UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DR. OLIVER JOVANOVIC,

04 CV 8437 (PAC)

Plaintiff,

-against-

THE CITY OF NEW YORK, DETECTIVE MILTON BONILLA, Shield No. 61, Individually and in his Official Capacity, New York County Assistant District Attorney LINDA FAIRSTEIN, Individually and in her Official Capacity,

Defendants.

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

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PRELIMINARY STATEMENT

Oliver Jovanovic's life as he knew it was destroyed on December 5, 1996, the day when Detective Bonilla arrested him for a crime he did not commit. Bonilla knew that the complainant's story was incredible—that's why he did nothing for nine days after learning of her outrageous tale. And the prosecution knew this case was baseless: in internal communications they described it as a "hopeless" case with "[redacted]." Yet neither Bonilla nor Fairstein dropped the case. Instead, to bolster a case Bonilla knew was incredibly weak, Bonilla lied to the jury and manufactured evidence. And Fairstein whipped up a media firestorm, leaking emails to the press and falsely claiming—without any basis—that there were other victims and Oliver was a "serial cyber sex attacker."

Defendants admit that lying to the jury and leaking evidence is wholly improper. Yet they contend that summary judgment should be granted. Defendants err. It is for a jury to decide the effect of Bonilla's lies and Fairstein's prejudicial leaks. Moreover, a jury must decide whether the Detective's failure to investigate the complainant's false claim and the prosecutor's wholly prejudicial statements on summation stemmed from wholesale failures to train.

ARGUMENT

I. SUMMARY JUDGMENT MUST BE DENIED ON PLAINTIFF'S MALICIOUS PROSECUTION CLAIM

A. Defendants Use The Wrong Standard For Probable Cause.

In their moving papers, defendants erroneously equate probable cause to arrest with probable cause to prosecute. See Posr v. Court Officer Shield #207, 180 F. 3d 409, 417 (2d Cir. 1999) ("The defendants seem to conflate probable cause to arrest with probable cause to believe that [plaintiff] could be successfully prosecuted. Only the latter kind of probable cause is at issue with respect to the malicious prosecution claim."). Indeed, as this Court noted, "probable

cause to arrest does *not* necessarily create probable cause to prosecute." Jovanovic v. City of New York, No. 04 Civ. 8437, 2006 U.S. Dist. LEXIS 59163, *28 (S.D.N.Y. Aug. 17, 2006) (emphasis added). Rather, "the probable cause determination in a malicious prosecution claim is whether there was probable cause to believe the criminal proceeding could succeed, and hence, should be commenced." Rateau v. City of New York, No. 06 Civ. 4731, 2009 U.S. Dist. LEXIS 90112, *27 (E.D.N.Y. Sept. 29, 2009) (internal quotations omitted).

Defendants' erroneous probable cause standard infects their entire malicious prosecution analysis. For example, defendants suggest that merely receiving a complaint from a putative victim is sufficient to establish probable cause. (Def. Mem. at 9). However, as this Court noted, "probable cause to arrest *cannot* be a springboard for probable cause to prosecute," especially "given the allegation of [Bonilla] knowingly making false statements to prosecutors and grand and petit juries." Jovanovic, 2006 U.S. Dist. LEXIS 59163, *29 (emphasis added). Thus, the cases relied upon by defendants—which involve *false arrest* claims, and *not* malicious prosecution claims—are inapposite. Def. Br. at 6 (citing Curley v. Village of Suffern, 268 F.3d 65, 70 (2d Cir. 2001); Panetta v. Crowley, 460 F.3d 388, 395 (2d Cir. 2006).)

Defendants' legal analysis is further flawed in that it completely disregards the legal effect of Bonilla's fabrication of evidence. (Point I(B), infra.). If a jury were to conclude that Bonilla fabricated evidence against plaintiff, this would wholly *negate* any defense of probable cause for Bonilla. See Richardson v. City of New York, No. 02 Civ. 3651, 2006 U.S. Dist LEXIS, 69577, * 21 (E.D.N.Y. 2006) ("on a malicious prosecution claim, if it can be proved that a law-enforcement officer fabricated material evidence against a suspect and forwarded it to prosecutors, ... then not only is the presumption of probable cause overcome, but *the existence of probable cause based on non-fabricated evidence ceases to be a defense for the fabricator*.")

(emphasis added, internal citation omitted).[1] Defendants' legal analysis—which does not consider probable cause in the context of a malicious prosecution claim—should be rejected.

B. Bonilla's Multiple Acts of Misconduct Are Sufficient To Overcome The Grand Jury Presumption.

It is well-established that the grand jury presumption of probable cause "may be rebutted by evidence of various wrongful acts on the part of the police." McClellan v. Smith, 439 F.3d 137, 145 (2d Cir. 2006); see also Murphy v. Lynn, 118 F.3d 938, 948 (2d Cir. 1997) (plaintiff "entitled to present rebutting evidence" relating to grand jury presumption); Marshall v. Sullivan, 105 F.3d 47, 54 (2d Cir. 1996) (the "presumption can be overcome by evidence that the indictment was the product of fraud, perjury, the suppression of evidence by the police or *other police conduct undertaken in bad faith*") (emphasis added). In this case, there is ample evidence in the record of fraud, bad faith and improper conduct on the part of Bonilla, such that the grand jury presumption is overcome.

1. Bonilla Lied About Observing Candles Inside of Plaintiff's Apartment.

Bonilla told the grand jury that he had observed two candles on a table in the plaintiff's apartment, which disappeared by the time he had come back to execute the search warrant. (Defs. Ex. FF Bonilla Grand Jury, at 51, 54). In fact, there were *no* candles inside plaintiff's apartment. (Jovanovic Dep. at 163). Nor, for that matter, was there even a *table* next to the front door, as Bonilla later claimed. (Bonilla Tr. at 1551, Sabina Jovanovic Dep. at 83-84; DeMartino Dep. at 34; Parr Dep. 52-53). Moreover, plaintiff's mother did *not* throw out, remove or otherwise dispose of any candles inside of the apartment. (S. Jovanovic Dep. at 61). Thus,

[1] To be clear, defendants did *not* have probable cause to prosecute plaintiff based on "non-fabricated evidence," Richardson, 2006 U.S. Dist LEXIS, 69577, at * 21, as both the medical and forensic evidence *overwhelmingly* disproved the complainant's false allegations. See Point I(D), infra; Plaintiff's Rule 56.1 Statement, ¶¶ 1-58.

Bonilla *lied* to the grand jury when he told them about the candles which had disappeared. At a minimum, there is a factual dispute on this issue which precludes summary judgment.[2]

2. Bonilla Also Lied About the Futon Video And The Recovery of "Cloth Strips" From The Apartment.

Defendants focus only on a single allegation against Bonilla – his lie about the candles – when in fact Bonilla committed multiple other acts of misconduct. For example, Bonilla also helped *create* false evidence against plaintiff by manufacturing a video that was both highly misleading and extremely prejudicial to plaintiff. This video—which features Bonilla opening up plaintiff's futon with a mere "flick of the wrist"—conceals the fact that Bonilla himself had actually *loosened the screws* on the futon prior to shooting the video. (Sosinksy Dep. at 62-65; Bonilla Dep. at 316-317).[3] Bonilla testified that he did nothing to the futon prior to opening it (Ex. 89, Bonilla Trail. Tr. at 1577-78). Thus, the jury was left with the highly misleading impression that, consistent with the complainant's story, the futon was instantly opened by plaintiff, without any participation on J.R.'s part. *Cf.* (Ex. 1, Jovanovic Dep. at 138: J.R. *directly participated in* lowering the futon).

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[2] While defendants concede – as they must – that there is a factual dispute over whether or not Bonilla observed candles inside of the apartment (Def. Mem. at 5), defendants attempt to dismiss this dispute as a mere "swearing contest." (Id.) However, courts in this jurisdiction have repeatedly held that such a conflict in testimony can overcome the grand jury presumption. See, e.g., Stewart v. City of New York, No. 06 Civ. 15490, 2008 U.S. Dist. LEXIS 30632 , *24 (S.D.N.Y. April 8, 2008) ("if a jury chooses to credit [plaintiff] rather [than defendant] , it could find that [defendant] lied when he told the district attorney's office and the grand jury that [plaintiff] acted as a lookout."); Sutton v. Duguid, No. 05 Civ. 1215, 2007 U.S. Dist. LEXIS 35853, *34-35 (E.D.N.Y. May 16, 2007); Taylor v. City of New York, 269 F. Supp 2d at 74 ("if plaintiff's version of the events is taken as true – that is that [defendant] did not announce himself as an officer, but told the grand jury that he did – a jury could reasonably conclude that the indictment was secured through bad faith or perjury ... thus there is a disputed issue of fact regarding whether false testimony was given to the grand jury, such that summary judgment is unwarranted."). Moreover, the "swearing contest" case which defendants rely upon – Brogdon v. City of New Rochelle – involves conflicting accounts between plaintiff and a non-party witness, and thus is easily distinguishable.

