Index No. 03-CV-9685 (DAB), 03-CV-9974 (DAB), 03-CV-10080 (DAB)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTRON McCRAY, et al.,

Plaintiffs,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.

_____

KHAREY WISE, et al.,

Plaintiffs,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.

_____

YUSEF SALAAM, et al.,

Plaintiffs,

- against -

THE CITY OF NEW YORK, et al.,
Defendants.

CITY DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

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CITY DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

Preliminary Statement

Defendants City of New York, the New York City Police Department ("NYPD"), Police Commissioner Raymond Kelly, Louis Rosenthal, Mario Selvaggi, Thomas McKenna, Jose Rosario, Carlos Gonzalez, Harry Hildebrandt, Michael Sheehan, John Hartigan, Humberto Arroyo, Scott Jaffer, John O'Sullivan, John Taglioni, Robert Nugent, Bruno Francisci, Thomas McCabe and Linda Fairstein (collectively the "City defendants")[1] submit this memorandum of law in support of their motion to dismiss the complaints in these actions[2] pursuant to Rules 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiffs Yusef Salaam, Antron McCray, Kevin Richardson, Raymond Santana and Kharey Wise (collectively, the "criminal defendants" or the "primary plaintiffs") allege, *inter alia*, that they were falsely arrested and imprisoned, maliciously prosecuted and wrongfully convicted for the sexual assault on the "Central Park Jogger," Patricia Meili, on April 19, 1989. Plaintiffs Linda McCray, Grace Cuffee, Connie Richardson, Valerie Cuffee, Raymond Santana Sr., Joann Santana, Sharonne Salaam, Aisha Salaam, Shareef Salaam, Deloris Wise, Daniel Wise, Michael Wise and Victor Wise also purport to bring various state and federal claims in their role as relatives of the primary plaintiffs.

Even assuming the factual allegations in the complaints to be true, the complaints as against the City defendants should be dismissed for the following reasons: (1) plaintiffs' claims

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[1] Former Assistant District Attorney Linda Fairstein is represented by the Corporation Counsel of the City of New York. District Attorney Robert M. Morgenthau, Assistant District Attorney Elizabeth Lederer, and former Assistant District Attorney Arthur Clements and are represented by attorneys at the New York County District Attorney's Office. The City defendants incorporate by reference all motions, authorities and arguments made by the District Attorney defendants to the extent they are applicable to the City defendants.

[2] The actions have not been formally consolidated; nevertheless the complaints arise from the same transaction or occurrence, and raise identical issues of law and accordingly the City defendants address the three complaints in a single memorandum of law.

based on coercion of the confessions and lack of probable cause are barred by the doctrines of collateral estoppel and Rooker-Feldman; (2) plaintiffs have not set forth a Brady claim based on the information pertaining to Matias Reyes; (3) the complaints fail to meet minimal standards for pleading claims against the individual defendants; (4) the claim, other than for false arrest and laicious prosecution, are time-barred; (5) the complaints establish that probable cause existed for the arrest and prosecution of the plaintiffs; (6) plaintiffs cannot state a claim for malicious prosecution against defendants because: (a) the NYPD defendants did not initiate the prosecutions (b) plaintiffs cannot demonstrate a favorable termination (c) the prosecutions were supported by probable cause, and (d) plaintiffs cannot demonstrate that the proceedings were instituted with malice; (7) all claims against former Assistant District Attorney Linda Fairstein fail pursuant to the 11th Amendment and the doctrine of Absolute Prosecutorial Immunity; (8) plaintiffs' conspiracy claims pursuant to 42 U.S.C. § 1983 and § 1985 fail as a matter of law; (9) plaintiffs have failed to set forth a claim pursuant to § 1981 or the Thirteenth Amendment; (10) plaintiffs conclusory allegations against the City are insufficient to establish municipal liability; (11) plaintiffs fail to state a claim based on the Armstrong Commission Investigation and Report, (12) the individual defendants are entitled to qualified immunity; (13) plaintiffs fail to state a § 1983 claim for Familial Association; and (14) the Court should dismiss the pendent state law claims because there are no viable federal claims in the actions;. Accordingly, defendants respectfully request that the Court dismiss all federal claims against the City defendants, with prejudice, and additionally dismiss the remaining pendent state law claims for lack of jurisdiction.

STATEMENT OF FACTS

Defendants do not adopt or concede the truth of any allegations set forth in this Statement of Facts, but submit that the Court must take such allegations as true for purposes of this motion.[3]

On April 19, 1989, sometime between 9:00 pm and 9:30 p.m., a series of violent attacks occurred in Central Park. Salaam, ¶ 26; McCray, 33; Wise, ¶ 25. Two individuals were accosted and assaulted by a group of youths. Thereafter, a couple on a tandem bike were menaced. Id. A taxi cab driver had rocks hurled at his cab and was threatened. Id. Four male joggers were also set upon on the jogging path at the northern end of the Central Park reservoir. Id. Two of the male joggers, John Laughlin and David Lewis, were assaulted and seriously injured, while another two escaped. Id.; see also, People v. Wise, et al., 194 Misc.2d 481, 483, 752 N.Y.S.2d 837, 840 (N.Y. Sup. Ct. Dec. 19, 2002), Ex. F. On April 20, 1989, at approximately 1:30 a.m., an unconscious woman, later identified as Patricia Meili, was found by two men walking on a footpath through Central Park near the 102nd Street Cross Drive. Salaam, ¶ 27; McCray, ¶ 34; Wise, ¶ 26; Ex. D, Galligan at 17. She was badly beaten and losing significant amounts of blood. Ex. D, Galligan at 17. The woman came to be known as "the Central Park Jogger." Plaintiffs concede that this woman had been brutally beaten and raped.

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[3] Defendants rely for their Statement of Facts on the allegations in the complaints and factual materials incorporated into or relied upon by the plaintiffs' complaints, as well as matters of public record of which the Court may take judicial notice. For brevity, defendants refer herein to the three complaints as "Salaam" (Yusef Salaam et al., v. City of New York, et al., 03-cv-10080 (DAB), "McCray" (Antron McCray, Kevin Richardson, and Raymond Santana, et al., v. City of New York, et al., 03-cv-9685 (DAB), and "Wise" (Kharey Wise, et al., v. City of New York et al., 03-cv-9974 (DAB). The complaints are submitted herewith as Exhibits A (McCray), B (Wise) and C (Salaam) to the Scheiner Declaration ("Scheiner Dec."). Exhibits to the Scheiner Dec. are referred to herein with the abbreviation "Ex. __." Defendants also rely on the factual findings of the decision of Justice Thomas B. Galligan, dated February 23, 1990 ("Galligan"), New York State Supreme Court in People v. Wise, et al., Indictment No. 4762/89, Ex. D, which for the reasons stated in Point I are binding on the plaintiffs under principles of collateral estoppel.

On that night, NYPD officers in Central Park encountered several park patrons who said they had been assaulted or harassed between 96th and 102nd Streets by a group of black and hispanic teenagers. Galligan at 3-7. One male jogger, John Laughlin, was found by police that night at 96th Street near the reservoir in the park. Id. at 6. He was severely beaten and assaulted by a group of teenagers and suffered massive head injuries as a result. Id. at 6. Other NYPD officers heard reports of the assaults through radio transmissions that included the age, gender, and ethnicity of the perpetrators, as well as a description of an unusual number of assailants operating as a group in the same general area of the park. Id. 7-8. Officers responded to these reports, tracked the youths through the park that night, and ultimately detained a number of youths in the vicinity of the 102nd Street Cross Drive and Central Park West. Id. at 9. Patricia Meili entered the park to jog during the same time-frame that plaintiffs and other youths were in the park, harassing and assaulting other joggers. Affirmation of Nancy Ryan in Response to Motion to Vacate Judgment of Conviction, December 5, 2002 ("Ryan Affirmation"), ¶8; ¶ 111, Ex. G.

These events began with an encounter with victim Antonio Diaz. Police Officer Alvarez encountered Mr. Diaz shortly after 9 p.m., bleeding from the head. Galligan at 3. Mr. Diaz told him that he had been assaulted and repeatedly punched and possibly hit with a rock at 102nd Street and the East Drive by five to seven young black and hispanic youths. Galligan at 3-4. P.O. Alvarez the stopped a man on a bicycle and stopped to ask him whether he had seen a large group of youths. Id. at 4. The bicyclist answered that he had, that they had tried to hit him and that he last saw them north of the 102 street Cross Drive on the East Drive. Id. at 4.

Police Officers Reynolds and Powers received a radio transmission at approximately 9:30 pm that seven or eight black males were in the park harassing people in the vicinity of 102nd Street, and a second transmission at approximately 9:45 pm to the effect that 20 to 30 black

males were harassing and assaulting people in the park north of 96th Street. Galligan at 5-6. Reynolds and Powers received another call reporting the attack on John Loughlin. Id. at 6, 12.

Police Officer Flores also heard a radio call about a disorderly group of 30 to 40 black males in the vicinity of 102nd and 103rd streets on the East Side, a second call reporting a disorderly group near 102nd Street, and proceeded to that area. Galligan at 7. On the way, two people on a tandem bicycle, Jerry and Patricia Malone, stopped her to report that 40 young black males were breaking bottles and drinking, and had tried to grab the female bicyclist at around 102nd Street by the West Drive. At 95th or 96th Street, an elderly man told Flores that he had seen a group leave the park at Central Park West. Id. at 8.

Santana and Richardson were arrested on "the Western outskirts of the park in the vicinity of 100th Street and Central Park West." McCray ¶ 35. Officers Reynolds and Powers were driving north on Central Park West between 101st and 102nd Streets when they saw a group of 10 to 20 black and hispanic male teenagers on the other side of the street. They observed that the group, which took up one forth of the block, "walking together" northward at a "brisk pace." Galligan at 8. Officers Reynolds, Powers and Flores approached the group and told the group "Stop, Police." Id. All but two individuals – Steve Lopez and plaintiff Raymond Santana –fled in different directions. Id. at 9. Officer Powers chased and detained Kevin Richardson while other officers detained suspects, including Lamont McCall and Clarance Thomas. Id. at 11; see also McCray, ¶ 35. While being transported by police, Thomas cried and stated "I know who did the murder…" Galligan at 11. Thomas stated that it was Antron McCray who "did it," and gave McCray's address. Kevin Richardson then stated "Yeah. That's who did it." Id. at 12. Thomas also stated that a pipe was used. Id.

At 1:40 a.m., Patricia Meili (then unidentified) was found unconscious and in critical condition near the 102nd Street Cross Drive. She had sustained massive injuries over her entire body. Galligan at 17. NYPD Detective Rosario arrived at the hospital trauma room 40 minutes

later, and, based on the severity and extent of her injuries, Rosario believed that the assault had likely been perpetrated by more than one individual. Id. at 17. Officers at the hospital told Rosario about the young men arrested concerning with the earlier park assaults. Id. at 17. They told him that the Loughlin attack had also resulted in severe head injuries and that he had been attacked with a metal pipe. Id. at 18.

The youths were brought to the Central Park Precinct at approximately 11:00 pm and their families were notified. Galligan at 13 –14. Family members began to arrive at the precinct and the youths slept. Id. at 18. At approximately 5:30 a.m. on April 20, 1989, detectives began interviewing the youths. Id. at 19. Lamont McCall was first interviewed, followed by Clarance Thomas. Id at 19-20. Plaintiffs Richardson and Santana were then questioned in the early morning of April 20, 1989, after their parents or an adult representative arrived at the precinct. Id. at 21. Raymond Santana was interviewed after Richardson, at approximately 1:40 p.m. on April 20, 1989.

Plaintiffs McCray, Salaam and Wise were questioned later that evening on April 20, 1989, after they had been identified by other youths as having been present or participants in the events in the park on the evening of April 19, 1989. See McCray ¶ 36; Wise ¶ 28; see also Galligan at 41-43. McCray voluntarily accompanied detectives to the precinct with his parents. Galligan at 25-26 & 33. Later in the evening of April 20, 1989, Kharey Wise and Yusef Salaam voluntarily accompanied a Detective to the 20th precinct for questioning. Id. at 42-43 & 80-81.

Assistant District Attorney Elizabeth Lederer took videotaped statements of McCray, Richardson, Santana, and Wise (along with other suspects). Salaam ¶ 40; McCray ¶ 37; Wise ¶ 29. The videotaped statements memorialized the statements earlier provided to detectives. Plaintiffs concede that each plaintiff made inculpatory statements, and all except for Salaam gave a videotaped confession that inculpated each plaintiff in various crimes in Central Park. Salaam ¶ 39, 41; McCray ¶ 38-42; Wise ¶ 30, 32. Although plaintiffs claim that they never admitted

actually "raping" Patricia Meili, each plaintiff admits that he "rendered an account of events in which he unwittingly made himself a possible accomplice to the crime against Meili." Salaam ¶ 41, McCray ¶ 38; Wise ¶ 30. The following sets forth the essential facts in each plaintiff's statement.

Kevin Richardson's Statement

In his videotaped confession on April 21, 1989, at which his father was present, plaintiff Richardson stated the following:[4] On April 19 he met up with some friends to go to Central Park to "beat people up." Richardson Videotape transcript at 5-6, 11, Ex. Q. At the park he met a group of about 30 young men, including Antron McCray, Raymond Santana, Kharey Wise, Yusef Salaam and Steve Lopez. Id. at 6-9. Richardson then committed the following crimes:

- The group physically attacked an "old man" near a lake, took his food, and then dragged him into the bushes. Id. at 9-14.

- The group proceeded west in the park and attempted to assault a man and woman on a bicycle. Id. at 14-15.

- The group went towards the reservoir, with Raymond Santana and Atron McCray in the lead, and hid behind trees and bushes. Id. at 16-17. They assaulted a male jogger (John Loughlin) after he ran past them. Antron McCray hit the jogger on his head repeatedly with a pipe, causing him to bleed from his head. Id. at 18-20.

- Richardson saw a female jogger, who was short with short hair. Id. at 23. The group began to chase her, with Antron McCray, Raymond Santana and Steve Lopez in the lead and Richardson running behind them. Id. at 23-24. They grabbed her and she fell to the ground. Id. at 24. Raymond Santana held her arms down, Steve Lopez held her feet and Antron McCray had sex with her. Id. at 27-28. Kevin Richardson was scratched by the victim when he went over to "stop them." Id. at 28. The woman was hit repeatedly in the face and eventually appeared to be "knocked out." Id. at 29, 43. Raymond Santana, Steve Lopez and another individual then had sex with her. Id. at 31, 33. Other individuals sexually assaulted the victim by "feeling" her, including Kharey Wise and Yusef Salaam. Id. at 34. She was then pushed to the side of the path and the group left the location. Id. at 35-36.

[4] The plaintiffs' video tapes statements are submitted as to the Declaration of Alan Scheiner, along with transcripts of each video tape, and plaintiffs' written statements, as Exhibits P-Z.

- Two other male joggers were chased and assaulted that night by the group of youths. Id. at 43-44. One of these male joggers was punched and kicked by several youths including Kharey Wise, Yusef Salaam, Raymond Santana, Antron McCray and Steve Lopez. Id. at 43-46.

Raymond Santana's Statement

In his videotaped confession on April 21, 1989, at which his father was present, plaintiff Raymond Santana stated the following: Santana, along with Antron McCray and others, met another group of boys at 110th Street and Fifth Avenue to go to Central Park to "rob bicyclists and joggers." Santana Videotape Tr. at 4-5, Ex. S. Kevin Richardson was with this other group. Id. at 5. The combined group totaled approximately 33 persons. Id. at 6. While in the park Santana with a group of other male youths committed the following crimes:

- They attempted to grab a male jogger in order to beat and rob him, but he escaped. Id. at 15-16.

- Another male jogger (John Loughlin), was grabbed, beaten and struck by McCray with a pipe. Id. at. 16-18, 21. After, the group headed towards the west side of the Park. Id. at 22.

- Santana saw plaintiff Richardson struggling with a woman and trip her. Id. at 22, 23, 25. Steve Lopez and Antron McCray were present. Id. at 23. McCray was pulling off her clothes while Lopez was kneeling on her arms and hitting her. Id. at 24-25. Lopez then hit her with a brick in her face and her screaming stopped. Id. at 26. Kevin Richardson had sex with her. Id. at 27. Santana grabbed her breasts and then abruptly left to look for his other friends. Id. at 28, 30-31.

- Santana, Antron McCray and others joined each other running up towards Columbus Avenue. Id. at 31. Antron McCray then started breaking lightbulbs by a building and was chased by a security guard. Id. at 32.

Anton McCray's Statement

Plaintiff McCray spontaneously came to the precinct with his mother on April 19, 1989, and left after giving a statement. Galligan at 15. The following day, and after being implicated by other youths, McCray voluntarily returned to the precinct for further questioning. Id. at 25-26 & 106. In his videotaped confession on April 21, 1989, plaintiff Antron McCray stated that he

went to the Park with Raymond Santana and Kevin Richardson and met up with a group of boys, and they committed the following crimes:

- McCray participated in an attack on a male "bum" by hitting him. A member of the group took the bum's beer and poured it on him. McCray Videotape Tr. at 8-9, Ex. U. The group then dragged him to the side of the road. Id. at 9.

- They chased a couple on a tandem bike but could not catch them. Id. at 10.

- They threw bottles and rocks at passing cabs on the roadway near 100th Street. Id. at 12.

- They attacked a female jogger, who looked like a boy, near the reservoir. Id. at 14. The group, including himself, Santana and Richardson, took turns "getting on top of her." Id. at 16. A "tall thin black guy" (Salaam, who stood 6'2 at the time (See Galligan at 41) hit the female jogger with a pipe, and "got on top of her" as well. Id at15, 18, 21. McCray "got on top of her" but only simulated intercourse with her. Id. at 23-24.

- The group walked south towards the reservoir and assaulted a male jogger by kicking, punching and hitting him with a pipe. Id. at 30.

Police responded to the park and McCray fled. Id. at 34. McCray confirmed that his parents were present for his prior statements made to detectives as well as the videotaped confession. Id. at 38.

Yusef Salaam's Statement

Plaintiff Yusef Salaam provided a statement to authorities on April 20, 1989, although he did not provide a videotaped confession. Galligan at 44-46; Salaam Complaint Follow-Up DD5, Ex. Z. Salaam made an "inculpatory statement[]" to the police in which he "rendered an account of events in which he unwittingly made himself a possible accomplice to the crimes committed against" Meili. Salaam ¶ 41. Police notes record the following statement by Salaam: He went to Central Park on April 19th with a group of friends including Kevin Richardson and Kharey Wise, and they committed the following crimes:

- They walked towards the baseball fields where they waited for someone to pass by. A bum passed by and was beaten. Someone took his food and poured his beer on him.

- Shortly thereafter, the group chased a male jogger but could not catch him. They heard a police car and the group split up into smaller groups.

- His group then tried to grab a couple on a tandem bike, but they, too, escaped. The group then went up a hill, crossed a road and stood near the trees.

- They saw a female jogger approach and Kevin Richardson grabbed her. The female jogger struggled and was hit with a pipe multiple times. They pulled her off the road and into the trees. Kharey Wise pulled her shirt and felt the victim's breast. Kevin Richardson, Kharey Wise and others had sex with her. He later left the area but stayed in the Park. He, along with others attacked a male jogger. He hit him on the head three times. They then heard police sirens and fled out of the park.

