not discuss what it means to "initiate" a case for purposes of a malicious prosecution. That is with good reason, for the standard to "initiate" a case is plainly satisfied by the evidence of pressure and fabrication in the record in this case -- as the District Court recognized. *See* SPA43-44.

"To initiate a prosecution, a defendant must do more than report the crime or give testimony. He must play an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act." *Manganiello v. City of New York*, 612 F.3d 149, 163 (2d Cir. 2010) (applying doctrine to a police officer-

[6] *See* Brief of New York State Police Appellants ("State Br.") at 35-37.

initiator). *See also Harewood v. City of New York*, 508 Fed. Appx. 60, 63 (2d Cir. 2013).

To that end, the District Court found two legal anchors to satisfy initiation in this case: one, "if a plaintiff produces evidence that the prosecutor was … pressured by the defendant police officers, the officer may be said to have initiated the proceeding;"[7] and two, police investigators can be said to have initiated a prosecution when they "fail[] to make a full and complete statement of the facts to the District Attorney or the court, or hold[] back information that might have affected the results…." *See, e.g., Rivera v. City of New York*, 148 A.D.3d 462, 463 (1st Dept. 2017) (internal references omitted). *See also Cannistraci v. Kirsopp*, 2012 WL 1801733, at *12 (N.D.N.Y. 2012).

Here, as set forth below, the record presented clear support for both initiation anchors. Nevertheless, the State argues that the District Court's findings of a genuine dispute over initiation should be reversed. As for Investigator Mulvey's pressure on District Attorney Keene, the State says, Keene did not need to be pressured in order to want to indict Calvin because he already had that desire; and, in any event, he never flatly said that he had been pressured by Ms. Mulvey or the State Police, who would have lacked authority to take over the prosecution. *See*

[7] *Campbell v. City of New York*, 2019 WL 569768, at *7 (E.D.N.Y. 2019). *See also Townes v. City of New York*, 176 F.3d 138, 147 (2d Cir. 1999).

State Br. at 35-36. And, as to the failure to make a full and complete statement of facts to the District Attorney, the State argues, the evidence in the record did not permit an inference of fabrication, which instead should have been decided as a matter of law.

These arguments do not give rise to a viable interlocutory appeal on this record.

i. The Record Supports the Finding that the State-Appellants Pressured the District Attorney to Indict.

Not only does the record support the District Court's finding that the State Police pressured the District Attorney to prosecute, but this evidence comes from the words of District Attorney Keene himself -- who confirmed that the State Police strong-armed him into pressing charges. "They indicated … that if I was not interested in presenting the case to the grand jury that in some situations [they] got authority to present cases themselves," he explained. *See* A1922. So, he wrote an apologetic e-mail to Senior Investigator Mulvey for his delays, and after years of opting against an indictment he assured her that he would proceed with one -- which

he then did. *Id.*[8, 9] The District Court correctly denied summary judgment on this basis. *See* SPA43 ("there is evidence tending to show that Senior Investigator Mulvey pressured DA Keene into presenting the case to a grand jury after four years of investigation and delays. That conclusion might be supported, in part, by DA Keene's apologetic e-mail sent after this conversation").

Contrary to the State's rendition, the question for purposes of pressure-based initiation is not whether District Attorney Keene desired to one day seek an indictment, once he felt he possessed adequate evidence. *See* State Br. at 36. The question is whether he was pressured to seek the *actual* indictment that he obtained, such that it was not the result of his independent judgment alone. *See, e.g., Dufort v. City of New York*, 874 F.3d 338, 352 (2d Cir. 2017) (inspecting whether indictment was the result of "independent judgment," focusing on whether prosecutor was "'misled or pressured' by the police").

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[8] He added a request to "have patience with me," implying his knowledge of her role in the pressure being instituted against him -- namely, that he had been pressured to bring an indictment because she had lost "patience." *See* A1920-21.

[9] None of this analysis is affected by the State Defendants' unpreserved argument that they could not have pressured District Attorney Keene to prosecute through threats to replace him because his prosecutorial authority was "nondelegable." *See* State Br. at 37. As tacitly acknowledged by the fact that the State Defendants did not press this argument before the District Court, the law surrounding prosecutorial delegation is a red-herring to whether the State Defendants made the threat in issue and whether it affected District Attorney Keene.

Indeed, the very fact that Keene showed general interest in pursuing Calvin helps solidify the cause of action rather than undermining it: *despite* his personal desires, the evidence against Calvin was so weak that it led District Attorney Keene to opt against an indictment for nearly half a decade -- for there was still no dead body, no murder weapon, and no eyewitnesses (A1471-72); and the evidence was wholly inconsistent with violence in the home, as there was only one eighth of one teaspoon of blood inside, with no traces of blood in the sink traps or other evidence of cleanup. *See* A1336-37.

The State argues that they did not pressure Keene to indict Calvin, but that argument founders on the shoals of the timeline in the record. The decision to indict Calvin was not based upon any new breakthrough in the evidence, because by the spring of 2005, no new evidence had been obtained against Calvin for several years -- as Investigator Mulvey has admitted (A1471-72). Thus, the new factor to the equation was not evidentiary, where the evidence and Keene's reluctance to proceed had stood still for years. The only new factor was the replacement-threat from State Police, which precipitated an indictment before the year was over. *See* A391 (describing apologetic email to Ms. Mulvey in May of 2005). Far from being "blatantly contradicted" by the record, then, the District Court's denial of summary judgment on this basis was a natural and logical inference from an undisputed timeline.

The record also does not "blatantly contradict" Mulvey's role in this pressure. After "they said" that in prior cases "they had picked up the ball … when district attorneys … did not want to pursue the case or couldn't pursue the case" (A394), District Attorney Keene explained, referring to the State Police, he wrote an apologetic email for his delays -- to one recipient: Investigator Mulvey. *See* A391-393. And in that email, District Attorney Keene included a plea upon which the District Court rightly seized -- to "have patience with me." *See* A391-392. This apology and plea to Mulvey implied that the District Attorney knew and understood that he had been pressured to bring an indictment because Mulvey had lost such patience with him. *See* A391-392. If Mulvey's role in this pressure was clear enough to prompt an apology from the District Attorney, it was reasonably inferable to a District Court judge tasked, on summary judgment, with construing all inferences against the State -- as the District Court correctly recognized. *See* SPA27 (recognizing that on summary judgment, a District Court must "resolve any ambiguities and draw all inferences … in a light most favorable to the nonmoving party"); SPA43 ("That conclusion might be supported, in part, by DA Keene's apologetic e-mail").

ii. The Record Supports the Finding that the State Appellants Failed to Make a Full and Complete Statement of Facts to the District Attorney.

Just as the record allowed an inference of overt pressure exerted against District Attorney Keene to indict Calvin, it also allowed an inference that the State Police submitted fabricated evidence to the District Attorney in order to secure Calvin's indictment. As set forth above, the State Appellants' contention that the District Court lacked a basis to find the existence of such fabrications is contrary to the record evidence and fails to meet the heavy burden required to sustain an interlocutory appeal. *See supra* Section II(A).