[3] In fact, as the Court can see when viewing plaintiff's own futon video (Ex. 39) – which shows the entire unfolding process *without any edits* – there are actually three separate wing-nuts which must be individually loosened before the futon can be transformed from a couch into a bed. This process takes far more than just a "flick of the wrist," and thus exposes the patent falsity of Bonilla's video demonstration.

Bonilla also lied to the grand jury when he testified that he had recovered the "cloth strips" that were allegedly used in the assault against the complainant. (Defs. Ex. FF at 54-55). In fact, there were *no* "cloth strips" recovered from the apartment, nor were there any "cloth strips" listed on the N.Y.P.D. property voucher form. (Monge Dep.at 109-110; Ex. 24, NYPD Voucher Form). While the police did recover karate belts from the apartment—a completely innocuous finding, given plaintiff's background as a martial arts instructor (Bonilla Dep. at 341)—J.R. specifically denied that these karate belts were used in the attack. (Heatherly Dep. at 74: "the complaining witness did *not* identify those as the ties that were used"). Thus, a jury reasonably could conclude that Bonilla *lied* to the grand jury when he told them that he had recovered "cloth strips," thus (falsely) corroborating J.R.'s claims of being forcibly restrained with pre-cut strips of cloth. (Def. Ex. F. Grand Jury at 23.) This lie is, by itself, sufficient to overcome the grand jury presumption.[4]

3. Bonilla's Misconduct Materially Impacted the Criminal Proceedings Against Plaintiff.

Defendants' suggestion that Bonilla's lies about the candles were not "material" is baseless. (Def. Mem. at 5, 10-11). First, the lies about the candles were *directly relevant* to plaintiff's conviction for Assault in the Second Degree – which was the *only* assault charge for which he was convicted – as the "dangerous instruments" involved were the candles which were allegedly observed by Bonilla. (Ex. 93 at 1-2). Since there were *no* burn marks to support J.R.'s

[4] Apart from lying about the candles and the cloth strips, Bonilla also "lost" (or destroyed) police photos taken during the search which would have completely discredited his claims about these items. (Plaintiff's Rule 56.1 Statement, ¶¶ 76-78). For example, the photos would have shown that there was *no* table at the front door where Bonilla claimed to have observed the candles. Bonilla's disposal of these photographs—as well as defendants' claim of having "lost" Bonilla's detective file (Ex.115, Sandomir Decl.; Bonilla Dep. at 322-24)—amounts to spoliation of evidence which gives rise to an adverse inference against defendants, and which by itself may be sufficient to defeat summary judgment. See Byrnie v. Town of Cromwell, 243 F.3d 93, 107 (2d Cir. 2001)

story (Chin Quee Tr. at 1923-24), Bonilla's false claims regarding the candles were *instrumental* in obtaining a conviction on this count.

Second, Bonilla's lie about the disappearance of the candles—and the implication that plaintiff and his mother had conspired to destroy incriminating evidence—suggested a "consciousness of guilt" that irreparably tainted the entire legal proceedings against plaintiff. Indeed, the prosecution *repeatedly* emphasized this point throughout the trial, using it to drive home the conclusion that plaintiff *knew* that he was guilty, and that he was trying to destroy evidence which established his guilt. Pl. R. 56.1 ¶ 64 (People's opening, closing, and Bonilla's direct); see also Heatherly Dep. at 441 (destruction of evidence "absolutely" probative of guilt).

Given Bonilla's multiple acts of misconduct, it is for *the jury* to decide whether or not Bonilla's misconduct caused harm to plaintiff. See Depace v. Flaherty, 183 F. Supp 2d 633, 638 (S.D.N.Y. 2002) ("Causation generally is a question for the finder of fact"); Petrozza v. Village of Freeport, 602 F. Supp. 137, 144 (E.D.N.Y. 1984) (same).

4. Bonilla's Egregious Deviation From Proper Police Procedures Is Another Basis For Overcoming The Grand Jury Presumption.

Apart from Bonilla's various acts of misconduct, the grand jury "presumption can [also] be overcome by showing that the conduct of the police deviated so egregiously from acceptable police activity as to demonstrate an intentional or reckless disregard for proper police procedures." See Haynes v. City of New York, 29 A.D.3d 521, 523 (2d Dept 2006); Gonzalez v. City of New York, 2008 N.Y. Misc. LEXIS 4642, *33 (Sup. Ct. Kings Co. Aug. 7, 2008); Sital v. City of New York, 2008 N.Y. Misc. LEXIS 608 * 2 (Sup. Ct. Brx. Co. Jan. 31, 2008). In this case, there is ample evidence in the record for a jury to reach just such a conclusion.

According to plaintiff's police expert, John Baeza—a former NYPD detective in the Manhattan Special Victims Unit—Bonilla repeatedly and flagrantly deviated from established

NYPD procedures for investigating a sex crime. (See Ex. 42, Baeza's report and CV). Based on Detective Baeza's opinion alone, a jury could reasonably conclude that Bonilla exhibited "an intentional or reckless disregard for proper police procedures," by, among other things, failing to ever read the statement he asked J.R. to write, failing to review the statement J.R. made to Dr. Chin Quee and failing to conduct *any* investigation before arresting Jovanovic nine days after his interview of J.R., thereby overcoming the grand jury presumption. Haynes v. City of New York, 29 A.D.3d 521, 523 (2d Dept 2006).

C. Defendants' Factual Summary Is Grossly Misleading, Since It Wholly Ignores The Glaring Weaknesses In The Prosecution's Case, Which Fairstein Herself Referred To As "Hopeless" and "Impossible."

Defendants have presented the Court with a highly distorted summary of the facts in this case. In so doing, defendants have not only glossed over glaring deficiencies in the prosecution's case—which defendant Fairstein herself characterized as "hopeless," "impossible", and having "[redacted]" (Exs. 63, 65)—but have also completely disregarded conflicting evidence in the record which strongly supports plaintiff's claims.[5] As detailed in plaintiff's 56.1 statement ¶¶ 5-58, each of J.R.'s claims that she was violently assaulted was disproved by medical evidence obtained within days of the alleged incident: No forensic evidence, such as blood, DNA, candle wax, or hair and fiber results, supported J.R.'s claims. No one heard her alleged screams. The manner in which J.R. changed her story each time she recounted the event and these egregious contradictions makes clear that she was falsifying her claim. (Ex. 9, Fairstein Dep. at 247-55, 2415, 425.) Finally, she had a strong motive to fabricate as she was involved in an S&M relationship in which she was repeatedly beaten with a belt.

[5] A comprehensive summary of such evidence – including the results of medical, forensic, DNA and hair and fiber test results, as well as other evidence which overwhelmingly disproves J.R.'s false allegations – may be found in plaintiff's Rule 56.1 Statement, ¶¶ 1-58.

Once such evidence is taken into account, there was clearly *not* probable cause to prosecute plaintiff. The prosecution was only able to obtain a conviction through the misconduct described here.

Defendants further bolster their (patently weak) probable cause argument by claiming that there were "three other women" who had come forward with claims that were "consistent" with J.R.'s claims. (Def. Mem. at 8). This claim also must fail. In fact, *none* of these women provided prosecutors with evidence that was even *remotely* probative of plaintiff's guilt.[6] Accordingly, defendants' motion for summary judgment must be denied.

D. Plaintiff Easily Satisfies The Element of Favorable Termination.

1. As A Matter of Law, The Charges Which Resulted In An Acquittal Constitute A "Favorable Termination."

Under the law of this Circuit, each criminal charge must be analyzed separately for purposes of a malicious prosecution claim. See Posr v. Doherty, 944 F.2d 91, 100 (2d Cir. 1991); Janetka v. Dabe, 892 F.2d 187, 190 (2d Cir. 1989). Once this is done, it is clear that several charges were, *as a matter of law*, terminated in plaintiff's favor. For example, plaintiff was *acquitted* of Assault in the Second Degree (striking thighs with baton), Aggravated Sexual Assault in the First Degree (inserting baton into rectum), and Sodomy in the First Degree (deviate sexual intercourse by contact between penis and anus). (Ex. 93.) Thus, plaintiff has already satisfied the element of favorable termination for those criminal charges.

[6] For example, one of these "victims" never even *met* plaintiff, another "remembered" the assault only after being hypnotized, and the third publicly admitted that plaintiff had *never* assaulted her. (Plaintiff's Rule 56.1 Statement, ¶¶ 88-98). Under these circumstances, reference to these women as supportive of the prosecution's case is astonishing.

2. The Remaining Criminal Charges Were Also Terminated In Plaintiff's Favor.

Defendants argue that the dismissal of all charges against plaintiff was "inconsistent with innocence." (Def. Mem. at 3). This argument, however, has already been heard – and rejected – by the Court. See Jovanovic, 2006 U.S. Dist. LEXIS 59163, * 27-28 (S.D.N.Y. Aug. 17, 2006) ("The dismissal of the indictment with prejudice ended the prosecution in Jovanovic's favor.")[7] Moreover, prior to dismissal, the prosecution repeatedly offered plaintiff various plea deals with *no jail time*, but plaintiff steadfastly refused to plead guilty to any criminal charges, insisting on a favorable termination. (See Ex. 45, Callan Decl.) Given these facts—which *must* be accepted as true for purposes of this motion—plaintiff satisfies the favorable termination requirement. At a minimum, the factual dispute regarding the grounds for dismissal is sufficient to defeat summary judgment. See Rounsesville v. Zahl, 13 F.3d 625, 631 (2d Cir. 1994); Rateau v. City of New York, No. 06 Civ. 4731, 2009 U.S. Dist. LEXIS 90112, *27 (E.D.N.Y. Sept. 29, 2009).

