UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VASHTI SHERROD EUGENE SHERROD, Plaintiffs, v. PHILLIP MCHUGH DISTRICT OF COLUMBIA DIANE LEE SCHULZ, Defendants.	: : : : : : : : : : :	Civil Action No. 16-0816 (RC) (GMH)

PLAINTIFFS' OPPOSITION TO THE MOTION OF DEFENDANTS DISTRICT OF COLUMBIA AND PHILLIP MCHUGH FOR SUMMARY JUDGMENT AND THE MOTION OF DEFENDANT DIANE LEE SCHULZ FOR SUMMARY JUDGMENT AND/OR DISMISSAL

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INTRODUCTION

"Tyranny, like hell, is not easily conquered; yet we have this consolation with us that the harder the conflict, the more glorious the triumph." Thomas Paine, December 23, 1776, in The Crisis Number 1. In many ways, Paine's words were prescient to Vashti and Eugene Sherrod and the instant case.

Vashti and Eugene Sherrod worked hard, educated their children, and dove into retirement with a sense of pride and accomplishment. They had followed the law their entire lives, from the time they were children in South Carolina and Virginia. Washington, D.C. had been good to them, affording them a comfortable life, a social network and a church community. It was only after stopping by a flower shop on 11th Street, SE, here in Washington, D.C., that this sense of fairness ended for the Sherrods when a seemingly non-event escalated into a series of illegal searches and seizures of their home and car, culminating in the arrest and detention of Vashti Sherrod over an allegation that, left unchecked, mushroomed out of control.

Plaintiffs here oppose the motions for summary judgment of Defendants District of Columbia and Phillip McHugh (collectively the "District Defendants") and Defendant Diane Lee Schulz. For the reasons that follow, both motions are without merit and should be denied.

STATEMENT OF FACTS

A. The May 14, 2015 Incident.

Plaintiff Vashti Sherrod and her husband, Plaintiff Eugene Sherrod own a Mercedes-Benz sedan which they purchased in 2000 (the "Mercedes"). On May 14, 2015, at approximately 11:00 a.m., Mrs. Sherrod parked the Mercedes in a curb lane parking space in front of Ginkgo Gardens, located at 911 11th Street, SE in the District of Columbia.[1] Ginkgo Gardens is a flower

[1] Vashti Sherrod Dep. at 90:10-12; Eugene Sherrod Dep. at 19:22-20:7.
[2] Vashti Sherrod Dep. at 90:1-5; Eugene Sherrod Dep. at 19:4-11.
[3] Eugene Sherrod Dep. at 20:17-18.
[4] Vashti Sherrod Dep. at 92:1-21.

store that Mr. and Mrs. Sherrod had planned to visit that morning.[2] Mr. Sherrod was traveling with his wife and was seated in the Mercedes' front passenger seat.[3]

Approximately ten to fifteen minutes after Mrs. Sherrod parked the Mercedes, Defendant Diane Lee Schulz stopped her Isuzu Trooper truck (the "Truck") next to Plaintiffs' car and attempted to parallel park the Truck behind the Mercedes.[4] As Ms. Schulz began to back the Truck up to park, Mrs. Sherrod was still seated in the driver's seat of the Mercedes and saw that Schulz was about to collide with her vehicle.[5] Mrs. Sherrod's car window was closed, but she nevertheless tried to get Schulz's attention by yelling "stop."[6] Ms. Schulz only stopped when the Truck collided with the driver's side mirror of the Mercedes.[7]

After the collision, Mrs. Sherrod and Ms. Schulz exited their vehicles.[8] Mrs. Sherrod saw that Schulz's truck had struck and damaged the driver's side mirror of the Mercedes and pointed out the property damage to Schulz.[9] Schulz responded by shouting obscenities at Mrs. Sherrod.[10] Mrs. Sherrod was shocked and frightened by Schulz's behavior but tried to remain calm as she attempted to exchange insurance and vehicle information with Schulz.[11]

Ms. Schulz repeatedly retreated to her truck and came back toward Mrs. Sherrod shouting obscenities and gesturing with her finger toward Mrs. Sherrod in a threatening and menacing

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[2] Vashti Sherrod Dep. at 90:1-5; Eugene Sherrod Dep. at 19:4-11.
[3] Eugene Sherrod Dep. at 20:17-18.
[4] Vashti Sherrod Dep. at 92:1-21.
[5] Resp. of Vashti Sherrod to the Interrogs. Propounded by Def. Diane Lee Schulz, Resp. to Interrog. No. 17.
[6] *Id.*; Eugene Sherrod Dep. at 23:11-24:6.
[7] Resp. of Vashti Sherrod to the Interrogs. Propounded by Def. Diane Lee Schulz, Resp. to Interrog. No. 17.
[8] Vashti Sherrod Dep. at 93:9-10.
[9] Resp. of Vashti Sherrod to the Interrogs. Propounded by Def. Diane Lee Schulz, Resp. to Interrog. No. 17.
[10] Vashti Sherrod Dep. at 94:1-95:15, 100:16-101:12.
[11] Resp. of Pl. Vashti Sherrod to the Interrogs. Propounded by Def. Diane Lee Schulz, Resp. to Interrog. No. 17.

manner.[12] During this encounter, Ms. Schulz stated that her dog had just died and that her husband had just left her for another woman.[13] Ms. Schulz maliciously said "he did not leave me for a black nigger woman like you, he likes white women."[14] Mr. Sherrod heard the entire conversation between his wife and Ms. Schulz.[15] Ms. Schulz then opened the front passenger door to get back into the Truck and hit the front left fender of the Mercedes with the door, causing additional damage to the fender of the Mercedes.[16]

As Mrs. Sherrod walked to the rear of the Mercedes to inspect it for other damage, Ms. Schulz continued to curse at her and physically confronted her at least three times.[17] By that time, the parties had exchanged insurance information. Ms. Schulz then got into the Truck and drove away from the scene.[18]

Immediately after leaving the scene, Ms. Schulz used her cellphone to call her car insurance company, USAA, to report the accident but did not call the Metropolitan Police Department ("MPD").[19] Ms. Schulz did not recall mentioning anything about a gun being involved in the incident with Ms. Sherrod at any point during the telephone call to USAA.[20] That was not the reason she called them.[21] Later that day, Ms. Schulz called her adult son,

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[12] *Id.*
[13] Vashti Sherrod Dep. at 97:21-98:5, 101:3-12 ; Eugene Sherrod Dep. at 26:18-21 (June 5, 2017).
[14] Resp. of Pl. Vashti Sherrod to the Interrogs. Propounded by Def. Diane Lee Schulz, Resp. to Interrog. No. 17; Vashti Sherrod Dep. at 101:8-12; Eugene Sherrod Dep. at 29:9-16.
[15] Eugene Sherrod Dep. at 29:1-3.
[16] Resp. of Pl. Vashti Sherrod to the Interrogs. Propounded by Def. Diane Lee Schulz, Resp. to Interrog. No. 17; Eugene Sherrod Dep. at 32:3-6, 33:4-8.
[17] Resp. of Pl. Vashti Sherrod to the Interrogs. Propounded by Def. Diane Lee Schulz, Resp. to Interrog. No. 17.
[18] *Id.*
[19] Schulz Dep. at 67:18-72:3; 75:22-77:15,103:6-105.
[20] Schulz Dep. at 74:2-21.
[21] *Id.*

Luciano Carafano, and spoke about the accident with him.[22] In deposition, Mr. Carafano recounted his conversation with his mother:

> Q. [By Mr. Bynum] Okay. Could you do the best you can to tell us what she told you.
>
> A. She told me that she had been going to the flower store, I believe, to get flowers for Missy, the dog [that had died].
>
> Q. Okay.
>
> A. And that when she was trying to back up into a space, she had had some sort of traffic incident. And that when she had gotten out to exchange information, a -- some sort of argument followed. I can't remember -- at the time, she probably told me what she remembered being said, but I don't remember at all.
>
> Q. Okay.
>
> A. And that she had had a gun pulled on her and that she had -- I think she said something about giving money over or giving information. And the thing that I remember most was that she was scared and wanted to leave as -- she didn't say she was scared, but I could tell that she had been scared by the incident and that she wanted to leave the scene as quickly as possible to get out of that situation, and that she had thought she had seen a gun.
>
> Q. I'm sorry. The last part, she thought she'd seen a gun?
>
> A. She said -- first she said, 'They pulled a gun on me,' and later, during the course of the conversation, *she started saying that she wasn't quite sure if she had seen a gun or not.* And I asked her if she had reported the incident to the police, and she had said no, and that's when she said, *'I'm not sure if I really saw a gun. I thought I saw a flash. I thought I saw a gun but I'm not sure now.'*
>
> And at that point I, basically, told her, 'If you thought you saw a gun, you should report it. It's your civic duty. If somebody has a firearm and is using it in that negligent of a way, it's your civic duty report it. It's not up to you if there's a gun or not. That's for the police to do,' and -- and I, basically, encouraged her to report the incident.
>
> Q. Okay. So your response to her was, after she said she wasn't sure, you said, 'Even if you're not sure,' to report to the police?
>
> A. *I asked her if she thought she saw a gun, and she said, 'At the time I thought I did, but I'm not so sure.*' And I said, 'Well, if there's a remote possibility that you

[22] *Id.* at 83:17-84:9; Dep. of Luciano Carafano at 31:17-34:3.

thought you saw a gun, you should report it.'

Q. What was her response to you?

A. I couldn't tell you. Mostly what I remember is how upset she was.[23]

Just after speaking with her son, at 7:00 p.m. on May 14, 2015, Ms. Schulz called the MPD 911 emergency telephone line to report the altercation with Mrs. Sherrod that had taken place earlier that day.[24] Without any equivocation or uncertainty, Ms. Schulz baldly claimed that Mrs. Sherrod "got her gun out because she was mad" during the incident -- the following is a verbatim transcription of Ms. Schulz' 911 call:

Dispatcher: DC 911, what is your emergency?

Ms. Schulz: I had a little traffic accident and a lady got her gun out because she was mad.

Dispatcher: She did what?

Ms. Schulz: There was this little old like 80-year-old lady and she didn't like the way things were going and so she said, I am going to get my gun and she did.

Dispatcher: Okay, where are you located?

Ms. Schulz: Well, this happened like around noon today, but I didn't stick around to see what she was going to do. I just got in my car and drove away. I was just telling my son about it and he said Mom, you need to call the police.

Dispatcher: Yes, where are you located now?

Ms. Schulz: I am home, southwest.

Dispatcher: Okay, where is that?

Ms. Schulz: 5** N Street, SW.

Dispatcher: Did you get her tag number?

Ms. Schulz: No, but I do have her vin number and her GEICO insurance number.

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[23] Carafano Dep. at 31:17-34:3 (emphasis added).
[24] Schulz Dep. at 75:22-76:14.

Dispatcher: Okay, that's good. What's your name?

Ms. Schulz: My name is Diane Schulz.

Dispatcher: In the future if anything like that happens, call us immediately – definitely leave but call us.

Ms. Schulz: Okay. I probably should have. I did call my insurance company.