2. As the District Court Correctly Held, Probable Cause Presents Questions of Fact.

Facing almost a complete absence of evidence, except for tiny stains of blood in the home with an absence of evidence of a cleanup, the Defendant-Appellants engaged in a campaign of evidence fabrication that included the adulteration of blood evidence, the doctoring of photographs, the withholding of material exculpatory information regarding the weakness of evidence submitted for grand jury review, and the manipulation or use of multiple grand jury witnesses to replace absent or even exculpatory renditions of events with a fabricated narrative that Calvin murdered his wife.

As the District Court correctly held, this collection of evidence in the record was sufficient to overcome the default presumption of probable cause created by a grand jury indictment, for there was "evidence tending to show that Investigator Andersen, with the involvement of Senior Investigator Mulvey, generated false or misleading forensic evidence related to the blood spatter found in the house and staged misleading photographs of this forensic evidence," and as "[t]here is also evidence tending to show that the potentially exculpatory information related to the blood evidence … [including] handwritten notes about Michele cutting her hand on some ice, were withheld or suppressed." *Id*. As set forth below, this finding is not subject to a viable attack on interlocutory appeal.

i. The District Court Correctly Held that Calvin Rebutted the Presumption of Probable Cause.

"[M]alicious prosecution claims under both New York and federal law require that a plaintiff prove the defendant lacked probable cause to prosecute. Probable cause, in th[is] context…, has been described as such facts and circumstances as would lead a reasonably prudent person to believe the plaintiff guilty." *Kee v. City of New York*, 12 F.4th 150, 166-67 (2d Cir. 2021) (internal references and quotations omitted). Accordingly, while "probable cause to prosecute is a complete defense to a claim of malicious prosecution, …. [w]ith respect to the evidence, at the summary judgment stage, the district court is not permitted to make credibility determinations

or weigh the evidence on the probable cause element…, for these are jury functions, not those of a judge." *Id*. (internal references and quotations omitted).

The Appellants highlight that an indictment by a grand jury creates a presumption of probable cause. *See, e.g.,* State Br. at 56; Tioga Br. at 29. "But under New York law the presumption can be rebutted by showing that the police witnesses have not made a complete and full statement of facts either to the Grand Jury or the District Attorney, that they have misrepresented or falsified evidence, that they have withheld evidence or otherwise acted in bad faith." *Hicks v. Marchman*, 719 F. Appx. 61, 65 (2d Cir. 2018). *See also White v. Frank*, 855 F.2d 956, 961-62 (2d Cir. 1988) ("this presumption may be rebutted by proof that the defendant misrepresented, withheld, or falsified evidence").

In this regard, "[a]lthough the government has no constitutional obligation to present exculpatory material to a grand jury, New York law … strips an indictment of its presumptive force in a malicious prosecution action when the indictment was obtained through improper means." *Richards v. City of New York*, 2003 WL 21036365, at *14 (S.D.N.Y. 2003).

Here, based upon waves and waves of evidence showing law enforcement misconduct, the District Court correctly held that Calvin rebutted the presumption of probable cause attributable to his indictment. Most notably, he demonstrated that the indictment was based upon "misrepresented, withheld, or falsified evidence"

concerning the blood photographs, which Mulvey admitted had been doctored in order to enhance the redness and alleged freshness of the blood. *See supra* Section II(A)(1)(i). He demonstrated that the indictment was based upon "misrepresented, withheld, or falsified evidence" concerning the relationship between violence and blood shapes, which Andersen connected by perpetrating junk science. *See supra* Section II(A)(1)(ii). And he demonstrated that the indictment was based upon "misrepresented, withheld, or falsified evidence" concerning the blood shapes themselves, which, in violation of protocol, had been manipulated before the blood was photographed. *See supra* Section II(A)(1)(iii).

In addition, Calvin demonstrated that the indictment was based upon "misrepresented, withheld, or falsified evidence" concerning the accounts offered by multiple witnesses. After conferring with Ms. Mulvey, and contrary to multiple prior statements, Barbara Thayer agreed to take credit for a highly exculpatory phone call that would not reasonably have been made by the killer -- yet was made by Calvin. *See* Section II(A)(1)(iv). *See also* A1848 (District Attorney Keene conceding the exculpatory value of this call). And she blamed Calvin for conduct that she herself committed, as she admitted in her personal diary. *See* Section II(a)(4). *See also* A2161. Along the same lines, after conferring with Ms. Mulvey, and contrary to two prior statements to law enforcement, Jerome Wilczynski changed his narrative of events to include overhearing Calvin make threats of

violence against Michele. *See* Section II(a)(iv). *See also* A2184; A1124 at 301; A1505. And to inflate a purported "motive" for murdering Michele related to an allegedly imminent divorce trial (A1819), Robert Miller, her divorce lawyer, agreed to testify that Michele went missing right before the trial would have begun (A1156 at 30) -- even though, in reality, he "didn't think he was going to be ready for the October 2001 trial date" on the case, which was instead "halted" (A1699) and gearing to settle (A1551). *See also* SPA19-23.

The State Police and District Attorney also withheld from the grand jury a material exculpatory explanation for why blood was in the home in the first place. While District Attorney Keene's wife had learned back in 2001 about a bleeding cut to Michele's hand after she fell in the snow near the garage (A1305; A1308-09), and while notes of this injury were turned over to the State Police one day after she was reported missing, *see* A2124 (dated "9/13/01), the only testimony elicited in the grand jury about bleeding-injuries to Michele was that there was no such injury at all. *See* A1061 at 42 ("Q. During the time that you knew her did you ever become aware of her receiving a cut or an injury that caused her to bleed? A. No."); 91 ("Q. As far as a cut that would require like -- that would bleed and require stitches or bandage being on it for a period of time, did you ever observe anything like that? A. No"); 121 ("Q Do you know if Michele had any injuries or occurrences that would

have resulted in blood being left in her garage and her kitchen? A. No."). *See also* A1161 at 50; A1197 at 196; A1265 at 470.

Clearly, the point of eliciting this false no-injury testimony was to establish a process of elimination -- namely, that if the blood did not emanate from a prior injury, it must have stemmed from the murder. The existence of the injury that spoiled this premise was one of the early pieces of evidence pursued and received by law enforcement in the investigation. *See* A2124. Yet it was withheld from the grand jury in lieu of testimony falsely suggesting just the opposite.

These cascading forces of misconduct were brought to bear in the District Court's adjudication of probable cause in this case, along the way to its ultimate and correct recognition that Calvin rebutted the presumption of probable cause. *See* SPA44.

ii. The Appellants' Reliance on Fabricated Evidence is Legally Erroneous, and Their Resort to the Remaining Non-Fabricated Evidence is Factually Insufficient.

Through this interlocutory appeal, and beyond its dispute over fabricating evidence, the State argues the investigation into Calvin was warranted regardless of whether Michele had previously cut her hand in the snow and traipsed blood into the house, because there were other sources of incriminating evidence against him. In addition, the State argues, it turned over the evidence of Michele's hand injury to the

District Attorney, such that the State Police was not responsible for its non-disclosure in the grand jury anyway. *See* State Br. at 57-60.[10] In turn, the Tioga Appellants offer a similar analysis of probable cause, arguing that if the evidence was sufficient to trigger two convictions in criminal court, then it was sufficient to meet the lower threshold of probable cause for a civil defense. *See* Tioga Br. at 28-31 (noting, "There is no way not to find probable cause given the extensive basis that these courts relied upon when holding legally sufficient evidence existed for the conviction").