II. SUMMARY JUDGMENT MUST BE DENIED ON THE FAIR TRIAL CLAIM.

A. Defendants Use The Wrong Legal Standard For Fair Trial Claims

Defendants erroneously argue that the fabrication of evidence must be "material to plaintiff's *conviction*" in order to state a fair trial claim (Def. Mem. at 10) (emphasis added). However, courts in this Circuit recognize that a plaintiff states a fair trial claim, regardless of whether he was convicted, so long as he suffered a deprivation of liberty; accordingly, the relevant question is whether Bonilla's fabrication of evidence caused *any* deprivation of liberty. See, e.g., Riccutti v. N.Y.C. Transit Auth., 124 F.3d 123, 130 (2d Cir. 1997) (denial of fair trial

[7] While defendants suggest that the Court's ruling should now be different—based upon new "evidence adduced in discovery" (Def. Mem. at 4), this claim is completely disingenuous. To the contrary, the new "evidence" was *not* obtained during discovery, but in fact, was available to both sides *prior* to discovery – and indeed, was actually used by defendants in their 12 (c) motion (Docket Entry 37, at 18) . There is therefore no reason to disturb the Court's prior ruling on this issue, which constitutes law of the case.

claim recognized even where all charges were dismissed prior to trial); Zahrey v. City of New York, No. 98 Civ. 4546, 2009 WL 1024261, *8 (S.D.N.Y. 2009) (same).

In this case, plaintiff suffered multiple deprivations of liberty *prior* to his conviction: First, Jovanovic spent *one week* at Rikers Island after he was arrested before being released on bail. (Ex. 47, Jovanovic Decl.).[8] Second, even after plaintiff was released on bail, he was *still* subjected to multiple restrictions on his freedom. (Id.). Under the law of this Circuit, such restrictions are sufficient to constitute a "seizure" within the meaning of the Fourth Amendment. See Jocks v. Tavernier, 316 F.3d 128, 136 (2d Cir. 2003) ("the requirements of attending criminal proceedings and obeying the conditions of bail suffice" as a seizure). Lastly, Bonilla's falsified evidence unquestionably impacted the *entire* criminal case against plaintiff, since it corroborated several critical (and otherwise unsupported) claims made by J.R. (See supra Point I(b)(iii)), without which plaintiff would not have been convicted. Thus, defendants' argument that plaintiff suffered *no* deprivation of liberty as a result of Bonilla's misconduct fails.

III. SUMMARY JUDGMENT MUST BE DENIED ON PLAINTIFF'S MALICIOUS ABUSE OF PROCESS CLAIM.

A. Defendants Use The Wrong Legal Standard For "Collateral Objective."

With regard to the "collateral objective" prong, defendants misstate the law. There is no requirement that a plaintiff allege "extortion, blackmail or retribution," nor is "personal animus" required. (Def. Mem. at 9-10). To the contrary, courts have recognized a wide variety other motives—having nothing to do with anger or retribution—as sufficient for purposes of establishing a "collateral objective." See, e.g., Richardson v. City of New York, No. 02 Civ. 3651, 2006 U.S. Dist. LEXIS 69577, * 22 (E.D.N.Y. Sept. 27, 2006) (defendants' desire "to

[8] The Second Circuit has expressly recognized that both the amount of bail, and the length of pre-trial detention, could be significantly higher based on false charges filed by an arresting officer. See Posr, 944 F. 2d at 100 ("unfounded charges [could] support a high bail or a lengthy detention").

protect their own reputations" was sufficient to establish collateral objective); Hernandez v. City of New York, No. 01 Civ. 4376, 2003 U.S. Dist. LEXIS 21146, at * 25 (S.D.N.Y. Nov. 18, 2003) (fear of losing job); Brawer v. Carter, 937 F. Supp. 1071, 1082 (S.D.N.Y. 1996) (currying favor with plaintiff's ex-wife was sufficient to establish collateral objective).

B. There Is Ample Evidence To Establish Bonilla's "Collateral Objective."

Bonilla's nine-day delay in arresting plaintiff suggests that Bonilla himself did *not* believe J.R.'s claims. See Jovanovic, 2006 U.S. Dist. LEXIS 59163, * 21 (delay "suggests that Bonilla himself doubted [J.R.'s] story at the time that it was made.").[9] Indeed, there is ample evidence in the record that Bonilla arrested plaintiff merely as a "favor" for a superior officer. First, Bonilla was assigned this case by Sgt. Monahan, who was *not* his boss, nor even a member of the Manhattan Special Victim Squad. (Pl. R. 56.1 ¶ 107). Sgt. Monahan ordinarily would *not* have the right to assign cases to Bonilla. (Id.). In this case, however, Sgt. Monahan was "friends with the head of security at Barnard College," William O'Connor, a former police captain whom Monahan had known for years. (Id. ¶ 108). Thus, when O'Connor *directly contacted* Monahan Monahan assured O'Connor that "he would handle it" (Id. ¶ 109). Thereafter, O'Connor was in constant contact with both J.R.'s family and Barnard's administration regarding the progress of the investigation. (Id. ¶ 110-11).

Given all these circumstances, a jury could certainly conclude that Bonilla's sudden decision to arrest plaintiff – after doing absolutely *nothing* for nine-days – was motivated *not* by his belief that plaintiff was guilty, but rather, by his desire to curry favor with Sgt. Monahan. Such a motive would clearly be sufficient to establish a "collateral objective" for a malicious

[9] While Bonilla testified that he might have been assigned several new cases during the nine day period – and was thus *too busy* to arrest plaintiff – records disclosed during discovery reveal this *not* to be the case. (Bonilla Dep. at 90-91; Bonilla Caseload, Ex.94). In fact, for the first six days following Bonilla's interview of J.R., Bonilla was not assigned *any* new cases. (Ex. 94).

abuse of process claim. See Jovanovic, 2006 U.S. Dist. LEXIS 59163, *33 ("motives such as protecting one's own job or currying favor .... may exceed mere malice and may constitute a "collateral objective.""); Brawer, 937 F. Supp. at 1082.[10]

IV. SUMMARY JUDGMENT MUST BE DENIED ON THE FAIR TRIAL CLAIM AGAINST FAIRSTEIN.

A. Fairstein is Liable for Her Prejudicial Statements and Improper Leaks

Defendant Fairstein's statements were precisely the type of prejudicial extrajudicial statements prohibited by DR 7-107: she purposefully made a litany of salacious statements and improper leaks to the press in order to attract media attention to this case. As a noted prosecutor and a self-described "shameless" publicity seeker, her statements were effective. She fanned the flames of press attention, ensuring rampant media coverage—including, for example, a New York Post *cover* photograph of Jovanovic with the blaring headline "Prosecutor: Cyber fiend struck before," followed by a full-page declaration: "HOW MANY MORE VICTIMS?" and underneath, "Doctoral student Oliver Jovanovic, 30, may be a *serial cyber sex attacker*, prosecutors fear"—which demonized Jovanovic and destroyed his right to a fair trial. (Pl. R. 56.1 ¶ 176; Ex. 51 at 11944.)

1. Defendants Fail to Address Many of Fairstein's Grossly-improper Statements

Defendants' contention that there were only nine extrajudicial statements made by Fairstein is highly misleading. (Compare Def. Br. at 12 with Pl. R. 56.1 ¶¶ 112-38). In fact, Fairstein made a litany of prejudicial statements to the press which made the headlines of every local newspaper and were repeated on local television newscasts. Defendants ignore many of

[10] Defendants' alternative argument—namely, that there was probable cause to arrest, thereby precluding an abuse of process claim (Def. Mem. at 10)—is equally without merit. First, the issue of probable cause was *not*, as defendants suggest, resolved against plaintiff. Rather, it was merely removed from this case on statute of limitations grounds as a result of Wallace v. Kato, 549 U.S. 384 (2007). Second, lack of probable cause is *not*, as defendants suggest, an element to a malicious abuse of process claim. See Cook v. Sheldon, 41 F.3d 73 (2d. Cir. 1994).

Fairstein's prejudicial statements, including: (1) that Jovanovic "tortured [J.R.] with hot wax and sex toys"; (2) that Jovanovic "tied the woman's legs to a chair and, once she was gagged as well, dropped all pretense of humor"; (3) that "We feel her courage for coming forward"; and (4) statements that the police "found literature on [Jeffrey] Dahmer" during the search.[11] Pl. R. 56.1 ¶¶ 114; Ex. 50-54 (news coverage). Each statement was grossly improper, as detailed further *infra*. Defendants also conspicuously ignore Fairstein's improper e-mail leaks, which she herself *admitted* would be a "gross violation of ethical standards." (Fairstein Dep. at 128, 192-93, 308). See, e.g., Ex. 50 at 1368 (N.Y. Post article, Dec. 8, 1996: "Is it a good idea to go somewhere with someone you do not know?"; "Do you think you know how to defend yourself?").