Ex. Z. Salaam admits that he had both a pipe (belonging to Kharey Wise) and a knife while in Central Park that night. Ex. Z.

Kharey Wise's Statement

Plaintiff Kharey Wise made two videotaped confessions on April 21, 1989. In his first confession, he states the following: He met up with a "bunch of boys" (approximately 30), including Steve Lopez, Yusef Salaam, Kevin Richardson, Raymond Santana and Antron McCray. Wise Videotape Tr. at 5-11, Ex. W. Wise did not know many of the boys that were part of the group that night. Id. at 27. Salaam carried a knife and Wise's pipe. Id. at 32-33. Lopez told him they were going to the park for violence Id. at 14. They went near the ball fields, and committed the following crimes.

- They saw a man, took his food and beer, and hit him with a bottle the victim had in his bag. Id. at 16-18, 20. The attack was swift and violent and Wise, along with Lopez and Richardson, thought the victim was dead. Id. at 19.

- The group then encountered a couple and decided to let them be. Id. at 23-24. Shortly thereafter, they demanded money from a male jogger. The group chased him but could not catch him. Id. at 25-26.

- The group attempted to attack a couple on a tandem bike but the couple escaped. Id. at 27 - 28.

- Someone from the group then threw a rock at a passing cab near 104th Street. Id. at 30.

- Wise saw a police car and ran off the path, into the wooded area, down a hill and near a stream. Id. at 36 - 40. He heard a woman screaming. Id. at 41. It was in this area that Lopez, Richardson and Santana first grabbed her. Id. at 41. Richardson tripped her and she fell. Id. at 48. Wise heard Lopez say that they would rape her. Id. at 44. The woman screamed so "they put something on her mouth, they gag her so she can't yell or

nothing." Id. at 44. Wise then saw Lopez, Richardson and Santana sexually abuse her. Id. at 47, 58, 61. Richardson was scratched by the victim. Id. at 54. The woman was physically beaten. Id. at 56, 81. Lopez was "playing" with her breasts while Santana was "playing with her legs" Id. at 63. Wise walked over to the female victim's body and thought that she would die. Nevertheless, he walked away. Id. at 77 -78).

In his second statement, Wise admits that he physically assaulted "the bum." Wise Videotape Tr. at 4, Ex. X. Wise also admits that he kicked a second male jogger. Id. at 5-6. Wise further states that the female jogger was initially grabbed and assaulted at the path and then dragged further off the path. Id. at 6, 8. Wise further states that Richardson, Salaam and himself were "playing with her," but that he only played with her legs. Id. at 6-9. Wise states that Richardson also raped the victim. Id. at 10. Santana and Richardson then hit the victim in the face with a rock and she was repeatedly punched on her face and body. Id. at 10-11, 14.

Statements by Other Youths

In addition to plaintiffs, other youths were questioned by authorities regarding the events at Central Park on April 19, 1989 and they also implicated some or all of the plaintiffs:

- Clarence Thomas and Lamont McCall, who were the first youths to be questioned by Detectives, indicated that they comitted assaults in the park with a group that included Antron McCray. Galligan at 19-20.

- Thomas told Officer Powers that Antron McCray had committed "the murder" and provided McCray's address. He also told Powers that he knew that a pipe had been used, and had been left at 97th Street and Central Park West. Id. at 12.

- Steven Lopez, who was detained with Santana on Central Park West at 102nd Street, said that Richardson, Salaam, McCray and McCall were in the park with him on April 19, 1989. Id. at 40.

- Al Morris, also questioned on April 20, 1989, indicated that Wise, Richardson and Salaam were present in the park on the 19th. Id. at 41.

Other youths, including Michael Briscoe, Jermaine Robinson, Antonio Motalvo and Orlando Escobar, were also questioned. See Ryan Affirmation, ¶ 14-17.

The Criminal Prosecutions

The plaintiffs were arrested on or about April 22, 1989. On May 4, 1989 plaintiffs Yusef Salaam, Antron McCray, Raymond Santana, Kevin Richardson and Kharey Wise were indicted for attempted Murder in the Second degree, Rape in the First Degree, Sodomy in the First Degree, Sexual Abuse in the First Degree and Assault in the First Degree on victim Patricia Meili; Robbery in the First and Second Degree and Assault in the Second Degree on victim John Laughlin; Assault in the Second Degree on David Lewis; and Riot in the First Degree. Salaam, ¶ 27; McCray, 45 - 47; Wise, ¶ 43; Indictment, People v. Wise, et al. No. 4762-89, Ex. O.

Plaintiffs argued in their criminal case that their confessions were the product of police misconduct and improper coercion. See Galligan, generally. In pre-trial motions, plaintiffs moved to suppress their statements and the legality of their initial seizures on the same grounds as alleged in the present complaints. Id. [5] On February 23, 1990, the court ruled that the plaintiffs' detentions and arrests were supported by probable cause, and that their statements were not the product of any unconstitutional conduct and were admissible. Galligan at 71-116.

On April 18, 1990, a jury convicted McCray, Santana and Salaam on one count of Assault in the First Degree and Rape in the First Degree for the attack on the female jogger Meili; Robbery in the First Degree and three counts of Assault on the Second Degree for the attack on male jogger John Loughlin; Assault on the Second Degree for the attack on male jogger David Lewis; and Riot in the First Degree. McCray, ¶ 46; Salaam, ¶ 9. Nevertheless, since each defendant was under 16, the trial court set aside their convictions except for those of first degree robbery and rape. Id. On December 11, 1990, a jury convicted plaintiffs Richardson and Wise on each count of the 13-count indictment, in which plaintiffs were charged with crimes against Meili, Lewis and Loughlin. McCray, ¶ 47; Wise, ¶ 43. Due to Richardson's age, his convictions were set aside except for Attempted Murder in the Second Degree, First Degree

[5] See Omnibus Motions, Exs. I-M.

Robbery, Rape and Sodomy. (McCray, ¶ 47). Kharey Wise was 16 at the time of the crime and therefore the jury's conviction on all 13 counts stood. McCray, ¶ 46-47; Wise, ¶ 43-44.

Plaintiffs Salaam, McCray, Wise and Richardson concede that their convictions and sentences were affirmed on appeal. Salaam, ¶ 34; McCray, 48-50; Wise, ¶ 44. Plaintiff Santana never perfected an appeal from his convictions. McCray, ¶ 50. In their appeals, plaintiffs Salaam, McCray, Wise and Richardson each had challenged the admissibility of their confessions.

In or around February 2002, the District Attorney's office learned that a convicted serial rapist and murderer, Matias Reyes, nowclaimed responsibility for the 1989 attack on Patricia Meili. People v. Wise, 752 N.Y.S.2d at 842**;** Salaam, ¶ 49; McCray, ¶52 –53; Wise, ¶46-47. In or around May 2002, the District Attorney's office learned that Reyes' DNA matched DNA taken from a sock that had been found at the Central Park Jogger crime scene. Id. In or around September 2002, plaintiffs moved pursuant to Criminal Procedure Law §440.10(1)(g) to vacate the judgments of conviction and for a new trial, on the grounds of newly discovered evidence. Salaam, ¶ 50, McCray, ¶ 54; Wise, ¶ 48. The newly discovered evidence consisted of Matias Reyes' purported statement that he was the sole perpetrator of all aspects of the attack on Meili, and DNA test results establishing Reyes as a source of semen recovered from the Meili crime. People v. Wise, 752 N.Y.S.2d at 842.

The District Attorney's office submitted an affirmation (the "Ryan Affirmation") consenting to plaintiffs' motion.[6] On December 19, 2002, the Honorable Justice Charles J. Tejada vacated plaintiffs' convictions and ordered a new trial on the grounds that newly discovery evidence created a "probability that had such evidence been received at trial, the

[6] None of the City defendants were involved in the creation of the Ryan Affirmation, and do not endorse or adopt, and are not bound by, the assertions set forth therein. Former Assistant District Attorney Linda Fairstein resigned from the New York County District Attorney's Office prior to the issuance of the Ryan Affirmation and played no part in its creation.

verdict would have been more favorable to the defendants." People v. Wise, 752 N.Y.S.2d at 848. The indictments were later voluntarily dismissed by the District Attorney's office on the grounds that "no useful purpose would be served by a retrial of any of the charges." Recommendation for Dismissal, December 19, 2002, Ex. H.

Plaintiffs do not allege the existence of any new evidence with respect to any of the crimes for which the plaintiffs were convicted, other than the attack on Meili. Other than Salaam, plaintiffs do not deny involvement in the attacks on Loughlin and Lewis. Although it is established that Reyes raped Meili, the only evidence that plaintiffs did not participate in the physical or sexual assault of Meili is Reyes' uncorroborated assertion that he acted alone.

RULE 12(B)(6) STANDARD FOR DISMISSAL

A court should dismiss a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) when "it appears beyond a doubt that the plaintiff can prove no set of facts in support of the claim which would entitle h[er] to relief." Staron v. McDonald's Corp., 51 F.3d 353, 355 (2d Cir. 1995) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The rule "does not permit conclusory statements to substitute for minimally factual allegations." Electronics Communications Corp. v. Toshiba America Consumer Prods., Inc., 129 F.3d 240, 243 (2d. Cir. 1997); see also Gant v. Wallingford Id of Education, et al., 69 F.3d 669, 673 (2d Cir. 1995) ("a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find violation…fails to state a claim"). Id. Furthermore, a motion under Rule 12(b)(6) should be granted if an affirmative defense, or other reason barring relief, is apparent from the face of the complaint. Conopco, Inc. v. Roll International, 231 F. 3d 82, 86-87 (2d Cir. 2000).

In deciding such a motion, a Court should consider "the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." Samuels v. Air Transportation Local 504, 992

F.2d 12, 15 (2d Cir. 1993); see also International Audiotext Network, Inc. v. AT&T Co., 62 F.3d 69, 72 (2d Cir. 1995) (*per curiam*). For purposes of dismissal, the complaint "is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002) (quoting Int'l Audiotext, 62 F.3d at 72). "Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint 'relies heavily upon its terms and effect,' which renders the document 'integral' to the complaint." Chambers, 282 F.3d at 153. (internal citations omitted). In addition, "it is well established that a district court may rely on matters of public record in deciding a motion to dismiss under Rule 12(b)(6)," including arrest reports, criminal complaints, indictments, and criminal disposition data. Vasquez v. City of New York, 99 Civ. 4606 (DC), 2000 U. S. Dist LEXIS 8887 at *3 (S.D.N.Y. June 29, 2000)(citations omitted); see also Brass v. American Film Technologies, Inc., 987 F.2d 142, 150 (2d Cir. 1993); see also Johnson v. P.O. #17969, 99 Civ. 3964 (NRB), 2000 U.S. Dist. LEXIS 18521, *4 (S.D.N.Y. Dec. 29, 2000)(court may consider any matter of which it could take judicial notice under the F. R. E. 201).

The following items submitted herewith, are incorporated into the Complaint, are integral to plaintiffs' claims and are relied upon by them, or are matters of public record of which the Court may take judicial notice: (1) plaintiffs' indictments, Ex. O; (2) written statements taken from plaintiffs during the criminal investigation, Exs. R, T, V, Y, Z; (3) videotape confessions of plaintiffs Wise, McCray, Santana, Richardson and McCray, with a typed transcript, Ex. P, Q, S, V, W, X; (4) portions of the criminal trial summations and jury instructions, Exs. AA-DD; (6) Justice Galligan's February 23, 1990 Decision on defendants motion to suppress in the underlying criminal prosecution, Ex. D; (7) Justice Galligans' August 9, 1989 Decision, Ex. D (7) the Ryan Affirmation, Ex. G; (8) The Report to the Police Commissioner on the Central Park Jogger Case (the "Armstrong Report"), Ex. N; (9) plaintiffs' pre-trial motions in their criminal

case, Exs I-M; Matias Reyes' OCA Criminal Appearance History, Ex. EE. Finally defendants refer to the published court opinions from plaintiffs' criminal appeals and the decision of Justice Tejada of December 19, 2002, relied on by plaintiffs in their complaints, and attached as Exhibit F. See McCray, ¶ 48-50; Salaam, ¶ 33; Wise ¶ 44; People v. Wise, et al., 194 Misc.2d 481, 483, 752 N.Y.S.2d 837, 840 (N.Y. Sup. Ct. Dec. 19, 2002).[7]

POINT I

PLAINTIFFS' CLAIMS OF FALSE ARREST AND COERCED CONFESSIONS ARE BARRED BY COLLATERAL ESTOPPEL.

Plaintiffs' claims based on (1) their alleged arrest without probable cause and (2) the alleged involuntariness of their confessions, should be dismissed under the doctrine of collateral estoppel because plaintiffs had a full and fair opportunity to litigate that issue in their criminal cases, where the issues were decided against them in a final order upheld on appeal (or, in Santana's case, an order that was not appealed). See, generally, Galligan, Ex. D. Although plaintiffs' falsely claim "exoneration by the court" (McCray ¶ 77, Salaam ¶ 71, Wise, ¶ 70), in fact, on December 19, 2002 the New York State Supreme Court ordered *a new trial* (*not* dismissal of the charges) pursuant to New York Criminal Procedure Law 440.10. The court in 2002 ruled *only* that the new evidence of Reyes participation in the Meili crime – his confession and DNA match, first discovered in 2002 –"create[d] the probability " that the new evidence "would have resulted in a more favorable verdict." See People v. Wise, 194 Misc. 2d at 485 & 496-97, 752 N.Y.S.2d at 842 & 850, Ex. F; see also N.Y. Crim. P. L. 440.10(1)(g). Indeed, the court, in vacating the convictions made no findings regarding plaintiffs' guilt or innocence, the

[7] However, to the extent that this Court determines that plaintiff's claims should be dismissed but bases that decision on evidence determined to be beyond that allowed under this analysis, defendants respectfully request that the court convert the motion to one for summary judgment and allow the parties an opportunity too submit additional supporting materials as contemplated by Rule 56. See Chambers, 282 F.3d at 154.

voluntariness or admissibility of their confessions, any purported withholding of evidence, or the probable cause for their arrest and prosecutions. People v. Wise, 194 Misc. 2d at 496-97, 752 N.Y.S.2d at 850. Thus, the new trial order does nothing to undermine the preclusive effect of Justice Galigan's pre-trial order, and the subsequent appeals.

In their criminal cases, plaintiffs moved to suppress their statements to police in pre-trial motions submitted to the criminal trial court.[8] Galligan at 1. Their motions claimedn (1) that their detentions and arrests lacked probable cause, and (2) that police coerced their statements from them in violation of the constitution. Id. (citing People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965) (suppression of coerced statements) and Dunaway v. New York**,** 442 U.S. 200 (1979) (suppression of statements made after unlawful arrest)). The Court hearings on these motions lasted over one month (from October 10, 1989 through November 29, 1989) and took testimony from approximately 40 witnesses, including several of the plaintiffs in this case, who testified on behalf of the criminal defendants.**[9]** Galligan at 2.

The Court decided all issues against the plaintiffs. Subsequently, the juries convicted plaintiffs, and each had an opportunity to appeal the pre-trial rulings against them after their convictions. All plaintiffs except Santana appealed; Santana chose to forego his appellate rights. The Appellate Division (and in Salaam's case the New York Court of Appeals) upheld the pre-trial rulings. See People v. Wise, 194 Misc.2d 281, 752 N.Y.S.2d 837, 840 (Sup. Ct. N.Y. Cty. 2002) (recounting appellate history and noting that Santana never perfected an appeal); People v.

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[8] See Notices of Motion on behalf of Antron McCray, ¶¶ 4 & 9 (Ex. I); Kevin Richardson, ¶ 2 (Ex. J); Ramond Santana, ¶¶ 15-20 (Ex. K); Kharey Wise, at pages 2-3 (Ex. L); Yusef Salaam, ¶¶ V & VI (Ex. M).

[9] The witnesses were Kharey Wise, Delores Wise, Gracie Cuffee, Angela Cuffee, Yusef Salaam, Aisha Salaam, Marilyn Hatcher, Vincent I. Jones, David Nocenti, Sharonne Salaam, Natividad Colon, and Raymond Santana, Sr. With the exception of Marilyn Hatcher (Salaam's aunt or cousin), Vincent I. Jones (Hatcher's fiance), and David Nocenti (a friend of Salaam's family), all of the non-police witnessed called by the defendants in the hearing are plaintiffs in this case.

Salaam, 83 N.Y.2d 51, 607 N.Y.S.2d 371 (1993) (affirming Salaam's conviction); People v. Salaam, 187 A.D.2d 363, 590 N.Y.S.2d 195 (1st Dept. 1992) (same); People v. Wise, 204 A.D.2d 133, 612 N.Y.S.2d 117 (1st Dept. 1994) (affirming Wise's conviction); People v. Richardson, 202 A.D.2d 227, 608 N.Y.S.2d 627 (1st Dept. 1994) (affirming Richardson's conviction); People v. McCray, 198 A.D.2d 200, 604 N.Y.S.2d 93 (1st Dept. 1993) (affirming McCray's conviction).

The collateral estoppel effect of the State court rulings in this case is governed by New York law. See Owens v. Treder, 873 F.2d 604, 607 (2d Cir. 1989). Under New York law "a party is barred from relitigating an issue if the following requirements are met: (1) the issue as to which preclusion is sought is identical to the issue decided in the prior proceeding; (2) the issue was necessarily decided in the prior proceeding; and (3) the litigant now opposing preclusion had a full and fair opportunity to litigate the issue in the prior proceeding." Id. Defendants bear the burden of showing the identity of issues and the fact that those issues were decided; the plaintiffs bear the burden of proof on the issue of their full and fair opportunity to litigate in the criminal case. See Schwartz v. Public Administrator, 24 N.Y.2d 65, 73. 298 N.Y.S.2d 955, 962 (1969) (plaintiff's claims against former employer barred because he had a full and fair opportunity to litigate issues in unemployment insurance administrative proceeding); Goodson v. Sedlack, 212 F. Supp. 2d 255, 257-58 (S.D.N.Y. 2002) (plaintiff's civil rights claim barred because he had full and fair opportunity to litigate issues in Court of Claims); Cox v. C.O. Colgane, 94 Civ. 6391 (DAB), 1998 U.S. Dist. LEXIS 3934, * 18-16 (S.D.N.Y. March 27, 1998) (Batts, J.) (plaintiff's § 1983 claim for denial of medical care barred by Judge's decision in court of claims action).

Collateral estoppel "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Allen v. McCurry, 449 U.S. 90, 94 (1980) (collateral estoppel bars relitigation of Fourth Amendment issues in Section 1983 claim that were decided in State criminal proceeding). These principles, and the requirement that federal courts give "full faith and credit" to State court

decisions, are fully applicable to federal civil rights actions. Id. at 95-96; Brooks v. McBride, 665 F. Supp. 160, 162-63 (E.D.N.Y. 1987) (pre-trial suppression ruling in criminal case precludes plaintiff's § 1983 claim for involuntary confession).[10]

A. Plaintiffs raised identical issues in their criminal prosecutions which were necessarily decided against them in the criminal case.

The first two elements of collateral estoppel – the "identity of the issues" and the fact that they were "necessarily decided" – are apparent from the face of plaintiffs' complaints, their criminal pre-trial motions, Justice Galligan's opinion, and the plaintiffs' criminal appeals.