These arguments do not withstand scrutiny, as they misapply the record to the probable cause analysis, confuse the relationship between the grand jury and probable cause for purposes of a civil rights claim, and, ultimately, rely upon such a fact-intensive inquiry that it proves to be self-defeating on an interlocutory appeal.

First, as this Court has recognized, it "would be objectively unreasonable for [an officer] to believe he had probable cause to arrest [plaintiff] if [the officer] himself fabricated the grounds for arrest." *Scotto v. Almenas*, 143 F.3d 105, 113 (2d Cir. 1998). Indeed, in those cases where law enforcement has poisoned the well of probable cause by fabricating evidence, "the existence of probable cause based on non-fabricated evidence ceases to be a defense for the fabricator." *Richardson v.*

[10] The State Appellants also argue that the court's findings of evidence-fabrication are "wholly discredited by the record" (State Br. at 57) -- a contention addressed *supra* at Section II(A).

City of New York, 2006 WL 2792768, at *7 (E.D.N.Y. 2006) (citing and discussing *Jocks v. Tavernier*, 316 F.3d 128 [2d Cir. 2003]). *See also Mitchell v. Kugler*, 2009 WL 160798, at *10 (E.D.N.Y. 2009); *Shiller v. City of New York*, 2008 WL 200021, at *9 (S.D.N.Y. 2008).

This doctrine undermines the Appellants' interlocutory appeal here, because the thrust of their remaining probable cause argument is that it was supported by other, non-fabricated evidence. *See* State Br. at 58-59; Tioga Br. at 30-31. If the Appellants truly believed that the non-fabricated evidence established the probable cause that their case needed, they would not have resorted to the illegal fabrications in the first place. *Scotto*, 143 F.3d at 113.

Yet that is precisely what took place here: without a dead body, murder weapon, or eyewitness, and with only one eighth of one teaspoon of blood in the home (A2288), without evidence of a cleanup, including not a single trace of blood in the sink traps or mop (A1336-37; A2216), and with an exculpatory explanation for the blood (A1305; A1308-09) -- there was no evidence to suspect that a murder had taken place in the Harris family home, and instead the evidence introduced against him was schematically designed to gloss over these absences, through fabricated photographs, manipulated blood, junk science, and false innuendos that Michele had never been injured. In the face of such widespread fabrication, and the

hiding of such a variety of exculpatory evidence, claiming probable cause is "objectively unreasonable." *Scotto*, 143 F.3d at 113.

Second, largely ignoring or simply denying the waves of fabrication that marked the evidence brought to bear against Calvin to shore up the investigative deficits, the Appellants argue that a "mountain of circumstantial evidence," or a "treasure trove" of evidence, supports the claimed existence of probable cause to prosecute him for murder. *See* State Br. at 65; Tioga Br. at 31. Yet after an extraordinary attempt by the State Police to locate evidence pinning the murder on Calvin, including tracking his car (A1431), flying a helicopter over his home (A1442-43), harassing him and his young children in the airport (A1434-35), and much more as described above, more than twenty years after Michele's disappearance, the entire body of this evidence is reduced now by the Appellants to less than a dozen flimsy and equivocal facts -- none of which grapple with the affirmative evidence of Calvin's innocence, including a quantity of blood in his home that was inconsistent with a violent crime and wholly consistent with a cut hand, the lack of any cleanup, and his phone call to Michele after she went missing -- and whose blatant flimsiness is corroborated by the very fact that, after four years of waiting, law enforcement relied upon misconduct in order to secure an indictment.

The alleged sources of probable cause are as follows:

1. "the blood evidence matched Michele's DNA" (State Br. at 65);

2. "the prospects of divorce and … los[ing] substantial financial assets" (*id.*)

3. "plaintiff had abused and threatened [Michele] and warned her not to go through with the divorce" (*id.*);

4. "Michele's car was found in the driveway with the keys still in the ignition" (*id.*);

5. "plaintiff wanted Michele's belongings out of the house only eight days after she disappeared" (*id.*);

6. "plaintiff told his girlfriend that Michele would not be coming home just two weeks after her disappearance" (*id.*);

7. "Mary Jo Harris' observations of the contentious marriage and her confronting plaintiff after her disappearance" (Tioga Br. at 30-31);

8. "Thayer's interactions and conversations with plaintiff the day Michele went missing" (*id.* at 31);

9. "plaintiff knowing about the police finding blood before the police told plaintiff" (*id.*); and

10. "Francine Harris relaying to plaintiff that Michele's body had been found in a shallow grave at his cottage and his response that the victim's body had not been found" (*id.*).

Most notably, half of these sources are the subject of the same misconduct that undermines the grand juries in which they were presented -- including Sources

1, 2, 3, 5 and 8 -- all of which rely upon testimony belied by contradictory statements withheld from the grand jury.[11] These claims are, thus, not sources of probable cause to defeat a civil rights claim, but a result of the underlying civil rights violation.

Of the five remaining claims, three were not discussed in the underlying briefing by the Appellants at all, and come now with no citation to the record on appeal. This includes alleged conversations between Calvin and his girlfriend (Source 6) (State Br. at 16); alleged observations by Mary Jo Harris (Source 7) (*see* Tioga Br. at 30-31); and Calvin allegedly knowing about police finding blood before the police had told him (Source 9) (*id*. at 31). By failing to link these arguments to

[11] The fact that a miniscule quantity of blood with Michele's DNA was located in the home's kitchen near the garage entrance (Source 1) is evidence that she lived in the home, not that she died there, as, contrary to what was reported to the grand jury, one of the very first leads in this case included evidence that Michele had fallen in the snow and suffered a bleeding cut outside the garage. *See* A1305; A1308-09. The notion that Calvin murdered his wife because of ongoing divorce proceedings (Source 2) is belied by Miller's prior statements to the State Police acknowledging that trial was not imminent, and by statements from Ms. Thayer and Ms. Burdick that a settlement was likely. *See* A1551. The notion that Calvin made threats to Michele over the divorce (Source 3), at least insofar as law enforcement alleged threats of violence, are belied by Wilszynski's prior statements to the State Police making no mention of such a threat. *See* A2184; A1505. And the notion that Calvin was packing up Michele's belongings (Source 5), or otherwise had interactions with Ms. Thayer indicative of guilt (Source 8), is belied by Ms. Thayer's contemporaneous diary in which she herself takes credit for that act, (A2161; A1841), her lies about having made an exculpatory phone call to Michele that she knew only Calvin could have made, and her acknowledgment that the rules she lives by -- "you don't cheat, you don't steal, you don't lie" -- did not apply to her dealings with Calvin. *See* A2180-81.

the record on appeal and having failed to discuss these points before the District Court, these arguments are not preserved for discussion now -- for a "brief must make all arguments accessible to the judges, rather than ask them to play archaeologist with the record." *See, e.g., DeSilva v. DiLeonardi*, 181 F.3d 865, 867 (7th Cir. 1999). *See also Heine v. Comm'r of Dept. of Cmty. Affairs of New Jersey*, 794 Fed. Appx. 236, 238 (3d Cir. 2020) ("We will not comb through the lengthy District Court record in an attempt to understand Appellants' arguments"); *United States v. Sellors*, 572 Fed. Appx. 628, 631 (10th Cir. 2014) ("It is not this court's task to comb through the record to determine whether he preserved his arguments for appeal"); *Chicago Bd. of Ed. v. Substance, Inc.*, 354 F.3d 624, 630 (7th Cir. 2003) ("incorporation by reference" is not "a valid method of bringing facts and arguments to the attention of an appellate court").