Dispatcher: Okay, what's your phone number Ms. Schulz?

Ms. Schulz: It is 202-***-****. I just thought they were crazy old people and I just -- Of course, I am not that young either. I am 62 years old.

Dispatcher: Okay. Repeat your phone number for the recorded line.

Ms. Schulz: It is 202-***-****.

Dispatcher: Okay, repeat the address?

Ms. Schulz: My address is 5** N Street. SW, Apartment ****.

Dispatcher: How long ago was this that the accident happened?

Ms. Schulz: This happened about maybe quarter to twelve this morning. (Inaudible) …something about having her insurance thing here and I think it may have the time that I reported it…

Dispatcher: Okay, she said she was getting her gun.

Ms. Schulz: Yeah and he said "yeah get your gun." (Chuckle)

Dispatcher: There was a man with her?

Ms. Schulz: Yeah, I reported it 12:04. Yeah, her boyfriend, it wasn't her husband, it was her boyfriend – because it was her car. … one way I can find out

Dispatcher: About twelve noon.

Ms. Schulz: Yeah, it probably happened like about quarter to twelve because I picked up my dog's ashes down in Potomac Yard at like eleven. Then I had a leisurely drive up to – and they were parked in front of – do you know where Ginkgo's is that little uh, uh – country where you can buy plants and stuff. It's in the 900 block on 11th Street? I was coming from the south and I saw this car parked there. It was like a black Mercedes I think and so I saw it and I thought – sometimes where there's no traffic I'll screw a U and park in front of there, but it was going to be a trickier parking job, so I went on up and turned on like 8th Street

and went around the block over to 12th and then came back to "I" and then had to wait at the light at "I" and 11th and then turned left to get back on to the – you know to be on the right side of the street to parallel park, and it was a parallel parking incident that started this whole thing.

Dispatcher: Was she black, white, Hispanic?

Ms. Schulz: They were both just really light skinned black. She had kind of long hair and he looked like a little turtle kind of and had a hat on. He was kind of cute. She was (inaudible)

Dispatcher: And she looked to be about 80?

Ms. Schulz: Yeah, I think 70s – late 70s early 80s. He looked older than her. He was probably 80, she's probably 75. They both were very nicely dressed.

Dispatcher: Was he light complexioned also?

Ms. Schulz: Yes, they were both light complexioned. Her hands – her skin was kind of ashy though. Her hands.

Dispatcher: All right, an officer will be dispatched out as soon as possible. Call us back immediately if anything changes or if you have any additional information, okay?

Ms. Schulz: Okay.

Dispatcher: All right, help is on the way.

Ms. Schulz: All right thank you.

Dispatcher: Uh-hum.[25]

The following is a verbatim transcription of the recording of the call made by the police dispatcher immediately following Ms. Schulz' 911 call:

Dispatcher: Time now is 19:08 Number 82?

82: Give me an accidental.

Dispatcher: Accidental, 1053 are you a dispatch?
Time now is 19:08 1051 are you ready for a police dispatch?

1051: Negative at this time, we are still in route.

[25] Transcript of Audio Recording of Schulz 911 Call (May 14, 2015).

> Dispatcher: 1053 are you clear from the station or are you still completing a report?
>
> 1053: 1053, I am going to head over there to 5** N Street and I'll have a report for you.
>
> Dispatcher: The caller is alleging a female 79 to 80 years of age was upset about an accident. She is saying that the lady is 80 years of age pulled a gun on her. All of this is in reference to who caused the accident. She said the subject was a back female light skin, long hair, 79-80 years of age pulled out a gun on her in reference to an accident. The female with the weapon has left the scene. 1053
>
> Dispatcher: Time now is 19:09 (Inaudible)
>
> Dispatcher: I'll see if I can get that for you, sir. Time now 1910
>
> Dispatcher: The suspect was in a black Mercedes Benz and it happened around 12 noon today. She just called it in – the time now is 12:11. 1910 12 noon this happened at 12 noon. Next unit.[26]

B. Officer Patel's Preliminary Investigation.

The International Association of Chiefs of Police ("IACP") Model Policy for Criminal Investigations sets forth the national standard for the conducting of criminal investigations by police officers in this country.[27] The IACP defines a criminal investigation as "[t]he collection of facts and information intended to identify an offender and to organize facts and information in a way that presents evidence sufficient for criminal charges."[28] "Normally, criminal investigations consist of a preliminary investigation, generally conducted by the responding patrol officer and, if necessary, a follow-up investigation performed by investigative services."[29] "[I]t is very important that patrol officers and first line supervisors have a broad understanding of

[26] Transcript of Audio Recording of MPD Dispatcher (May 14, 2015).
[27] Declaration of Philip P. Hayden, Ed.D. at Ex. 1. The IACP Model Policies and related Concepts and Issues Papers reviewed by Dr. Hayden and discussed herein are appended to the Hayden Declaration as Ex. 3.
[28] IACP Model Policy for Criminal Investigations at 1.
[29] IACP Criminal Investigations Concepts and Issues Paper at 1.

the criminal investigation process in order to ensure that they take those measures and avoid missteps that will better ensure the overall success of criminal investigations."[30]

Officer Sapan T. Patel of the First District responded to the MPD dispatcher's request for assistance following Ms. Schulz's 911 call.[31] At approximately 7:30 p.m., Officer Patel arrived at Ms. Schulz's apartment and performed the initial investigation of her criminal complaint by interviewing her.[32]

Officer Patel had completed his police academy training only eight months before responding to Ms. Schulz's 911 call.[33] Moreover, Officer Patel had only been working on his own, without another more senior officer accompanying him, since December of 2014.[34] Officer Patel admitted during his deposition testimony that he had not received any training specific to taking notes of interviews in the police academy and was merely trained in what information should be gathered to complete a report in the MPD's computerized "I/Leads" system.[35]

According to the IACP Model Policy for Criminal Investigations, officers conducting a preliminary investigation should "[t]ake written notes and conduct voice recordings whenever possible."[36] Officer Patel took handwritten notes during his interview of Ms. Schulz.[37] His notes contain only one reference to a gun: "big black gun under the driver's seat."[38] After completing the interview, Officer Patel purportedly returned to his patrol car and prepared his incident

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[30] *Id*. at 1.
[31] Patel Dep. at 21:21-23:9.
[32] *Id.* at 21:21-24:8.
[33] *Id.* at 12:20-14:15.
[34] *Id.*
[35] *Id.* at 16:2-7.
[36] IACP Model Policy for Criminal Investigations at 1.
[37] Patel Dep. at 24:12-26:17; Dep. Ex. 3(a), Handwritten Notes of Officer Sapan Patel (May 14, 2015).
[38] Dep. Ex. 3(a), Handwritten Notes of Officer Sapan Patel (May 14, 2015).

report, in which he wrote:[39]

> On 5/14/15 C-1 [Ms. Schulz] reports that at approximately 1200 hours in front of 911 11th St SE, she was involved In a parking accident Involving her vehicle and S-1's [Mrs. Sherrod] vehicle. C-1 states that S-1, a B/F approximately 75-80 years of age, was the driver and S-2 [Mr. Sherrod], a B/M approximately 80-85 years of age, was seated in the front passenger seat. C-1 states that S-1 was very irate regarding the accident; however C-1 and S-1 agreed to exchange Information. C-1 states that there was no damage to her vehicle, and S-1's vehicle suffered some slight damage to the side view mirror. S-1 copied down all of C-1's information and as C-1 was copying down S-1's Insurance information, C-1 asked S-1 for her name. C-1 stated that S-1 said "I'm not going to tell you my name, I'm going to get my gun." C-1 stated that S-1 then reached beneath the front passenger seat and brandished a large black handgun. C-1 then immediately got into her vehicle and drove away. C-1 called the police from her residence at approximately 1900 hours.[40]

The IACP model criminal investigation policy makes accurate note taking by investigating police officers a matter of particular importance:[41]

> Note taking is important when conducting a preliminary investigation and is vital to a successful criminal investigation… Notes should be legible, understandable, accurate, and complete, as they will serve to facilitate the officer's memory and may need to be used in court where their accuracy may be challenged... Before a patrol officer turns the case over to investigative services, he or she must be certain that the preliminary report is clear and all information detailed. The information should have been collected in such a way that investigators would not need to repeat the steps of the preliminary investigation but would have an outline for developing effective follow-up plans.[42]

It is impossible to reconcile the disparity between Officer Patel's handwritten interview notes regarding what Ms. Schulz allegedly told him about the gun during the interview with his description of the events of the interview in the report that he prepared within minutes of the interview's conclusion. Significantly, Ms. Schulz would ultimately change her story about what the alleged gun looked like several times after this initial interview, ultimately admitting in

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[39] Patel Dep. at 51:13-52:6; McHugh Depo. Ex. 6, Incident-Based Event Report #15070009l (May 14, 2015).
[40] McHugh Depo. Ex. 6, Incident-Based Event Report #15070009l (May 14, 2015).
[41] IACP Criminal Investigations Concepts and Issues Paper at 2-3.
[42] *Id.*

deposition that ***she never saw a gun in Mrs. Sherrod's possession at any time***.[43] At a minimum, Officer Patel failed to properly interview Ms. Schulz and failed to meet the standard required of a police officer to prepare "understandable, accurate, and complete" notes in this case.

Officer Patel testified that he had initially desired to classify the reported offense as an "Assault with a Dangerous Weapon" (ADW), a felony, although he admitted that this assessment was not contained in his report or his notes from the interview.[44] Officer Patel discussed with his supervisor, Sergeant Architzel, the specifics of his conversation with Ms. Schulz, including information about Mrs. Sherrod allegedly pulling a gun on Ms. Schulz.[45] Nevertheless, Sergeant Architzel directed Officer Patel to classify the alleged crime as "Threats to do Bodily Harm," a misdemeanor, which is reflected in the police report prepared by Officer Patel.[46]

C. Detective McHugh's Follow-Up Investigation.

The following day, on May 15, 2015, Det. McHugh was assigned to the case in order to conduct a follow-up investigation.[47] "The primary goal of the follow-up investigation is to gather information and evidence."[48] "To accomplish this goal, the investigator may decide to re-interview the victim, any witnesses or others in the hope that additional information can be uncovered."[49] "When the investigator re-interviews the victim and witnesses, he or she must test and retest the validity of their statements."[50] "The investigator must be able to recognize that factors of fear, stress, relationship, friendship, or dishonesty color and affect the credibility of the

[43] Schulz Dep. at 63:20-64:20, 83:13-16.
[44] Patel Dep. at 42:2-43:11.
[45] *Id.* at 41:19-42:6.
[46] *Id.* at 43:1-11; McHugh Depo. Ex. 6, Incident-Based Event Report #15070009l (May 14, 2015).
[47] McHugh Dep. at 42:2-43:11.
[48] IACP Criminal Investigation Concepts and Issues Paper at 5.
[49] *Id.* at 5.
[50] *Id.* at 5.

responses."[51] "Information obtained by persons should … be primarily categorized as investigative leads rather than positive evidence of a suspect's guilt or innocence."[52]