Although plaintiffs' complaints lack specific allegations regarding police conduct, they make the same general and conclusory allegations regarding the "coercion" of their confessions, alleging, *inter alia*, "coercion, isolation, intimidation, manipulation, suggestiveness, deceit, false promises, [and] sleep deprivation," and co-opting of or interference with family members. McCray ¶ 38; Wise ¶ 30; Salaam ¶ 41. In addition, Salaam makes the specific allegation that his mother, aunt, and a friend of the family, David Nocenti, were prevented from seeing him at the precinct. Salaam ¶¶ 34-35. Plaintiffs also appear to assert that they were arrested without probable cause, although it is unclear whether they intend to assert a claim for false arrest, or merely attack the voluntariness of their confessions on that basis. See McCray ¶ 81; Salaam ¶ 75; Wise ¶ 81.[11]

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[10] Collateral estoppel applies equally to the claims of the family members in this case, as well as the criminal defendants, because under New York law, absent a conflict of interest, family members are in privity with parties for the purposes of collateral estoppel. See In re Slocum v. Joseph B., 183 A.D.2d 102, 104-05, 588 N.Y.S.2d 930, 932 (3rd Dept. 1992).

[11] To the extent that plaintiffs' claim that there was insufficient basis for their indictment, they also made that claim during the criminal case and it was rejected by the trial court after review of the grand jury minutes. See People v. Wise, et. al., Indictment No. 4762/89, slip op., at 1 & 3 (Sup. Ct. N.Y. Cty. August 9, 1989) (Galligan, J.), Ex. E. To the extent the validity of the indictment is at issue in this case, Justice Galligan's August 9, 1989 decision also has collateral estoppel effect against the plaintiffs, for all the reasons stated herein.

Wise makes the curious allegation that he "stated [to Elizabeth Lederer] that he had been induced to make his statement by being yelled at and struck by police officers," without alleging that his statement was true. Wise ¶ 35. He adds the conclusory allegation of "policies" of the NYPD permitting the "use of force, and threat of force," again without asserting that force was used against him. Wise ¶ 86.

Plaintiffs' pre-trial motions in the criminal case raised identical issues, by seeking the following relief:

McCray:

- "Suppressing any [and] all statements alleged to have been made by the defendant McCray." McCray Omnibus Motion, ¶ 4, Ex. I.

- "[A]n order suppressing any statements made by the defendant or physical evidence seized from the defendant pursuant to Dunaway v. New York on the grounds that probable cause did not exist to seize the defendant, hold him in the precinct, interrogate him and seize physical evidence from him." McCray Omnibus Motion, ¶ 9, Ex. I.

Richardson:

motion to suppress all statements pursuant to New York Crim. P. Law § 710.20(3) on the grounds that they were involuntary, because of, *inter alia*, "improper conduct on the part of the Police Officers and undue pressure" and "promises or statements of fact created a substantial risk that the defendant might falsely incriminate himself." Richardson Omnibus Motion, ¶ 2, Ex. I.

Santana:

for a pre-trial hearing to suppress statements made by the Defendant after being taken into custody, on the grounds that:

- he was taken to a "non-designated police precinct" in violation of § 724 of the Family Court Act,
- his grandmother who was present during questioning could not speak English, in violation of § 724 of the Family Court Act,
- a statement was obtained from the defendant on the promise that he "would be released within the hour";
- that said statements were procured by "false and deceptive statements" made by the arresting officers. Santana Omnibus Motion, ¶¶ 17-20, Ex. K.

Wise

- an order "suppressing the statements as being involuntarily and being the exploitation of an illegal arrest" and
- "suppressing the waiver as not being intelligently, voluntarily and knowingly" made,
- a Dunaway/Mapp hearing to determine the legality of the initial arrest and seizure and
- a Huntley hearing to determine the voluntariness of the statements and admissions. Wise Omnibus Motion, at 3-4, Ex. L.

Salaam

- suppression or exclusion of any "admissions, confessions, conversations or waivers" on the grounds that they were
- "obtained involuntarily, in violation of the state and federal constitutional privileges against self-incrimination and right to counsel,"
- were obtained without Salaam having been advised of his state and federal constitutional rights, and
- were obtained in violation of the statutory and constitutional right of a 15-year-old not to be questioned without his consent and the consent of his parent. Salaam Omnibus Motion, ¶ V, Ex. M.

- suppression or exclusion of the use of any evidence obtained as the result of "an unlawful arrest of defendant." Salaam Omnibus Motion, ¶ VI, Ex. M.

The criminal trial court ruled as follows:

Santana's Stop and Detention

The police were justified in stopping and questioning Santana at 96th Street on reasonable suspicion that he was involved in the assaults in Central Park (the rape was not yet known), based on the descriptions of the perpetrators, the number of perpetrators, and the proximity of Santana and others to the scene of the crimes, the direction of their movement, the absence of other civilian traffic, and the flight of their companions from the police (including Richardson). Galligan at 73-75. "Clearly, the conjunction of time and place with the distinct-characteristics of the group as described in the series of radio runs made reasonable the inference that the members of this group might be the perpetrators of the reported crimes." Id., at 73-74. Santana's obvious lies about his relationship with the fleeing group of suspects provided further support for his

temporary detention for the purposes of a "show up" identification by victim John Loughlin at 100th Street. Id., at 75 & 77.

Richardson's Detention and Arrest

Richardson's flight from police when they approached him, Santana and others, combined with the suspicious circumstances that justified the stop and detention of Santana, created reasonable suspicion justifying Richardson's forcible detention and transport to a "show up" identification by one of the victims. Id., at 76. While Richardson and Thomas were en route to the show up, Thomas stated that he knew "who did the murder" and would tell them. Thomas said that Antron McCray "did the murder" and Richardson confirmed it; Thomas said a pipe had been used as a weapon. Id., at 11-12. The court found that Richardson's voluntary statements indicating first hand knowledge about a "murder," his presence with Thomas, and his demeanor and initial flight, and the information that a large group of youths participated in the attacks, were all incriminating and created probable cause for Richardson's arrest. Id., at 77-78.

Santana's Arrest

While at the 100th Street "show up" location, either Thomas or Richardson indicated to the police that Santana and Lopez were with them in the park. Id., at 13. Since there was already probable cause to arrest Richardson for participation in the attack on Loughlin, the court found that there was then probable cause to arrest Santana as well. Id., at 79.

Wise's and Salaam's Detention

The court found that Wise and Salaam voluntarily went with police for questioning, and therefore probable cause was not required to justify their questioning and presence at the precinct, and their statements would not be suppressed on that ground. Id., at 80-81. In any case, before Wise and Salaam came in for questioning, the Court found that the police had garnered ample evidence from the statements of other youths implicating Wise and Salaam in at least some of the crimes in Central Park. Galligan at 41.

Richardson's Statements

The court found that Richardson, and his mother (Gracie Cuffee) and sister (Angela Cuffee), who were present with him during questioning, all understood his Miranda rights and voluntarily waived them. Id., at 82-83. The court specifically rejected Richardson's contention that his mother waived his rights because of a false promise by the police, or that other statements by the police (i.e., that it would "behoove" him to tell the truth) would have induced an involuntary confession. Id., at 84-85.

The court also rejected Richardson's claim that his statements made to Assistant District Attorney Linda Fairstein at the Central Park crime scene should be suppressed. The court found that Ms. Fairstein advised Richardson's father (Paul Richardson) that she was taking Richardson to Central Park, that he was welcome to accompany them, and that although she would ask him questions there would be "no new avenues of inquiry." Id., at 86-87. The court found that the statement at the park, as well has all his prior statements, were knowing and voluntary. Id., at 86.

Santana's Statements

The court also rejected Santana's arguments that his statements should be suppressed on the grounds that: (i) some statements were made without his father, (ii) some statements were made as a result of deceitful representations to his father, (iii) some statements were made involuntarily as the result of prolonged pre-arraignment detention, (iv) the delay in his arraignment deprived him of the right to counsel, (v) his grandmother should have been provided a Spanish interpreter, and (vi) Det. Arroyo's Spanish translation of his Miranda rights was confusing. Id., at 86-93. The court found, *inter alia*, that:

- the police notified Santana's father and he chose to be absent during part of his son's questioning (Id., at 90);
- no deceitful representations were made to Santana's father and in fact the police deliberately delayed Santana's questioning until his father

could be present and fully advised his father of what was going on (Id., at 28-29 & 91);

- the conditions of Santana's detention were not coercive: he slept, was fed, and the police made repeated efforts to give him access to family members (Id., at 91);
- the delay in Santana's arraignment did not deprive him of his right to counsel (Id., at 91-92);
- Santana's grandmother could fully understand his rights (Id., at 92-93).

The court ruled that all of Santana's statements were admissible, except his statement to an officer "I already got mines," which was made in response to an off-hand comment but which was not Mirandized. Id., at 93-94.

McCray's Statements

The court also rejected McCray's arguments that his statements should be suppressed because (i) he was questioned for an excessive period of time, (ii) that he was not questioned in a properly designated facility, (iii) that his waiver of Miranda rights was not voluntary due to misleading and unfair inducements by detectives, and (iv) that his arraignment was unnecessarily delayed and denied him right to counsel. Id., at 103-104. The court rejected these claims, finding:

- that McCray's questioning was voluntary, not custodial, and therefore no Miranda waiver was required (Id., at 104-106);
- even if McCray had been subjected to custodial interrogation his waiver was voluntary (Id., at 106);
- that statements by detectives to McCray and his father to the effect that McCray was lying were not misleading or coercive (Id., at 107);
- that McCray's mother leaving the room did not impair the voluntariness of his confession because his father remained present (Id.);
- that the delay in arraignment was justified, and that the police were under no obligation to arrest McCray as soon as they had probable cause (Id., at 108); and
- the facility in which McCray was questioned was not deficient so as to require exclusion of his statements (Id., at 109).

Accordingly, the court ruled all of McCray's statements to be admissible. Id., at 108-09.

Salaam's Statements

The court rejected Salaam's argument that his statements should be suppressed because the police failed to notify his mother of his interrogation. The court found that Salaam deliberately misled the police into believing that he was 16 (rather than his true age of 15) by lying to police and provided a transit ID card with a false age. Id., at 110-11. Therefore, the police were not required to notify Salaam's parents because they reasonably believed him to be 16 years old. The court also held that:

- Salaam's questioning was otherwise voluntary because he was fully Mirandized, the questioning was brief, he had appeared at the precinct voluntarily, and made no request that his mother be present. Id., at 111.
- Salaam lied about his age and presented false identification to the police indicating that he was 16 years old. Id. at
- Linda Fairstein properly rejected the request of David Nocenti to see Salaam, because he was not a family member and was not an attorney who could represent Salaam. Id., at 48.
- Nocenti never told anyone at the precinct that Salaam was only 15 years old. Id. at 49.
- Linda Fairstein was informed by Salaam's mother that he was fifteen years old, she took action to stop the questioning. Id., at 49-50.
- the police used no deception to isolate Salaam from any assistance, and that Salaam had deceived the police about his age. Id., at 112.
- the police advised Salaam's sister of where he was going, and his family was obviously aware of his questioning, because his aunt and her friends, his mother, and his "Big Brother" Nocenti all arrived at the 20th Precinct soon after Salaam arrived. Id.
- Salaam's questioning ceased *before* his mother invoked Salaam's right to counsel. Id.
- a detectives' statements to Salaam that he was implicated by other suspects (which was true) and that his fingerprints could be found on the jogger's clothing (which was not true) were not unconstitutional and did not create a "substantial risk that the defendant might falsely incriminate himself." Id., at 45-46 & 113.

Wise's Statements

The court also rejected Wise's claims that his statements were involuntary and should be suppressed because physical force was used against him. Id., at 114. The court explicitly rejected that claim, although Wise had testified on his own behalf, stating that "[t]he record simply does not sustain" Wise's contention that physical force was used to obtain his statements. Id. The court also found that Wise slept, ate and received milk when has asked for it, and that his behavior while in custody, "particularly his laughing and asking his codefendants if they had

told the police allegedly humorous incidents involving joggers, belies his contention that he suffered from physical abuse or psychological duress." Id. at 114. The Court also rejected Wise's claim that his second videotaped statement was not admissible for lack of Miranda warnings. Id. at 115.

The Pre-Trial Rulings Were Upheld on Appeal

In Salaam's appeal, the Appellate Division upheld the trial court's finding that Salaam accompanied police officers to the precinct voluntarily, that the police advised Salaam's family of where he was going, that Salaam lied to the police about his age, and that there was no reason to suppress his statements. See People v. Salaam, 187 A.D.2d at 363-64, 590 N.Y.S.2d at 196. Salaam's arguments under the Family Court Act were also rejected, and the court upheld all of the trial court's other findings. Id.

On appeal from the Appellate Division, the New York Court of Appeals held that the evidence supported the conclusion of the trial court and the Appellate Division that Salaam deceived the police about his age, and there was no evidence that the police employed objectionable deception or trickery to isolate Salaam from adults. Salaam, 83 N.Y.2d at 54 & 55-56, 607 N.Y.S.2d at 900 & 901. The Court of Appeals explicitly upheld the trial court's findings that the officers told Salaam's family where he was going, that neither he nor his family requested the assistance of counsel, and that his questioning ceased when the fact that Salaam was really 15 was revealed to the police. Id. The Court of Appeals also rejected Salaam's claim that his statement should have been suppressed because of a violation of Criminal Procedure Law governing juvenile offenders. The court affirmed the lower court's findings that "the police diligently attempted to comply with all statutory and constitutional responsibilities, and actually did so, when lawfully required within the framework of the fast developing investigation." 83

N.Y.2d at 57-58, 607 N.Y.S.2d at 902. All of Salaam's other arguments were likewise reviewed and rejected. Id.

The rulings against Wise were also upheld by the First Department, which held that Wise came to the precinct voluntarily, and that in any case there was probable cause to arrest Wise at the time he was questioned by the police. People v. Wise, 204 A.D.2d at 133, 612 N.Y.S.2d at 118. The court also explicitly rejected Wise's contention that his statements were involuntary, either because of his purported learning disability or any other reason. Id.

In Richardson's appeal, he chose not to appeal the trial court's finding on probable cause and conceded that there was probable cause for his arrest for the assaults in the park, and the court held that such probable cause was a sufficient basis for his arrest. People v. Richardson, 202 A.D.2d at 228, 608 N.Y.S.2d at 628. The court also explicitly rejected Richardson's arguments that his Miranda waivers and statements to the police were not voluntary, and held that "[t]he evidence strongly supports the trial court's conclusion that neither the Family Court Act nor the State and Federal constitutions were violated and that defendants statements were properly admitted." Id.

The rulings against McCray were also upheld, the First Department finding that "the hearing testimony provided a reasonable basis for the court's finding that the questioning of defendant was not coercive, and, in particular, that the exhortations of the detectives to defendant's parents imploring them to have defendant tell the truth were not improper." People v. McCray, 198 A.D.2d at 200-201, 604 N.Y.S.2d at 95.

B. The pre-trial rulings in the criminal case have full preclusive effect.

Under New York law, rulings on pre-trial motions – even if not reduced to judgments – are treated as final orders for the purposes of collateral estoppel, where, as here, they contain the court's final decision on a particular issue. See Vavolizza v. Krieger, 33 N.Y.2d 351, 356, 352

N.Y.S.2d 919, 923 (1974) (denial of motion to vacate guilty plea was collateral estoppel on question of voluntariness of guilty plea); Brooks v. McBride, 665 F. Supp. at 161-62 (pre-trial orders in criminal cases may have collateral estoppel effect in subsequent civil cases, citing Vavolizza); Davis B. Siegal, New York Practice, 3d Ed., § 445, at 719 ("an order entered on a motion is ordinarily entitled to the same res judicata and collateral estoppel treatment that a judgment gets") (West 1999); Carmody-Wait, New York Practice, 2d Ed., § 63:469 at 440 & n. 50 (West 1999) (order made upon a motion has the same effect as a judgment).

Under New York law, on remand of a reversed conviction, pre-trial rulings remain binding on the trial court if the reversal does not disturb those rulings. See People v. Evans, 94 N.Y.2d 499, 505, 706 N.Y.S.2d 678, 682 (2000) (pre-trial suppression decision is binding upon retrial of a criminal case); People v. Nieves, 67 N.Y.2d 125, 137 n. 5, 501 N.Y.S.2d 1, 8 (1986) (same). Accordingly, the vacatur of plaintiffs' convictions here would have (but for the District Attorney's voluntary dismissal of the case) resulted in a new trial subject to the same pre-trial rulings on the admissibility of confessions as the first. If the pre-trial order would be binding in the criminal trial court, it should be binding here as well.[12]

To have preclusive effect, a State court's ruling on the suppression of a confession must be either clearly adopted by the criminal trial jury, or clearly upheld on appeal. Owens v. Treder, 873 F.2d at 609-11.[13] In this case, both criminal juries were instructed, pursuant to Crim. P.

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[12] A conviction is normally required for collateral estoppel only to ensure that the plaintiff had an opportunity to appeal. See Johnson v. Watkins, 101 F.3d 792, 795-96 (2d Cir. 1996). In the unusual procedural posture of this case, the preclusive effect of the prior findings of the trial court are not affected by the vacatur of the judgment because plaintiffs already had their opportunity to appeal. See Hall v. Tudbury, 35 Fed. Appx. 428, 433-34, 2002 U.S. App. LEXIS 7409, * 14-15 (9th Cir. 2002) (pre-trial finding given collateral estoppel effect although the conviction was vacated on other grounds and the prosecution was dropped).

[13] Pre-trial findings of probable cause, such as those entered here, have collateral estoppel effect without respect to any findings of the jury, because Crim. P. L. § 710.70 is not implicated. See, e.g., Wallace v. Dillon, 921 F. Supp. 946, 954 (E.D.N.Y. 1996) (criminal trial court's finding that there was probable cause to arrest plaintiff precludes false arrest claim); Brown v. De

Law. 710.70(3), that in order to rely on a confession in convicting the defendants they must find beyond a reasonable doubt that the confession was voluntary and lawfully obtained. See People v. McCray, Trial Tr. 5447-5459, Ex. CC; People v. Richardson, Trial Tr. 4262-4272, Ex. DD. Because, as plaintiffs concede, the confessions were "critical" to plaintiffs' convictions, there is no doubt that the juries found the confessions voluntary when convicting the plaintiffs. Wise ¶ 43; Salaam ¶ 46; McCray ¶ 46; see also People v. Wise, 194 Misc.2d at 496, 752 N.Y.S.2d at 850 ("defendants' statements played a crucial role in the jury's verdict as to all convictions"). In addition, unlike Owens, the appellate courts in this case would have been mandated to reverse plaintiffs' convictions had they found that the defendants statements were inadmissible for any reason. In any case, each appellate court explicitly ruled that the plaintiffs' statements were admissible, thereby satisfying the requirements of Owens. Id. at 611.[14]

C. Plaintiffs had a full and fair opportunity to litigate the issues of probable cause and the voluntariness of their statements.

Plaintiffs cannot meet their burden of proving that they did not have a full and fair opportunity to litigate the issues of probable cause and voluntariness in the state court. Under New York law, courts consider the following factors in determining whether a party had a full and fair opportunity to litigate: "the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation." Schwartz, 24 N.Y.2d at 72, 298 N.Y.S.2d at 961. In this

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Fillipis, 717 F. Supp. 172, 178-79 (S.D.N.Y. 1989); Greene v. Civilian Police Review Board, No. 86 Civ. 0212 (KC), 1988 U.S. Dist. LEXIS 2399, * 12-13 (S.D.N.Y. March 25, 1988).