Moreover, to the extent that the defendants base their current appellate arguments on factual recitations contained in judicial decisions in other jurisdictions, they are relying upon inadmissible hearsay. *See, e.g., Penree v. Watson*, 2017 WL 3437680, at *3 (N.D.N.Y. 2017) ("judicial findings of fact are inadmissible hearsay") (collecting cases). *See also United States v. Nelson*, 365 F. Supp.2d 381, 388 (S.D.N.Y. 2005).[12]

[12] Note that to the extent that Tioga County argues that the prior convictions prove the existence of probable cause, this argument has nothing to do with absolute immunity. It is a far more basic contention about the existence or non-existence of

This leaves a grand total of two remaining evidentiary bases for establishing probable cause -- that Michele's car was found at the foot of the Harris family home the morning she was discovered missing (Source 4); and Calvin's refusal to believe that Michele's body was found in a shallow grave near his cottage (Source 10). Even if these bases were valid -- and they are not -- this would be clearly insufficient to prosecute Calvin for murder in a case where there is no murder weapon, no eyewitnesses to a homicide, and no dead body. And at the very least the District Court was warranted in certifying that analysis for inspection by a jury.

Nevertheless, neither of these bases stands up to summary judgment's exacting scrutiny. First, the fact that Michele's car was found at the foot of the Harris family driveway does not establish probable cause that Calvin murdered her inside their home. To the contrary, the driveway was the approximate length of three football fields. *See* SA157. Thus, if there were a link between the car and the scene of Michele's death, it would weigh against the theory that law enforcement

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probable cause, and, as such, is outside the boundaries of Tioga's claimed exception to non-appealability. Moreover, this argument glosses over a fundamental distinction between the pre- and post-conviction trials: Calvin was convicted before he discovered law enforcement's admission to altering the blood photographs. By that time, the New York Court of Appeals had already gone on record to note the truly limited evidence that had been brought to bear against Calvin: "[T]here was no body or weapon, and the evidence against defendant was purely circumstantial," it reported. *People v. Harris*, 19 N.Y.3d 679, 686 (2012). Yet as the *48 Hours* outtake helped establish, the case was not just slim but manufactured. And, notably, once it was discovered, he was never convicted again.

concocted as against Calvin -- because the car remained a tremendous distance from the tiny bloodstains found in the Harris family home. Indeed, the car was notable not just for where it was, but for what it did not contain: Michele's purse. *See* A2050. Combined with the car's location, the absence of her purse suggested that Michele had been killed after leaving the home, not after returning to it.

Second, Calvin's disbelief that Michele was found by the cottage on their property in a "shallow grave" is equally unavailing to establish probable cause to charge him with murdering his wife. As would have again been clear to law enforcement by the time they indicted Calvin, he would have had good reason to doubt her body was buried in such a location: first, being innocent of any crime, he had no reason to believe that anyone would have "buried" Michele on his property; second, the cottage did not abut the woods -- it had a lawn. *See* A2251-52. The notion that she was buried in a "grave" "by the cottage" was thus nonsensical, because it would have disturbed the grass in a manner that would have been obvious to anyone from the moment the search began. Thus Calvin's (correct) analysis of this report's invalidity did not support any inference that he murdered his wife.

Third, and most importantly, these truly flimsy claims must be measured against the highly exculpatory evidence that emerged from the no-holds-barred investigation into Calvin for this murder. *See, e.g., McGrier v. City of New York*, 849 Fed. Appx. 268, 270 (2d Cir. 2021) ("In determining whether there was probable

cause, we must consider the totality of the circumstances, reviewing plainly exculpatory evidence alongside inculpatory evidence to ensure … a full sense") (internal quotations omitted). This includes the highly exculpatory phone call that Calvin placed to Michele the morning after she went missing -- when he did not leave a message -- where "if Cal had killed her and he was calling as some kind of fake alibi, you would [have] expect[ed] him to leave … a message like, Michele where are you or I'm worried or something like that." *See* A1496 (Keene agreeing, "Yes"). And it includes the miniscule amount of blood found inside the home with an utter lack of evidence of a cleanup, which is wholly inconsistent with the notion that the blood was evidence of Michele's murder. *See* A1336-37; A2216.

Ultimately, then, Appellants are both legally wrong in relying upon fabricated evidence in their probable cause analysis, and factually wrong in omitting critical exculpatory information known to law enforcement from their description of the totality of the available evidence. On this record, the District Court was well within its authority to certify the probable cause inquiry for a trial.

iii. Rebutting the Presumption from a Grand Jury Indictment Does not Depend Upon the Identity of the Law Enforcement Wrongdoer.

On the opposite end of the spectrum from the Appellants' global discussion about probable cause, the State Police make a narrower argument suited to their own defense -- that, in the grand jury, the withholding of evidence about the innocent

derivation of Michele's blood was a decision made by District Attorney Keene rather than the State Police and, thus, cannot rebut the presumption of probable cause occasioned by the indictment as to the State defendants. *See* State Br. at 59-60. This argument fundamentally misconstrues the relationship between a grand jury indictment and the presumption of probable cause in a civil rights case.

The reason why grand jury indictments create an inference of probable cause is not because of trust placed in a particular officer or prosecutor, but because of faith placed in the grand jury process as a whole -- that "the Grand Jury acts judicially and … regularly." *Colon v. City of New York*, 60 N.Y.2d 78, 82-83 (1983).

Thus, even where the breakdown in that process is the fault of a prosecutor rather than a police officer, this vitiates the presumptive quality attendant to a grand jury proceeding -- for in either case the circumstances have "erode[d] the premise that the grand jury acts judicially." *See Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004) (stating general standard for vitiating presumption). *See also Cabble v. City of New York*, 2010 WL 1222035, at *3 (S.D.N.Y. 2010) (internal references omitted) (probable cause presumption rebutted even though "Plaintiff does not allege … bad faith conduct by the police [but] [r]ather … contends that the presumption of probable cause is vitiated by the prosecutors' failure to present exculpatory evidence"); *Tabaei v. New York City HHS*, 2012 WL 5816882, at *6 (S.D.N.Y. 2012) (in case brought against individual investigators, presumption of

probable cause rebutted due to grand jury misconduct by non-party district attorney). *See also Duncan v. Cardova*, 2014 WL 12771128, at *8 (S.D.N.Y. 2014) ("this Court has held that the presumption of probable cause can be vitiated by prosecutorial misconduct").

This rule is logical, because vitiating probable cause is not grounded in a theory of punishment for a wrongdoer; it is grounded in the eroded faith in certain grand jury proceedings more generally. *See Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004) (highlighting whether the "circumstances warrant a finding of misconduct sufficient to erode the premise that the Grand Jury acts judicially") (internal quotations omitted).