At the time that he commenced the follow-up interview of Ms. Schulz, Det. McHugh had only recently completed training to be a detective -- just three months before being assigned to investigate the May 14, 2015 incident.[53] Moreover, Det. McHugh was still considered only an "investigator" and was subject to a one-year probationary period.[54] Det. McHugh did not become a "detective" until after his involvement in the Sherrod criminal case had ended.[55]

On May 15, 2015, Officer Patel spoke to Det. McHugh about his interview of Ms. Schulz.[56] Officer Patel told Det. McHugh that Sergeant Architzel had previously advised him not to classify this incident as an ADW.[57] While not his immediate supervisor, Sergeant Architzel was an officer of higher rank and with more experience than Det. McHugh.[58] Nevertheless, against the advice and judgment of a superior officer who had spoken to Officer Patel immediately after the initial interview of Ms. Schulz, and without any additional or different information than was available to Sergeant Architzel at the time that he made his initial assessment, Det. McHugh reclassified the alleged offense as a felony ADW and investigated the matter as such.[59]

Det. McHugh believed that Sergeant Architzel had directed Officer Patel to classify the alleged incident as a threat report due to a "delay in reporting," as Ms. Schulz had waited

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[51] *Id.* at 5.
[52] *Id.* at 5.
[53] McHugh Dep. at 24:5-7, 31:17-22.
[54] McHugh Dep. at 38:4-39:4.
[55] *Id.*
[56] McHugh Dep. at 75:14-76:12; Patel Dep. at 44:5-22.
[57] McHugh Dep. at 76:5-77:1; Patel Dep. at 45:4-21.
[58] Patel Dep. at 46:2-10.
[59] Patel Dep. at 45:19-21.

approximately seven hours before calling the police about this alleged event.[60] It is important to note that the IACP considers the question of "Was the amount of time between the crime's occurrence and the notification of the police normal?" an important factor for an investigating police officer to consider when assessing the credibility of a complaining witness.[61] Det. McHugh admitted that he considered Ms. Schulz's long delay in reporting "strange."[62]

The IACP provides "a typical follow-up investigation outline" consisting of 19 activities.[63] Of particular relevance in this case are the following activities that Det. McHugh employed during his follow-up investigation: "telephone the victim," "interview the victim, witnesses, and potential witnesses," "conduct a records search," "transmit all-points bulletins and other official communications," "prepare required reports and records on case progress" and "contact other government agencies."[64]

Moreover, the IACP Model Policy for Criminal Investigations provides that the officer in charge of a follow-up investigation should "search for new witnesses," "complete background checks on witnesses, victims, and suspects as appropriate," and "seek additional information from other officers…."[65] Det. McHugh failed to complete any of these crucial steps during his follow-up investigation of the May 14, 2015 incident. Specifically, Det. McHugh failed to search for, locate, or interview an eye-witness of the incident, Mr. Wright, an employee of Gingko Gardens who was plainly visible in the surveillance video obtained and reviewed by Det. McHugh.[66] Additionally, Det. McHugh failed to seek additional information from Sergeant

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[60] McHugh Dep. at 76:6-10; 275:7-12.
[61] IACP Criminal Investigations Concepts and Issues Paper at 2.
[62] McHugh Dep. at 83:2-15.
[63] IACP, Criminal Investigation, Concept and Issues Paper at 4.
[64] IACP, Criminal Investigation, Concept and Issues Paper at 4.
[65] IACP Model Policy for Criminal Investigations at 2.
[66] McHugh Dep. at 119:17-120:14; Resp. of Def. Phillip McHugh to the Reqs. for Admissions Propounded by Pl. Vashti Sherrod, Resp. to Request No. 34.

Architzel, a senior officer who had reviewed the evidence from Officer Patel's initial interview of Ms. Schulz and determined that the case should properly be investigated as a misdemeanor threats charge rather than a felony ADW charge. Det. McHugh also failed to investigate Ms. Schulz, the alleged victim, to properly judge her credibility and discover any underlying ulterior motives that may have led her report of this incident to the MPD long after the event had concluded.[67]

On May 15, 2015, Det. McHugh interviewed Ms. Schulz at her apartment.[68] According to Det. McHugh, during their meeting, Ms. Schulz claimed that during the May 14, 2015 incident, "Mrs. Sherrod went to her car and reached under the driver's seat, pulling out what Schulz described as a black semi-automatic pistol similar to what a police officer would carry."[69] Contrary to IACP policy, Det. McHugh failed to take detailed notes during his interview and denied taking any notes other than the sparse handwritten notes that he placed on the printed police report that Officer Patel had prepared the day before.[70]

"As with the preliminary investigation, it is important for Detectives to record all information obtained during the follow-up investigation. A Detective must develop the sound habit of taking legible and accurate notes … from the moment he or she arrives on the scene …. The importance of note taking by preliminary investigators and investigative personnel is again underscored. Field notes should be taken as facts are learned and as evidence is obtained. These notes are the foundation of the investigative report; therefore, it is important that they be clear

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[67] *Id.* at 59:3-61:12.
[68] McHugh Dep. at 87:6-13.
[69] Resp. of Def. Phillip McHugh to the Reqs. for Admissions Propounded by Pl. Vashti Sherrod, Resp. to Request No. 32.
[70] McHugh Dep. at 87:19-88:1, 286:14-287:10; McHugh Depo. Ex. 6, Incident-Based Event Report #15070009l (May 14, 2015); IACP Criminal Investigations Concepts and Issues Paper at 6-7.

and concise."[71]

During the afternoon of May 15, 2015, Det. McHugh visited Gingko Gardens and interviewed Matthew Roberts, a witness Ms. Schulz had told Det. McHugh to speak with.[72] Det. McHugh interviewed Mr. Roberts and testified in deposition that on May 14, 2015, Mr. Roberts was inside the upper level of the shop when he heard an argument outside that went on for an extended period of time.[73] However, according to Det. McHugh, Mr. Roberts stated that he never looked to see what was going on or who was involved.[74]

Det. McHugh also located a video recording of the incident, recorded by a Gingko Gardens security camera, and watched it on the computer in the flower shop.[75] Det. McHugh downloaded the video and brought it back to the police station where he showed it to his supervisor, Lieutenant Richard Brady.[76] The video, according to Det. McHugh, was "grainy and not clear," and he could not tell whether Mrs. Sherrod had a gun in her hand during the encounter between Ms. Schulz and Mrs. Sherrod.[77]

The IACP considers the question of "Does the physical evidence support the facts of the crime related by the victim?" an important factor for the investigating police officer to consider when assessing the credibility of the complaining witness.[78] Despite the admittedly poor quality of the surveillance video, Det. McHugh did not seek to have the video-recording enhanced in order to see what was in Mrs. Sherrod's hand more clearly and, in fact, did not even ask MPD

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[71] IACP Criminal Investigations Concepts and Issues Paper at 6-7.
[72] McHugh Dep. at 116:7-118:1. Mr. Roberts is a white male.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 118:17-119:5.
[76] *Id.* at 119:3-11.
[77] *Id.* 119:14-16; 147:15-18; 157:15-20.
[78] IACP Criminal Investigations Concepts and Issues Paper at 2.

officials whether such enhancement would be possible.[79]

The video does not corroborate and, in fact, contradicts the allegations that Ms. Schulz asserted against Mrs. Sherrod. Moreover, the video shows the presence of Gingko Gardens employee Kenneth Wright, a young African American male who witnessed the May 14, 2015 altercation between Ms. Schulz and Mrs. Sherrod.[80] Despite Mr. Wright clearly appearing in the video during the time of the event, Det. McHugh never sought out or interviewed Mr. Wright.[81] Had Det. McHugh interviewed him, Mr. Wright "would have told the investigator that no gun was used or displayed by Mrs. Sherrod or anyone else involved in the May 14, 2015 altercation."[82]

A critical part of any police investigation is identifying and interviewing witnesses to an alleged crime and determining whether there are "any discrepancies in the statements of victims and witnesses."[83] This should include attempting to locate any potential witnesses at the scene of the alleged offense, as well as canvassing the neighborhood or surrounding area for any witness that may exist.[84] The significance of the failure of Det. McHugh to identify and interview Mr. Wright cannot be over stated. This witness plainly contradicted Ms. Schulz's story and, as Det. McHugh would learn, supported Mrs. Sherrod's position that she did not own a gun and did not display or point a gun at Ms. Schulz at any time during the May 14, 2015 incident.

At no time after his initial meeting with Ms. Schulz did Det. McHugh show Ms. Schulz the video of the incident.[85] Det. McHugh's investigation also did not include a review of Ms. Schulz' social media profiles, a tactic that Det. McHugh testified is a widely accepted method

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[79] McHugh Dep. 119:12-13, 267:2-270:5.
[80] Decl. of Kenneth Wright at ¶ 4.
[81] McHugh Dep. at 119:17-120:14; Decl. of Kenneth Wright at ¶ 6.
[82] Decl. of Kenneth Wright at ¶ 6.
[83] IACP Criminal Investigation Concept and Issues Paper at 2.
[84] *Id.*
[85] McHugh Dep. at 140:16-142:16; 255:6-256:3; Schulz Dep. at 46:20-47:14, 125:3-9.

used in criminal investigation.[86] Det. McHugh testified that he did not locate or view any of Ms. Schulz's social media profiles until the day of the Grand Jury witness conference, after Mrs. Sherrod had already been arrested for the alleged offense.[87] Det. McHugh admitted that he had looked at Ms. Schulz's Twitter account;[88] however, he failed to find the publicly available Tweets in which Ms. Schulz admitted that she suffered from bipolar depression.[89]

On Saturday, May 16, 2015, Det. McHugh, accompanied by officers from the Prince George's County Police Department, went to interview Mrs. Sherrod at her Mitchellville, Maryland home.[90] Mrs. Sherrod was not at home, and Det. McHugh left his business card in her mailbox.[91] On the back of the card, Det. McHugh left a handwritten a note asking Ms. Sherrod to call him at the telephone number listed on his card.[92]

On the same day, Det. McHugh posted a felony lookout in the NCIC system for the Sherrods' car, describing it as a "felony vehicle" and instructing any police officer who located the vehicle to immediately stop and "secure the vehicle for forensic processing, hold all occupants [and] contact Investigator Phillip McHugh of the First District Detectives Unit."[93] Det. McHugh also made inquiries with Maryland and federal law enforcement agencies regarding whether either of the Sherrods had purchased a gun or had a permit to possess a gun.[94] All of the law enforcement agencies that Det. McHugh contacted reported that neither Mr. nor

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[86] McHugh Dep. at 47:6-49:14; 59:3-61:12.
[87] *Id.* at 47:6-49:14, 59:3-61:12, 253:7-15.
[88] *Id.*
[89] *Id.*; Dep. Ex. 83, Social Media Posts by Diane Schulz.
[90] McHugh Dep. at 122:11-22, 124:16-20.
[91] *Id.* at 123:1-2, 124:21-22; Business Card Left By Det. Phillip McHugh (undated).
[92] Resp. of Vashti Sherrod to the Interrogs. Propounded by Def. Diane Lee Schulz, Resp. to Interrog. No. 17.
[93] Dep. Ex. 14, Request for Local Lookout, ADW - Gun (May 15, 2015); Dep. Ex. 15, MPD Felony Vehicle Report, ADW - Gun (May 16, 2015).
[94] McHugh Dep. at 145:19-146:13; 183:17-22; 216:3-10; Maryland Req. for Service Requesting Firearms Registration Check for Vashti Sherrod (undated); Maryland Req. for Service Requesting Firearms Registration Check for Eugene Sherrod (undated).