[14] Santana's choice to forego appeal does not prejudice the defendants' right to collateral estoppel, where all that is required is the *opportunity* to appeal. Grieve v. Tamerin, 269 F.3d 149, 254 (2d Cir. 2001) (failure to appeal results in collateral estoppel form the unappealed ruling); In re Cappoccia, 272 A.D.2d 838, 846, 709 N.Y.S.2d 640, 648 (3d Dept. 2000); Mickel v. Christie's, Inc., 207 F. Supp. 2d. 237, 255 (S.D.N.Y. 2002).

case, there are no factors on which plaintiffs can rely to establish the absence of a full opportunity to litigate.

There can be no greater incentive to litigate an issue than defense of criminal charges of the type that the plaintiffs faced here: rape, sexual assault, and robbery, among others. The plaintiffs (then criminal defendants) attacked the admissibility of their statements both on the grounds that they were in custody without probable cause for arrest at the time they gave their statements, and on the grounds that their statements were coerced. The issue of the admissibility of those statements – on both probable cause and voluntariness grounds – was crucial to their defense. All of the evidence relevant to those questions was within their knowledge, because they knew the circumstances of their arrest and especially of their interrogations. All of the plaintiffs had the opportunity to testify regarding the circumstances of their arrest and their interrogations, and Wise and Salaam did testify. Galligan at 2. All the plaintiffs had the right to subpoena witnesses on their behalf, and several friends and family members testified for them. Galligan at 2.

Plaintiffs will argue that the presence of "new evidence" in this case deprived them of a full and fair opportunity to litigate. To meet their burden of showing an impaired ability to litigate because of the existence of new evidence, plaintiffs must show that there is "significant new evidence, which would *almost certainly* change the earlier result." Schwartz, 24 N.Y.2d at 73, 298 N.Y.S.2d at 961; Shire Realty Corp. v. Schorr, 55 A.D.2d 356, 363, 390 N.Y.S.2d 622, 627 (2d Dept. 1977) ("significant new evidence, which would almost certainly change the earlier result" is required to overcome collateral estoppel). It cannot be said that the new evidence -- DNA evidence that Reyes participated in the rape and his uncorroborated claim that he acted on his own -- would have 'almost certainly' changed Justice Galligan's pre-trial

rulings. Indeed, that evidence is irrelevant to the voluntariness of defendants' statements and to the probable cause for plaintiffs' arrests.[15]

POINT II

THIS COURT LACKS SUBJECT MATTER JURISDICTION PURSUANT TO THE ROOKER-FELDMAN DOCTRINE.

Plaintiffs' claims based on lack of probable cause and on plaintiffs' confessions must also be dismissed because they are barred by the Rooker-Feldman doctrine. Pursuant to the Rooker-Feldman doctrine, this Court lacks subject matter jurisdiction to second guess state court determinations. See Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923); Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983); see Brown v. City of New York, 210 F. Supp. 2d 235, 240 (S.D.N.Y. Nov. 16, 1999). Under the doctrine, federal courts (except the Supreme Court) have no subject matter jurisdiction over cases that effectively seek review of either final or interlocutory judicial decisions of state courts. Brown, 210 F. Supp. 2d at 240; see also Kropelnicki v. Siegal, 290 F. 3d. 118 (2d Cir. 2002)). The doctrine is based on the premise that "[l]ower federal courts possess no power whatever to sit in direct review of state court decisions." Id. (quoting Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 296 (1970); see also Moccio v. New York State Office of Court Admin., 95 F.3d 195, 197 (2d Cir. 1996)(no subject matter jurisdiction to review state court determinations or claims that are "inextricably intertwined" with federal litigation).

In determining whether Rooker-Feldman applies, "the test is whether the federal district court would necessarily have to determine that the state court erred in order to find that the

[15] Any claim based on the admission of unlawful confessions at trial is also barred by the related doctrine articulated by the Second Circuit in Townes v. The City of New York, 176 F.3d 138 (2d Cir. 1999). It was Justice Galligan, not the police, who caused plaintiffs' confessions to be admitted against them notwithstanding plaintiffs making the same arguments to Justice Galligan as they make to this court. 176 F.3d at 147.

federal claims have merit." (emphasis added) Khal Charidim Kiryas Joel v. Village of Kiryas Joel, 935 F. Supp. 450, 455 (S.D.N.Y.1996) (citing Pennzoil Company v. Texaco, Inc., 481 U.S. 1, 25, (1987) (Marshall, J., concurring)) (other citations omitted). Thus, the Rooker-Feldman doctrine precludes Section 1983 claims that challenge a state court's findings on constitutional issues that were, as in this case, previously decided in an underlying state court suppression hearing. See Wishnefsky v. Addy, 969 F. Supp. 953, 955 (E.D. Pa 1997), aff'd, 162 F.3d 1153 (3d Cir. 1998) (1983 claim for search ruled legal by state criminal court barred by Rooker-Feldman doctrine)

The Rooker-Feldman doctrine extends beyond the contours of general issue preclusion principals. See Doctor's Assocs. v. Distajo, 107 F.3d 126, 137-38(2d Cir. 1997) ("district court may lack subject matter jurisdiction under the Rooker-Feldman doctrine even when that court would not be precluded, under res judicata or collateral estoppel principles, by a prior state judgment."); Campbell v. Greisberger, 80 F.3d 703, 707 (2d Cir. 1996) (Rooker-Feldman applies, for example, to non-final orders). In fact, a plaintiff's federal constitutional claims may be barred even when the precise constitutional issues were not decided in the state decision. See Brooke-Jones v. Jones, 916 F. Supp. 280, 281-82 (S.D.N.Y. Feb. 13, 1996)(DAB) ("a plaintiff may not seek a reversal of a state court judgment simply by casting [their] complaint in the form of a civil rights action"); Roemer v. Bd. of Educ., -1-CV-1105 (SMG), 2002 U.S. Dist. LEXIS 27118, *20 (E.D.N.Y. Dec. 30, 2002)(plaintiff's federal claims barred despite the fact that the precise constitutional claims were not decided in the state Article 75 petition). In Brooke-Jones v. Jones, plaintiff challenged a state court's determination pertaining to child support payments and custody of her child, and challenged whether the state court had personal jurisdiction to make such determinations. The Honorable Judge Batts dismissed plaintiff's complaint upon the Rooker-Feldman doctrine, not on the basis of collateral estoppel or res judicata, but because the federal constitutional claims were "inextricably intertwined" with the state court judgment.

Brooke-Jones v. Jones, 916 F.Supp at 281 –82. Judge Batts determined that although plaintiff's constitutional claims were not raised in the state court proceedings, they could succeed only to the extent that the state court wrongly decided the issues before it; thus the claim was barred. Id. For the same reasons, plaintiffs' claims must be dismissed here.

POINT III

PLAINTIFFS' CLAIMS ARISING FROM THE DEFENDANTS ALLEGED FAILURE TO DISCLOSE INFORMATION ABOUT MATIAS REYES SHOULD BE DISMISSED.

Plaintiffs' claim that the defendants violated plaintiffs' constitutional rights by failing to disclose exculpatory evidence fails as a matter of law because the information allegedly withheld was not exculpatory or material, and therefore was not required to be disclosed to the plaintiffs under Brady v. Maryland, 373 U.S.93 (1963). Plaintiffs ask the Court to assume, contrary to the admitted facts, that at the time of plaintiffs' prosecution, Reyes' had confessed to the Meili rape, his DNA had been matched to that rape, and he had confessed to another purportedly similar crime on April 17, 1989 in Central Park. But in fact, the details of plaintiffs' allegations and the Ryan Affirmation on which they rely show that the *only* information available about Reyes during plaintiffs' prosecutions was (1) that a person named Matias Reyes was treated for injuries similar to those of a rape perpetrator in Central Park on April 17, 1989, and (2) that beginning *two months after* the rape of Meili, Reyes committed a series of rapes on the Upper East Side. This information was not Brady material because it does not tend to show that Reyes committed the crime against Meili; it would not have been admissible at plaintiffs' trials to prove that Reyes committed that crime; and even if admitted, it would not have tended to prove plaintiffs' innocence in light of the prosecution's theory at trial that defendants aided and abetted at least one other unknown rapist.

A. The alleged Brady information does not show that Reyes committed the attack on Meili and therefore would not have been admissible for that purpose.

It is undisputed that there was no evidence withheld that linked Reyes directly to the attack on Meili. Reyes' confession to the Meili attack, his assertion that he acted alone, and the match of his DNA to the semen from that crime, "simply did not exist" at the time of the plaintiffs' prosecutions. See People v. Wise, 194 Misc.2d at 486, 752 N.Y.S.2d at 842. It was not until January 2002 that Reyes told law enforcement officials that he raped and assaulted the jogger, and that he did so alone. See McCray ¶ 52; Wise, ¶ 46; see also McCray, 194 Misc.2d at 487, 752 N.Y.S.2d at 843 (District Attorney's office first learned of Reyes confession in February 2002). It was not until May 8, 2002 that the District Attorney's office learned that Reyes' DNA matched the DNA from the jogger crime scene. Id. & Salaam, ¶ 49. Despite plaintiffs' attempt to blur past and present in their loose and misleading pleading,[16] none of that evidence could form the basis of plaintiffs' Brady claim.

Rather, plaintiffs' claim rests on allegations regarding an April 17, 1989 rape in Central Park, and five other crimes that did not occur until several months later, on the Upper East Side, for which Reyes was convicted in 1991.[17] With respect to the April 17, 1989 crime, plaintiffs allege that some of the defendants "knew or should have known" that: (1) on April 17, 1989 another woman was raped in Central Park by an unknown single assailant near the location of the Meili attack; and (2) that Matias Reyes had been treated at an area hospital for an injury described by the victim of the April 17, 1989 attack. McCray ¶ 43; Salaam ¶ 45; Wise ¶ 41. The

[16] Plaintiffs inexplicably allege that defendants, "at the time that they had elicited" statements from the plaintiffs on or before April 22, 1989, knew that in 2002 Reyes DNA would match the DNA found in the Meili case. See McCray, ¶ 67; Salaam, ¶ 62; Wise, ¶ 60. The Court need not accept physical impossibilities as true.

[17] Plaintiffs' allegations regarding Reyes' other crimes are drawn entirely from the Affirmation of Assistant District Attorney Nancy Ryan, which plaintiffs rely upon and adopt as true. See McCray ¶ 55; Salaam ¶ 51; Wise ¶ 49 (Reyes' veracity was conceded by the District Attorney's office); see Ryan Affirmation, at 24-28, 37-38; Scheiner Dec. Ex. G. Defendants do not adopt the Ryan Affirmation, but contend that plaintiffs' are bound by its assertions for the purposes of this motion because they rely upon it so heavily in their complaint.

injury for which Reyes was treated, allegedly linking him to the April 17 rape, was "stitches in a cut on the right side of his chin," a common injury. Ryan Affirmation, ¶ 58. Other than that allegation – a tenuous connection at best – plaintiffs allege no facts known to the police linking Reyes to the April 17 crime at the time of plaintiffs' prosecutions. Plaintiffs do not allege that Matias Reyes was a person known to law enforcement at the time that his name was allegedly discovered at the area hospital. As is clear from the Ryan Affirmation, Reyes made no statement regarding the April 17 crime until 2002.[18] Plaintiffs do not allege any facts supporting their conclusory allegation that Reyes was, on April 19, 1989, a "far more likely suspect" in the Meili crime, or even that the April 17 rape was a "similar attack." Id.

With respect to Reyes' later crimes, plaintiffs inexplicably allege that the police, "at the time" that they interrogated and arrested the plaintiffs, somehow knew that Matias Reyes *would* commit a series of similar rapes that would not occur until *beginning two months in the future*. See McCray, ¶ 67; Salaam, ¶ 62; Wise, ¶ 60. The Ryan Affirmation describes Reyes' five later crimes for which he was not arrested until August 5, 1989 (well after plaintiffs' arrests and indictments), and for which he was not convicted until 1991 (well after the plaintiffs' criminal trials): **[19]**

- June 11, 1989: Reyes "stalked, raped, robbed, stabbed and beat" a 24 year old Caucasian woman inside her apartment on 116th Street between Park and Lexington Avenues. He

[18] Even today, only "circumstantial evidence" links Reyes to the April 17 crime. Ryan Affirmation, ¶ 58. Even Reyes did not know when that alleged crime took place, and he recalled almost nothing of the details of the attack, including, for example, believing it was an attempted (rather than, in fact) a completed rape Id. Nancy Ryan's opinion that Reyes committed the April 17 crime has never been litigated or tested.

[19] Contrary to plaintiffs' allegations that Reyes pled guilty before their convictions, public records show that Reyes was arrested on August 5, 1989, indicted on August 11, 1989, arraigned on August 24, 1989, pled guilty on October 7, 1991, and was sentenced on November 1, 1991, well after the plaintiffs' trials which concluded on April 18, 1990 and December 11, 1990. See, e.g., McCray ¶¶ 65 & 46-47; Ryan Affirmation, ¶ 38, Ex. G; Office of Court Administration Database Report on Matias Reyes, at 2-3, Ex. EE.

stole the victim's walkman, and left her with a fractured nose, multiple bruises and black eyes, and superficial stab wounds.

- June 14, 1989: Reyes "raped, robbed and stabbed to death" a 24 year old, light-skinned, blonde Hispanic woman in an apartment on 97th Street, between Madison and Park Avenues, using a knife from the victim's kitchen.

- July 19, 1989: Reyes "stalked, raped, robbed and cut" a 20 year old Caucasian woman inside an apartment on Madison Avenue, between 95th and 96th Streets, using a knife he brought with him. "He then tied her with extension cords in a fashion which parallels the way the Central Park jogger was tied . . . ." The victim suffered small superficial cuts over one eye and over the other. "Reyes used extension cords to tie his victim. He bound her feet with one cord, used another to tie her hands, and a third to gag her by wrapping a cord around her head and crisscrossing it through her mouth. The cords were attached so that her hands were raised in front of her face."

- July 27, 1989: Reyes "stalked, robbed and punched" a 28 year old white woman in the hallway of her apartment building on Lexington Avenue, at the corner of 95th Street.

- August 5, 1989: Reyes "stalked, raped and robbed" a 24 year old white woman in her apartment on East 91st Street, between Lexington and Third Avenues.

Ryan Affirmation, ¶ 55, Ex. G.

None of this information about Reyes' alleged other crimes (five of which were public knowledge once Reyes was arrested and charged in 1989) was Brady material. Under Brady v. Maryland, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is *material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S. Ct. at 1196-97 (emphasis added). For Brady purposes, "[e]vidence is favorable only if it would tend to exculpate the defendant or reduce the penalty he faces." Brown v. McGinnis, 62 F. Supp.2d 855, 871 (E.D.N.Y. 1999) (citing Lamberti v. United States, 22 F. Supp.2d 60, 69 (S.D.N.Y. 1998)); see also Brady, 373 U.S. at 88; 83 S. Ct. at 1197; United States v. Stofsky, 527 F.2d 237, 247 (2d Cir. 1975) (deeming new evidence not exculpatory where key factual issue in dispute would not have been affected one way or the other by new evidence). In addition to being favorable, the evidence must also be "material." See United States v. Payne, 63 F.3d 1200, 1208 (2d Cir.

1995). Evidence is *material* for Brady purposes "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433 (1995) (internal quotations and citations omitted); see also Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 766 (1972) (evidence not required to be disclosed if it was "not likely to have changed the verdict") This standard requires a higher probative value for the evidence than the customary "harmless error" standard. See United States v. Agurs, 427 U.S. 97, 112 (1976); Payne, 63 F.3d at 1209.

Evidence that is not admissible under the usual rules of evidence is not material under Brady, because it never would have reached the jury and, therefore, could not have affected the trial outcome. See Wood v. Bartholomew, 516 U.S. 1, 6-7 (1995) (defendant did not have a right to disclosure of inadmissible polygraph results of prosecution witnesses); Scarpati v. United States**,** 93 Civ. 740 (JFK), 1994 U.S. Dist. LEXIS 7492, *7-8 (S.D.N.Y. June 4, 1994) (undisclosed FBI report not Brady material where they are not admissible); Rodriguez v. Mann, 94 Civ. 1771, (PKL) (BAL), 1995 U.S. Dist. LEXIS 18513, *23 (S.D.N.Y. 1995) (undisclosed police reports containing witness statements are not Brady material because such reports are inadmissible hearsay); see also Illinois v. Tate, 87 Ill. 2d 134, 143 (1981) (no Brady violation when prosecution failed to disclose arrest report of another person, because such evidence was inadmissible at defendant's trial under a *modus operandi* theory).

Evidence of other, similar crimes committed by other persons is generally not Brady material because it does not tend to prove that the defendants are innocent. See McGonagle v. United States, Civil No. 02-73-M, 2002 U.S. Dist. LEXIS 20728, *29-30 (D. N.H. Oct. 23, 2002) (evidence of robberies with similar modus operandi and information regarding other suspects was not Brady material because it would not have been likely to change the result of the trial). In this case, because the evidence of Reyes' other crimes would not have been admissible during plaintiffs' prosecutions, and would not have tended to prove their innocence in any case,

that evidence was not required to be disclosed under Brady. See Huber v. Schriver, 140 F. Supp. 2d 265, 274-75 (E.D.N.Y. 2001) (undisclosed crime not similar enough to constitute Brady material).

Contrary to plaintiffs' allegations, Reyes' attacks reveal significant dissimilarities, not common methods, and would not meet the standards under New York law for *modus operandi* evidence used to prove the identity of Meili's attacker. New York law requires clear and convincing proof that: 1) the method used in the Meili crime and Reyes's other crimes was "sufficiently unique to make it highly probable that [all of the] crimes were committed by the same individual"; and 2) that Reyes was the perpetrator of the other crimes. See People v. Robinson, 68 N.Y.2d 541 at 549 (1986). The pattern of each assault, when viewed as a whole, must be sufficiently unique to indicate that one person was responsible for all of the assaults. People v. Beam, 57 N.Y.2d 241, 253 (1982) (citing People v. Allweiss, 48 N.Y.2d 40)). A person's actions in perpetrating a crime are sufficiently unique when *"certain oddities"* are an *"invariable part"* of his modus operandi. People v. Allweiss, 48 N.Y.2d 40, 48 (1979) (internal citations omitted) (emphasis added). In other words, facts of the crimes must be both bizarre and consistent among all the crimes. "[I]t is not sufficient to show that [the perpetrator] has committed similar acts if the method used is not uncommon." Id., at 47. There must be "some additional factor to set the crimes apart from the ordinary so that the mere proof that [he] had committed a similar act would be highly probative of the fact that he committed the one charged." Id. at 47-48 (citing People v. Condon, 25 N.Y.2d 139, 257 N.E.2d 615 (1970)).