Here, then, the State Appellants' do not alter the probable cause rebuttal analysis by passing the buck to District Attorney Keene -- for, regardless of fault, the fact is that the grand jury was not given a "complete and full statement of facts" (*Hicks v. Marchman*, 719 Fed. Appx. 61, 65 [2d Cir. 2018]), and instead was told a series of affirmative falsehoods, including that Michele had *not* suffered a bleeding injury before she went missing -- which law enforcement knew to be false. *See* A1061 at 42 ("Q. During the time that you knew her did you ever become aware of her receiving a cut or an injury that caused her to bleed? A. No."); A1073 ("Q. As far as a cut that would require like -- that would bleed and require stitches or bandage being on it for a period of time, did you ever observe anything like that? A. No");

A1081 at 121 ("Q Do you know if Michele had any injuries or occurrences that would have resulted in blood being left in her garage and her kitchen? A. No.").

The grand jury indictment does not garner blind faith despite known corruption of its process. The District Court correctly held that the presumptive force of an indictment thus procured was rebutted for purposes of summary judgment.

C. The District Court's Adjudication of the Conspiracy Claim is Supported by the Record.

"To prove a § 1983 conspiracy, a plaintiff must show: (1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Butler v. Hesch*, 286 F. Supp.3d 337, 363 (N.D.N.Y. 2018) (internal quotations omitted). By their very nature, however, "conspiracies are … secretive operations, and may have to be proven by circumstantial, rather than direct, evidence." *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999). Construed in Calvin's favor, the circumstantial evidence before the District Court presented a question of fact as to whether Susan Mulvey, Gerald Keene, and Barbara Thayer conspired to inflict unconstitutional injuries in violation of Calvin's rights under the Fourth and Fourteenth Amendments.

First, each defendant had a motive to conspire against Calvin. Calvin had fired Senior Investigator Mulvey's father, and he was entrenched in a divorce where

his spouse was obtaining legal counsel from the wife of District Attorney Keene. *See* A1385-86. In addition, Ms. Thayer did not have an independent reason to target Calvin, but she was predisposed to entering the conspiracy. She thought he was guilty, and thus according to her own admission, the ends justified the means. *See* A2181 ("Q Why was it okay to cheat Cal? … Because you think he killed Michele, right? A Yes"); *id*. (the rules she lives by -- "you don't cheat, you don't steal, you don't lie" -- they did not apply to her dealings with Calvin; admitting, "you're right"). *See also* A2166 (acknowledging cheating in diary).

Second, the conspiracy is corroborated by the concerted action from each member, as detailed below.

Gerald Keene. He elicited grand jury testimony from Thayer, Wilszinski, and Miller that he knew was objectively undermined by prior statements he withheld from grand jurors' review. *See supra*, II(A)(1)(iv); II(B)(2)(i). And when his initial efforts were thwarted by a judge in criminal court, who indicated his intention to dismiss the first indictment, he moved for the judge's recusal by making "sworn allegations in support of his application, pitting his oath of office against that of the court -- tactics the subsequent sitting judge held "should not be tolerated." *See* SA1616 and SA1620. He also withheld from the grand jury material exculpatory information about a prior injury to Michele, instead eliciting testimony from witnesses that no such injury had taken place. *See* A1061 at 42 ("Q. During the

time that you knew her did you ever become aware of her receiving a cut or an injury that caused her to bleed? A. No."); A1073 at 91 ("Q. As far as a cut that would require like -- that would bleed and require stitches or bandage being on it for a period of time, did you ever observe anything like that? A. No"); A1081 ("Q Do you know if Michele had any injuries or occurrences that would have resulted in blood being left in her garage and her kitchen? A. No."). *See also* A1161 at 50; A1197 at 196; A1265 at 470.

Susan Mulvey. Keene's behavior was matched by the efforts of Senior Investigator Mulvey, the head of the investigation, who tampered with witnesses (*supra,* at II(A)(1)(iv)); stopped following up on leads into the guilt of other viable suspects, including Stacy Stewart (A1417); resorted to chicanery, like lying to Calvin about the whereabouts of the mother of his children; and harassed him and his 2-8 year-old kids at the airport. *See* A1432-35. Construing the facts most favorably to Calvin, two of the most critical witnesses in this case -- Barbara Thayer and Jerome Wiszynski -- were manipulated by Senior Investigator Mulvey to provide damaging testimony contrary to their initial claims; and the other most important piece of evidence in the case -- miniscule stains of blood -- was manipulated by officers working under her direction to make blood appear fresh and to make stains appear spattered by violence. *See supra*, at II(A)(1)(i)).

Barbara Thayer. Having made up her mind about Calvin's guilt as early as 2001, A1747-48, Ms. Thayer demonstrated an eagerness to assist the scheme. She lied about critical evidence in order to indict Calvin, including blaming him for acts that she herself had performed instead (*See* A2161) (admitting she was the one to bag Michele's clothing after she went missing). She endeavored to prevent his exoneration, taking credit for an exculpatory 7:15am phone call that was physically impossible for her to have made,[13] and which she indeed did not take credit for in her initial statements to police, and even denied. *See* A1963-67; A2050-52; A2068-70, 2071-72. And for State Police benefit, she, among other things, engaged in a controlled telephone call with Calvin's father -- conduct for which she was labeled a law enforcement "agent" (A1572; A2086-87).

[13] She placed a phone call from her own house at 7:08am, then let the phone ring, waited for the answering machine, and left a message, a process that took one minute and five seconds -- taking her to 7:09am. A2036-37. *See* A1345, A1854, A2036-37. She then left her house and walked out to her car and started driving. Assume that took one minute more -- putting her in her car at 7:10am, two minutes after she had picked up the phone to place a call inside her home. She then drove 4 to 4.5 minutes to the foot of the long Harris driveway, and stopped -- taking her to approximately 7:14am *See* A2038. She then exited her car, inspected the outside of Michele's van that was sitting suspiciously still, made several observations, and then found an open door to the van so that she could continue her investigation inside. *See* A2044-45. Assuming that she conducted that investigation within one minute, that takes her to 7:15am -- when she would still be at the foot of a driveway the length of three football fields (SA157) -- and nowhere close to inside of the Harris home. Notably, after this, she still would have had to get back in her car, go up the driveway, park her car, get out of her car, walk to the house, knock on the door, enter the Harris home, and speak to Mr. Harris -- all before placing the critical call.

Zooming out, if this case did not involve a conspiracy, then Keene, Mulvey and Thayer would have engaged in all of this misconduct by coincidence. While that is, perhaps, possible, it is not the type of inference to which they were entitled at summary judgment -- as the District Court held. *See* SPA58 (noting that the defense relies upon "the type of credibility determinations that are forbidden on summary judgment"). For "[i]f the plaintiff's account is believed by a jury, then the defendants were not coordinating to implement [an objective and lawful investigation], but rather acting in concert to exact retaliation…. The jury could conclude that the plaintiff's account … provides sufficient circumstantial evidence of coordination to prove a meeting of the minds," and thus the "section 1983 conspiracy claim presents questions of fact that must go to a jury." *Walsh v. City of New York*, 2016 WL 3648370, at *3 (S.D.N.Y. 2016).[14]

Nevertheless, the Appellants seek reversal of the District Court's denial of summary judgment on the conspiracy claim. According to the State, the conspiracy

[14] Even if District Attorney Keene had been entitled to prosecutorial immunity, which he was not, this would still not prevent claims against others based upon a conspiracy to which he was a party. *See Rounseville v. Zahl*, 13 F.3d 625, 633 (2d Cir. 1994) ("Even if Judge Barrett was shielded by absolute immunity from personal liability, his involvement as a state actor in an alleged conspiracy might still ground a viable section 1983 claim against the other conspirators").

claim is belied by the fact that District Attorney Keene "specifically testified that he chose to prosecute plaintiff based on his own review of the evidence," and "both Thayer and Mulvey denied any agreement or understanding between them…." *See* State Br. at 62-63. Echoing this argument, Tioga swears that Keene "had nothing to do with tampering with any witness or collection of blood evidence." *See* Tioga Br. at 46.