Mrs. Sherrod had a registered firearm or a permit to possess one.[95]

On Saturday, May 16, 2015 at 3:36 p.m., Det. McHugh sent the police report concerning the May 14, 2015 incident to Ms. Schulz *via* email with the following message:

> Ms. Schulz, the police report is attached. While the classification on the initial report reads 'Threats to Do Bodily Harm' this case is being investigated as an Assault with a Dangerous Weapon - Gun. I will keep you apprised of any developments.[96]

Shortly thereafter, at 5:09 p.m. on May 16, 2015, Ms. Schulz responded *via* email to Det. McHugh to correct an error in the police report that he had just sent her:

> It was the driver's seat. I never ever said the passenger seat. I was standing on the passenger, side she was on her driver's side. Diane Schulz[97]

Over the next several days, Mrs. Sherrod called and left messages for Det. McHugh on his telephone's voicemail.[98] Det. McHugh did not respond to the telephone messages that Mrs. Sherrod left for him.[99] On May 21, 2015, Mrs. Sherrod was finally able to reach Det. McHugh by telephone.[100] Det. McHugh explained to her that he was investigating a complaint from Ms. Schulz alleging that Mrs. Sherrod had pointed a gun at Ms. Schulz in the aftermath of the May 14, 2015 motor vehicle collision and that the alleged assault had been captured on videotape.[101] In her telephone conversation with Det. McHugh, Mrs. Sherrod emphatically told Det. McHugh that she did not own a gun and had not pointed a gun at Ms. Schulz at any time.[102]

By this point in time, Det. McHugh had sought and been denied an arrest warrant for

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[95] McHugh Dep. at 145:19-146:13; 183:17-22; 216:3-10.
[96] Dep. Ex. 25, Email from Phillip McHugh to Diane Schulz (Saturday, May 16, 2015 at 3:36 p.m.).
[97] Dep. Ex. 85, Email from Diane Schulz (Saturday, May 16, 2015 at 5:09 p.m.).
[98] Vashti Sherrod Dep. at 114:16-116:15.
[99] Resp. of Vashti Sherrod to the Interrogs. Propounded by Def. Diane Lee Schulz, Resp. to Interrog. No. 17.
[100] Vashti Sherrod Dep. at 116:10-15.
[101] Vashti Sherrod Dep. at 119:20-121:13.
[102] *Id.*

Mrs. Sherrod from the U.S. Attorney's Office ("USAO") for the District of Columbia.[103] The USAO denied Det. McHugh's request because he lacked sufficient evidence of probable cause to support the issuance of an arrest warrant.[104]

D. Detective McHugh's Search Warrant For The Sherrods' Home.

On June 23, 2015, Det. McHugh contacted Detective Simmons of the City of Bowie Police Department, and requested that she file an application in the Circuit Court for Prince George's County, Maryland for a search warrant for the Sherrods' home and provided her with a draft search warrant application and affidavit.[105] Det. Simmons relied entirely on the information supplied to her by Det. McHugh and did not independently view the video recording of the May 14, 2015 incident.[106] This effectively made the entire application for the search warrant of the Sherrods' home that of Det. McHugh. On June 29, 2015, Det. Simmons applied for and obtained a search warrant for the Sherrods' home from Prince George's County Circuit Court Judge Michael P. Whalen based on the application and affidavit drafted by Det. McHugh.[107]

In the application for the search warrant for the Sherrods' home (and later the warrant for Mrs. Sherrod's arrest), Det. McHugh consistently wrote the following:

> The video corroborates the victim's series of events. The video shows Vashti Sherrod bend down at the driver's seat of her Mercedes and emerge with her right arm raised as if pointing something at the victim. Sherrod walks toward the victim, who then abruptly reenters her vehicle and leaves the scene. The video quality is not clear enough to see what Sherrod has in her hand, but the victim described it as a black pistol.[108]

However, the video, in fact, does not show Mrs. Sherrod bending down and then raising

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[103] McHugh Dep. at 190:4-20; 198:9-203:9; Dep. Ex. 38, Emails Between Det. Phillip McHugh and Susan P. Wittrock (June 24, 2015-June 29, 2015).
[104] *Id*.
[105] McHugh Dep. at 165:12-170:9;
[106] *Id.* at 170:10-172:15.
[107] McHugh Dep. 41, Knock Search and Seizure Application and Warrant (June 29, 2015).
[108] *Id.*; Dep. Ex. 53, Affidavit in Support of An Arrest Warrant (July 10, 2015).

her arm and pointing something at Ms. Schulz. It does not show Mrs. Sherrod walking toward Ms. Schulz. It also does not show Ms. Schulz abruptly reentering her vehicle and leaving the scene. The following is the actual sequence of events recorded on the video, along with the times each event occurred:[109]

26:25	Sherrod bends over in her car
26:33	Sherrod visible again
26:36-44	Sherrod talking to Schulz. Schulz continues bending over hood of Sherrod's car, then starts walking away.
26:45-48	Schulz starts walking back toward Sherrod and faces her, standing very close to Sherrod's person.
26:49-51	Schulz starts walking away again and walks behind her truck
26:52-55	Schulz turns and faces Sherrod. Sherrod is carrying a black handbag.
26:56	Schulz faces Sherrod, again very close to her person
26:59	Sherrod points her finger at Schulz and walks in between the vehicles
27:03-07	Schulz walks in between the vehicles and again confronts Sherrod Sherrod is standing upright and visible.
27:09	Schulz starts to walk away toward back of truck, but turns around and faces Sherrod for a third time
27:10-13	Sherrod points at Schulz with her hand outstretched and continues pointing at her with her arm raised as Schulz calmly walks away
27:16	Schulz gets into her truck
27:17	Sherrod looks through the passenger window of the truck
27:22	Sherrod gets in her car
27:34	Schulz drives off

Mrs. Sherrod is not shown to be bending over and into her vehicle just prior to pointing her arm at Ms. Schulz. In fact, she is shown to be bending over at the driver's side of her car approximately 45 seconds prior to the time she points her arm toward Ms. Schulz.[110] Ms. Schulz does not get into her car and leave immediately after Mrs. Sherrod pointed her arm at her, but delays leaving for 21 seconds, during which time Mrs. Sherrod is shown to be appearing to

[109] Video Recording of May 14, 2015 Schulz-Sherrod Incident. The video-recording of the May 14, 2015 Schulz-Sherrod incident was filed with the Court on December 5, 2017 (ECF No. 25).
[110] *Id.*

continue to talk to Ms. Schulz through the passenger window of her truck.[111]

E. Detective McHugh's Felony Lookout June 24, 2015 Capitol Hill Traffic Stop Of The Sherrods.

On June 24, 2015, the Sherrods, while driving their Mercedes in the District of Columbia, were stopped by members of the U.S. Capitol Police, who then surrounded the Sherrods' car with their guns drawn and pointed at Mr. and Mrs. Sherrod.[112] The stop occurred as a result of the NCIC felony lookout that Det. McHugh had posted on May 16, 2015. The language that Det. McHugh used in the lookout request made it virtually certain that any law enforcement personnel who approached the Sherrods' car would do so with their weapons drawn.[113] In fact, Det. McHugh testified that he was not surprised that the officers who stopped the Sherrods' vehicle approached the Sherrods' car with their guns drawn.[114]

The U.S. Capitol Police notified Det. McHugh that they had stopped the Sherrods' car, and he came to the scene.[115] There, Det. McHugh demanded to search the Sherrods' car and coerced and bullied Ms. Sherrod into giving him permission to do so.[116] Det. McHugh then conducted a search of the Sherrods' Mercedes for a gun and found nothing.[117] During the search, the Sherrods were not free to leave, and Det. McHugh did not release them until he had completed the search of their car.[118] These events occurred after Det. McHugh had sought an

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[111] *Id.*
[112] Resp. of Vashti Sherrod to the Interrogs. Propounded by Def. Diane Lee Schulz, Resp. to Interrog. No. 17.
[113] Hayden Decl., Ex. 1 at 7.
[114] McHugh Dep. at 133:13-134:3; 137:6-11.
[115] McHugh Dep. at 177:7-22.
[116] Vashti Sherrod Dep. 225:9-17.
[117] Phillip McHugh Dep. at 183:6-13. The IACP Model Policy for Obtaining Search Warrants specifically provides that where consent for a warrantless search is obtained improperly, such as through coercion, the search is rendered illegal. IACP Obtaining Search Warrant Concepts and Issues Paper at 2.
[118] McHugh Dep. at 184:16-185:4.

arrest warrant from the USAO and had been denied due to a lack of probable cause.[119]

F. The July 7, 2015 Execution Of Detective McHugh's Search Warrant For The Sherrods' Home.

On July 7, 2015, at approximately 9:00 p.m., Det. McHugh, with the assistance of "[m]embers of the District 3 robbery unit, PG County police officers, [Bowie Police Department's] Detective Simmons [and] Lieutenant Mrotek… and [MPD] Detective Sergeant David Edelstein" executed the search warrant for the Sherrods' home.[120]

The Sherrods were at home and had retired to their bedroom for the evening when they were awakened by the sound of pounding on the front door of their home in suburban Prince George's County, Maryland.[121] The Sherrods cowered inside their home, suspecting a home invasion and fearing for their safety.[122] Then, the front door to their home was kicked in, and the police officers, led by Det. McHugh, barged through the front door and into the Sherrods' home.[123] Before doing so, the police officers failed to announce their presence or give the Sherrods a chance to open their front door before knocking it down and entering the house.[124]

One of the officers ordered Mrs. Sherrod to place her hands on her head, while another officer handcuffed the sightless Mr. Sherrod.[125] Mr. and Mrs. Sherrod were both in their

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[119] Emails Between Def. Phillip McHugh and Susan P. Wittrock (June 24, 2015-June 29, 2015); McHugh Dep. at 190:4-20; 198:9-203:9

[120] McHugh Dep. at 205:22-206:10; Resp. of Vashti Sherrod to the Interrogs. Propounded by Def. Diane Lee Schulz, Resp. to Interrog. No. 17; McHugh Dep. at 205:6-17.