Defendants' failure to analyze these statements (along with the remainder of the statements in plaintiff Rule 56.1 ¶¶ 112-138; Fairstein made a total of 30 statements), let alone defend their propriety, means that defendants have utterly failed to meet their burden on summary judgment. On this ground alone, defendants' motion should be denied.

2. Fairstein's Statements Were Grossly Improper and Violated the Ethical Rules.

Fairstein's extrajudicial statements were clearly improper in that they had a "substantial likelihood of materially prejudicing an adjudicative proceeding," and specifically fell into several of the (non-exhaustive) categories of statements that the ethical rules deem "ordinarily . . . likely to prejudice materially an adjudicative proceeding." DR 7-107(a) and (b) (Ex. 101.). Strikingly, of the *six* categories of presumptively-prejudicial speech, Fairstein violated *five*, as detailed by Professor Gershman. Gershman's Decl. ¶¶ 9-13 (citing DR 7-107 (b)(1), (3), (4), (5,) and (6);

[11] Contrary to the claims of defendants, Fairstein did *not* make any of these statements during the arraignment. *Cf.* Def. Br. 12. While Fairstein stated at arraignment that Jovanovic "has a collection of Jeffrey Dahmer materials," Def. Ex. U, Fairstein admitted at her deposition that she was categorically *not* referring to Dahmer literature (Jovanovic had none) and instead claimed that her statement at arraignment referred to such common items such as belts, tape, and condoms which were recovered during the search of Jovanovic's home. Fairstein Dep. at 83-87; Defs. Ex. T (search inventory).

N.Y. Bar Ass'n Ethics Op. No. 420, 10/29/75: "any public statements [by a prosecutor] which are designed to sway or inflame public opinion, to gain political advantage rather than provide education, or to attempt to influence or intimidate the judiciary are clearly improper").[12]

Specifically, Fairstein's statements were improper in the following ways:

- Fairstein repeatedly opined on defendant's guilt and maligned his character, and vouched for the complaining witness, in violation of DR 7-107(b)(1), (4), (5) and (6), by stating that he (a) "terrorized this young woman," (b) that "we believe this is not the first time he did something like this; (c) that "he was so prepared for this and carried it off so smoothly;" (d) that "we feel her courage for coming forward;" (e) that "she was too frightened to call the authorities until weeks after it happened;" and (f) that "the stunned victim told her friends about the attack -- and event went to a doctor -- but was too terrified to tell police."

- Fairstein revealed extensive information concerning the witness's "expected testimony," and the "evidence expected to be presented," in violation of DR 7-107(b)(1) (3), (4) and (6). In short she described (a) plaintiff's alleged actions during the incident, including tying J.R.'s legs to a chair, playing a violent movie and referencing Jeffrey Dahmer; (b) evidence seized by the police, including evidence that never existed and evidence that she falsely contended was destroyed (as detailed *supra*); (c) evidence seized by her subpoena to AOL; (d) that "prosecutors have an expert witness who will explain how a baton-wielding attacker could sodomize a victim without leaving telltale marks." Additionally, (e) Fairstein leaked e-mails between the Jovanovic and J.R. which she admits constitutes evidence in the case which should not have been leaked.

- Fairstein also stated that "there are other victims," in violation of DR 7-107(b)(1), (4), (5), and (6), despite the fact that information concerning prior bad acts would likely be inadmissible. Marshall, 360 U.S. at 312-13 (inadmissible evidence in press accounts may cause "greater" prejudice as it is "not tempered by protective procedures); Sheppard v. Maxwell, 384 U.S. 333, 360 (1966) (where prosecutor provided evidence to media, "the exclusion of such evidence in court is rendered meaningless").

Pl. R. 56.1 ¶¶ 112-138. Powers I makes clear that violation of these "canons of ethics and standards" is actionable. Powers v. Coe, 728 F.2d 97, 105 (2d Cir. 1984) (detailing improper leaks); see also Martin v. Merola, 532 F.2d 191, 196 (2d Cir. 1976) (decrying prosecutors' prejudicial press statements).

[12] While DR 1-107 applies to all attorneys, statements by law enforcement are seen as especially authoritative and therefore more likely to "prejudice materially an adjudicative proceeding." DR 1-107(a); United States v. Mancusi, 445 F.2d 613, 617 (2d Cir. 1971); Henslee v. United States, 246 F.2d 190, 193-94 (5th Cir. 1957); United States v. Coast of Maine Lobster Co., Inc., 538 F2d 899, 901 (1st Cir. 1976).

B. Fairstein's Contention that Her Statements Were Proper Is Baseless.

As detailed in the accompanying Declaration of Prof. Bennett Gershmann, Fairstein's grossly prejudicial statements clearly violated the relevant ethical rules.[13] Fairstein misconstrues the facts and the relevant legal rules in attempting to argue otherwise.

1. Fairstein Admits is it a Gross Violation of Ethical Standard to Leak Emails Exchanged between Jovanovic and J.R.

Fairstein admits that it is a "gross violation of ethical standards" for the prosecution to release emails between the defendant and the complainant, as it is "inappropriate to leak the facts and evidence that are evidence in chief in the case." (Fairstein Dep. at 128, 192-93, 308). She admits that leaking such emails would "potentially damage[e]" defendant's "right to a fair trial." *Id.* at 193. Though Fairstein denies leaking these emails, the jury could easily find otherwise.[14]

2. Fairstein's Statements Were Wholly Inaccurate

For Fairstein to defend her attempt to try this case in the press by claiming that her highly misleading statements were "accurate" is factually wrong, particularly at summary judgment. For example, Fairstein's statement that "because he was so prepared for this and carried it off so smoothly, we believe there are other victims," Ex. 50 at 1387, is inaccurate in every respect. First, there were *no* evidentiary items collected by the police that would even *remotely* support Fairstein's claim that plaintiff was "prepared for this." Def. Ex. T (search inventory). Second,

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[13] Courts routinely admit expert testimony on legal ethics where relevant to plaintiff's claims. In re Zyprexa Products Liability Litigation, 04-MD-01596, 2005 WL 3312479 (E.D.N.Y. Dec. 5, 2005) (Weinstein, J.); United States v. Kloess, 251 F.3d 941, 949 (11th Cir. 2001); United States v. Kellington, 217 F.3d 1084, 1098 (9th Cir. 2000); United States v. Cavin, 39 F.3d 1299, 1309 (5th Cir. 1994).

[14] There is ample evidence that Fairstein was the cause of these leaks. She has admitted leaking information to reporters and, specifically, to Barbara Ross, one of Fairstein's "good friends" and a reporter who wrote the Daily News article containing the leaked emails. (Ex. 9, Fairstein Dep. at 187-88, 162); (Ex. 61, Media Studies Journal interview, at 3). Moreover, the source who leaked the emails stated they would "prove the case against Jovanovic," Ex. 50 at 1370, and Fairstein is the only member of the prosecution team who admitted speaking to the press about this case. In any event, it is no defense to claim that the police officers leaked information because prosecutors have an obligation to ensure that officers do not disclose prejudicial information. Gershman Decl. ¶ 14.

Fairstein had no basis whatsoever for stating that plaintiff "carried it off so smoothly." Fairstein never even *met* with the complainant, much less interviewed her, or even *read* her statement. (Fairstein Dep. at 75-76; 150-151). Fairstein's comments were manufactured out of whole cloth. Lastly, Fairstein's statement that "we believe there are other victims" is the height of irresponsible speculation by a prosecutor. At the time Fairstein made this statement, there was *no basis whatsoever* for believing that there were "other victims."[15]

3. Fairstein's Claim That Her Improper Statements Were Accurate is *Not a* Valid Defense

Fairstein's defense is also wrong on the law: the Supreme Court and other authorities have squarely rejected the contention that alleged *accuracy* is a defense: "A publication . . . would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained." Patterson v. People, 205 U.S. 454, 462 (1907); see also Martin, 532 F.2d at 198 (while criminal defendant may have been part of crime family: "It is now enough to observe that truth should not be a defense to this cause of action, although, conceivably, it may later become relevant in mitigation of damages."); Ex. 101 (DR 1-107(b)): including as "presumptively prejudicial" truthful information such as the identity of witnesses and the physical evidence to be presented at trial).

Fairstein's further attempt to seek refuge in the exceptions detailed in DR 1-107(c) must fail. DR 1-107(c) states: "Provided that the statement complies with DR 7-107(A), a lawyer . . . may state the following without elaboration," and Fairstein relies upon (c)(2), (5), and (6) (public records, request for assistance in obtaining evidence, and warning of danger). Def. Br. at 13, 15.

[15] Defendants' attempt to justify this improper remark by claiming that three other women *later* surfaced, Def. Br. at 14-15, is not only *not* a valid defense for Fairstein, it is grossly misleading. See plaintiff Rule 56.1 ¶¶ 88-98. No woman *ever* emerged with truthful information corroborating J.R. and, in any event, not a single woman had come forward at the time Fairstein made her statements.