The evidence cited by plaintiffs does not meet these standards for admissibility. First, no clear and convincing evidence existed in 1989-1990 to establish Reyes's identity as the April 17 attacker, and the April 17 evidence would have been inadmissible for that reason alone.[20] But

[20] The Ryan Affirmation states that the "victim picked a photograph *resembling* Reyes as a look alike in 1989," and recently identified a 1989 photograph of Reyes as looking "*most like*" her

even assuming that Reyes was, in fact, the April 17 attacker, a cursory comparison of the April 17 and Meili attacks does not reveal a common *modus operandi*. As plaintiffs emphasize, Meili was gagged and tied (Ryan Affirmation, ¶ 8), while the April 17 victim was not gagged or tied. Ryan Affirmation, ¶ 56-59. Reyes was armed in the Meili attack (Ryan Affirmation, ¶ 63(3)), but was unarmed on April 17. Ryan Affirmation, ¶ 57. The April 17 attack occurred in daylight, in mid-afternoon, not at night like the Meili attack. Id., ¶ 59. Reyes allegedly introduced himself to the April 17 victim as "Tony," but allegedly attacked Meili from behind while she was running, after a foot pursuit. Id., ¶ 58. The fact that both victims were white women in Central Park can hardly be described as unique "oddities."

Moreover, mere geographic or temporal proximity of the same type of crime is insufficient to use the April 17 attack to prove that Reyes committed the Meili attack. For example, the Appellate Division ruled that a defendant accused of committing robberies in Upper East Side housing projects elevators had no right to introduce evidence that another man was committing robberies in Upper East Side housing project elevators during the same time period. People v. Coleman, 186 A.D.2d 509, 509, 589 N.Y.S.2d 414, 415 (1st Dept. 1992). The facts of the two rapes show only they were the same type of crime, not that they had the same perpetrator; such "naked similarity" of crimes is insufficient. People v. Molineaux, 168 N.Y. 264 at 317, 61 N.E. 286 at 295 (1901) (evidence of a prior homicide was erroneously admitted at defendant's murder trial, even though both crimes were committed using mercury cyanide powder that had been sent to rented mailboxes); People v. Sanza, 121 A.D.2d 89, 94-95, 509 N.Y.S.2d 311, 314-15 (1st Dept. 1986) (reversing conviction because evidence of defendants' other rapes showed only "common methods" used in rape and robbery).

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attacker. Ryan Affirmation, ¶ 58 (emphasis added). Plaintiffs do not allege, and cannot, that the April 17 victim has ever identified Reyes as her attacker, then or now.

Reyes' five other crimes do not help plaintiffs, and in fact weaken any claim that Reyes had a unique *modus operandi* consistent with the Meili attack. None of these crimes contain any "oddities" that were "bizarre" or "too unusual for coincidence," and which "*invariably*" formed part of his crimes. Allweiss, 48 N.Y.2d at 48 (emphasis added). In fact, these crimes show no similarity with the Meili attack. In all of Reyes' Upper East Side attacks, Reyes:

- stalked a woman in her apartment building, rather than attacking outdoors in the park or street at night;
- talked or pushed his way into his victim's apartment, rather than striking at a random victim in a public place, from behind;
- used a knife or no weapon at all, rather than a blunt instrument such as a branch, rock or brick.

There is no reason to assume that the same perpetrator who committed these knife wielding, push-in home invasions on the Upper East Side also raped a jogging woman at night, in Central Park, attacking her from behind with a blunt instrument without warning. Plaintiffs' argument is illogical bootstrapping, resting on the *assumption* that Reyes raped Meili (which plaintiffs' would have had to prove in 1989 without the benefit of his confession or DNA evidence). Without assuming that Reyes raped Meili, Reyes only attacked a woman in Central Park in *one out of seven* other crimes (including an additional sexual assault occurring in a Church at Fifth Avenue and 96th Street, in September 1988). See Ryan Affirmation, ¶¶ 55, 57 & 60. Plaintiffs also inexplicably claim that Reyes "characteristically" tied his victims, based solely on the July 19 attack. McCray, ¶ 62, 63, 67; Salaam, ¶ 57, 58, 62; Wise, ¶ 55, 56, 60. Again, the fact that Reyes tied up his victim in *only one of the seven* other crimes demonstrates that it was *unusual*, and not "characteristic." Moreover, the Ryan Affirmation does not reveal any conclusive similarity between the manner in which the July 19 victim and Meili were tied.[21]

[21] According to the District Attorney's office, Meili was tied with her own t-shirt which was "placed behind her head, crisscrossed over and through her mouth, and then used to tie her hands and wrists up in front of her face." Ryan Affirmation, at 4 & ¶ 67, Ex. G. Reyes did not recall

Plaintiffs also allege that Reyes "characteristically severely beat" his victims around the eyes in an attempt to blind them to avoid being identified. McCray, ¶ 63; Salaam, ¶ 58; Wise,¶ 56. In fact, Reyes was more likely to use a knife against his victims than to beat them; Reyes only beat his victims on two alleged occasions. See Ryan Affirmation, ¶ 55. Of all his alleged victims, *only Meili* was beaten with a blunt instrument, or injured with a natural implement such as a branch or rock.

There is no greater pattern to Reyes' actions than those of the perpetrator of People v. Sanza, 121 A.D.2d 89 (1st Dept. 1986), where a murder and rape conviction was reversed because purported modus operandi evidence was erroneously admitted. In Sanza, the prosecution introduced evidence of three other rape-assaults to which the defendant had pled guilty, in order to establish a pattern identifying the defendant as the person who raped and killed a fourth woman. 121 A.D.2d 89 at 95. The prosecution contended that the "pattern" of threatening three women with a gun, asking about their rings, and taking their rings, could be used to establish *modus operandi*. Id. The court found that "there is nothing remarkable or unique about such behavior in the course of a rape or murder" and that, like Reyes in this case, Sanza's behavior was not consistent among all the crimes, either in location, weapon used, or details of his actions. Id. at 95-96. Just like the evidence ruled inadmissible in Sanza, the evidence about Reyes' other crimes in this case "establish no plan in common with the rape committed in this case. Actually, the differences are more notable than the similarities." 121 A.D.2d at 96.

Like the evidence erroneously admitted in Sanza, the evidence cited by plaintiffs here "merely establishes that [Reyes] is a convicted rapist," not that he committed the Meili rape. Id.

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tying up the jogger. Id., ¶ 67. It was Ryan who concluded that Reyes must have tied up Meili. Id. The July 19 victim was tied with extension cords, and unlike Meili both her hands and feet were bound. Id., ¶ 55(3).

at 97. The modus operandi evidence would never have been admitted to prove that Reyes raped Meili, and would not have convinced anyone if it were admitted. Accordingly, it cannot be Brady material.

B. Evidence regarding Reyes would not have been admissible at plaintiffs' criminal trials because there was no evidence to link Reyes directly to the Meili attack.

Even if the purported modus operandi. evidence regarding Reyes did show a pattern similar to the Meili attack, it would not have been admissible. It was well settled under New York law in 1989, and thereafter, that before a criminal defendant may offer evidence of an alternative perpetrator based on similar acts, there must be "such a train of facts or circumstances as tend clearly to point out some one besides the prisoner as the guilty party." Greenfield v. People, 85 NY 75, 89 (1881) (no error when trial court excluded testimony from a defense witness that three people were seen carrying guns and washing their hands on the night of the murder, along the route defendant would have traveled in leaving the murder scene). The evidence must raise more than a mere suspicion that it was a different person who committed the crime. People v. Aulet, 111 A.D.2d 822, 825-26, 490 N.Y.S.2d 567, 568 (2d Dept. 1985) (internal citations omitted) (evidence of other suspect's proclivities towards arson not admissible); People v. Jimenez, 172 A.D.2d 367, 367, 568 N.Y.S.2d 624, 625 (1st Dept. 1991) (evidence offered by the defendant that other drug dealers used his alleged stash location was not admissible). There must be a clear link that establishes that it was someone other than the defendant who committed the crime. Aulet, 111 A.D.2d at 825; see also People v. Coleman, 186 A.D.2d at 509; see also DiBenedetto v. Hall, 272 F. 3d 1, 8 (1st Cir. 2001) ("there must be evidence that there is a connection between the other perpetrators and the crime, not mere speculation on the part of the defendant"); United States v. De Noyer, 811 F.2d 436, 440 (8th

Cir. 1987) (defendant was not entitled to prove that other child sex offenders were operating in the community because the theory was remote, speculative, a "red herring").[22]

Because there was no clear link between Reyes and the Meili crime before 2002, evidence of Reyes' other crimes could never have been admitted in the criminal trials of the plaintiffs.[23] Where, as here, evidence of other crimes by an alternative perpetrator would not be admissible, it also cannot be Brady material. For example, in Illinois v. Tate, 87 Ill. 2d 134, 137 (1981), the defendant was accused, *inter alia*, of attempting to shoplift meat from a food mart. Id at 137. The Supreme Court of Illinois held that evidence that another perpetrator committed an almost identical offense was would not have been admissible according to Illinois state law under a modus operandi theory, and therefore was not required to be disclosed under Illinois procedural rules or Brady. Id., at 143.

C. The evidence regarding Reyes was not exculpatory or material because the prosecution's theory included the presence of another rapist.

Plaintiffs admit that they knew, and that it was part of the evidence at trial, that an unidentified rapist participated in the Meili attack: DNA from semen in the Meili case did not

[22] The New York Court of Appeals held in People v. Primo, N.Y.2d 351, 728 N.Y.S.2d 735 (2001) held that the "clear link" test is "best described in terms of conventional evidentiary principles." Id. at 355. General evidentiary principles still require that a criminal defendant show a sufficient "nexus" between an alternative suspect and the crime at issue, before suggesting an alternative suspect to a jury. See Wade v. Mantello, 333 F.3d 51, 61-62 (2d Cir 2003) (upholding under Primo trial court's exclusive of evidence that an alternative suspect had a motive to kill murder victim for lack of a 'clear link' of that person to the crime) (quoting United States v. McVeigh, 153 F.3d 1166, 1191 (10th Cir. 1998)).

[23] Plaintiffs may claim that they could or would have been able to uncover a clear link connecting Reyes to the Meili, had they only known of Reyes's other crimes at the time of their criminal trials. This is the same speculative argument, however, that was rejected by the Supreme Court in Wood v. Bartholomew, 516 U.S. 1, 6-7 (1995). The Supreme Court rejected the Ninth Circuit's speculation that had defendants known of the inadmissible polygraph results, they might have been driven to develop a better case as "mere speculation" and contrary to the Court's standards for determining materiality under Brady. There is no indication here that plaintiffs' attorneys were interested in identifying the unknown rapist whose DNA was present in the case by using *modus operandi* from other crimes; certainly they never asked the prosecution for any such evidence.

match any of the plaintiffs, or any other known person (including the victim's boyfriend), and came from a single source. McCray ¶¶ 59-60; Salaam, ¶ 55; Wise, ¶¶ 52-53. Thus, the fact that an unknown person raped the victim, and that there was no physical evidence that the plaintiffs did so, was known to the plaintiffs and the jury. McCray ¶ 61; Salaam, ¶ 56; Wise, ¶ 54. Indeed, the prosecution at both trials argued to the jury – and the jury was instructed – that even if the plaintiffs did not personally rape the victim, they could be found guilty of rape for aiding and abetting or acting in concert with someone else, including an unidentified person. See Summation & Jury Instructions, People v. Salaam, Tr. 5281-83 & 5461-66, Exs. AA & CC; People v. Wise, Tr. 4134, 4201-4204 & 4275-4279, Exs. BB & DD. That theory was consistent with the plaintiffs' statements used against them at trial, in which they said that others, not themselves, actually raped the victim. McCray ¶ 38-39; Salaam, ¶¶ 41-42; Wise, ¶¶ 30-32 Moreover, several of the plaintiffs stated that they did not know everyone who participated in the attack on the jogger, and some participants were identified only by their first name**.** See People v. Wise**,** 194 Misc.2ds at 490, 752 N.Y.S.2d at 845 (defendants identified "a tall skinny black male, a Puerto Rican with a black hoodie," and "a couple of unknown males").[24]

Where, as here, the presence of multiple and unknown perpetrators is part of the prosecution's case, evidence that someone else might have participated is not considered Brady material. For example, where a prosecution's case is based on the testimony of accomplices, "the fact that there may have been other suspects" who may have participated in the robbery was not probative of guilt or innocence. Bohanan v. United States, 821 F. Supp. 902, 903-04 (S.D.N.Y. 1993), aff'd, 19 F.3d 8 (2d Cir. 1994). Moreover, where, as here, the prosecution did not rely on modus operandi proof to establish the defendants' identity, the fact that some other

[24] Among other unidentified perpetrators, one of the plaintiffs named "Tony" – a name allegedly used by Reyes as a nickname and in the April 17, 1989 rape. Ryan Affirmation, ¶ 58; Ex. G; McCray Videotaped Statement Tr., at 14-15, Ex. U.

criminals has a similar *modus operandi* is irrelevant to the defense of the criminal case. Id. at 904-05. Indeed, even direct DNA evidence that Reyes actually committed the rape (which did not exist at the time of the plaintiffs' prosecutions), would not have been Brady material because it would not have proven that defendants did not commit or assist in the rape of Meili. See Smith v. Edwards, 2000 U.S. Dist. LEXIS 7414, *17 (S.D.N.Y. May 31, 2000) (DNA's failure to match rape defendant would not have resulted in an acquittal because prosecution's theory accounted for the presence of other semen).

D. The police officer defendants did not "conceal" any evidence of Reyes' rapes from the District Attorney's office.

Under Brady, the sole duty of the police is to disclose purported exculpatory information to the District Attorney's office. See Walker v. City of New York, 974 F.2d 293, 200 (2nd Cir. 1992). It is undisputed that the evidence of Reyes' Upper East Side rapes was known to the District Attorney's Office which prosecuted Reyes for those crimes. Therefore, the police obligations under Brady were satisfied with respect to that evidence. The plaintiffs also allege that the District Attorney's office was aware of the purported link between Reyes' and the April 17, 1989 rape, which was never prosecuted. McCray ¶ 43 & 76; Salaam ¶ 45 & 70; Wise ¶ 41 & 69. Thus, the police officer defendants also satisfied their duty with respect to the April 17, 1989 evidence.

POINT IV

PLAINTIFFS' FEDERAL CLAIMS SHOULD BE DISMISSED AS TIME BARRED.

The statute of limitations applicable to Section 1981, 1983 and 1985 actions is three years. Owens v. Okure, 488 U.S. 235 (1989); Maier v. Phillips, 2000 U.S. App. LEXIS 1882, at * 3 -4 (2d Cir. 2000) (conspiracy claims under § 1983 and § 1985 are subject to the three year statute of limitations). A federal claim, brought pursuant to Section 1983, accrues at the time that plaintiff knows, or has reason to know, of the injury that is the basis of his action. Eagleston

v. Guido, 41 F.2d 865, 871 (1994); Singleton v. City of New York, 632 F.2d 185, 191 (2d Cir. 1980), cert. denied, 450 U.S. 920 (1981). A constitutional claim for false arrest accrues at the time of the arrest except in actions where success on a false arrest claim would impugn a criminal conviction. Covington v. City of New York et al., 171 F.3d 117, 123 (2d Cir. 1999). A malicious prosecution claim, however, accrues when the prosecution is favorably terminated. Frooks v. Cortlandt, 997 F. Supp. 438, 455 (S.D.N.Y. 1998) (citing Murphy v. Lynn, 53 F.3d 547, 548 (2d Cir. 1995)).[25]

In the instant case, plaintiffs were arrested in April 1989 and convicted in 1990. In 2002, plaintiffs convictions were vacated based on the "newly discovered evidence" consisting of Matias Reyes' confession and DNA analysis. Plaintiffs' claims based on their confessions and the circumstances of their interrogations clearly arose in 1989. Plaintiffs' potent knowledge of the alleged "wrongs" committed against them is evidenced by their pre-trial suppression motions and criminal appeals in which they argued that the statements were false and coerced and that the police and district attorney defendants engaged in the same type of purported misconduct alleged in the instant complaint.[26] (See Point I, supra). As such, plaintiffs' claims for due process, equal protection, and fifth amendment violations based on the interrogations and use of confessions at trial, and any purported conspiracy or Monell claims pertaining to the conduct of defendants during their arrest and prosecutions, accrued long ago. The fact that their convictions were

[25] To the extent that false arrest is not time barred under Covington, defendants note that the scope of that claim is severely limited. The Second Circuit has made clear that the tort of false arrest (or false imprisonment) allows a plaintiff to seek damages only from the "time of detention up until the issuance of process or arraignment, but not more." Townes v. City of New York, 176 F.3d 138, 149 (2d Cir. 1999)(citations omitted). After arraignment the "accused is no longer held as a result of the arrest but as the result of the intervening action of the arraigning Magistrate." Broughton v. State, 37 N.Y.2d 451, 458 (1975). Therefore, the cause of action for post-arraignment deprivations of liberty would lie in the tort of malicious prosecution. Singer v. Fulton County Sheriff, 63, F3d 110, 117 (2d Cir. 1995). In the instant case, plaintiffs were arraigned in April 1989 and were indicted on felony charges on May 4, 1989.

[26] Plaintiff Santana did not perfect an appeal.

recently vacated because of "new evidence" does not affect the accrual of plaintiffs' claims, which are purportedly based upon their personal knowledge. See Pearl v. City of Long Beach, 296 F.3d 76, 88-89 (2d Cir. 2002)(plaintiff barred by statute of limitations for Section 1983 police brutality and Monell claims despite purported "new evidence" consisting of a former police officer's recent admission that he lied in prior testimony). Clearly, claims based on excessive force – which are entirely independent of the outcome of any prosecution – accrued in 1989 and are time barred. See McCray, ¶35; Wise, ¶ 35 (referring to excessive force).

POINT V

THE PLEADING STANDARDS ARE NOT MET BECAUSE THE COMPLAINTS DO NOT STATE FACTS WITH RESPECT TO EACH INDIVIDUAL DEFENDANT.

A. Plaintiffs Conclusory Allegations Fail as a Matter of Law.

"A complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)." DeJesus v. Sears, Roebuck & Co., 87 F.3d 65, 70 (2d Cir. 1996). (citations omitted). Moreover, a complaint entirely void of any allegations as to a particular defendant cannot survive a motion to dismiss. Morabito v. Blum, 528 F. Supp. 252, 262 (S.D.N.Y. 1981).

An examination of the complaints in these matters reveals that sufficiently specific allegations against the individual defendants. Throughout each complaint, wholesale allegations are set forth against the "defendants" as a group, and, with a very few exceptions, each particular defendant's purported action is never identified. Importantly, with few exceptions, plaintiffs do not differentiate among the defendants with respect to who interrogated each plaintiff, who criminally charged each plaintiff, and who withheld the supposed "exculpatory evidence." See Complaints, generally. With respect to any claims purportedly based on the concealment of evidence regarding Matias Reyes – only defendants Sheehan and Francisi are specifically alleged

to have had knowledge of any such information. Finally, plaintiffs have failed to assert any factual allegations that support a claim of constitutional dimension against former Assistant District Attorney Linda Fairstein, as their conclusory assertions that she was "present and consulting" while plaintiffs were being questioned is not sufficient as a matter of law.

B. Plaintiffs Fail to Set Forth A Claim Against Defendants Kelly, Rosenthal and Selvaggi

It is well settled in this Circuit that a municipal official may be liable under Section 1983 only if he personally directed the particular actions alleged to have caused a constitutional deprivation or affirmatively advanced a policy sanctioning the type of action alleged to have caused the deprivation. Duchesne v. Sugarman, 566 F.2d 817, 830 (2d Cir. 1997); see also Cecese v. City of New York, 967 F.2d 826 (2d Cir. 1996). Supervisory officials cannot be held liable for the acts of their subordinates solely on the theory of *respondeat superior*. Meriwether v. Coughlin, 879 F.2d 1037, 1046 (2d Cir. 1989).