[121] Resp. of Vashti Sherrod to the Interrogs. Propounded by Def. Diane Lee Schulz, Resp. to Interrog. No. 17.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

pajamas.[126] The Sherrods were terrified, especially Mr. Sherrod, who was unable to see who was forcibly breaking into his home due to his blindness.[127]

Det. McHugh demanded that the Sherrods produce their guns and ammunition.[128] The Sherrods explained that they did not own a gun or have ammunition for one.[129] Det. McHugh responded by stating the "search is on."[130] Throughout the search, Mr. and Mrs. Sherrod were detained by Det. McHugh, Mr. Sherrod in handcuffs, and were not free to leave unless and until he permitted them to do so.[131]

Det. McHugh personally participated in the search of the Sherrods' home.[132] During the search, Det. McHugh upended the Sherrods' furniture, shelves, books, and personal effects and found nothing.[133] Det. McHugh negligently caused damage to the Sherrods' property that was unnecessary to the execution of the search warrant.[134] As he was leaving the Sherrods' home, Det. McHugh gave Mrs. Sherrod a copy of the search warrant that he had obtained.[135] The police officers released Mr. and Mrs. Sherrod, and they spent the evening cleaning up their ransacked home, still in shock from the traumatic experience.[136]

G. Detective McHugh's Arrest Warrant For Mrs. Sherrod.

On July 10, 2015, Det. McHugh, with the approval of the USAO, managed to obtain an arrest warrant for Mrs. Sherrod on the felony ADW charge.[137] Despite not finding a gun in

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126 *Id.*
127 *Id.*
128 *Id.*
129 *Id.*
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.*
137 McHugh Dep. at 202:15-203:4.

Plaintiffs' car or home, Defendant McHugh: (1) swore out a false complaint against Mrs. Sherrod in which he claimed that "[o]n or about May 14, 2015; within the District of Columbia, Vashti Valma Sherrod assaulted Diane Schulz with a dangerous weapon, that is, a gun. (Assault with a Dangerous Weapon, in violation of 22 D.C. Code, Section § 402 (2001 ed.))"[138] and (2) swore out a false affidavit in support of his application for an arrest warrant for Mrs. Sherrod, which Det. McHugh presented to D.C. Superior Court Judge John Bagley.[139]

In his affidavit, Det. McHugh asserted facts which he knew, or should have known, were materially false, including, but not limited to, the materially false allegations made by Ms. Schulz against Mrs. Sherrod on May 14, 2015, set forth above.[140] Det. McHugh also failed to disclose in the affidavit that the video evidence did not corroborate the allegations that Ms. Schulz had asserted against Mrs. Sherrod and, in fact, contradicted Ms. Schulz's story.[141] Based on Defendant McHugh's false affidavit, Judge Bagley issued a warrant for the arrest of Mrs. Sherrod on July 10, 2015.[142]

H. Detective McHugh's Arrest Of Mrs. Sherrod.

Following the search of her home, on July 17, 2015, Mrs. Sherrod retained attorney Brian K. McDaniel to represent her.[143] Attorney McDaniel then contacted Det. McHugh and determined that he had obtained a warrant for the arrest of Mrs. Sherrod.[144]

At or about 5:00 a.m. on July 20, 2015, Mrs. Sherrod, accompanied by Attorney

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[138] McHugh Dep. 51, Superior Court Criminal Division Complaint (July 10, 2015).
[139] Dep. Ex. 53, Affidavit in Support of An Arrest Warrant (July 10, 2015).
[140] *Id.*
[141] *Id.*
[142] McHugh Dep. 51, Superior Court Criminal Division Complaint (July 10, 2015).
[143] Retainer Agreement Between Attorney Brian K. McDaniel and Vashti Sherrod (July 17, 2015).
[144] Email from Phillip McHugh to Attorney Brian K. McDaniel (July 15, 2015).

McDaniel, turned herself in at the MPD First District's station.[145] There, the 77-year-old Mrs. Sherrod was handcuffed, fingerprinted, photographed, and jailed, all pursuant to the fraudulent arrest warrant sought and obtained by Det. McHugh.[146]

On July 21, 2015, Mrs. Sherrod was transferred to the Central Cell Block of the MPD, located at 300 Indiana Avenue, NW, where she awaited her initial appearance in D.C. Superior Court.[147] Near the end of the day on July 21, 2015, Mrs. Sherrod was presented to Magistrate Judge Raymond in shackles and formally charged with Assault with a Dangerous Weapon ("ADW"), a felony.[148] Magistrate Judge Raymond released Mrs. Sherrod on her own recognizance and ordered her to return for a preliminary hearing on August 12, 2015.[149]

I. The August 12, 2015 Preliminary Hearing.

On August 12, 2015, Mrs. Sherrod attended the Preliminary Hearing before Magistrate Judge Frederick Sullivan.[150] During the hearing, Det. McHugh testified:

> Q. [Mr. McDaniel]: [Vashti Sherrod] was stopped by the Capitol Police. Was she stopped by the Capitol Police at your request?
>
> A. [McHugh]: I had entered the tag number of her vehicle into Crime Database NCIC with information that the vehicle was involved in a crime and that the vehicle should be stopped. The vehicle passed by a license plate reader on Capitol territory. One of their units subsequently stopped the vehicle and called me.[151]

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[145] Resp. of Vashti Sherrod to the Interrogs. Propounded by Def. Diane Lee Schulz, Resp. to Interrog. No. 17.
[146] *Id.*; Arrest Report Arrest Report *United States v. Vashti Sherrod* (July 21, 2015).
[147] Resp. of Vashti Sherrod to the Interrogs. Propounded by Def. Diane Lee Schulz, Resp. to Interrog. No. 17; Arrest Packet for Vashti Sherrod (July 21, 2015).
[148] Presentment Hearing Tr. in *United States v. Vashti Sherrod,* Case No. 2014 CF2 9758, D.C. Superior Court (July 21, 2015).
[149] *Id.* at 34.
[150] Preliminary Hearing Tr. in *United States v. Vashti Sherrod,* Case No. 2014 CF2 9758, D.C. Superior Court (August 12, 2015).
[151] *Id.* at 18:18-25.

Det. McHugh's testimony was patently false. First, the Sherrods' car had not been "involved in a crime." Second, McHugh had entered the tag number of Plaintiffs' vehicle into the NCIC system as belonging to a "felony vehicle," which was also untrue.[152] Moreover, during the hearing, Det. McHugh made additional materially false statements when he testified against Mrs. Sherrod based on his arrest warrant affidavit and the falsehoods contained therein in order to establish probable cause to bind the case over to the Grand Jury.[153]

During the preliminary hearing, Mrs. Sherrod's counsel repeatedly urged the court to view the video-recording of the May 14, 2015 incident because it exonerated Mrs. Sherrod.[154] The judge refused to do so.[155] At the conclusion of the preliminary hearing, without viewing the video recording of the encounter, the court bound the case over to the Superior Court Grand Jury for its consideration.[156]

J. The Grand Jury Proceedings And Mrs. Sherrod's Exoneration.

Following the preliminary hearing, in the Fall of 2015, the USAO, the local prosecutor for felony crimes in the District of Columbia, scheduled Ms. Schulz to appear before the Superior Court Grand Jury to testify against Mrs. Sherrod.[157]

Both Ms. Schulz and Det. McHugh met with Assistant United States Attorney Lisa Walters before testifying before the Grand Jury.[158] Ms. Schulz was interviewed in advance of

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[152] Dep. Ex. 14, Request for Local Lookout, ADW - Gun (May 15, 2015); Dep. Ex. 15, MPD Felony Vehicle Report, ADW - Gun (May 16, 2015).
[153] Preliminary Hearing Tr. in *United States v. Vashti Sherrod,* Case No. 2014 CF2 9758, D.C. Superior Court (August 12, 2015) at 5-10.
[154] *Id*. at 12-15.
[155] *Id*. at 15.
[156] Preliminary Hearing Tr. in *United States v. Vashti Sherrod,* Case No. 2014 CF2 9758, D.C. Superior Court (August 12, 2015) at 12-15.
[157] Letter from Lisa Walters to Diane Schulz (August 18, 2015).
[158] McHugh Dep. at 243:12-250:3, 258:19-261:6.

her Grand Jury testimony by Ms. Walters and Det. McHugh.[159] According to Ms. Schulz: "[t]he U.S. Attorney, Lisa Walters, was not forthcoming during the period of preparation for the Grand Jury about what the tape did or did not have on it" and she "was not allowed to see the tape" before testifying.[160] It was at this meeting when Ms. Schulz's version of the events that transpired during the May 15, 2015 incident completely unwound.[161]

During the interview, it became apparent to Det. McHugh that Ms. Schulz had insurmountable credibility issues.[162] Significantly, Ms. Schulz's description of the gun changed dramatically. As Det. McHugh recounted in his deposition testimony in this case:

> So the color of the gun was something that was -- was different. And then when we explored that more with [Ms. Schulz], she -- she sort of backed -- backed off of it being silver, and changed it to, Well, it was metal, and I got a glint of the metal that was being pointed at me."[163]

Equally important to Det. McHugh was Ms. Schulz's confession during her pre-Grand Jury testimony interview that she was mentally ill and suffered from bipolar disorder -- a revelation that caused Det. McHugh to completely change his view of her and doubt her credibility.[164]

Before Ms. Schulz testified before the Grand Jury, Det. McHugh falsely told her that "the tape corroborated [her] statement," which led Ms. Schulz to go "ahead with the testimony" against Mrs. Sherrod.[165] Ms. Schulz also admitted that she "would never have done so" had she

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[159] McHugh Dep. at 242:13-244:11.
[160] Defendant Schulz' Motion to Extend Time to Answer Complaint, filed June 6, 2016 (ECF No. 12).
[161] *Id.* There were no meetings or conversations between Ms. Schulz and Det. McHugh between May 15, 2015 and the Grand Jury interviews, despite McHugh's office being within walking distance of Ms. Schulz' apartment. Schulz Dep. at 122:4-17; McHugh Dep. at 87:14-18; 277:5-279:11.
[162] McHugh Dep. at 243:12-250:3, 258:19-261:6.
[163] *Id.* at 245:5-20; 249:1-205:3; 259:6-22; 260:22-261:6-262:2.
[164] *Id.* at 243:9-244:22; 247:18-249:10.
[165] *Id.*

known that the tape did **not,** in fact, "backup" her story.[166] Moreover, despite doubting Ms. Schulz's credibility, Det. McHugh nonetheless testified in front of the Grand Jury in support of an indictment for felony ADW against Mrs. Sherrod and showed the video recording of the May 14, 2015 incident during his testimony.[167] The Grand Jury refused to indict Mrs. Sherrod and, on January 6, 2017, the ADW charge was dismissed by the USAO.[168] On January 7, 2016, the Criminal Division of the D.C. Superior Court advised Mrs. Sherrod to make an application under the Criminal Record Sealing Act (D.C. Code § 16-801, et seq.), which provides for the "sealing of criminal records on grounds of actual innocence." D.C. Code § 16-802.[169]

LEGAL STANDARD

"Federal Rule of Civil Procedure 56 makes clear that summary judgment is appropriate only if there is 'no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Rothe Development, Inc. v. Department of Defense*, 107 F. Supp.3d 183, 205 (D.D.C. 2015) (quoting Fed. R. Civ. P. 56(a)). "In determining whether there is a genuine dispute about material facts, the court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inference in that party's favor." *Id.* (citing *Grosdidier v. Broad. Bd. of Governors, Chairman*, 709 F.3d 19, 23–24 (D.C. Cir. 2013); *Wiley v. Glassman,* 511 F.3d 151, 155 (D.C. Cir. 2007)). Accordingly, at the summary judgment stage, this Court "*must* draw reasonable factual inferences in the light most favorable to [], the nonmovant." *Scott v. Harris*, 550 U.S. 372, 378 (2007) (emphasis added).