As extensively detailed by Professor Gershman, however, none of these provisions are applicable, (Gershman Decl. ¶¶19-27): A "request for assistance" must be made without elaboration, i.e. "anyone with information about this case is encouraged to call the police." (Id. ¶ 26). Fairstein went significantly further than such a neutral statement. Nor is the claim believable that her intention was to "warn" the public given that defendant had already been apprehended at the time Fairstein spoke to the press and police had not arrested him for over a week after learning of J.R.'s allegations.

Furthermore, no information may be disclosed, *including information in the public record*, where releasing such information would likely "materially prejud[ice] an adjudicative proceeding." (Gershman Decl. ¶ 26 (citing DR 7-107(a) and ethics opinions)).[16] Here the information was on its face extremely prejudicial and therefore could not be disclosed. Thus, DR 7-107(c) is no license to make horrific statements concerning a criminal defendant's supposed actions. Moreover, Ms. Fairstein is particularly unable to seek the protections of DR 7-107(c) as she "intended a trial by media." Publicity in Civil Trial, N.C. State Bar Formal Ethics Op. 4, 1998 WL 609805 (Apr. 17, 1998), Ex. 100.

C. Fairstein is Not Entitled to Qualified Immunity.

1. Making Public Statements was Not Part of Fairstein's Official Duties.

Fairstein's official duties did *not* include communicating with the press. As defendants admit, only two prosecutors in the District Attorney's office were permitted to speak to the press as part of their official duties: Morgenthau himself and his Chief Assistant. Def. 56.1 ¶ 191; Pl.

[16] While Ms. Fairstein is not liable for statements she made at arraignment, (Def. Br. at 12), *none* of the extrajudicial statements identified by plaintiff, Pl. R. 56.1 ¶¶ 112-38, were statements Fairstein made at the arraignment. Moreover, the privilege for statements made in court proceedings, provides no license to repeat such statements to the press. Buckley, 509 U.S. at 277 & n.8 ("the speech of a counsel is privileged by the occasion on which it is spoken"). Fairstein is therefore liable for repeating information from the arraignment where she elaborates on that information or where that information is likely to prejudice Jovanovic's trial. Id.; Gershman Decl. ¶ 24 (citing DR 7-107(c).

R. 56.1 ¶ 182. Every other prosecutor was *required* to refer all inquiries to the press office, and could only speak to the press where specifically authorized. (Ex. 22 (policy memo).) Morgenthau (and the press office) *did not* authorize Fairstein to speak to the press concerning Jovanovic's case. (Fairstein Dep. at 120). Accordingly, the defense of qualified immunity is unavailable. See Shechter v. Comptroller of City of New York, 79 F.3d 265, 268 (2d Cir. 1996) (Qualified immunity available only where the "conduct of which the plaintiff complains falls within the scope of the defendant's official duties.").

2. Qualified Immunity is Inapplicable as Fairstein Acted in Bad Faith.

Nor does Fairstein have any claim to have acted in a good faith in this case. Defendant's counsel had pleaded with her to stop making her prejudicial statements, to no avail. (Ex. 59; Ex. 50 at 1382.) Fairstein admits considering how her statements would generate publicity and recognizing that "[pretrial press coverage] can obviously prejudice a juror's ability to make a decision based solely on the facts," but she made her statements anyway. (Fairstein Dep. at 96, 226.) She knew that law enforcement's salacious statements to the press can cause a case to be high-profile. (Fairstein Dep. at 449-50.) She knew that no "other victims" had come forward. Plaintiff's Rule 56.1 Statement, ¶¶ 88-98. And she knew that her statements were not authorized by DA Morgenthau. (Fairstein Dep. at 120.) Moreover, she spoke to the press notwithstanding the lack of evidence and inconsistencies in J.R.'s story which Fairstein knew to be "red flags" that J.R.'s allegation was false (one of the many false claims of sexual assault filed annually). Pl. R. 56.1 ¶¶ 238-241.

Indeed a reasonable jury could find that Fairstein clearly acted in bad faith in this case, and may have purposely spoken to the press to bolster her then-burgeoning second career as a

novelist.[17] She admits that she is "shameless" in seeking publicity and would "go anywhere to sell one book." Pl. R. 56.1 ¶ 176. To that end she publicized her novels by highlighting the "high-profile cases she had prosecuted" as the head of the Sex Crimes Unit, such as the Robert Chambers (aka "preppie murder") case. (Ex. 97.) She used her press contacts to bolster her book career, even inviting court reporters (including Barbra Ross and Laura Italiano, who wrote some of the prejudicial articles in this case) to book release parties. (Id.) Yet the Chambers case concluded in the 1980s and, by 1996, Fairstein needed another high-profile case to bolster her book sales—Jovanovic's case was the type of salacious tale that would garner priceless publicity. (Fairstein Dep. at 117 (cannot remember last high profile case)).

Indeed, the State Bar has recognized that a prosecutor-turned-author may be improperly "tempt[ed] to take a course of action that might enhance the value of the lawyer's publication or media rights." N.Y. Bar Ass'n Ethics Op. No. 606, 1/11/1990, Ex. 100 (internal quotations omitted) (determining that prosecutor may not sell media rights during ongoing prosecution). A jury could find that Fairstein was motivated to "enhance the value" of her books.

D. Fairstein's Prejudicial Statements and Leaks were a Proximate Cause of Jovanovic's Denial of a Fair Trial

1. Fairstein Cannot Claim Lack of Causation as She Purposefully Made Her Statements to the Press, Knowing Their Prejudicial Effect

Fairstein's attempt to hide behind lack of causation should fail because she *purposefully* made her statements to prejudice Jovanovic's case, with full awareness of the resulting harm to the constitutional right to a fair trial. Indeed in an interview with the Media Studies Journal just months before plaintiff's trial, Fairstein explained that in high-profile cases, "it is almost

[17] Fairstein's first novel, "Final Jeopardy," was published in June 1996, less than six months prior to plaintiff's arrest. Fairstein's second novel, "Likely to Die," was completed in January 1997, within weeks following plaintiff's arrest. (Fairstein Dep. at 363). This career was very profitable, earning her $2.5 million by 1999. Ex. 66.

impossible" for jurors to ignore the media accounts: While jurors pledge to only listen to "evidence from the witness stand," in Fairstein's experience, "it is almost impossible" for jurors to ignore the media accounts: jurors "can't sit on a train and not see what's there," "human nature doesn't always work that way." (Fairstein Dep. at 113); (Ex. 61, Media Studies Journal.) According to Fairstein, the prosecution can use the press to "great advantage." (Ex. 61.)

In this case, Fairstein made an onslaught of prejudicial statements to the press, knowing full well that these statements would prejudice defendant's rights. She admitted that she "must have considered" the possibility that her statements would generate publicity about Jovanovic's case. (Fairstein Dep. at 226.) In the month of December 1996 alone, there were 64 articles in the daily papers. (Ex. 50-51.) These statements created a media firestorm which lasted through the entire pre-trial period and during the trial itself. As Fairstein herself admitted, her pretrial statements were most opportune for prejudice: "As I've said many times, [pretrial press coverage] *can obviously prejudice a juror's ability to make a decision based solely on the facts* and evidence in the case." (Fairstein Dep. at 96). See also Estes, 381 U.S. at 536 ("Pretrial [publicity] . . . may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence.").

2. Fairstein is Liable for the Media Firestorm She Created and Factual Questions of Causation Should be Resolved by the Jury

It is well-established that defendants in § 1983 actions, like tort defendants, are responsible for the "natural consequences" of their actions. Higazy v. Templeton, 505 F.3d 161, 175 (2d Cir. 2007); Zahrey v. Coffey, 221 F.3d 342, 351, 357 (2d Cir.2000). Moreover, "foreseeability and causation ... are issues generally and more suitably entrusted to fact finder adjudication." Higazy, 505 F.3d 161 at 175.

While Fairstein claims that she was no longer involved with the case after December 1996, she in fact continued to speak to the press long after that point. *Cf.* Def. Br. at 12. Indeed, just weeks before trial, Fairstein made false and derogatory statements about Jovanovic's defense counsel and again vouched for the credibility of the complaining witness. Pl. R. 56.1 ¶ 136. Just the day before trial in this case, Ms. Fairstein restated the (false) claim that Jovanovic had "tied his alleged victim to a chair" and described expected testimony from the prosecution's expert as to "how a baton-wielding attacker could sodomize a victim without leaving telltale marks." (Ex. 50 at 1353.) No such witness ever testified. Moreover, the media firestorm created by Fairstein was reignited in the days leading up to the trial--and continued unabated throughout the criminal trial--with extensive news coverage of the case on local news stations and in all local tabloids. In fact, in the period surrounding the trial, there were at least 40 news articles concerning this case and over 40 news segments on television, displaying the *same newspaper headlines* from the days immediately following plaintiff's arrest. (Ex. 50-54).