However, these defenses run directly into the problem recognized by the District Court -- which is that their self-serving denials of wrongdoing require "the type of credibility determinations that are forbidden on summary judgment." *See* SPA58. Such denials of wrongdoing are what trials are made of; they present as weak evidence on a summary judgment application -- where the very existence of such a factual dispute requires denial of the motion. *See, e.g., Cornell University v. UAW Local 2300*, 942 F.2d 138, 141 (2d Cir. 1991) (discounting the "union's conclusory self-serving averment").

In the face of a claim that so inherently requires circumstantial evidence, like a conspiracy, the oft-stated summary judgment rule is worth repeating: "if there is any evidence in the record from any source from which a reasonable inference in the nonmoving party's favor may be drawn, the moving party simply cannot obtain a summary judgment." *R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 58 (2d Cir. 1997).

Because that evidence is available here, this interlocutory appeal is not permissible, and the District Court's denial of summary judgment should be affirmed.

III. THE DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT ON ACCOUNT OF PROSECUTORIAL IMMUNITY SHOULD BE AFFIRMED.

The District Court denied Keene's plea for absolute immunity, recognizing that while absolute immunity is afforded to prosecutors, it is limited to prosecutorial functions rather than investigative functions. Because inferences are available from the record that District Attorney Keene engaged in misconduct during the unusually lengthy investigative phase of this case -- before probable cause was established -- the District Court correctly denied summary judgment and preserved the case for trial. *See* SPA45-49.

Nevertheless, District Attorney Keene seeks reversal of the District Court's adjudication of immunity. In addition to arguing that the case against Calvin was supported by probable cause, addressed *supra*, he argues that (1) his pre-indictment conduct should be deemed prosecutorial rather than investigative because it was merely his expression of "due diligence" to "educate him[self] … about the case," which is simply "good attorney hygiene;"[15] (2) claims of evidence or witness tampering, if true, are protected by absolute immunity because they fit within the

[15] *See* Tioga Br. at 32-33.

rubric of prosecutorial conduct;[16] (3) the District Court confused the analysis of prosecutorial immunity by thinking that "probable cause" and "motivation for prosecution" were each relevant to the prosecutorial immunity analysis, which they are not;[17] and (4) he should have received an additional layer of protection against Calvin's state law claims, because under New York state law, prosecutorial immunity applies to not just prosecutorial but also investigative functions. *See* Tioga Br. at 35.

District Attorney Keene's discussion of probable cause is addressed *supra* in Section II(B)(2). What follows is a discussion of why his remaining arguments are erroneous, and why the District Court's adjudication should be affirmed.

A. The District Court's Adjudication of Absolute Immunity Should Be Affirmed Because the Summary Judgment Record Permitted an Inference of Investigative Misconduct.

Prosecutors retain absolute immunity from civil rights actions when "function[ing] as advocates for the state in circumstances intimately associated with the judicial phase of the criminal process." *See Bernard v. County of Suffolk*, 356 F.3d 495, 502 (2d Cir. 2004). This immunity draws from the public interest in having prosecutors remain vigorous and confident rather than stymied by fears of

[16] *See* Tioga Br. at 36-39.
[17] *See* Tioga Br. at 33-34.

lawsuits. *See, e.g., Parkinson v. Cozzolino*, 238 F.3d 145, 151 (2d Cir. 2001). It is "grounded in the fear that the public trust of the prosecutor's office would suffer if the prosecutor were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Id*. (internal quotations omitted).

"However, not every action performed by a prosecutor is 'absolutely immune merely because it was performed by a prosecutor.'" *Calgano v. Cty of Putnam, New York*, 2018 WL 4757968, at *23-24 (S.D.N.Y. 2018) (rev'd in part on other grounds) (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 [1993]). The limits of the doctrine derive from strong public policy. "A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial; every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial." *Buckley v. Fitzsimmons*, 509 U.S. 259, 276 (1993).

Thus, absolute immunity does not apply "where a prosecutor … is performing investigative and administrative rather than prosecutorial functions." *Easton v. Sundram*, 1990 WL 102231, at *3 (S.D.N.Y. 1990) (internal references, quotations, and ellipses omitted). *See also Hill v. City of New York*, 45 F.3d 653, 661 (2d Cir.

1995) ("When a district attorney functions outside ... her role as an advocate for the People, the shield of immunity is absent"). Stated another way:

> [T]he pre-litigation function that a prosecutor performs has at least two aspects: (1) the supervision of and interaction with law enforcement agencies in *acquiring* evidence …, and (2) the *organization, evaluation, and marshalling* of this evidence into a form that will enable the prosecutor to try a case or to seek a warrant, indictment or order. … [Without expressing a view as to the second category], the first category consists of actions that are of a police nature and are not entitled to absolute protection.

Barbera v. Smith, 836 F.2d 96, 100-01 (2d Cir. 1987) (emphasis in original).

In turn, the line between protected and unprotected acts can be "difficult to draw." *See, e.g., Zahrey v. Coffey*, 221 F.3d 342, 347 (2d Cir. 2000); *Knox v. County of Ulster*, 2013 WL 286282, at *16 (N.D.N.Y. 2013); *Galgano v. Cty of Putnam, New York*, 2018 WL 4757968, at *23-24 (S.D.N.Y. 2018) (*vac'd on other grounds*). But a helpful rule of thumb is one of timing: "the Supreme Court has observed that absolute immunity is unavailable for investigative conduct that takes place before probable cause has been established," though, even then, a "determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards." *Galgano*, at *23-24. *See also Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993) ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested").

Ultimately, the burden of proof governing prosecutorial immunity rests firmly with the prosecutor asserting it. *Burns v. Reed*, 500 U.S. 478, 486 (1991). And here, as the District Court found, District Attorney Keene did not meet that burden for purposes of summary judgment. *See* SPA49.

Preliminarily, while the line between investigative and prosecutorial functions is drawn at the moment "probable cause has been established," *Galgano*, at *23-24; *Buckley*, 509 U.S. at 274, here that line was drawn unusually late in the Michele Harris homicide investigation. While Michele went missing on September 11, 2001, and while Calvin immediately became the focus of law enforcement's attention, he was not indicted for nearly half a decade -- carving a period of at least *four years* during which Keene was operating without immunity's shelter.