The Supreme Court recently reiterated that in a summary judgment proceeding, it is reversible error for a court to weigh evidence or resolve disputed issues in favor of the moving

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166 *Id.*
167 *Id.* at 261:12-16, 292:10-12.
168 *Id.* at 292:13-293:1; Dismissal Notice in *United States v. Vashti Sherrod,* Case No. 2013 CF2 9758, D.C. Superior Court (January 7, 2016).
169 *Id.*

party. *See Tolan v. Cotton*, ___ U.S. ___, 134 S.Ct. 1861, 1866–68 (2014) (per curiam). A district court may not credit the evidence of the party seeking summary judgment and ignore evidence offered by the non-movant. *Id.* Thus, it is impermissible for a court, when deciding a summary judgment motion, to embrace factual inferences that conflict with the non-movant's evidence because to do so is contrary to the "fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the non-moving party." *Id.* at 1868. The reason for these longstanding principles is that "witnesses on both sides come to [the] case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system." *Id.* In short, in deciding the instant Defendants' pending motions, this Court must "adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Tolan*, 134 S. Ct. at 1863 (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255, 106 S.Ct. 2505 (1986)).

ARGUMENT

I. The District Defendants Are Not Entitled To Summary Judgment Because Whether Detective McHugh's Actions Were Supported By Probable Cause Is Inherently An Issue Of Material Fact In Dispute.

The District Defendants are not entitled to summary judgment on Counts I and III because Defendant McHugh violated the Sherrods' clearly established Fourth Amendment rights under 42 U.S.C. § 1983 ("§ 1983") when, without probable cause, he searched their car and home and seized and arrested them.

Because the existence of probable cause is a question of fact to be resolved by the jury, the District Defendants' argument that Detective McHugh's actions were supported by probable cause invites the Court to impermissibly: (1) credit Defendants' evidence; (2), ignore Plaintiffs' contrary evidence and/or (3) weigh the parties' competing evidence. *Tolan*, 134 S.Ct. at 1866–

68; *DeLoach v. Bevers*, 922 F.2d 618, 623 (10th Cir. 1990) ("We have long recognized that it is a jury question in a civil rights suit whether an officer had probable cause."); *Smith v. Tucker*, 304 A.2d 303 (D.C. App. 1993) (holding that when the facts are in dispute, the issue of probable cause is for the jury). As the court "*must* draw reasonable factual inferences in the light most favorable to [], the nonmovant," the District Defendants' version of facts is entirely irrelevant at this stage of the litigation. *Scott v. Harris*, 550 U.S. 372, 378 (2007) (emphasis added). The Sherrods have adduced ample evidence in discovery from which a reasonable jury could find that none of the actions that Det. McHugh took against them were supported by probable cause. At this stage of the proceedings, Plaintiffs' version of facts controls. *Tolan*, 134 S. Ct. at 1863.

A. Detective McHugh's Actions Were Never Supported By Probable Cause.

Plaintiffs have produced sufficient evidence from which a reasonable jury could conclude that Det. McHugh's actions were not supported by probable cause. Accordingly, The District Defendants are not entitled to summary judgment. "Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information are sufficient to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). At no point during the criminal investigation did Det. McHugh have "trustworthy information sufficient to warrant a man of reasonable caution" to believe that Mrs. Sherrod had committed the offense of assault with a dangerous weapon or any other crime. *Brinegar*, 338 U.S. at 175–76. As Plaintiffs' police procedures expert, Dr. Philip Hayden, will testify, "Det. McHugh never had probable cause at any point in his investigation to pursue a criminal case against Mrs. Sherrod and no objectively

reasonable police officer would have believed that probable cause existed under the facts of this case."[170]

The District Defendants argue that Dr. Hayden's opinions regarding whether probable cause existed is inadmissible, as this is an issue for the jury to ultimately decide. Dist. Defs.' Mem at 57. However, this argument is meritless because given the specialized nature of probable cause determinations, expert testimony is admissible. *See District of Columbia v. Mino*r, 740 A.2d 523, 531 (D.C. 1999) (approving the admission at trial of expert testimony on the issue of whether a police officer had probable cause --"the jury heard the testimony of both defense and plaintiff's experts that under national standards there was no probable cause to arrest…").

On May 15, 2015, Det. McHugh interviewed Ms. Schulz in her home about the incident that had occurred the day before on the street in front of Gingko Gardens.[171] According to Det. McHugh, Ms. Schulz stated that during the incident, "Mrs. Sherrod went to her car and reached under the driver's seat, pulling out what Schulz described as a black semi-automatic pistol similar to what a police officer would carry."[172] Ms. Schulz, who had previously described the gun to Officer Patel as a "big black gun," was unable to describe the gun in any greater detail.[173]

One day after the incident, May 15, 2015, Det. McHugh viewed and obtained a video recording of the incident between Ms. Schulz and Mrs. Sherrod. As discussed in the fact section, Det. McHugh alleged that the video was "grainy and not clear," such that he could not tell whether Mrs. Sherrod, in fact, had a gun in her hand.[174] However, the video was sufficiently clear to enable an objective and reasonable viewer to see that when Mrs. Sherrod raised her right

[170] Hayden Decl., Ex. 1 at 5
[171] McHugh Dep. at 87:6-13.
[172] McHugh Answer to Req. for Admission No. 32.
[173] Dep. Ex. 3(a), Handwritten Notes of Officer Sapan Patel (May 14, 2015).
[174] McHugh Dep. at 119:6-11.; 147:16-18; 157:15-20.

arm, she was merely pointing her hand and was certainly not pointing a gun.[175] Therefore, upon viewing the video surveillance, any reasonable officer would have concluded that there was not probable cause to believe that Mrs. Sherrod had committed assault with a dangerous weapon because the video contradicted the allegations of the only complaining witness. Moreover, Det. McHugh would later describe the surveillance video as "corroborating" Ms. Schulz version of events when, as discussed above, it did not.[176]

Additionally, on May 16, 2015, after he had viewed the video that contradicted Schulz's version of events, Det. McHugh posted the felony lookout on the NCIC system for the Sherrods' Mercedes.[177] At the time Det. McHugh posted this felony lookout, he lacked probable cause to believe that Mrs. Sherrod had committed a crime and, consequently, lacked probable cause to describe the Sherrods' vehicle as a "felony vehicle."

Despite the obvious lack of probable cause once the video surveillance had been discovered and viewed, Det. McHugh continued to pursue his criminal investigation against Mrs. Sherrod. Not only did Det. McHugh lack probable cause to continue his criminal investigation after he had viewed the video, each new piece of information gathered during his investigation supported the Sherrods' assertion that they did not have a gun, bringing him farther and farther away from a finding of probable cause.

Further, Det. McHugh's May 16, 2015 inquiries with Prince George's County Police and Alcohol Tobacco and Firearms (ATF) revealed that neither Mr. nor Mrs. Sherrod had a registered gun or a permit to possess one.[178] Despite discovering another piece of evidence

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[175] Hayden Decl. Ex. 1 at 4.
[176] McHugh Dep. 41, Knock Search and Seizure Application and Warrant (June 29, 2015); Dep. Ex. 53, Affidavit in Support of An Arrest Warrant (July 10, 2015).
[177] Dep. Ex. 14, Request for Local Lookout, ADW - Gun (May 15, 2015); Dep. Ex. 15, MPD Felony Vehicle Report, ADW - Gun (May 16, 2015).
[178] McHugh Dep. at 145:19-146:13; 183:17-22; 216:3-10.

suggesting there was no probable cause to believe Mrs. Sherrod had committed ADW, Det. McHugh charged blindly ahead with his investigation.

On May 21, 2015, when Mrs. Sherrod was finally able to reach Det. McHugh after attempting to contact him by telephone for several days, Mrs. Sherrod emphatically told Det. McHugh that she did not own a gun and that she had never pointed a gun at Ms. Schulz at any time.[179] Despite Mrs. Sherrod's unequivocal denial of pointing a weapon at Ms. Schulz, which was supported by the video surveillance and the lack of a registered weapon, all of which indicated a lack of probable cause, Det. McHugh continued to ignore the red flags and proceeded with his wrongheaded investigation of Mrs. Sherrod.

Moreover, the first time Det. McHugh applied for an arrest warrant for Mrs. Sherrod, the USAO denied the application because there was insufficient evidence of probable cause for an arrest.[180] Once again, Det. McHugh ignored objective evidence that there was no probable cause to believe that Mrs. Sherrod had committed a crime and charged ahead with his misguided investigation.

On June 24, 2015, after the Sherrods were stopped by the U.S. Capitol Police pursuant to the NCIC felony lookout that Det. McHugh had issued on May 16, 2015, Det. McHugh searched the Sherrods' Mercedes.[181] The search of the car uncovered no weapons.[182] Det. McHugh's failure to uncover a weapon in the very vehicle that Ms. Schulz had alleged Mrs. Sherrod stored a gun under the passenger seat was yet another piece of objective evidence indicating there was no probable cause to believe Mrs. Sherrod had committed a gun crime. Notwithstanding the

[179] Vashti Sherrod Dep. at 114:16-116:15; Vashti Sherrod Dep. at 119:20-121:13.
[180] McHugh Dep. at 190:4-20; 198:9-203:9; Emails Between Det. Phillip McHugh and Susan P. Wittrock (June 24, 2015-June 29, 2015).
[181] McHugh Dep. at 177:7-22; Vashti Sherrod Dep. at 225:9-17.
[182] McHugh Dep. at 183:6-13.

overwhelming evidence of Mrs. Sherrod's innocence, Det. McHugh pressed ahead with his investigation.

Further, despite not finding a gun when he searched the Sherrods' car, Det. McHugh proceeded with the execution of his search warrant for the Sherrods' home on July 7, 2015.[183] After a thorough search of the Sherrods' entire home and garage, which continued for over an hour, no gun was found.[184] The lack of a gun in the Sherrods' home was yet another piece of objective evidence indicating the lack of probable cause that Det. McHugh ignored.

By this point, every piece of objective and reliable evidence indicated that there was no probable cause for a reasonable officer to believe that Mrs. Sherrod had committed an assault with a deadly weapon or any other crime, including: (1) the video surveillance recording showing that Mrs. Sherrod was not holding a gun, (2) the law enforcement record checks, which revealed that the Sherrods had neither a registered weapon nor a permit for a gun, (3) Mrs. Sherrod's unequivocal denial that she had brandished a weapon at Ms. Schulz, (4) the failure of Det. McHugh to find a gun during his search of the Sherrods' vehicle, and (5) the failure of Det. McHugh to find a gun during the search of the Sherrods' home. However, notwithstanding this clear lack of probable cause, on July 20, 2015, Det. McHugh sought and obtained an arrest warrant for Mrs. Sherrod on the felony ADW charge.[185]

Based on the substantial evidence Plaintiffs have set forth contradicting the District Defendants' factual assertion that Det. McHugh's actions were supported by probable cause, it is clear that making all reasonable factual inferences in favor of the Plaintiffs, as the Court must at

[183] Resp. of Vashti Sherrod to the Interrogs. Propounded by Def. Diane Lee Schulz, Resp. to Interrog. No. 17; McHugh Dep. at 205:6-17.
[184] McHugh Dep. at 205:6-14, 214:1-219:4.
[185] Resp. of Vashti Sherrod to the Interrogs. Propounded by Def. Diane Lee Schulz, Resp. to Interrog. No. 17.

the summary judgment stage, there is a genuine dispute of material fact, rendering summary judgment inappropriate on the issue of probable cause.