3. Fairstein's Statements Led to an Indictment by a Biased Grand Jury

The harm occasioned by Fairstein's improper statements was not limited to the trial. Rather, in the days following plaintiff's arrest, Jovanovic was indicted by a Grand Jury that had been absolutely inundated with inflammatory and highly prejudicial news coverage. In the short time between the arrest and the Grand Jury's vote to indict on all charges, there were at least 58 articles as well as television coverage on all the local networks. (Pl. R. 56.1 ¶ 160.) In fact, the publicity was so bad that there were reports of protesters standing outside of the courthouse yelling "Pervert! Pervert!" as Jovanovic left. (Id. ¶ 161.) As a result, Jovanovic's defense counsel were compelled to ask the prosecution to question grand jurors about press exposure and discharge jurors that indicate bias. (Id. ¶¶ 163-67.) Yet, the prosecution inexplicably refused this request and never *voir dired* the grand jury.

Accordingly, a jury could reasonably conclude that Fairstein's statements to the press impermissibly tainted the grand jury proceedings and resulted in plaintiff's indictment. This indictment not only ensured that the criminal case against plaintiff would continue, but also caused plaintiff to suffer a deprivation of liberty while awaiting trial. See Jocks, 316 F.3d at 136 ("the requirements of attending criminal proceedings and obeying the conditions of bail suffice" as a seizure); Murphy, 118 F.3d at 948 (same).

4. Fairstein's Statements Caused Two Witnesses to Give False and Prejudicial Trial Testimony Based on Newspaper Accounts

Fairstein has admitted that *witnesses* can also be affected by press accounts; the media can irreparably alter witness testimony and "deprive us of evidence." (Ex. 85 at 2.) Moreover, there were no procedural mechanisms to attempt to insulate witnesses from Fairstein's extrajudicial statements; there is no *voir dire* of witnesses. Gershman Decl. ¶ 38.

(a) Chambers' Testimony Was Based on Pretrial Publicity

Mary Jo Chambers was a trial witness whose testimony was wholly false and simply drawn from newspaper accounts. Chambers falsely testified that Jovanovic admitted, in an instant message (IM) to her, assaulting J.R. and explaining that he did this because he "wanted to teach her a lesson for trusting someone." Pl. R. 56.1 ¶¶ 186-93. Jovanovic never sent such an IM (which must be taken as true for purposes of summary judgment, and, indeed, no such IMs were ever recovered though police seized Jovanovic's computer). (Id.); (Ex. 47, Jovanovic Decl.) The source of this false testimony is clear—Chambers testified that she only approached police *immediately after* reading a press article describing Jovanovic's case. (Id.) Moreover, the claim that he admitted wanting to teach J.R. "a lesson" was lifted from the post-incident e-mail messages leaked to the press.

Chambers' testimony was indisputably important to the case: She is the *only* witness who claimed that Jovanovic admitted assaulting J.R. For this reason, both parties discussed her testimony during summation and the prosecution asked the jury to request that Chambers' testimony be read back. (Ex. 88; Ex. 87 at 3346-47). The jury clearly agreed: before convicting Jovanovic, they asked for Chambers' testimony to be read back (Ex. 92). Given that even the prosecution admitted they only won this case by the skin of their teeth, a reasonable jury could find that Chambers' testimony—which was manufactured from the newspaper accounts—was decisive in causing the conviction.[18]

5. Given the Widespread and Highly-Inflammatory Press Coverage in this Case, Procedural Remedies Could Not Cure the Prejudice

(a) *Voir Dire* Did Not Cure the Harmful Prejudice

Fairstein has admitted that (1) jurors can become "immersed" in reading press coverage before trial which is "the period of greatest impact"; (2) while jurors promise to "take their evidence from the witness stand" "human nature doesn't always work that way"; and (3) jurors cannot avoid press coverage during the trial in high-profile cases. (Ex. 61). Indeed, the trial judge agreed, stating: "any honest [potential juror] who says they read about the case would be compelled to say that they formed an opinion." (Def. App. 1 [3/10/98] at 167.)

Here, the jurors had been exposed to the extensive press coverage that permeated the community. Defendants' contention that "few jurors . . . actually had heard anything about the case" is wrong. (Def. Br. 17.) They conspicuously fail to cite Judge Wetzel's contrary statement to the jury: "this case did in fact receive certain media coverage, and it's apparent from the questionnaires that *many of you* have some recollection with regard to that media coverage."

[18] Vita DeLeon is a second witness whose testimony was infected by the media firestorm Fairstein created. Upon being informed that her initial account was inconsistent with media accounts of the details of the incident, DeLeon altered her testimony accordingly. Pl. R. 56.1 ¶¶ 197-99.

Def. App. 2 [3/10/98] at 353 (emphasis added)[19]; see also Def. App. 1 [3/10/98] at 158 ("it's quite likely that many of you read the paper every day, at that time read those articles [in the paper and on television] and you may recall some or all of what was written.").

1) Jurors' Statements Regarding Media Exposure Are Not Dispositive On The Issue of Prejudice.

Courts have repeatedly held that the defendant was denied a fair trial due to the extreme publicity, *even where there was no showing that the jurors were unduly influenced by the coverage*. In Sheppard, a case "notorious" in the press for its salacious subject matter (Sheppard was accused of murdering his pregnant wife) the Court held that the pretrial press coverage which "emphasized evidence that tended to incriminate Sheppard," coupled with a "carnival atmosphere at trial" denied defendant his right to a fair trial. The Court overturned Sheppard's conviction though "all of the jurors stated that they would not be influenced by what they had read or seen." Id. at 354 n.9. See also Dobbert v. Florida, 432 U.S. 282, 303 (1977) (publicity that so pervaded the community as to "utterly corrupt[ ]" the trial atmosphere); Rideau v. State of Louisiana, 373 U.S. 723,726 (1963) (due process violation was clear with no need to "examine a particularized transcript of the *voir dire*"); Estes, 381 U.S. at 542, 545 (overturning Estes' conviction because his trial was televised, finding "a showing of actual prejudice is not a prerequisite to reversal.").[20] Here, a reasonable jury could easily find that this trial was "[u]tterly corrupted by press coverage." Murphy, 421 U.S. 794, 798 (1975).

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[19] It appears that the trial judge's policy was to destroy completed jury questionnaires.

[20] See also Irvin, 366 U.S. at 726 (overturning murder conviction where prosecutor had issued a press release describing defendant's confession as "adverse publicity caused a sustained excitement and fostered a strong prejudice" though each juror indicated that he could reach an impartial verdict despite exposure to prejudicial newspaper articles); Marshall v. United States, 360 U.S. 310, 311-13 (1959) (overturned conviction, under supervisory authority, where newspapers revealed defendant's prior convictions, though jurors swore they would not be influenced by these press accounts); United States v. Rattenni, 480 F.2d 195 (2d Cir. 1973) (reversing conviction due to effect of prejudicial publicity, though there was "weighty evidence presented against [defendant] appellant," where one juror "was never asked if the article,"—a prejudicial newspaper article published during trial—"biased her and made no such disclaimer *sua sponte*").

2) Voir Dire Is A Limited Tool Which Cannot Eliminate Prejudice In An Extreme High-Profile Case

Where the media coverage is extreme, courts recognize—as Fairstein herself has—that *voir dire* is a limited tool that is not equipped to remove the prejudice resulting from overwhelming media coverage. See United States v. Dennis, 183 F.2d 201, 227 (2d Cir. 1950) ("*voir dire* is a clumsy and imperfect way of detecting suppressed emotional commitments"); Stroble v. California, 343 U.S. 181, 201 (1952) (Frankfurter, J., dissenting) (courts cannot "determine when the impact of such newspaper exploitation has spent itself or whether the powerful impression bound to be made by such inflaming articles as here preceded the trial can be dissipated in the mind of the average juror by the tame and often pedestrian proceedings in court."); see also United States v. Rattenni, 480 F.2d 195, 198 (2d Cir. 1973); Fairstein Dep. at 113 ("You hope they're telling you the truth when they swear to ignore the headlines and take their evidence from the witness stand . . . [but] human nature doesn't always work that way.")

Moreover, the *voir dire* could be of only limited effect as the jury knew they were facing intense public scrutiny which, courts recognize, fundamentally distorts the jury's decision-making process. See Estes, 381 U.S. at 545 (1965) (where the jury recognizes that a case is a "cause celebre," "[e]very juror carries [that awareness] with him into the jury box," and it is "highly probably that it will have a direct bearing on [the juror's] vote."); Maine Lobster Co, 538 F2d at 901 (describing potential prejudice, including "of making a juror feel that public attention . . would be more sharply and critically directed to the ultimate verdict"). Not only had the jurors in this case been exposed to media accounts for months, they were clearly aware of the continuing media coverage, and this was even emphasized by the trial judge: "It is of no surprise to you from observing the activity in the courtroom indeed there has been newspaper coverage." (Ex. 56, Trial Tr. at 3025). Additionally, the jury received the local daily papers in the jury

room, with the stories about Jovanovic's case cut out. (Id. at 3509-10). From the extensive blank space where stories should have been, jurors were well-aware that this was a case that garnered significant public attention.[21]

(b) Powers II is Easily Distinguishable as its Holding was Dependent upon Powers' *Guilty Plea*

Powers II is easily distinguishable as Powers – unlike plaintiff – *pleaded guilty* mid-trial after hearing weeks of evidence against him. Both the Circuit and the lower court made clear that this fact was *crucial* to the dismissal of Powers' civil rights case. Powers v. McGuigan, 769 F.2d 72, 75-76 (2d Cir. 1985) ("when Powers pleaded guilty, he did not in any way indicate that he did so because of pretrial publicity or because he did not believe he could be tried fairly."). In marked contrast, here the jury convicted Jovanovic in what was, according to the prosecution, a "hopeless" and "impossible" case that had "[redacted]"[22] (Exs. 63, 65). Jovanovic maintained his innocence throughout the trial, and while the criminal investigation was proceeding, indicated his concerns about the prejudicial publicity. (Ex. 59; Ex. 50 at 1382 56.1.) He used every single peremptory challenge. (Ex. 113, March 12, 1998 Tr. at 138). Moreover, alternative remedies would have been useless given the extent of the publicity and the effect of the publicity on witnesses, as detailed *supra*. Under these facts, a reasonable jury can certainly find a "causal link between the pretrial publicity and the . . . unfairness of the trial." Powers II, 769 F.2d at 76.