Keene's value in helping to acquire evidence began at the earliest possible time in the investigation. One day after Michele's disappearance, he got a call from Michele's divorce attorney -- with whom Keene's wife, Betty Keene, was working as co-counsel on the Harris divorce. *See* A1707. One day later, critical and privileged attorney-client documents prepared by Keene's wife were then conveyed to law enforcement. And this included handwritten notes squarely relevant and harmful to what became the prosecution's blood theory -- that Michele had indeed "cut her hand on the ice when she fell causing it to bleed." *See* A1305; A2124 (showing production on "09/13/01").

Thus, while District Attorney Keene argues now on appeal that he was "clearly and unequivocally involved exclusively in his role as district attorney and prosecutor" (Tioga Br. at 12), and while he thus chalks up all of his conduct here as attorney-based and immune,[18] his own testimony proves this false. Pre-indictment, he admits, he accompanied State Police to interview Calvin's first wife. *See* A1916-17. Pre-indictment, he also took a trip to Albany to present the case to the Forensic Unit to evaluate the need for further investigations. *See* A1465. And pre-indictment, he instigated witness interviews independent from police prompting. *See* A1567 ("Q So this is not something the State Police asked you to do. This is something you said to the State Police you wanted to do and asked them if they wanted to participate; is that right? A Yes. Q So … this is one example … where you as the attorney pre-indictment are making suggestions on the case, contacting people, trying to improve the quality of the case, right? … A Yeah"). These behaviors show without reasonable dispute that regardless of whether he was engaged in "good … hygiene,"[19] Keene's involvement in the case was not limited to prosecutorial functions but, instead, he also participated in the case in an investigative capacity.

In turn, Keene also admits he had a general practice of interviewing witnesses in the pre-grand jury setting -- which is to say, before probable cause had been

[18] *See* State Br. at 32-39.

[19] State Br. at 32-33.

established. *See* A1746. This is notable here, because in 2005, four years after Michele went missing, he still lacked confidence in the quality of the evidence against Calvin. *See* A1471-72 (Mulvey: "I don't believe we got any additional evidence" between 2002 and 2005, but there had not been an arrest yet because "the District Attorney asked us to keep investigating and keep searching"). *See also* A1922. Yet after receiving overt pressure from the State Police to proceed with an indictment, and after meeting with witnesses personally, he suspiciously managed to acquire and secure false statements from Robert Miller, Barbara Thayer, and Jerome Wilszinski -- all of whom departed from their initial statements, and who claimed, respectively, that Michele went missing before an imminent divorce trial (false); that Calvin was caught boxing Michele's belongings shortly after she disappeared (false); and that Calvin threatened on a phone call to make her "disappear" (false). *See* A1156 at 30; A1068 at 71; and A124 at 301. All of this conduct took place before Calvin had been indicted and, thus, when the conduct at issue was presumptively investigatory.

Thus, contrary to Keene's claim that all alleged misconduct and tampering would have been prosecutorial due to a hoped-for indictment, consider *Hill v. City of New York,* 45 F.3d 653, 662-63 (2d Cir. 1995). In *Hill*, the prosecutor coerced a witness to lie on video with the aim of introducing that video in the grand jury. "[I]f the videotapes were made to collect or corroborate evidence against Hill in order to

get probable cause to arrest her," this Court held, "the act of making the tapes receives only qualified immunity." 45 F.3d at 662. The same is true here: whether the fabricated evidence is a video (as in *Hill*), or blood or witnesses (as here), the inference at summary judgment was that it was fabricated in order to collect or corroborate evidence against Calvin in order to get probable cause to arrest him. Even though this behavior ultimately resulted in the presentation of the fabricated evidence to jurors, this preliminary act of "making the tapes" -- or, here, altering the photographs, or crafting the inculpatory statements before Calvin was arrested -- "receives only qualified immunity."

Thorpe v. County of St. Lawrence offers similar guidance, highlighting that, ultimately, the defense promoted here relies upon casting inferences in the movant's favor about which hat he was wearing when engaging in the suspected misconduct. *See* 2016 WL 7053545 (N.D.N.Y. 2016). There, prosecutors were alleged to have "fabricated evidence by coercing false testimony from [a witness] to connect [suspects] to the crime." *Id*. at 2. In particular, the prosecutors "allegedly coerced [the witness] to provide false testimony at some point prior to the grand jury proceeding." *Id*. And since the suspects were not arrested until after the grand jury returned an indictment, this "suggest[ed] that probable cause was lacking to effectuate an arrest before then," such that if the prosecutors coerced false testimony

"to provide [such] probable cause…, then they would be acting as investigators and not advocates." *Id*.

The same principles applied here and explain why Keene's analysis is flawed. Keene rightly points out that *after* probable cause is established, prosecutors preparing the case for court may engage in misconduct concerning witnesses or hard evidence without losing immunity's protection. *See* State Br. at 38 (discussing "preparing evidence for presentation"), and 39 (discussing "[w]itness preparation and selection"). Yet the thrust of the claim against Keene is not that he *reacted* to probable cause by engaging in misconduct, but that he helped create evidence to *establish* probable cause in the first place. Such behavior would fall squarely outside the protections of absolute immunity, which, as *Hill* makes clear, does not apply "when a prosecutor manufactures evidence for the purpose of obtaining probable cause…." *Hill v. City of New York*, 45 F.3d 653, 663 (2d Cir. 1995).

Such willingness to engage in outrageous conduct outside of his judicial function would fall in line with the behavior Keene exhibited in a judicial role -- including his misconduct during the 2005 grand jury presentment itself, which prompted the dismissal of that indictment, as well as the court's subsequently noting Keene's "not … tolera[ble]" behavior targeting a criminal court judge after learning of that judge's intentions to dismiss the case. *See* SA1616 and SA1620. If Keene's impropriety pre-dated the indictment, as the record evidence suggests, this is

precisely where prosecutorial immunity would not apply. *Barbera v. Smith*, 836 F.2d 96, 100-01 (2d Cir. 1987).

The District Court's denial of summary judgment against District Attorney Keene should thus be affirmed.

B. The District Court Did Not Impute "Motivation" into its Absolute Immunity Analysis.

Keene argues that "the District Court erred by giving credence to plaintiff's argument that [he] chose to prosecute due to pressure from the state police," which he alleges defies precedent holding that "motivation for prosecution is irrelevant for the applicability of absolute immunity." *See* Tioga Br. at 34.

This argument is a gross distortion of the District Court's decision, which clearly and unequivocally does not consider motivation in arriving at its decision concerning absolute immunity. *See, e.g.,* SPA46 (acknowledging that the doctrine applies "regardless of motivation"). Instead, the District Court declined to extend pre-trial immunity to Keene because, construing all facts against him for purposes of summary judgment, his misconduct occurred during the lengthy pre-indictment phase of the case within the realm of "gathering and piecing together … evidence" -- when only qualified immunity applies. *See* SPA49.

The role played by police-pressure, as explained by the District Court, was not a lever on "motivation"; it was a lever on a separate element of one of the claims

in issue -- malicious prosecution (SPA43) -- where such pressure satisfies one of the essential elements of the cause of action. *See supra* Section II(B)(1).