Here, plaintiffs merely name individual defendants former Police Commissioner Ward, police commissioner Raymond Kelly, former Police Chief of Manhattan Detectives Rosenthal and former Chief of Patrol Borough Manhattan North Selvaggi, without alleging how each violated his constitutional rights.[27] Clearly plaintiffs have only named these individuals based on their high ranking supervisory positions with NYPD at the time of plaintiffs' arrests and prosecutions and have not identified any personal involvement. Accordingly, this Court should dismiss the complaint pursuant to Rule 12(b)(6) as against these defendants.

C. Plaintiffs allegations are also insufficient with respect to Assistant District Attorney Linda Fairstein.

Defendants establish above that defendant Fairstein is entitled to absolute immunity for the claims asserted against her. In addition, plaintiffs allegations are insufficient to implicate

[27] The same is true of "Inspector Powell" and other defendants not served.

Fairstein in any purportedly unconstitutional interrogations. Plaintiffs have not alleged that defendant Fairstein was in the room with plaintiffs during their questioning by detectives or videotaped questioning by Lederer. Plaintiffs' allegation that defendant Fairstein was "present and consulting" during the questioning of these plaintiffs simply does not rise to the level of a constitutional violation. Salaam ¶ 40; McCray ¶ 37; Wise ¶ 29. Notwithstanding the liberal pleading standards, a complaint must still allege facts which set forth constitutional violation. See Barren v. Harrington, 152 F.3d 1193, 1194-95 (9th Cir. 1998) ("A plaintiff must allege facts, not simply conclusions, that show that an individual was personally involved in the deprivation of his civil rights."); see also Montero v. Travis, 171 F.3d 757, 761-62 (2d Cir. 1999) (claim against parole board chairman was properly dismissed for failure to allege any facts describing personal involvement in the claimed constitutional violations") (2d Cir. 1999); Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996) ("While the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice"). No constitutional claim has been alleged against Fairstein.[28]

POINT VI

ANY CLAIM FOR FALSE ARREST MUST FAIL BECAUSE PLAINTIFFS' ARRESTS WERE SUPPORTED BY PROBABLE CAUSE.

[28] Justice Galligan's findings of fact, by which plaintiffs' are bound by the doctrine of collateral estoppel, show that Fairstein was not present with the plaintiffs during any questioning at the precinct. Only Salaam sets forth any particularized allegations against defendant Linda Fairstein. Salaam claims that defendant Fairstein and Elizabeth Lederer "unlawfully and improperly prevented" Salaam's Aunt, mother, and friend of the family David Nocenti (allegedly a member of the "Big Brother" mentoring program) from seeing Salaam while he was allegedly being "improperly questioned" by a police officer at the 26th precinct. Salaam, ¶ 34-35. For the reasons stated above, Justice Galligan's decision precludes any claim based on this conduct under the doctrine of collateral estoppel. But in any case, Salaam has no constitutional right to be seen by any of these persons. See Prince v. Irvin, 95-CV-2949, 1997 U.S. Dist. LEXIS 23240, * 13-14 (E.D.N.Y. June 25, 1997) (there is no constitutional requirement that a parent or guardian be present during the questioning of minors).

Plaintiffs claims for false arrest must be dismissed as their arrests were supported by probable cause. To state a claim of false arrest a plaintiff must prove that "the defendant intentionally confined him without his consent and without justification. Escalera v. Lunn, 361 F.3d 737, 743 (2d Cir. 2004). Probable cause to arrest constitutes a complete defense to any action for false arrest, whether brought under state law or under § 1983. Wyant v. Okst, 101 F.3d 845, 852 (2d Cir. 1996).

Probable cause exists when the arresting officer has knowledge or reasonable trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." Escalera, 361 F.3d at 743 (citations omitted). Probable cause must be determined on the basis of the totality of the circumstances. Illinois v. Gates, 462 U.S. 213, 230-32 (1983). Probable cause is an objective determination measured at the moment of arrest and an officer's subjective beliefs and motivations are irrelevant. Codling v. City of New York, 01 Civ. 2884 (RWS), 2002 U.S. Dist. LEXIS 16547, at *13 (S.D.N.Y. Sept. 5, 2002). With probable cause established, a police officer is under no duty to '"explore and eliminate every theoretically plausible claim of innocence before making an arrest."' Coons v. Casabella, 284 F.3d 437, 441 (2d Cir. 2002) (citations omitted).

In this case, the complaints and facts incorporated therein establish probable cause. For brevity, defendants respectfully refer the Court to the summary of plaintiffs' statements in the Statement of Facts set forth above. In sum, each plaintiff admitted to participating in multiple acts of violence in Central Park on August 19. Salaam ¶26; McCray ¶33, Wise ¶25. Plaintiffs also admit that they were "brought in for questioning" after being "identified by other youths as having been present or participated in some of the events in the park …" McCray, ¶ 36; Wise ¶28. Most importantly, plaintiffs admit that defendants obtained inculpatory statements from all of the plaintiffs which implicated them (and each other) in the crimes against Meili. Salaam, ¶

41; McCray, ¶ 38; Wise ¶ 30; transcripts and videotape confessions; Ryan Affirmation, ¶ 10. The statements are generally consistent in their description of the various attacks. None of the plaintiffs except Salaam even deny that they were involved in the assaults against victims other than Meili.

These confessions establish probable cause to arrest. Despite plaintiffs' allegations that the police engaged in tactics that "coerced" them into making admissions of guilt, it was objectively reasonable for any officer to believe that the plaintiffs participated in the crimes based upon these admissions. This was especially true given that plaintiffs were each questioned and made confessions in the presence of family members, and the reasonableness of this belief was supported by Justice Galligan's decision that the interrogations were lawful. The purported variations in plaintiffs' statements do not vitiate the probable cause arising from their admissions. See Hathaway v. County of Essex, 995 F. Supp. 62, 69 (N.D.N.Y. 1998) ("[r]eliance on variations in testimony, as well as defendants' failure to pursue further avenues of investigation . . . are insufficient to overcome the presumption of probable cause"), aff'd, 172 F.3d 37 (2d Cir. 1999). In any case, plaintiffs' allegations of coercion do not vitiate probable cause because a finding of probable cause may be based on evidence that is later found to have been illegally obtained. See Townes v. City of New York, 176 F.3d 138, 149 (2d Cir. 1999)(gun found during an illegal stop supports probable cause, even though not admissible).

Moreover, each plaintiff implicated others in the crimes, establishing ample probable cause for each arrest. None of the plaintiffs have standing to challenge the constitutionality of the interrogations of the others. See People v. Thomas, 103 AD2d 854, 855, 478 NYS 2d. 369, 371 (2d Dep't. 1984). And the statement of an accomplice identifying the defendant as a perpetrator certainly supports probable cause to arrest and prosecute an offender. People v. Berzups, 49 N.Y. 2d 417, 427, 426 N.Y.S.2d 253, 258 (1980) (a statement by a codefendant or accomplice implicating a defendant in the commission of a crime constitutes ample probable

cause); People v. Nelson, 125 A.D.2d 339, 338-40, 509 N.Y.S.2d 67, 68 (2d Dept. 1986) (probable cause supported by a statement against the penal interest of the informant).

Additional bases for probable cause are in Justice Galligan's opinion, to which we respectfully refer the Court. As noted in the Statement of Facts, the presence of the defendants in or near the park that night, in a large group of black and hispanic teenagers, combined with the numerous reports of victims describing such a group, provided at least reasonable suspicion for their investigatory stops. Statements by the plaintiffs and other suspects provided the probable cause for their arrests for the assaults in the park other than Meili. An arrest is valid if an officer has probable cause to believe that the suspect has committed *any* crime. Washington v. Kelly, 03-CV-4638 (SAS), 2004 U.S. Dist. LEXIS 6580, at ** 9 (S.D.N.Y. Apr. 12, 2004) (citing Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001)). Each plaintiff admitted taking part in the large group of youths that roamed the park on April 19, 1989 and implicated each other in the crimes against not only Meili, but also Loughlin and Lewis.[29] See Videotape confessions; transcripts; written statements. Even now, plaintiffs' complaints do not deny involvement in the attacks on the male jogger victims, David Lewis and John Laughlin.[30] Accordingly, the arrests of the plaintiffs were privileged by probable cause.

POINT VII

PLAINTIFFS FAIL TO STATE A CLAIM FOR MALICIOUS PROSECUTION.[31]

[29] See. Justice Tajada Opinion, People v. Wise, et al., 752 N.Y.S.2d at 845-46.

[30] In fact, A.D.A Nancy Ryan states that in interviews conducted in 2002, plaintiffs Richardson and Santana "candidly acknowledge involvement in criminal incidents that occurred on April 19, while steadfastly asserting their innocence of rape. Ryan Affirmation, ¶ 117. Salaam coyly alleges only that he has "*asserted* his innocence of the crimes that occurred in Central Park," but only "specifically denied any involvement" in the Meili attack. Salaam ¶ 36. Salaam's lawyers apparently chose not to allege that he is innocent of the other crimes.

[31] As set forth in Point X, the Supreme Court and Second Circuit have made clear that an action for malicious prosecution against a District Attorney defendant is barred by the doctrine of

Plaintiffs fail to state a claim for malicious prosecution because (a) the prosecution was supported by probable cause, (b) plaintiffs cannot allege a favorable termination as required and, (c) despite allegations to the contrary, plaintiffs cannot demonstrate that the proceeding was instituted with malice. Plaintiffs allege that they were maliciously prosecuted for the crimes for which they were charged, including the assaults on David Lewis, John Laughlin and the Patricia Meili. To prevail on a § 1983 malicious prosecution claim, a plaintiff "must show: (1) that the defendant commenced or continued a criminal proceeding against him; (2) that the proceeding was terminated in the plaintiff's favor; (3) that there was no probable cause for the proceeding; and (4) that the proceeding was instituted with malice." Rothstein v. Carriere, 373 F.3d 275, 282 (2d Cir. 2004)(citing Savino v. City of New York, 331 F.3d 63, 72 (2d Cir. 2003).

A. The NYPD defendants did not initiate or continue the prosecution.

Any claim against the NYPD defendants[32] for decisions to initiate or continue a prosecution must be dismissed because police officers do not make the decision whether or not to initiate or continue a prosecution. After plaintiffs' arrest, control of the prosecution passed into the hands of the District Attorney's Office and any decision to charge the plaintiffs was made by that office, and the Grand Jury. See Bernard v. United States, 25 F.3d 98 (2d Cir. 1994) (once grand jury indicts, control of prosecution passes to prosecutor and is no longer within agent's authority); Williams v. City of New York, 02-CV-3693 (CBM), 2003 U.S. Dist. LEXIS

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absolute immunity. Therefore, any claim for malicious prosecution, whether brought pursuant to state or federal law, must be dismissed as against defendant Fairstein. Plaintiff's allegations against defendant Fairstein, including claims that defendant Fairstein used false testimony, presented the allegedly coerced confessions at grand jury and trial or deliberately suppressed exculpatory evidence, does not subject defendant Fairstein to liability because the conduct occurred during the "judicial phase of the criminal process." See Imbler, 424 U.S. at 416

[32] As established elsewhere in this Memorandum, any claim against Assistant District Attorney Linda Fairstein for malicious prosecution is barred by absolute immunity.

19078, *18-19 (S.D.N.Y. Oct. 23 2003) ("once a criminal defendant has been formally charged, the chain of causation between the officer's conduct and the claim of malicious prosecution is broken by the intervening actions of the prosecutor, thereby abolishing the officer's responsibility for the prosecution."); Rohman v. New York City Transit Auth., 215 F.3d 208, 217 (2d Cir. 2000) ("[o]ne who does no more than disclose to a prosecutor all material information within his knowledge is not deemed to be the initiator of the proceeding."); Carson v. Lewis, 35 F. Supp. 2d 250, 263 (E.D.N.Y. 1999) (once the arrest was effectuated it became the responsibility of the District Attorney's office to determine the contours of the prosecution and the necessity, if any, of a continued investigation).

B. The Existence of Probable Cause to Commence Criminal Proceedings Against Plaintiffs is an Absolute Bar to Plaintiffs' Claim of Malicious Prosecution.

Plaintiffs' claims fail because the prosecutions were supported by probable cause. Probable cause to commence a criminal proceeding exists when a defendant has "knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of." Rounseville v. Zahl, 13 F.3d 625, 629 (2d Cir. 1994). Probable cause is a complete defense to a malicious prosecution claim. Savino v. City of New York, 331 F.3d 63, 72 (2d Cir. 2003). A grand jury indictment creates a presumption that probable cause existed for the prosecution. Bernard v. United States, 25 F.3d 98, 104 (2d Cir. 1994). This presumption "may be overcome *only* by showing 'that the indictment was produced by fraud, perjury, the suppression of evidence, or other police conduct undertaken in bad faith.'" Id. (quoting Colon v. New York, 60 N.Y.2d 78, 83 (1983))(emphasis added). Dismissal of a prosecution due to subsequently obtained evidence does not rebut the presumption of probable cause. See Johnson v. Town of Greece, 983 F. Supp.

348 (W.D.N.Y. 1997). Plaintiff bears the burden of rebutting the presumption of probable cause. Savino v. City of New York, 331 F.3d at 73.[33]

Plaintiffs here were charged, indicted and convicted on multiple criminal counts for the Meili, Loughlin and Lewis attacks. As demonstrated above with respect to false arrest, plaintiffs' assertions of improper questioning are insufficient to overcome the presumption of probable cause established by their indictments, or the probable cause created by their own statements incriminating themselves and each other. Under the Second Circuit's decision in Townes, even if plaintiffs' confessions were in fact coerced, there is no "fruit of the poisonous tree" doctrine that would taint those confessions for the purpose of any Section 1983 probable cause analysis. Townes, 176 F.3d at 149; see also Caminito v. City of New York, 25 A.D.2d 848, 849, 269 N.Y.S.2d 826, 829 (2d Dept. 1966), aff'd, 19 N.Y.2d 931, 281 N.Y.S.2d 338 (1967) (ruling that confession used at trial was involuntary does not overcome probable cause arising from the confession). Moreover, whatever plaintiffs' allegations regarding information about Matias Reyes, there is "no obligation to present exculpatory material to a grand jury." United States v. Regan, 103 F.3d 1072, 1081 (2d Cir. 1997)(citing United States v. Williams, 504 U.S. 36 (1992)). There is no factual allegation from which it can be inferred that the grand jury indictment was unlawful or invalid in any way.

C. Plaintiff's Cannot Allege the "Favorable Termination" Required For Malicious Prosecution.

Plaintiffs have not and cannot allege a "favorable termination" as required for malicious prosecution. To maintain a malicious prosecution action, a plaintiff must allege a termination that is not "inconsistent with innocence." Rothstein v. Carriere, 373 F.3d 275, 286 (2d Cir. 2004). A new trial order, such as the December 19, 2002 ruling in this case, is not a favorable

[33] A presumption of probable cause also arises in this case from the jury's conviction of the plaintiffs. See Williams v. City of New York, 508 F.2d 356, 359 (2d Cir. 1974).

termination because it does not conclude the prosecution. See DiBlasio v. City of New York, 102 F.3d 654, 658 (2d Cir. 1996); see also Russell v. Smith, 68 F.3d 33, 36-37 (2d Cir. 1995)(dismissal with leave to represent does not constitute a favorable termination). In this case, the prosecution was terminated voluntarily by the District Attorney's office because "no useful purpose would be served by a retrial of any of the charges" (presumably because the plaintiffs had already served their respective sentences). Ex. H. Such a dismissal, similar if not identical to a dismissal in the interests of justice, is presumptively not a favorable termination. Giannattasio v. Artuz, 97-CV-7606, 2000 U.S. Dist. LEXIS 3907, at * 15 (S.D.N.Y. Mar. 30, 2000); Ryan v. New York Tel Co., 62 N.Y.2d 494, 478 N.Y.S.2d 823, 829 (1984).

C. Plaintiffs Do Not Allege Malice.

Plaintiffs must also allege malice to plead a malicious prosecution claim, and only where probable cause to initiate a proceeding is "so totally lacking" may malice reasonably be inferred. Sulkowska v. City of New York, 129 F. Supp. 2d 274, 295 (S.D.N.Y. 2001) (quoting Martin v. City of Albany, 42 N.Y.2d 13, 17 (1977)). Accordingly, plaintiffs must allege both that defendants had a wrongful motive *and* that the case against them was baseless. As set forth above, the statements of the plaintiffs' implicating themselves and each other show that the prosecution was not baseless, defeating an inference of malice in this case.

POINT VIII

THE CLAIMS AGAINST LINDA FAIRSTEIN ARE BARRED BY THE 11TH AMENDMENT AND THE DOCTRINE OF ABSOLUTE IMMUNITY.

Plaintiffs' claims against Linda Fairstein must be dismissed under the 11th Amendment and the doctrine of absolute immunity.

A. Any claims Brought Against Linda Fairstein in Her "Official Capacity" as a Former Assistant District Attorney Must be Dismissed Pursuant to the Eleventh Amendment.

The Eleventh Amendment prohibits federal courts from entertaining suits brought by a private party against a State. Edelman v. Jordan, 415 U.S. 651, 662-663 (1974). While performing prosecutorial acts, district attorneys in New York represent not the county in which they serve but the state. Baez v. Hennessy, 853 F.2d 73, 77 (2d Cir. 1988)). Accordingly, when a district attorney is sued for damages in her official capacity, the suit is deemed to be against the state, and the district attorney may invoke the Eleventh Amendment immunity belonging to the State. Ying Jing Gan v. City of New York, 996 F.2d 522, 529 (2d Cir. 1993). Thus, all "official capacity" claims against Fairstein should be dismissed.

B. Any Purported Claims Against Defendant Fairstein are Per Se Barred By the Doctrine Of Absolute Immunity.

All claims against Fairstein are based on her prosecutorial functions and therefore are barred by the doctrine of absolute immunity. "[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993); see Bernard v. County of Suffolk, 356 F.3d 495, 503 (2d Cir. 2004); Day v. Morgenthau, 909 F.2d 75, 77 (2d Cir. 1990); see also Burns v. Reed, 500 U.S. 478, 486 (1991)(prosecutors absolutely immune from liability under § 1983 for initiating a prosecution and in presenting the case, insofar as that conduct is 'intimately associated with the judicial phase of the criminal process.') (quoting Imbler v. Pachtman, 424 U.S. 409, 430-31(1976)).[34] Any allegation that the prosecutor "engaged in malicious prosecution of the charge against [the plaintiff] is clearly within the 'judicial phase of the criminal process,'" and therefore barred by the immunity doctrine. Day v. Morganthau, 909 F.2d at 77. Immunity is absolute and cannot be overcome by allegations that the prosecutor acted intentionally or even maliciously.

[34] Qualified immunity, however, applies to law enforcement officials, including prosecutors, when they perform investigative functions. Bernard v. County of Suffolk, 356 F.3d at 502.

Bernard v. County of Suffolk, 356 F.3d at 503.[35] Therefore, a prosecutor's motives for his or her actions are irrelevant. See Dory v. Ryan, 25 F.3d 81, 83 (2d Cir. 1994); Smith v. Gribetz, 958 F. Supp. 145, 153 n. 9 (S.D.N.Y. 1997).