[21] Given the widespread and highly inflammatory press coverage in this case, change of venue would have had no effect. The publicity was widespread and infected the entire area. Pl. R. 56.1 ¶ 139-43. Mancusi, 445 F.2d 613 n. 4 ("because of the nationwide coverage of certain crimes . . . spatial separation . . . [does not] guarantee isolation from prejudicial news coverage"); Irvin, 366 U.S.717, 722 (1960) (vacating conviction where trial moved to county which had been exposed to essentially the same news coverage).

[22] And, as detailed *supra*, plaintiff does not have to demonstrate that the sole cause for his conviction was the extrajudicial statements, just that they were one of the proximate causes, as detailed further infra note 33.

V. SUMMARY JUDGMENT MUST BE DENIED ON PLAINTIFF'S MONELL CLAIM CONCERNING THE NYPD.

A. The City is Liable for Failing to Train Its Detectives Regarding False Rape Claims.

It is well-established that in a Section 1983 action, municipal liability may be "premised on a failure to train employees when inadequate training 'reflects deliberate indifference to . . . constitutional rights'" Okin v. Village of Cornwall-on-Hudson Police Department, 577 F.3d 415 (2d Cir. 2009) (quoting City of Canton v. Harris, 489 U.S. 378, 392 (1989)). Indeed, "[e]vidence of a *single* violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability." Bd. of County Comm'rs v. Brown, 520 U.S. 397 (1997) (emphasis added).

In this case, discovery has revealed that the NYPD gives virtually no training to its detectives regarding false rape claims. Indeed, both Detective Bonilla and Detective Cullen testified that they received absolutely *no training* on false rape claims. (Bonilla Dep. at 16; Cullen Dep. at 113, 132). Further, the City's Rule 30(b)(6) witness on training admitted that the NYPD provides *no* training whatsoever on the frequency of false claims, and provides *no* training on the procedures to be followed when it appears that a complainant is lying. (Giuntini Dep. at 53, 136, 157-58). He also admitted that the NYPD's two-week sex crimes training course included *not a single* class—or even a *portion* of a class—concerning false rape claims. (Id.). Given the high prevalence of false rape claims, as discussed below, the City's complete and abject failure to provide any training on false rape claims gives rise to municipal liability under Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). See Okin, 577 F.3d at 440-41 (reversing summary judgment on Monell claim based upon City's failure to train officers how to investigate domestic violence complaints).

1. Due to the High Prevalence of False Rape Claims, The Need for Training Was Obvious.

During discovery, multiple witnesses confirmed that complainants *frequently* make false claims of sexual assault. For example, Detective Cullen, who investigated this case with Bonilla, testified that a full *one-third* of rape claims in Manhattan are false. (Cullen Dep. at 131). Similarly, plaintiff's police expert, Detective Baeza – who worked in the same unit as Bonilla and Cullen, and who has co-authored a national study on false rape claims – likewise stated that anywhere between 30% to 40% of all rape claims are false. (Baeza Report at 9). Even Linda Fairstein has acknowledged the high percentage of false rape claims, stating publicly that "there are about 4,000 reports of rape each year in Manhattan. Of these, *about half simply did not happen."* (Ex. 64).[23] Given the high prevalence of false claims – and the inherent difficulty of identifying and investigating such claims – the need for training on false rape claims was *obvious*. Thus, the City's failure to provide such training clearly states a Monell claim under the law of this Circuit. See Walker v. City of New York, 974 F. 2d 293, 208 (2d Cir. 1992).

2. The City's Training Program Was Not Only Deficient, But Also Highly Misleading.

The City not only failed to provide adequate training, but the *single* page in its training manual which discussed false claims actually *misled* its detectives by grossly underestimating the number of such claims that are made each year. (Baeza Report at 9-10). Specifically, the City taught its detectives that false rape claims are *extremely rare*, occurring in only 2-5% of all cases. (See Ex. 78, NYPD Sex Crimes Investigation Guide).[24] Further, the City taught its detectives to

[23]Amazingly, Fairstein denies making this statement, despite the fact that the she was quoted by her "very close personal friend" Ben Stein. (Fairstein Dep. at 262-263). In any event, Fairstein never requested a retraction of this statement. (Id. at 268), and thus, for purposes of this motion, Fairstein's statement must be accepted as true.

[24] Further, this guide provides *no* techniques or guidelines whatsoever for a detective to follow to determine if a false claim was made. Thus, to the extent that this guide may be considered as "training material", it is woefully inadequate and further confirms the deficiencies in the City's training program. (See Ex. 42, Baeza Report at 9-10).

accept at face value all sexual assault claims, without critically evaluating the complainant's story and her credibility. (Id.) ("the validity and credibility of the allegations" must be "accepted as fact."). Worse yet, this deficient training was accompanied by an official NYPD *policy* that the police would *never* arrest complainants who make false rape claims (Giuntini Dep. at 165). In light of this policy – and in the absence of *any* training detailing the importance of uncovering false claims, or *any* guidelines as to how to detect false rape claims – there is ample evidence in the record to support plaintiff's Monell claim based on inadequate training. Accordingly, summary judgment on this claim must be denied.

B. Defendants Have Failed to Move For Summary Judgment on this Claim, and Are Therefore Precluded from Doing So in Their Reply Papers.

Plaintiff's Monell claim concerning the NYPD must proceed to trial as it has not been challenged by the City. Despite being served with plaintiff's Expert Disclosure on June 30, 2009 – which specifically addressed "The NYPD's Inadequate Training on False Rape Claims" (Baeza Report at 9-10) – defendants have wholly failed to address this Monell claim in their moving papers. In light of this failure, defendants cannot raise this issue for the first time in their reply papers. See Morgan v. McElroy, 981 F.Supp. 873, 876 n.3 (S.D.N.Y. 1997).[25]

[25] Defendants unquestionably had notice of this claim. First, as noted above, this claim was specifically addressed in plaintiff's June 30, 2009 expert's disclosure. Second, defendants agreed to produce a Fed. R. Civ. P. 30(b)(6) witness from the NYPD on the subject of training. Ex. 18 (Giuntini Dep). Third, the issue of training was repeatedly raised at the depositions of various police witnesses. Thus, defendants clearly had notice of this claim. Lastly, even if defendants were to argue that this claim was not sufficiently pleaded in plaintiff's Amended Complaint ¶¶ 168-69—which it *was*, see Cooper v. Metro Transp. Auth., No. 05 Civ. 525, 2006 WL 1975936, at *3 (S.D.N.Y. July 14, 2006) (Monell claim is sufficiently pleaded "even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom or practice")—Rule 15 provides that where a party "implied[ly] consents" to try an issue, as defendants did here, it is irrelevant whether that issue was raised in the original pleadings. See Hogan v. Wal-Mart Stores, Inc., 167 F.3d 781, 784 (2d Cir. 1999) ("Defendant cannot now claim it was not on notice").

VI. SUMMARY JUDGMENT MUST BE DENIED ON PLAINTIFF'S MONELL CLAIM CONCERNING THE MANHATTAN D.A.'S OFFICE (DANY)

A. Despite Multiple Appellate Reversals, DANY Failed To Train Prosecutors As to the Ethical Boundaries For A Proper Summation.

From 1990 though 1995, there were seven instances where the First Department or Court of Appeals found that a Manhattan ADA had made improper comments during summation. See, e.g., People v. Tolbert, 198 A.D.2d 132 (1st Dept 1993) (reversing conviction where "[i]n summation, the prosecutor vouched for the truthfulness of the complaining witness, denigrated the defense and defense witnesses, impermissibly referred to suppressed evidence, and misrepresented evidence.").[26] In light of these decisions, the Manhattan District Attorney's Office ("DANY") was on notice of the *need* for better training regarding the ethical constraints on a prosecutor giving a summation. Yet, based on the training materials received during discovery, this need was *not* addressed by DANY.