C. The Argument that New York State Offers Additional Immunity Protections is Unpreserved and Wrong.

Keene argues that, "[i]mportantly, the District Court erred by not dismissing the state law claim … because 'unlike federal law, prosecutors are absolutely immune for official acts in both the prosecution and investigation of criminal charges.'" *See* Tioga Br. at 35 (citing *Rich v. New York*, 2022 WL 992885, at *7 (S.D.N.Y. 2022). Despite this issue's alleged importance, Keene has never before raised or preserved it -- and it is fundamentally wrong.

First, on the merits, "the same distinction between prosecutorial and investigative conduct holds in New York" as holds under federal law. *See Norton v. Town of Islip*, 2013 WL 84896, at *4 (E.D.N.Y. 2013) (citing cases). *See also Kirchner v. County of Niagra*, 107 A.D.3d 1620, 1623 (4th Dept. 2013). As the New York Court of Appeals has held, adopting the same functional approach that prevails under federal law, "[w]hether an action receives … absolute immunity … requires an analysis of the functions and duties of the particular governmental official … whose conduct is in issue." *Arteaga v. State*, 72 N.Y.2d 212, 216 (1988). "The question," the court adds, "depends not so much on the importance of the actor's

position or its title as on … whether the position entails making decisions of a *judicial* nature…." *Id*. (emphasis added).

This distinction -- judicial versus investigative -- is precisely the same fault-line recognized under federal law. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (differentiating "investigative activities" from those linked to "the judicial process"). Thus, while the Southern District of New York held in *Rich* that the immunity conferred to prosecutors under state law is broader than under federal law, it was incorrectly decided and at odds with the pronouncements of New York's highest court.

Second, the relationship between state and federal immunity law was simply not argued before the District Court. This Court will "[g]enerally … not consider unpreserved arguments or those raised for the first time on appeal…." *See, e.g., Popular Lane Farm LLC v. Fathers of our Lady of Mercy*, 449 Fed. Appx. 57, 59 (2d Cir. 2011). Consideration of such arguments would require "a showing of manifest injustice or an extraordinary need." *Anchor Fish Corp. v. Torry Harris, Inc.*, 135 F.3d 856, 858 (2d Cir. 1998). *See also Simms v. Vill. Of Albion, N.Y.*, 115 F.3d 1098, 1109 (2d Cir. 1997) (requiring "'plain error' that may result in a miscarriage of justice, or in 'obvious instances of … misapplied law'").

This "extraordinary need" standard cannot be met in an interlocutory appeal, as here, presenting at best a disputed question of law. *See, e.g., United States v.*

Moore, 563 Fed. Appx. 866, 869 (2d Cir. 2014) ("the interpretive question is subject to reasonable dispute, [such that] any error by the district court was neither clear nor obvious"); *United States v. Alli-Balogun*, 72 F.3d 9, 12 (2d Cir. 1995) ("we do not see how an error can be plain error when the Supreme Court and this court have not spoken on the subject, and the authority in other circuit courts is split").

Thus, whether it is because Keene's analysis of state law is wrong or because it is an unpreserved argument about an unsettled question of law, his resort to New York state law doctrine is misplaced.

For these reasons, Tioga's plea for absolute immunity should be denied.

IV. THE DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT OVER THE *MONELL* CLAIM SHOULD BE AFFIRMED.

The District Court correctly held that Tioga County was not entitled to summary judgment over Calvin's *Monell* cause of action, because *Monell* provides for liability arising from the misconduct of a policymaking official, like a District Attorney. *See* SPA60. Because neither absolute nor qualified immunity is available to a county, the claim against Tioga County remains triable regardless of pleas for immunity by the individual defendants. *See, e.g., Bobolakis v. DiPietrantonio*, 523 Fed. Appx. 85, 87 (2d Cir. 2013). Indeed, for this reason, the appeal by Tioga County is a glaring procedural impropriety -- for the narrow interlocutory path for an immunity-based defense is simply not available to municipalities, as they are not

entitled to immunity in the first place. *Id*. ("an individual defendant's immunity from suit does not transfer to the municipality").

In any event, Tioga's appeal from *Monell* liability rests upon fundamental confusion about the District Court's adjudication and the law in this arena. Claiming that the District Court imposed "vicarious liability" and "overlooked … *Walker v. City of New York*" (Tioga Br. at 48-49), Tioga argues that it cannot be held liable for Keene's conduct because he was "acting as a prosecutor not as a manager of the district attorney's office." *See* Tioga Br. at 49. These arguments are erroneous.

First, while Tioga correctly notes that federal civil rights claims do not allow for "vicarious liability" (*id*. at 48), "[i]t is well-established that *Monell* liability attaches where a single act is taken by a municipal employee who, as a matter of state law, has final policymaking authority in the area in which the action is taken." *Galgano v. County of Putnam*, 2020 WL 3618512, at *11 (S.D.N.Y. 2020) (citing cases, applying doctrine to a district attorney). *See also Anilao v. Spota*, 774 F. Supp.2d 457, 496 (E.D.N.Y. 2011) ("municipal liability in this case against the County can also be based upon District Attorney Spota's alleged role as the final policymaker"). Thus, the premise of the District Court's decision is not the doctrine of vicarious liability; it is the progeny of *Monell* -- where counties are liable for the acts of their policymaking officials.

Second, in turn, Tioga argues that Keene was simply acting as a prosecutor (Tioga Br. at 49), but *Monell* affords plaintiffs like Calvin far greater flexibility in obtaining damages for District Attorney misconduct than in direct claims against the prosecutors themselves. While *Monell* claims arising through a prosecutor's misconduct raise inquiries into the type of conduct at issue -- namely, conduct on behalf of the state or municipality -- there is a difference between "the circle demarcating what is a 'prosecutorial' function for purposes of prosecutorial immunity … [versus] the circle New York has chosen to demarcate state versus local prosecutorial functions." *Bellamy v. City of New York*, 914 F.3d 727, 760 (2d Cir. 2019). In short, unlike the broad construction that has been afforded to prosecutorial immunity, the protection from *Monell* liability is far more cabined: this Court has been "consistent in holding that the actions of county prosecutors in New York are generally controlled by municipal policymakers for purposes of *Monell*, with a narrow exception … being the decision of whether, and on what charges, to prosecute. *Id*. at 759. Far from "overlook[ing] … *Walker*," this holding from *Bellamy* -- relied upon by the District Court (SPA59-60) -- discusses and incorporates that decision extensively. *See Bellamy*, 914 F.3d at 758-59 (undertaking comprehensive review of relevant caselaw, including *Walker*).

District Attorney Keene's conduct barred summary judgment over the *Monell* claim, as the District Court recognized (SPA59-60), because it rose and fell based

upon behaviors beyond the confines of whether and what to prosecute. Construing all inferences in Calvin's favor, the *Monell* claim is based upon a prosecutor who tampered with witnesses before they gave grand jury testimony, who introduced falsified photographs of blood whose manipulation he was aware of in at least 2006 (before the 2007 indictment) (*see* A2192), and who violated his *Brady* obligation to disclose such material exculpatory information. As this conduct was committed by a final policymaker in the Tioga County government -- the District Attorney -- Tioga County's request to summarily dismiss the municipal liability claim was properly denied.

CONCLUSION

For these reasons, we respectfully request that if the appeals are not dismissed for lack of jurisdiction, then the District Court's summary judgment decision be AFFIRMED.

Dated: Garden City, New York
February 26, 2024

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