Absolute immunity protects a prosecutor from liability for virtually all acts associated with his role as an advocate, regardless of whether the conduct was performed in court or out of court. Pinaud v. County of Suffolk, 52 F.3d, 1139, 1148 (2d Cir. 1995); see also Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993) (prosecutor entitled to absolute immunity with respect to acts undertaken in preparation of trials and/or judicial proceedings as well as those taken in the course of role as advocate for State); Taylor v. Kavanagh, 640 F.2d 450, 452 (2d Cir. 1981) (prosecutor immune from liability where his actions directly concern pretrial or trial phases of case); Barr v. Abrams, 810 F.2d 358, 362 (2d Cir. 1987) (immunity for filing criminal information and obtaining arrest warrant).

Here, plaintiffs' claim that they were subjected to malicious prosecution by the Assistant District Attorneys alleged conduct of: (1) presenting false evidence to the grand jury and at trial; (2) suppressing "exonerating exculpatory evidence," and; (3) by general "deception of grand juries, petit juries, and the New York Courts." See Salaam ¶ 75; McCray ¶ 81; Wise ¶76.[36] Despite the shocking nature of these allegations, they all fall within the rubric of activities that

[35] In fact, the immunity accorded to prosecutors is so broad that certain acts by prosecutors, while barred from civil liability under the absolute immunity doctrine, may nevertheless be subject to criminal charges or professional discipline. See Imbler, 424 U.S. at 428.

[36] Plaintiffs appear to allege that this purported conduct associated with the prosecution of defendants constituted an "unconstitutional seizure" without due process of law and in violation of the Fourth and Fourteenth Amendments. See, e.g., Salaam, ¶75. However, plaintiffs' allegations amount to a claim of malicious prosecution as "the tort of malicious prosecution [that] will [be] implicate[d] [by any] post-arraignment deprivations of liberty." Singer v. Fulton County Sheriff, 63 F.3d 110, 117 (2d Cir. 1995). In any event, any claims of constitutional dimension pertaining to the conduct of defendant Fairstein during the course of the prosecution are barred by absolute immunity, as the doctrine applies to all acts and is not limited to the tort of malicious prosecution.

are 'intimately associated with the judicial phase' of the criminal process. In fact, prosecutorial conduct that is *per se* protected by absolute immunity includes claims, like here, that a prosecutor wrongfully initiated or continued a prosecution, withheld exculpatory evidence, committed Brady violations, presented perjured testimony or false evidence, conspired to maliciously prosecute, or commenced and continued a prosecution motivated by personal or political reasons. See Imbler v. Pachtman, 424 U.S. at 417-19, 430-431 (use of perjured testimony and suppressed exculpatory information); Dory v. Ryan, 25 F.3d at 83 (conspiracy to present false evidence at trial and withhold exculpatory evidence); Pinaud v. County of Suffolk, 52 F.3d at 1148 (presentation of false evidence to the grand jury and out-of-court conspiracy); Taylor v. Kavanagh, 640 F.2d at 452 (falsification of evidence, coercion of witnesses, failure to drop charges, the solicitation and subornation of perjured testimony, withholding evidence, or the introduction of illegally-seized evidence at trial); Lee v. Williams, 617 F.2d 320, 322 (2d Cir. 1980) (absolute immunity for prosecutor for alleged falsification of evidence and coercion of perjured testimony); Hill v. City of New York, 45 F.3d 653, 661-62 (2d Cir. 1995)(decision to initiate prosecution, alleged use of false evidence and withholding exculpatory evidence at grand jury proceeding entitled to absolute immunity). Accordingly, plaintiffs' claims are barred.

Plaintiffs also assert that defendants *conspired* to violate plaintiffs' rights by maliciously prosecuting them, leading to their alleged wrongful conviction and imprisonment. These conspiracy allegations cannot circumvent the doctrine of absolute immunity. See Washington v. Kelly, 03-CV-4638 (SAS), 2004 U.S. Dist. LEXIS 6580, at *14 (S.D.N.Y. Apr. 13, 2004)("when the underlying activity at issue is covered by absolute immunity, the 'plaintiff derives no benefit from alleging a conspiracy"); Pinaud v. County of Suffolk, 52 F.3d at 1148; see also Dorman v. Higgins, 821 F.2d 133, 139 (2d Cir. 1987). Accordingly, any conspiracy claims against Fairstein must be dismissed.

In addition, any correlative claims under §§ 1981 and 1985 are also barred by absolute immunity. See Daniels v. City of Binghamton, 1998 U.S. Dist. LEXIS 9753, *9 n.1 (N.D.N.Y. June 27, 1998)("When a prosecutor is immune under Section 1983, he is likewise immune from liability under 42 U.S.C. §1981"); Halpern v. New Haven, 489 F. Supp. 841, 844 (D. Conn. 1980)("the parameters of prosecutorial immunity are the same under both §§ 1983 and 1985").

Finally, to the extent that plaintiffs base any claims against Fairstein on their alleged unlawful interrogations, this too must fail. As defendants establish elsewhere herein, plaintiffs fail to allege that Fairstein engaged in any unconstitutional interrogation of the plaintiffs. But assuming *arguendo* that plaintiffs' alleged such a claim, absolute immunity would have already attached because probable cause existed by the time of any such questioning. A prosecutor acts within their role as an advocate, and is thus shielded by absolute immunity, once probable cause for a criminal defendant's arrest has been established. See Hill v. City of New York, 45 F.3d 653, 661 (2d Cir. 1995); see also Cousin v. Small, 325 F.3d 627 (5th Cir. 2003)(after probable cause established, the prosecutor acts as an advocate even if a suspect has not been formally charged or arrested). As such, once the determination to criminally charge a suspect has been made, a prosecutor acts as an advocate.

For the reasons stated above, probable cause existed to prosecute the plaintiffs prior to any interrogations, based on their presence in or near the park at the time of the assaults and the statements of those suspects initially stopped and questioned. In fact, plaintiffs allege that from the moment that their questioning began the police and the prosecutors were bent on a "speedy and politically expedient accusation that it was the five youths who had committed the attack on Meili." Salaam ¶ 62; McCray ¶ 67; Wise ¶ 60. Thus, plaintiffs' allegation that they were 'framed' from the moment their questioning began – that defendants had initiated and conducted the interrogations after deciding to prosecute them for the rape – defeats any claim against

Fairstein. Once the decision to prosecute is made, even trial preparation – such as interviewing of witnesses and defendants – falls under the protection of absolute immunity.

POINT IX

PLAINTIFF FAILS TO STATE A CLAIM FOR CONSPIRACY UNDER 42 U.S.C. SECTIONS 1983 OR 1985.

Plaintiffs allege that the named defendants engaged in a conspiracy to wrongfully arrest, imprison and prosecute plaintiffs and deny them their right to access to the Courts and equal protection under the laws the Fourteenth Amendment. Plaintiffs further allege that such conspiracy was directed at plaintiffs with racial animus and in violation of 42 U.S.C. Secs. 1983 and 1985. Nevertheless, plaintiffs have not sufficiently alleged a claim of conspiracy under 42 U.S.C. § 1983 or § 1985.

In order to prevail on a claim pursuant to §1985(3) plaintiffs must demonstrate the following four elements: "1) a conspiracy; 2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; 3) an act in furtherance of the conspiracy; 4) whereby a person is either injured in his person or property or deprived of any right of a citizen of the United States." Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1087-88 (2d Cir. 1993). A § 1985(3) plaintiff must also establish that the conspiracy was motivated by "some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' actions" Id. (quoting United Brotherhood of Carpenters v. Scott, 463 U.S. 825, 828-29 (1983)).

To prove a § 1983 conspiracy, a plaintiff must show: (1) that two or more people entered into an agreement to violate the victim's civil rights; (2) that the alleged co-conspirators shared in the general conspiratorial objective; and (3) that an overt act was committed in furtherance of the conspiracy, causing injury to him. Pizzuto, et al. v. County of Nassau et al., 2003 U.S. Dist.

LEXIS 612 (E.D.N.Y. 2003). See also, Carson v. Lewis, 35 F. Supp 2d, 250, 271 (E.D.N.Y. 1999); Ricciuti v. N.Y.C. Transit Auth., 124 F.3d 123, 131 (2d Cir. 1997) (citations omitted).

In support of their claims, plaintiffs assert that defendants manufactured "knowingly false inculpatory evidence" against plaintiffs (McCray ¶88; Wise ¶ 82), suppressed exonerating evidence (the Matias Reyes evidence), failed to investigate the Matias Reyes evidence, provided false information to prosecutors, judges, juries and appellate courts and filed incomplete and false statements. Essentially plaintiffs argue two conspiracies – one conspiracy to falsely arrest and prosecute plaintiffs and another conspiracy to "cover up the truth" including the re-investigation and report produced by the Armstrong Commission in 2002. McCray ¶ 77, 86. Notwithstanding, plaintiffs have not sufficiently alleged a claim of conspiracy under 42 U.S.C. § 1983 or § 1985.

A. Plaintiffs Claims are Wholly Conclusory

The essence of a conspiracy claim pursuant to § 1983 or §1985 is the allegation of facts — not merely the recitation of conclusory allegations — which clearly demonstrate an *agreement* between the alleged co-conspirators, and the specific acts committed in furtherance of that agreement. See Zemsky v. City of New York, 821 F.2d 148, 151 (2d Cir. 1987) (dismissing pro se complaint containing only vague and conclusory allegations of conspiracy), cert. denied, 484 U.S. 965 (1987); Webb v. Goord, 340 F.3d 105, 110-11 (2d Cir. 2003)(In order to sustain a conspiracy claim pursuant to § 1985(3), a plaintiff must also allege facts showing a meeting of the minds).

Vague and conclusory allegations of conspiracy, such as those here, not plead with particularity, cannot survive a motion to dismiss. See, e.g., San Filippo v. U.S. Trust Co. of New York, Inc., 737 F.2d 246, 256 (2d Cir. 1984), cert. denied, 470 U.S. 1035 (1985) (affirming a dismissal of conspiracy complaint where allegations were vague and unsupported by a

description of particular overt act); Webb v. Goord 340 F.3d at 111; Boddie v. Schnieder, 105 F.3d 857, 862 (2d Cir. 1997).

Plaintiffs has not alleged any facts in support of their contention that there was an agreement among the detectives and the District Attorney's Office to falsely accuse them. Plaintiffs have also failed to allege specific facts pertaining to what the alleged agreement was and how and when it was formulated. Moreover, plaintiffs' § 1985 conspiracy claims fail because the mere recitation that plaintiffs are African American and Hispanic is insufficient to demonstrate any purported conspiracy was motivated by racial animus.

B. Plaintiffs' Conspiracy Claims are Barred by the Intra-Corporate Conspiracy Doctrine

Plaintiffs' conspiracy allegations are also barred by the intra-corporate conspiracy doctrine. Under this doctrine, members of a single entity, as a matter of law, cannot be found to have conspired together. Linder v. City of New York, No. 01 CV 8245, 2003 U.S. Dist. LEXIS 6493, *7 (E.D.N.Y. 2003) (no conspiracy claim where conspirators all employees of the City of New York or Board of Education). See also Salgado v. City of New York, No. 00 Civ. 3667, 2001 U.S. Dist. LEXIS 3196, *25-25 (S.D.N.Y. 2001) (intra-corporate conspiracy doctrine barred § 1985 claim for degrading and harassing conduct towards lesbian co-worker). In this case all of the potential "conspirators" identified by plaintiffs in the complaints are police officers and district attorney employees. Although the District Attorney's office is a separate governmental entity under New York State law, the Second Circuit has held that the City of New York is liable for the polices and practices of the District Attorney's Office. See Walker v. City of New York, 974 F.2d 293, 301 (2d Cir. 1992)(plaintiff's allegations of deliberate indifference by the District Attorney provide proper basis for holding City liable pursuant to § 1983). Thus, the City and the District Attorney's Office should be treated as one entity for purposes of any federal conspiracy claim and any claim must be barred pursuant to the doctrine.

POINT X

PLAINTIFFS CANNOT MEET THE STANDARD FOR A § 1981 CLAIM.

Plaintiffs, in their first cause of action, seek relief under 42 U.S.C. § 1981 and the Thirteenth Amendment. Section 1981 is derived from the Thirteenth and Fourteenth Amendments and provides a right against racial discrimination. Hardin v. Meridien Foods, 98-cv-2268(BSJ), 2001 U.S. Dist. LEXIS 15564, *21-22 (S.D.N.Y. Sept. 24, 2001). As construed by the Second Circuit, § 1981 "prohibits discrimination that infects the legal process in ways that prevent one from enforcing contract rights, by reason of his or her race, [and it] covers. . . efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations." Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1087 (2d Cir. 1993) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 177 (1989)).

To state a claim under § 1981, plaintiff must allege: (1) that he is a member of a racial minority; (2) that a defendant had an intent to discriminate against him on the basis of race; and (3) that "the discrimination concerned one or more of the activities enumerated in the statute, namely make and enforce contracts, sue and be sued, give evidence, etc." Mian v. Donaldson, 7 F.3d at 1087. A Plaintiff cannot defeat a Rule 12(b)(6) motion with 'naked assertions' of discrimination. Yusuf v. Vassar College, 35 F.3d 709, 713-14 (2d Cir. 1994)(affirming dismissal of §1981 claim where complaint alleged only conclusory racial discrimination without any factual circumstances supporting bias); see also Johnson v. City of New York, 01-cv-1860 (SJF), 2004 U.S. Dist. LEXIS 2517, at * 7 (S.D.N.Y. Jan. 12, 2004)("naked assertions" not enough to survive § 1981 claim). The complaint must also "allege that similarly situated person have been treated differently." Id., at * 7 (quoting Gagliardi v. Vill. of Pauling, 18 F.3d 188, 193 (2d Cir. 1994)). Section 1981 only prohibits intentional racial discrimination. Almonte v. Florio, 02-cv-6722 (SAS), 2004 U.S. Dist. LEXIS 335, at *19 (S.D.N.Y. Jan. 12, 2004).

Plaintiffs' complaints fail to state a viable claim under the plain terms of the statute. While plaintiffs do plead that they are members of a racial minority, they cannot satisfy either of the two remaining requirements for a viable § 1981 claim. Nowhere in the complaint is any of the individual defendants alleged to have made any statement or taken any action which could be construed as racially motivated, or show that people of another race were treated differently. In fact, none of the alleged actions of defendants evidence any racial animus at all. [37] "Naked assertion[s] by plaintiff[s] that race was a motivating factor without a fact-specific allegation of a causal link between defendant's conduct and the plaintiff's race [are] too conclusory [to support a claim under § 1981]." Carson v. Lewis, 35 F. Supp. 2d 250, 269 (E.D.N.Y. 1999), (quoting Yusuf, 827 F. Supp. at 955). As such, plaintiff's § 1981 claim cannot stand.[38]

POINT XI

PLAINTIFFS CONCLUSORY ALLEGATIONS AGAINST THE CITY OF NEW YORK MUST BE DISMISSED.

Plaintiffs' Monell claims against the City of New York should be dismissed for failure to state a claim under 42 U.S.C. §1983 because plaintiffs fail to allege facts that could establish that a municipal policy caused any constitutional violation. In order to hold a municipality liable as a "person" within the meaning of §1983, the plaintiff must also establish that the municipality

[37] Moreover, plaintiff Salaam alleges that he was deprived of the "full and equal benefit of all laws and proceedings for the security of persons as is enjoyed by white people…" (Salaam, ¶ 94). Plaintiffs McCray, Richardson, Santana and Wise failed to even allege that similarly situated individuals were treated differently. McCray¶ 83-85; Wise, ¶ 78-79). In any event, no plaintiff alleges that non-African Americans or Hispanics participating in the same activities as plaintiff were treated more favorably. See Johnson v. City of New York, 01-cv-1860 (SJF), 2004 U.S. Dist. LEXIS 25, at * 7 (S.D.N.Y. Jan. 12, 2004)).

[38] To the extent that plaintiffs purport to assert an independent claim for a violation of their rights under the Thirteenth Amendment, that too must fail. The Thirteenth Amendment concerns slavery and involuntary servitude, which is inapplicable to the instant matters. See Obilo v. City Univ. of N.Y., 01-cv-5118 (DGT), 2003 U.S. Dist. LEXIS 28, at * 38-39 (E.D.N.Y. Feb. 28, 2003)(Thirteenth Amendment claim premised on an underlying false arrest and malicious prosecution claim dismissed as inapplicable)(citations omitted).

itself was somehow at fault. Oklahoma v. Tuttle, 471 U.S. 808, 810 (1985); Monell v. Department of Social Services, 436 U.S. 658, 609-91 (1978). In addition, in order to establish municipal liability, plaintiff must demonstrate that an identified municipal policy or practice was the "moving force [behind] the constitutional violation." Monell 436 U.S. at 694.

Plaintiffs, in wholly conclusory fashion, allege various "policy, practice and customs[s]" of suppressing or destroying exculpatory evidence, failing to properly train or supervise officials in the proper techniques of investigating serious crimes where juveniles are involved, using various improper methods to secure false confessions, failing to properly discipline officers who violate the law or rights of criminal suspects during investigation and, engaging is "public vilification" of persons accused of high profile crimes. Salaam, ¶¶ 31-33, 110 – 117; McCray, ¶¶ 27-29, 91 – 99; Wise, 26-28, 85-95.[39]

These conclusory, boilerplate Monell allegations are not sufficient to survive a motion to dismiss on the pleadings. The Second Circuit in Dwares v. City of New York stated that the mere assertion "that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such as inference." Dwares v. City of New York, 985 F.2d 94, 100 (2d Cir. 1993). This is true even under the more liberal pleading standards set forth in Leatherman v. Tarrant County Narcotics, 507 U.S. 163 (1993). See Smith v. City of New York, 290 F. Supp.2d 317, 321-22 (E.D.N.Y. 2003) (conclusory Monell allegations, unsupported by any facts, is insufficient to survive a motion to dismiss even under Leatherman); Brogdon v. City of New Rochelle, 200 F. Supp. 2d 411 (S.D.N.Y. 2002)(Monell claims dismissed against City where conclusory allegations of failure to adequately discipline, train and conduct an investigation were insufficient to establish the

[39] The Heading under the Fifth Claim in the Wise complaint purports to be a Monell Claim against the New York County District Attorney's Office. See Wise at 29. Nevertheless, the title appears to be a mistake as the allegations set forth pertain to state law claims.

existence of any policy or custom); Simms v. De Paolis, 99 Civ. 2776, 2000 U.S. Dist. LEXIS 11303, at *10 (S.D.N.Y. Aug. 2, 2000)(conclusory allegations of failure to train, hire, and implement procedures to protect individuals from police conduct without supporting facts insufficient to state a Monell claim); Perez v. County of Westchester, 83 F. Supp.2d 435, 438 (S.D.N.Y. 2000) (conclusory, boilerplate Monell claim, unsupported by any facts demonstrating a policy or custom, dismissed pursuant to Rule 12(b)(6)). Therefore plaintiffs' claims against the City of New York and the District Attorney's Office are insufficient on their face are must be dismissed.

POINT XII

THE COMPLAINTS FAIL TO STATE A CLAIM ARISING FROM DEFENDANTS' ALLEGED 'COVER UP' OF DEFENDANTS' MISCONDUCT AFTER REYES CONFESSED TO THE CENTRAL PARK RAPE.