B. DANY's Training Program Disregarded The Rules Set Forth By The Appellate Division.

[redacted]. Yet, as the First Department has stated, "[t]his line of argument, suggesting that the People's witnesses are credible, whereas the defendant's witnesses are incredible, has been *condemned by this Court*."

[26] See also People v. Ellis, 567 N.Y.S.2d 685 (1st Dep't 1991), People v. Norton, 563 N.Y.S.2d 802 (1st Dep't 1990), aff'd on other grounds, 79 N.Y.2d 808 (1991), People v. Thompson, 555 N.Y.S.2d 266 (1st Dep't 1990), People v. Tongue, 678 N.Y.S.2d 41 (1st Dep's 1998) , People v. D'Alessandro, 591 N.Y.S.2d 1001 (1st Dep't 1992), People v. Davis, 81 N.Y.2d 281 (1993). Some of these cases included other types of prosecutorial misconduct as well.

Tolbert, 198 A.D.2d at 133-34 (emphasis added). [redacted]

[redacted]. Yet, the Appellate Division has repeatedly condemned this type of argument as well. See, e.g., People v. Ortiz, 116 A.D.2d 531, 532 (1st Dep't 1986); Tolbert, 198 A.D.2d at 133-34.

[redacted]. See id. [redacted]

[27] [redacted].

[redacted].[28]

Since DANY blatantly disregarded the rulings of the Appellate Division – and since the need for better training was *obvious* based upon these decisions – DANY's training program "reflects deliberate indifference" sufficient to establish liability under City of Canton, 489 U.S. 378.[29]

C. ADA Heatherly Repeatedly and Flagrantly Violated Ethical Rules For Summation, Thus Depriving Plaintiff of a Fair Trial.

ADA Heatherly's summation was – not surprisingly – a reflection of the improper and grossly deficient training which she had received at DANY.[30] Among other things, Heatherly: (1) repeatedly attacked the integrity of defense counsel, accusing him of "outright lies," "distortion" and "deception"; (2) improperly vouched for the People's witnesses by claiming falsely that "our witnesses were not paid. Absolutely no payment to them"; (3) repeatedly attacked the plaintiff's experts as "hired guns" and mocked them with sarcastic nick-names ("Multi-Quell"; "Multipurpose"); (4) repeatedly appealed to class prejudice by attacking plaintiff's "fancy suit" and "fancy lawyers"; (5) repeatedly emphasized plaintiff's failure to testify by reminding the jury that the complainant's story had not been "disputed" or

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[28] [redacted].

[29] DANY's failure to appropriately train its prosecutors is compounded by its utter failure to discipline its prosecutors for any type of serious misconduct. [redacted]. Indeed, Fairstein recalled only one situation where a prosecutor was disciplined in her thirty years at DANY. (Fairstein Dep. at 323-324.)

[30] While Heatherly was a lateral transfer when she joined DANY (in 1993), she nonetheless received training on summations from DANY. (Heatherly Dep. at 14-15).

"contradicted" by the defense; and (6) falsely told the jury that the plaintiff had attended medical school – thus explaining J.R.'s lack of medical injuries – when she *knew* this not to be true.[31] (Ex. 87, People's Summation at 3317, 3369-70, 3370-3292, 3324, 3313, 3311); (Gershman Decl., ¶¶ 40-43). It is important to note that these improper remarks were *not* "heat of the moment" arguments made by a prosecutor, but rather, were "carefully planned out and thought out" by Ms. Heatherly, and then "refined" by her supervisors (Heatherly Dep. at 326-27).

Given the large number of improper remarks made by Ms. Heatherly (Gershman Decl., ¶¶ 39-45) – and the fact that there was a *seven day* gap between the close of evidence and her summation, increasing the likelihood that the jury would be misled by Heatherly's statements – Ms. Heatherly's closing argument might well have impacted the jury's verdict in this case, especially given the fact that the prosecution's case had "[redacted]" was "hopeless" and "impossible" (Exs. 63, 65). See Tolbert, 198 A.D. 2d at 134 ("the prosecutor's misconduct in summation may very well have tipped the scales against defendant, especially since the evidence against defendant was not overwhelming").

D. Defendants' Monell Causation Analysis Is Inherently Flawed.

Defendants argue that the trial judge's rulings in the criminal case somehow break the chain of causation between the City's inadequate training (for both DANY and the NYPD), and plaintiff's resulting deprivation of liberty. (Def. Br. at 23.) However, the Second Circuit has repeatedly held that the intervening action of a judge does *not* break the chain of causation between the wrongdoer and the subsequent damages to plaintiff. See, e.g., Zahrey v. Coffey, 221

[31]A full copy of Ms. Heatherly's summation, as well the sections of the Appellant's Brief detailing the improprieties of this closing argument, is annexed hereto. (Exs. 87 and 93) While defendants suggest that Ms. Heatherly's summation was proper because the First Department did not reverse on this ground (Def. Br. at 22-23) – there was *no* ruling whatsoever by the Appellate Division on this issue. Therefore, the reversal on Rape Shield grounds alone is *not*, as defendants suggest, "powerful evidence" that Ms. Heatherly's summation was proper (id); rather, it is *no* "evidence" at all.

F.3d 342, 351 (2d Cir. 2000) ("defendants in Section 1983 cases are liable for consequences caused by reasonably foreseeable intervening forces" (citation omitted)); Warner v. Orange County Dep't of Probation, 115 F.3d 1068, 1071 (2d Cir. 1998) (sustaining a claim against a probation officer whose wrongful recommendation led to an unconstitutional sentence, despite subsequent "intervening" actions of the sentencing judge); White v. Frank, 855 F. 2d 956, 962 (2d. Cir. 1988) (subsequent "intervening" actions of a prosecutor and grand jury did not relieve police officer from liability based upon false testimony).[32] Here, a jury could easily find that the City's failure to properly train its police officers (regarding false rape claims) and/or prosecutors (regarding summations) was a substantial factor in causing plaintiff's deprivation of liberty.[33] Thus, defendants' causation argument must be rejected.

E. Van De Kamp Has No Application To This Case.

Defendants claim, without any citation whatsoever, that, under the reasoning in Van De Kamp v. Goldstein, 29 S.Ct. 855 (2009), "the St[34]ate, not the county" is liable for the District Attorney's failure to train its prosecutors. (Def. Br. at 24-25). Yet defendants conspicuously fail to cite the Second Circuit's opinion to the contrary: Myers v. County of Orange makes clear that "'relevant state law'"—not federal law—governs whether a District Attorney is considered a State or county official "'on a particular issue.'" 157 F.3d 66, 76-77 (2d Cir. 1998) (quoting McMillian v. Monroe, 520 U.S. 781 (1997)). Under New York law, "DAs and ADAs are

[32] To the extent that defendants rely upon Wray v. City of New York, 490 F.3d 189, 193-94 (Def. Br. at 23), it is misplaced. In Wray, the individual officer's conduct "was not in itself illegal or unconstitutional," id. at 194, whereas here, plaintiff has alleged *multiple* unconstitutional acts by Bonilla – including fabrication of evidence and perjury – which "misled" not only the prosecution, but also the grand jury, the petit jury and the trial judge. Id. at 193.

[33] It is well established that "a given proximate cause need *not* be, and frequently is not, the exclusive proximate cause of harm." Sosa v. Alvarez-Machain.

generally presumed to be local county officers." Id. (citing N.Y. Pub. Off. Law § 2 (defining DA as "local officer" not "state officer")). The only "*narrow* exception to this general rule [is] when a prosecutor makes individual determinations about whether to prosecute violations of state penal law," in which case the county is not liable. Id. at 76-77 (emphasis added). Indeed, Myers, 157 F.3d at 77, and Walker, 974 F.2d 293 (2d Cir. 1992), specifically made clear that a challenge to the DA's failure to train prosecutors—such as plaintiff's *Monell* claim here—is not a challenge to a "determination about whether to prosecute" and, accordingly, the county, and not the state, is the appropriate defendant under New York law.

In marked contrast to the applicable New York law which "confines" state liability to challenges to the prosecutor's decision to prosecute, Walker, 974 F.2d at 301, Van De Kamp engaged in a "functional" analysis, which considered the policy reasons for the immunity in question. Such an analysis has no place in construing New York's local laws. Indeed, at least one court in this Circuit has rejected this argument. See Norton v. Town of Islip, No. 04-cv-3079, 2009 WL 804702, at *18-*19, *25-*27 (E.D.N.Y. Mar. 27, 2009) (finding prosecutor immune under Van De Kamp, but holding that, under Myers, Suffolk County was liable under Monell for its failure to supervise prosecutors).[35]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Defendants' motion for summary judgment should be denied.

[35] Furthermore, Van De Kamp's holding clearly has no applicability to a Monell claim. It is well established that that "unlike various government officials, municipalities do not enjoy immunity from suit – either absolute or qualified – under § 1983." Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 166 (1993); see also Morris v. Lindau, 196 F.3d 102, 111 (2d Cir. 1999) ("In other words, municipalities have no immunity defense, either qualified or absolute, in a suit under § 1983."). Thus, even if Heatherly herself would be entitled to immunity for her trial misconduct, the City of New York is not entitled to such immunity.

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New York, New York

_____/s/_____

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