II. Detective McHugh Is Not Entitled To Qualified Immunity Because He Violated The Sherrods' Clearly-Established Fourth Amendment Rights.

A. The District Defendants Are Not Entitled To Summary Judgment On The Issue Of Whether Detective McHugh Violated The Plaintiffs' Clearly Established Fourth Amendment Rights Because When He Executed The Search Warrant For The Sherrods' Home And When He Executed The Arrest Warrant For Mrs. Sherrod, There Is Ample Evidence That The Search And Arrests Warrants Were Invalid.

In resolving questions of 42 U.S.C. § 1983 qualified immunity at the summary judgment stage, courts engage in a two-pronged inquiry. *Tolan*, 134 S.Ct. at 1865. The first prong "asks whether the facts, '[t]aken in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a [federal] right.'" *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)); *See also BEG Investments, LLC v. Alberti*, 2014 WL 1280261 (D.D.C. Mar. 31, 2014) (Contreras, J.); *Mazloum v. Dist. Columbia Metropolitan Police Department*, 522 F. Supp.2d 24, 33 (D.D.C. 2007).

The second prong asks, "whether the federal right was clearly established at the time of the violation." *Id.* at 1866 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). Government officials are shielded from liability if their actions did not violate clearly established federal rights "of which a reasonable person would have known." *Id.* (quoting *Hope*, 536 U.S. at 739). "'[T]he salient question . . . is whether the state of the law' at the time of [the] incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'" *Id.* (quoting *Hope*, 536 U.S. at 741).

District courts have discretion to determine "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). "But under either prong, courts may not

resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan*, 134 S.Ct. at 1866. "This is not a rule specific to qualified immunity; it is simply an application of the more general rule that a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Id.* (citation omitted). For the reasons that follow, the District Defendants are not entitled to summary judgment on their qualified immunity defense.

1. Violation Of A Clearly-Established Right.

"It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant is 'per se unreasonable.'" *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (quoting *Katz v. United States*, 389 U.S. 347, 257 (1967)). Moreover, it is a bedrock principle of our jurisprudence that the Fourth Amendment authorizes the issuance of warrants only "upon probable cause, supported by Oath or affirmation." U.S. Const. amend. IV. "Inherent in this language is 'the obvious assumption [ ] that there will be a truthful showing' of facts to support probable cause, meaning that 'the information put forth is believed or appropriately accepted by the affiant as true.'" *Harte v. Board of Commissioners of County of Johnson, Kansas*, 864 F.3d 1154, 1162 (10th Cir. 2017) (quoting *Franks v. Delaware*, 438 U.S. 154, 164–65 (1978)).

Therefore, although police officers who obtain a warrant before executing a search or arrest are ordinarily entitled to rely on the issuing judge's determination that probable cause exists, where there is evidence that a warrant was issued based upon an affidavit containing a "deliberate falsehood or reckless disregard for the truth, and the exclusion of false statements would undermine the existence of probable cause, a warrant is invalid." *Harte*, 864 F.3d at 1162 (citing *Franks*, 438 U.S. at 171–72). Where officers rely upon a warrant they have obtained through deliberate falsehoods or reckless disregard for the truth, the shield of qualified immunity

is lost because the officers have violated a clearly established constitutional right. *See Harte*, 864 F.3d at 1163 (reversing the grant of summary judgment where there was a triable issue of fact regarding whether officers fabricated information to obtain warrants, rendering qualified immunity inapplicable). "Accordingly, if there is evidence from which a jury could conclude that the officers made intentional or reckless misstatements in their warrant affidavit, or recklessly omitted information 'critical' to a probable cause determination, summary judgment is inappropriate." *Harte*, 864 F.3d at 1162 (citing *DeLoach v. Beyers*, 922 F.2d 618, 622 (10th Cir. 1990)).

Here, the search warrant for the Sherrods' home and the arrest warrant for Mrs. Sherrod were both invalid because the affidavits that Det. McHugh proffered in support of each warrant application contained "deliberate falsehood[s]," "the exclusion of [which] would [have] undermine[d] the existence of probable cause." *Harte*, 864 F.3d at 1162 (citing *Franks*, 438 U.S. at 171–72). Accordingly, summary judgment is inappropriate here, as there is ample evidence from which a reasonable jury could conclude that Det. McHugh made intentional misstatements of fact critical to a probable cause determination.

2. Issuance Of The Search And Arrest Warrants.

As discussed in the fact section, on June 23, 2015, Det. McHugh contacted Det. Simmons of the Bowie Police Department and asked her to apply to the Circuit Court for Prince George's County for a search warrant that would allow Det. McHugh to search the Sherrods' home.[186] Acquiescing, Det. Simmons relied entirely on the search warrant application and affidavit prepared and supplied by Det. McHugh[187] and thus did not independently review the video recording of the May 14, 2015 incident upon which the application and affidavit were largely

[186] McHugh Dep. at 165:12-170:9.
[187] *Id.*

based.[188] On June 29, 2015, Det. Simmons applied for a search warrant for the Sherrods' home from Prince George's County Circuit Court Judge Michael P. Whalen; the affidavit submitted in support of the warrant application contained the following language, drafted by Det. McHugh:

> The video corroborates the victim's series of events. The video shows Vashti Sherrod bend down at the driver's seat of her Mercedes and emerge with her right arm raised as if pointing something at the victim. Sherrod walks toward the victim, who then abruptly reenters her vehicle and leaves the scene. The video quality is not clear enough to see what Sherrod has in her hand, but the victim described it as a black pistol.[189]

On June 29, 2015, Judge Whalen issued the search warrant.[190] As discussed above, Det. McHugh's subsequent search of the Sherrods' home failed to produce a gun.

On July 10, 2015, despite not having found a gun during the search of the Sherrods' car or during the search of their home, Det. McHugh sought and obtained an arrest warrant for Mrs. Sherrod on the felony charge of assault with a deadly weapon from D.C. Superior Court Judge John Bagley.[191] Det. McHugh's affidavit submitted in support of the arrest warrant included the same materially false and misleading language regarding the video recording as the affidavit that he prepared for use in Prince George's County to obtain the search warrant for the Sherrods' home:

> The video corroborates CW's [Schulz'] series of events. The video shows SHERROD bending down at the driver seat of her Mercedes and emerge with her right arm raised as if pointing something at CW [Schulz]. SHERROD walks toward CW [Schulz], who then abruptly reenters her vehicle and leaves the scene. The video quality is not clear enough to see what SHERROD has in her hand, but CW [Schulz] described it as a black pistol.[192]

3. Detective McHugh's Materially False Statements.

Detective McHugh's conduct constituted a constitutional violation because in the

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[188] *Id.* at 170:10-172:15
[189] McHugh Dep. 41, Knock Search and Seizure Application and Warrant (June 29, 2015).
[190] *Id.*
[191] Dep. Ex. 53, Affidavit in Support of An Arrest Warrant (July 10, 2015).
[192] Dep. Ex. 53, Affidavit in Support of An Arrest Warrant (July 10, 2015).

applications for the search warrant and the arrest warrant, Det. McHugh deliberately made several false statements regarding material facts to manufacture probable cause where none existed.[193] Chief among these material falsehoods were Det. McHugh's statements that: (1) "[t]he video corroborates [Schulz'] series of events;" (2) "[t]he video shows Sherrod bending down at the driver seat of her Mercedes and emerge with her right arm raised as if pointing something at [Schulz];" (3) "Sherrod walks toward [Schulz], who then abruptly reenters her vehicle and leaves the scene;" and (4) "[t]he video quality is not clear enough to see what Sherrod has in her hand, but [Schulz] described it as a black pistol."

Each of Det. McHugh's statements was deliberately false and misleading, as: (1) the video recording does not corroborate Ms. Schulz's series of events; (2) the video does not show Mrs. Sherrod bending down just prior to raising her arm and pointing something at Ms. Schulz; (3) the video does not show Mrs. Sherrod walking toward Ms. Schulz, who then abruptly reenters her vehicle and leaves the scene; and (4) the video's quality is *not* "not clear enough" to see what Mrs. Sherrod had in her hand.[194] Indeed, contrary to Det. McHugh's assertion on this critical point, the video ***is*** sufficiently clear to enable an objective viewer to determine that Mrs. Sherrod did ***not*** have a gun in her hand at any time during her encounter with Ms. Schulz.[195] Further, Ms. Schulz did not get into her car and leave immediately after Mrs. Sherrod pointed her

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[193] Following Mrs. Sherrod's arrest, Det. McHugh made materially false statements a third time during the August 12, 2015 preliminary hearing when Superior Court Magistrate Judge Frederick Sullivan considered the government's ADW case against Mrs. Sherrod. Preliminary Hearing Tr. in *United States v. Vashti Sherrod,* Case No. 2014 CF2 9758, D.C. Superior Court (August 12, 2015). Det. McHugh appeared at the preliminary hearing and testified against Mrs. Sherrod based on his arrest warrant affidavit and the material falsehoods contained therein to establish probable cause to bind the case over to the Grand Jury. *Id*. at 5-10. During the hearing, Mrs. Sherrod's counsel repeatedly urged the court to view the video-recording of the May 14, 2015 incident because it exonerated Mrs. Sherrod. *Id*. at 12-15. Magistrate Judge Sullivan refused to do so. *Id*. at 15.

[194] Hayden Decl. at 13–15.

[195] Video Recording of May 14, 2015 Schulz-Sherrod Incident.

arm at her, but delays leaving for 21 seconds, during which time Mrs. Sherrod is shown to continue to talk to Ms. Schulz through the passenger window of Ms. Schulz's truck. Ms. Schulz's actions of causally leaving the scene and speaking with Mrs. Sherrod before she left are hardly the behavior of a person who just had a gun pulled on her. Thus, "[t]he video-recording [did not] corroborate Ms. Schulz's version of events." In fact, the video contradicted her story. Det. McHugh swore under oath that the video corroborated Ms. Schulz's story and relied on the video to bolster Ms. Schulz's allegations against Mrs. Sherrod in his affidavits seeking warrants and thereby made materially false statements concerning the essential facts of this case.