The plaintiffs purport to bring a claim against the City of New York and the current Police Commissioner Raymond Kelly for conduct occurring in 2002 alleged to be part of a "cover-up" of improprieties in their prosecution and conviction for the Central Park Jogger rape. These cover-up claims, regardless of whom they are alleged against, must be dismissed, because that conduct could not have violated any constitutional right of the defendants and is not actionable under any State law. In addition, the allegations concerning conduct occurring in 2002 should be stricken from the complaint pursuant to Fed. R. Civ. P. 26(f) because they constitute "immaterial" and "impertinent" allegations to which defendants should not be required to respond.

The plaintiffs' "cover-up" allegations are that the "defendants have continued to actively conspire to propound the belief that the plaintiffs were and are in fact guilty of the crimes they were charged with . . . and that defendants engaged in no misconduct in the course of their investigation and prosecution of the plaintiffs." Salaam, ¶71; McCray ¶ 77; Wise 70. The only

actual statements referred to in the complaints are those contained in a report of a commission consisting of the private attorneys Michael Armstrong and Jules Martin, and Stephen L. Hammerman, the NYPD's Deputy Commissioner for Legal Matters ("Armstrong Report"). Id., ¶ 72; ¶ 78; ¶ 71. As plaintiffs allege, the Armstrong Report found that there was no misconduct by police officers in the arrests and interrogations of the plaintiffs. Id., ¶ 72; ¶ 78; ¶ 73; see Armstrong, at 3, Ex. __. Plaintiffs also allege that the Armstrong Report found no misconduct in the police officer's "failure to connect Reyes to the rape and sexual assault of Meili prior to him coming forward and admitting his involvement." Id.. In fact, the Armstrong Report does not contain a "finding," although it does relate facts, such as the plaintiffs' own statements, which show that it was reasonable for the police to not connect Reyes to the assault on Meili. Armstrong at 43, Ex. __. Plaintiffs also allege that Commissioner Kelly "accepted" the findings in the Armstrong Report, although they do not describe any act or statement in which he did so. Id., ¶ 80, 93.

Plaintiffs allege that the Armstrong Report "concluded," despite Reyes' claim that he acted alone, that the plaintiffs "were nevertheless guilty of the sexual assault of Meili." Id., ¶ 79. In fact, the Armstrong Report makes no conclusions about plaintiffs' guilt or innocence, but states that "[t]here is no corroboration for Reye's claim that he acted alone" and that "there is an alternative theory of the attack upon the jogger – that both the defendants and Reyes assaulted her, perhaps successively." Armstrong at 4 & 25, Ex. __. Plaintiffs claim that somehow the Armstrong Report, and Commissioner Kelly's "acceptance" of it, "ratified the wrongful conduct of the defendants." Id., ¶ 74, 80, 93. Despite plaintiffs' ipse dixit that defendant Kelly "accepted" the Armstrong Report, there is no allegation that would make the report a statement of any of the defendants.

Plaintiffs' allegations about the Armstrong Report amount merely to criticism of the opinions in the report. Plaintiffs attack the Armstrong Report because it opines that Reyes

should not be believed, since he is a psychopath and a liar, and for opining that "the most likely scenario," based on all the evidence is that the defendants physically assaulted the jogger prior to Reyes' committing the rape, or that they assisted Reyes in doing so. Armstrong Report, at 25-26, 41. Section 1983 does not authorize suits based on plaintiffs' disagreement with the opinions of City officials. Plaintiffs can articulate no legal theory or cause of action that could justify a suit based on these statements or any part of the Armstrong Report, even if plaintiffs could allege that it contained false statements of fact, which it does not. It is well settled that defamation (which is not even properly alleged here) does not violate the constitution even if done by state actors. See Paul v. Davis, 424 U.S. 693, 697-99 (1976) (no claim under the Due Process clause for alleged defamatory statement by the police that the plaintiff was a shoplifter). There is no legal theory on which a report, issued 13 years after the alleged misconduct, constitutes a municipal policy that could have caused alleged misconduct 13 years in the past.[40]

Nor can the plaintiffs prevail against Commissioner Kelly on a theory of supervisory liability, arising from the Armstrong Report. It is axiomatic that a defendant may not be held liable for constitutional violations merely because he held a high position of authority. Black v. Coughlin, 76 F.3d 72, 74 (2d Cir. 1996). That is even more true where the defendant did not hold that position at the time of the alleged constitutional violation.

Should plaintiffs claim that any "cover up" denied them "access to courts," the claim must also be dismissed. To allege such a claim, the complaint must set forth the "cause of action, whether anticipated or lost," that cannot now be litigated because of state action, and must also "identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought." Christopher v. Harbury, 122 S.Ct. 2179, 2187 (2002). To

[40] Plaintiff must show a "direct casual link between municipal policy or custom and the alleged deprivations." City of Canton, 489 U.S. at 385; see also Dwares v. City of New York, 985 F.2d 94, 100 (2d Cir. 1993); Monell, 436 U.S. at 694.

proceed on a claim of denial of access, therefore, a plaintiff must show that there is a "nonfrivolous…arguable" claim that *cannot now be litigated* because of the alleged state action, and must further seek a remedy, separate and distinct from the remedy available for other pleaded claims, which has allegedly been denied them. Id.; Chappell v. Rich, 340 F.3d 1279, 1283-84 (11th Cir. 2003) (plaintiffs must allege that defendants actions made their lawsuit inadequate, ineffective or not meaningful); see Pizzuto v. County of Nassau, No. CV 00-0148 (NGG), 2002 U.S. Dist. LEXIS 25280, at *30-31. (E.D.N.Y. 2002); Paige v. Police Department of Schenectady, 264 F.3d 197, 200 (2d Cir. 2001). Plaintiffs have not and cannot make such an allegation here based on the Armstrong Report.

POINT XIII

DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.

The individual NYPD defendants and Linda Fairstein are entitled to qualified immunity. Qualified immunity is "an immunity from suit rather than the mere defense to liability." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). This doctrine is "an entitlement not to stand trial or face the other burdens of litigation." Saucier v. Katz, 533 U.S. 194, 200 (2001) (quoting Mitchell, 472 U.S. at 526). Therefore, it is necessary that qualified immunity questions be resolved at the earliest possible stage of litigation, to satisfy the goal of the doctrine. Id. at 201 (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam)). Even where factual disputes exist, qualified immunity may properly be found as a matter of law if a defendant is entitled to it even under plaintiff's version of the facts. Tierney v. Davidson, 133 F.3d 189, 194 (2d Cir. 1998).

The purpose of qualified immunity is to protect government employees from civil liability where performance of their discretionary functions "does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." Harlow v.

Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982). Where reasonably competent officials could disagree as to whether the conduct at issue would violate clearly established rights, the immunity defense is available. Malley v. Briggs, 475 U.S. 335, 341 (1986); Anderson v. Creighton, 483 U.S. 635, 641 (1987) (official "who act in ways they reasonably believe to be lawful, should not be held personally liable"); Cartier v. Lussier, 955 F.2d 841, 846 (2d Cir. 1992). Qualified immunity is warranted if either (1) the official's actions did not violate clearly established law, or (2) even if the actions violated a clearly established law, the official was objectively reasonable in believing in the lawfulness of his actions. See Ford v. Moore, 237 F.3d 156, 162 (2d Cir. 2001); Connecticut ex rel. Blumenthal v. Crotty, 346 F.3d 84 , 101-102 (2d Cir. 2003)(citations omitted).

The constitutional violation is "clearly established" if it Supreme Court or Second Circuit precedent had clearly held – at the time of the events at issue – that the conduct violates the constitution. Moore v. Vega, 317 F.3d 110, 114 (2d Cir. 2004). Moreover, it must be clearly established that the *specific* conduct at issue violated the constitution. Saucier, 533 U.S. at 201-202. "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." Id. at 201. ""The right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. at 202 (quoting Anderson v. Creighton, 483 U.S. at 640)). Thus, a district court must determine whether, under the specific circumstances, it would be clear to a reasonable officer that his conduct was unlawful. See Shechter v. Comptroller of the City of New York, 79 F.3d 265, 271 (2d Cir. 1995) (right in question must be defined with reasonable specificity).

In an unlawful arrest action, an officer is immune if he has 'arguable probable cause,' and is subject to suit only if his 'judgment was so flawed that no reasonable officer would have made

a similar choice.'" Provost v. City of Newburgh, 262 F.3d 146, 169 (2d Cir. 2001), citing Lee v. Sandberg, 136 F.3d 94, 103 (2d Cir. 1997); Martinez v. Simonetti, 202 F.3d 625, 634 (2d Cir. 2000). "Arguable probable cause" is all that is required because "the concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." Saucier, 533 U.S. at 205.

Plaintiffs' Interrogations and Confessions

Whether a suspect's statements were made voluntarily must be analyzed under a the totality of the circumstances surrounding the interrogation. DeShawn E. v. Safir, 156 F.3d 340, 346 (2d Cir. 1997); Weaver v. Brenner, 40 F.3d 527, 536 (2d Cir. 1994). Based on plaintiffs' pleadings, as well as the decision of Justice Galligan, it could not have been clearly established that the circumstances of plaintiffs' questioning violated the constitution.

As detailed above, the criminal court scrupulously reviewed the circumstances of plaintiffs' questioning. See Galligan, generally. Justice Galligan determined that, based upon the law at the time the interrogations were completed and the circumstances surrounding the interrogations, the confessions were voluntary and no constitutional or statutory violations occurred during the questioning. That decision was upheld in every appeal taken by the plaintiffs, including by the highest court in New York State. It would defy logic to assert that, despite this legal determination, it was clearly established in 1989 that some aspect of plaintiffs' questioning was unconstitutional.

Furthermore, plaintiffs do not allege in their complaints any *per se* violations of their constitutional rights with respect to their interrogations. Authorities are permitted to engage in aggressive investigative techniques while interrogating a suspect. For instance, as Justice Galligan held in 1989, falsely informing a suspect that others have implicated him in a crime are not unfairly coercive. Galligan at 113. Additionally, a confession is not rendered involuntary "merely because the suspect was promised leniency if he cooperated with law enforcement

officials." United States v. Ruggles, 70 F.2d 262, 265 (2d Cir. 1995)(quoting United States v. Bye, 919 F.2d 28, 31 (2d Cir. 1987)). Police statements that a suspect would benefit by cooperating is not improperly coercive. Id., citing United States v. Pomares, 499 F.2d 1220, 1222 (2d Cir. 1974). In addition to other precautions taken by authorities in the questioning of plaintiffs, plaintiffs were provided their Miranda rights, allowing them the power to assert some control over the course of their interrogation. See Oregon v. Elstad, 470 U.S. 298, 308 (1985)("Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities). There is simply no aspect of plaintiffs' questioning that plaintiffs could point to as a clearly established violation of the constitution (in 1989, or at any time).

Moreover, the individual defendants are clearly entitled to qualified immunity for any claim that they denied plaintiff Salaam or any other plaintiff access to his family members. As detailed above, Justice Galligan held that the police and defendant Fairstein had a reasonable belief that Salaam was 16 years old because he lied to them about his age and produced false identification. Galligan at 110-11. Moreover, New York law held, at least as of February 1989, that "there is no *per se* rule invalidating a confession where the police isolate an infant defendant from his parents during questioning." People v. Green, 147 AD2d 955, 957 (4th Dept. 1989) (quoting People v. Taylor, 16 NY2d 1038, 1039-1040 (1965)). Accordingly, if the police did isolate any minor plaintiffs from their family members, there was simply no clearly established constitutional right at that time that was violated.

Plaintiffs' Arrests and Prosecution

For the reasons set forth above, as well as the findings of Justice Galligan, it is abundantly clear that, at the very least, the defendant officers had "arguable probable cause" for plaintiffs' arrests, which is all that is required to support a finding of qualified immunity. Plaintiffs' pleadings alone establish that probable cause certainly existed for the prosecution of

each plaintiff, because plaintiffs admit in their complaints that not only did they inculpate themselves in various crimes including the Meili attack, but that each plaintiff inculpated other plaintiffs in the crimes against Meili. In light of the totality of the circumstances, each individual defendant is entitled to qualified immunity for the arrests and prosecutions of each plaintiff.

Brady Claims

For the reasons set forth above regarding plaintiffs' purported Brady violations, it could not have been "clearly established" in 1989 that withholding the alleged modus operandi evidence regarding Matias Reyes would have violated defendants constitutional rights. Any reasonable officer would have concluded, based on the law of evidence and the nature of the information, that the information regarding Matias Reyes was not exculpatory or material, and could not have been used by plaintiffs in their defense.

Armstrong Report

Defendants are also entitled to qualified immunity for any claim arising from the Armstrong Report. For the reasons stated above, there is no constitutional right implicated by that report. But even if the court were to find such a right existing now, it could not have been clearly established in 2002 when the report was issued.

POINT XIV

PLAINTIFFS' § 1983 CLAIM FOR FAMILIAL ASSOCIATION SHOULD BE DISMISSED.

Plaintiffs' complaints purports to state a claim for deprivation of plaintiffs' rights familial association under the Fifth and Fourteenth amendments. (Salaam Fourth Cause of Action; McCray, Seventh Cause of Action; Wise, Seventh Cause of Action). These causes of actions are brought by Yusef Salaam's mother (Sharonne Salaam), sister (Aisha Salaam) and brother (Shareef Salaam); Antron McCray's mother (Linda McCray); Kevin Richardson's mother Grace Cuffee and his siblings (Connie Richardson, Valerie CufeeCrystal Cufee and Angela Cuffee);

Raymond Santana's mother (Joann Santana); and Kharey Wise's mother Deloris Wise and siblings (Daniel Wise, Michael Wise and Victor Wise). The family members claim that they are entitled to recover because the defendants' conduct interfered with the federally protected liberty interests "in preserving the integrity and stability of the family relationship from intervention by the state without due process of the law." (Salaam, ¶ 108; McCray ¶ 107; Wise, ¶ 104 – 105).

It is well-established that "ordinarily, one may not claim standing ... to vindicate the constitutional rights of some third party." Singleton v. Wulff, 428 U.S. 106, 114 (1976)(quoting Barrows v. Jackson, 346 U.S. 249, 255 (1953); see also Powers v. Ohio, 499 U.S. 400, 410 (1991)("… a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.")(citations omitted). To extend a derivative constitutional cause of action to a family member based solely on the alleged false arrest and imprisonment of a primary plaintiff would have far reaching implications and could result in a slippery slope of derivative claims by family members and close friends.

Plaintiffs do not have a claim for loss of familial association because the prosecution in this case was only indirectly related to their familial relationship. In Valdivieso Ortiz v. Burgos, 807 F.2d 6, 7-10 (1st Cir. 1986), the First Circuit rejected claims of a stepfather and siblings based on incidental deprivation of their relationship with their adult son and brother. In Ortiz, a stepfather and siblings brought a suit for compensation under §1983 claiming a constitutionally protected interest in the companionship of an adult stepson and brother, an inmate who died as a result of blows by guards in a Puerto Rican prison. The court observed that where the government has not acted directly to sever or affect the parent-child relationship, the Supreme Court has not recognized a fundamental right. Id. The Court also held that applying a due process right to familial association in that context would inappropriately "constitutionalize adjudication in a myriad of situations which we think inappropriate for due process scrutiny, including the alleged wrongful prosecution and incarceration of a child…" Id. Other courts have

reached the same conclusion. See Willard v. Myrtle Beach, 728 F. Supp. 397, 400-03 (D. S.C. Nov. 22, 1989) (mother had no claim for false imprisonment of child); Pizzuto, et al. v. County of Nassau, et al., 240 F. Supp. 2d 203, 212 (E.D.N.Y. 2002) (parents had no familial relationship claim for the death of their son because the state action was not aimed at their familial relationship).

With respect to siblings, there is no Supreme Court authority that a sibling has any liberty interest symmetrical with that of her parent, in maintaining her filial relationship with a sibling. See Michael H. v. Gerald D., 491 U.S. 110, 111 (1989). Even courts allowing claims for indirect interference with familial relationships have not granted such rights to siblings. See Bell v. Milwaukee, 746 F.2d 1205, 1244-45 (7th Cir. 1984) (father, but not siblings, may recover under § 1983 for deprivation of liberty interest where police officers shot and killed son); Ward v. City of San Jose, 967 F.2d 280, 284 (9th Cir. 1992) ("Neither the legislative history nor Supreme Court precedent supports an interest for siblings consonant with that recognized for parents and children."); Valdivieso Ortiz, 807 F.2d at 9 (declining to extend constitutional protection beyond the relationship between a parent and child). While the Tenth Circuit has held that siblings have an actionable claim under Section 1983 for the loss of life of a family member, it limited the claim to those situations where there is *purposeful intent to interfere* with the relationship. Trujillo, 768 F.2d at 1190 (10th Cir. 1985)(emphasis added).

Family members have no conceivable claims other than familial relations. Accordingly, the claims of Linda McCray, Grace Cuffee, Connie Richardson, Valerie Cuffee, Raymond Santana Sr., Joann Santana, Sharonne Salaam, Aisha Salaam, Shareef Salaam, Deloris Wise, Daniel Wise, Michael Wise and Victor Wise's should be dismissed.

Plaintiffs' state law claims should be dismissed because, where, as here, all federal claims are meritless, the Court is either without subject-matter jurisdiction, or, because the proceedings are at an early stage, the Court should exercise its discretion to dismiss the State

law claims. There can be no pendent jurisdiction under 28 U.S.C. § 1367 where, as here, the purported federal claims are "plainly unsubstantial and "obviously without merit." Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933). Where all of plaintiffs' federal claims are subject to dismissal at the outset of proceedings, pendent jurisdiction should not be retained. Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 102-103 (2d Cir. 1998). Accordingly, all of the plaintiffs' state law claims should be dismissed.[41]

[41] With respect to any state law claims for false arrest and malicious prosecution, these too must be dismissed for the same reasons as the federal claims because the elements for the state law causes of action are the same. Weyant v. Okst, 101 F.3d 845. 852 (2nd Cir. 1996) (false arrest); Janetka v. Dabe, 892 F.2d 187, 189 (2nd Cir. 1989); Kinzer v. Jackson, 316 F.3d 139, 143 (2d Cir. 2003)(malicious prosecution). In addition, with respect to the statute of limitations, a state law claim of false arrest or false imprisonment accrues, at the latest, when the plaintiff is released from custody. Nunez v. City of New York, 762 N.Y.S.2d 384, 385 (App. Div. 2003). Pursuant to New York State General Municipal Law § 50-i, all personal injury claims brought against a city or any of its officers, agents or employees must be commenced within one year and ninety days after the occurrence of the event upon which the claim is based. N.Y. Gen. Mun. Law § 50-I (McKinney 2001); Norr v. Spiegler, 72 A.D.2d 20, 22-23 (1st Dept. 1980), aff'd, 53 N.Y.2d 661 (1981). Plaintiff McCray served a 7 ½ yr. sentence. McCray ¶ 49. Salaam served up to 10 yrs. Salaam ¶ 32. Santana and Richardson served 7 yrs. McCray ¶ 49-50. Wise served approximately 13 years and was released in August 2002. Wise ¶ 43. Each plaintiff filed their complaints in mid-December 2003, after the one year and ninety day statute of limitations had expired on their false arrest and imprisonment claim.

CONCLUSION

For the foregoing reasons, defendants respectfully requests that the Court grant their motion to dismiss the complaints as against defendants, with prejudice, together with such other and further relief as this Court may deem just and proper.

Dated: New York, New York
September 30, 2004

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