Where there is evidence that a warrant was issued based upon an affidavit containing a "deliberate falsehood or reckless disregard for the truth, and the exclusion of false statement would undermine the existence of probable cause, a warrant is invalid." *Harte*, 864 F.3d at 1162 (citing *Franks*, 438 U.S. at 171–72). Here, the search warrant for the Sherrods' home and the arrest warrant for Mrs. Sherrod were both invalid because the affidavits that Det. McHugh proffered in support of each warrant application contained "deliberate falsehood[s]," "the exclusion of [which] would [have] undermine[d] the existence of probable cause." *Harte*, 864 F.3d at 1162 (citing *Franks*, 438 U.S. at 171–72). Moreover, where, as here, a police officer relies upon an invalid warrant obtained through deliberate falsehoods or reckless disregard for the truth, the shield of qualified immunity is lost because the officer has violated the clearly established Fourth Amendment constitutional rights of the Plaintiffs. Accordingly, as there is ample evidence of record in this case from which a jury could conclude that Det. McHugh made intentional or reckless misstatements in his warrant affidavits critical to a probable cause determination, summary judgment is inappropriate. *Harte*, 864 F.3d at 1162 (citing *DeLoach v. Beyers*, 922 F.2d 618, 622 (10th Cir. 1990)).

B. The District Defendants Are Not Entitled To Summary Judgment Because There Is Ample Evidence That Detective McHugh Used Excessive Force In The Execution Of The Search Warrant For The Sherrods' Home, Violating Their Well-Established Fourth Amendment Rights.

The District Defendants are not entitled to summary judgment because in addition to obtaining the search and arrest warrants in violation of the Sherrods' constitutional rights, Det. McHugh violated the Sherrods' Fourth Amendment rights by executing the search warrant in a constitutionally unreasonable manner. "The Fourth Amendment requires examination of whether or not a search and seizure is conducted in a reasonable manner." *Harte*, 864 F.3d at 1164 (citing *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985)). Further, "the decision to employ . . . force far greater than that normally applied in police encounters with citizens" in the execution of a search warrant is subject to the Fourth Amendment reasonableness analysis. *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1190 (10th Cir. 2001) (determining the reasonableness of using a SWAT team to execute a search warrant).

Assessing the reasonableness of the use of a team of officers who use great force in the execution of a search warrant is dependent upon a consideration of a variety of factors, including: (1) the property owner's history of violence; (2) other individuals residing on the property who have histories of violence; (3) officers' reasonable belief there are firearms on the property; (4) the number of adults on the property; (5) the belief that the raid was likely to be very dangerous to all persons on scene and concern about the safety of any children present; and (6) whether the use of a team of officers was intended to ensure a quick and safe execution of the search warrant and preservation of evidence. *Holland,* 268 F.3d at 1190–9.

Considering these factors, in *Harte*, where the property owners lacked any criminal history at all and the officers had no reason to believe there would be any other adults in the home or threats to the officers' safety, the court held that the use of a team of officers violated

the property owners' Fourth Amendment rights under the reasonableness analysis. *See Harte*, 864 F.3d at 1164. Accordingly, in situations where there is no reason to believe that the use of extraordinary force is necessary to effectively execute a search warrant, the use of such excessive force is a violation of the victim's Fourth Amendment rights.

Here, the use of a SWAT-like team to execute the search warrant for the Sherrods' home was unreasonable and violated their Fourth Amendment rights. First, at approximately 9:00 p.m., when the elderly Plaintiffs had already retired for the evening, Det. McHugh, along with members of the MPD, Bowie and Prince George's County Police Departments, forcibly entered the Plaintiffs' home by breaking down their front door.[196] After forcibly entering the home, Det. McHugh and the other officers had their weapons drawn, an extraordinary display of force, and called out to the Sherrods to come downstairs.[197] The officers then proceeded to keep the Sherrods at gunpoint as they made their way into their living room, where they were detained for approximately two hours.[198] The officers exhibited further unnecessary force when they handcuffed Mr. Sherrod, an elderly blind man.[199]

Det. McHugh and the other officers had no justification for using such excessive force in their execution of the search warrant, rendering the search unreasonable. Mr. and Mrs. Sherrod were both elderly individuals, aged 74 and 77 at the time. Moreover, Mr. Sherrod suffers from glaucoma, which has rendered him legally blind. Neither Mr. nor Mrs. Sherrod have any criminal history, let alone a history of violent crime. Further, the officers were aware that no weapons were registered to the Sherrods and no weapon had been found following the search of their vehicle. The Sherrods lived alone, and there is no evidence that the officers had reason to believe

[196] Vashti Sherrod Dep. at 166:8–171:11; Resp. of Vashti Sherrod to the Interrogs. Propounded by Def. Diane Lee Schulz, Resp. to Interrog. No. 17; McHugh Dep. at 205:6-17.
[197] Vashti Sherrod Dep. at 170:2; 185:17-186:7.
[198] *Id.* at 186:3-196:2.
[199] Vashti Sherrod Dep. at 186:3-7.

any other individuals, especially individuals with a history of violent crime, lived in the Sherrods' home with them. In short, the Sherrods posed no threat to the officers requiring the extraordinary display of force that they employed. Therefore, given the unnecessary and excessive use of force, Det. McHugh and the other officers acted unreasonably in their execution of the search warrant, violating the Sherrods' clearly-established Fourth Amendment rights. Because there is ample evidence supporting the Plaintiffs' assertion of excessive force, whether Det. McHugh used excessive force in executing the search of the Sherrods' home is an issue of fact for the jury to decide. *Smith v. Lanier*, 779 F. Supp.2d 79, 92 (D.D.C. 2011) (denying defendant's motion for summary judgment because it was an issue for the jury to decide whether the officers' conduct in the execution of a search warrant was reasonable).

C. The District Defendants Are Not Entitled To Summary Judgment Because There Is Ample Evidence That Detective McHugh Violated Plaintiffs' Clearly Established Fourth Amendment Rights By Causing The U.S. Capitol Police To Stop And Detain The Sherrods.

Det. McHugh is responsible for the violations of the Sherrods' clearly established Fourth Amendment constitutional rights that directly resulted from his issuance of the felony lookout without probable cause. The District Defendants assert that "[t]he detention by the U.S. Capitol Police was reasonable," and "[t]he U.S. Capitol Police did not violate a clearly established constitutional Fourth Amendment right when they detained the Plaintiffs and their vehicle based on the NCIC bulletin." Dist. Defs.' Mem. at 28. However, as Plaintiffs have not asserted any claims against the U.S. Capitol Police in this litigation, the District Defendants are challenging a claim the Plaintiffs have not made. The Capitol Police had no reason to know that Det. McHugh lacked probable cause to post the felony lookout for the Sherrods' vehicle, and therefore they are not subject to liability for the violations of the Sherrods' constitutional rights that occurred during the stop caused by Det. McHugh's wrongful conduct.

However, it does not follow from the reasonableness of the Capitol Police's reliance on the NCIC bulletin that Det. McHugh is not liable for *his* violation of the Sherrods' constitutional rights that resulted by his positing of the materially false felony vehicle lookout discussed below.

D. The District Defendants Are Not Entitled To Summary Judgment Because There Is Ample Evidence That By Seizing The Sherrods In The Absence Of Probable Cause During The Search Of Their Car And The Search Of Their Home, Detective McHugh Violated Their Clearly Established Fourth Amendment Rights.

Det. McHugh is further ineligible for qualified immunity because he violated the Sherrods' clearly-established Fourth Amendment rights when he caused them to be detained in the absence of probable cause and in the absence of a warrant during the June 24, 2015 stop by the Capitol Police and during the execution of the search warrant of the Sherrods' home, as both detentions constituted an arrest under District of Columbia law.

When the Sherrods were stopped by the U.S. Capitol Police on June 24, 2015, Det. McHugh caused them to be detained in the absence of probable cause, as already discussed.[200]

After the Sherrods had been pulled over, but before their car was searched, they were forced to remain in their vehicle at the location where they had been pulled over until Det. McHugh arrived, approximately 20-40 minutes later.[201] During this time, there was an officer stationed near the passenger door of the car at all times and the Sherrods were unable to leave.[202] Once Det. McHugh arrived on the scene, he instructed the Sherrods to exit their vehicle and forced them to remain outside their vehicle as it was searched for approximately an hour.[203]

[200] Vashti Sherrod Dep. at 144:1-3; 155:4-6.
[201] Vashti Sherrod Dep. at 144:1–3.
[202] Vashti Sherrod Dep. at 144:16-18.
[203] Vashti Sherrod Dep. at 152:1–155:9.

During this time, the Sherrods had no means to, and were unable to, leave the scene until Det. McHugh allowed them to do so.[204]

It is clearly established that "[t]he Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause." *Manuel v. City of Joliey, Ill.*, 137 S.Ct. 911, 918 (2017). Moreover, under D.C. law, it is well-established ***that an arrest occurs*** "the moment when the injured part can no longer move freely." *S. Freedman & Sons, Inc. v. Hartfor Fire Ins. Co.*, 396 A.2d 195, 198 (D.C. 1978) ("In regard to the allegation of false arrest, this jurisdiction's reading of the phrase seems clear. The injury occurs at the moment when the injured party can no longer move freely") (citing *Marshall v. District of Columbia*, D.C.App., 391 A.2d 1374 (1978)) (emphasis added). Further, "[t]he gist of any complaint for false arrest or false imprisonment is an unlawful detention and that being shown the burden is imposed upon the defendant to establish that there was probable cause for the arrest." *Id.*

Therefore, on June 24, 2015, when the Plaintiffs were stopped by the U.S. Capitol Police and subsequently not free to leave the scene for approximately 90 minutes, Det. McHugh's actions detaining them constituted an arrest under D.C. law, which violated their clearly-established Fourth Amendment rights because there was never probable cause to stop the Sherrods' car, to search their car, or to seize them during the traffic stop.

Similarly, during the July 7, 2015 execution of the search warrant for the Sherrods' home, Det. McHugh caused the Sherrods to be detained for approximately two hours, effectuating an unlawful arrest in violation of the Sherrods' Fourth Amendment rights.[205] As Det. McHugh ransacked the Sherrods' home, the Sherrods were "detained in the living room" in

[204] Vashti Sherrod Dep. at 155:16–156:3.
[205] Vashti Sherrod Dep. at 192:3–5;196:1–2.

the presence of armed police officers.[206] Neither of the Sherrods were permitted to leave the living room or leave their home during the search.[207] Moreover, Mrs. Sherrod, who was dressed for sleep in a "skimpy nightgown," was not even permitted access to additional clothing.[208] During this time, the Sherrods were unable to leave the confines of their living room unless and until Det. McHugh allowed them to do so, approximately two hours later.[209] Accordingly, the District Defendants are not entitled to summary judgment because Det. McHugh effectuated two warrantless arrests of Mr. and Mrs. Sherrod in the absence probable cause in violation of their clearly-established Fourth Amendment rights.

E. The District Defendants Are Not Entitled To Summary Judgment Because There Is Ample Evidence That Detective McHugh Violated The Sherrods' Clearly Established Fourth Amendment Rights By Searching Their Vehicle Pursuant To Coerced Consent.

Moreover, the District Defendants are not entitled to summary judgment on the issue of whether Det. McHugh violated the Sherrods' clearly established Fourth Amendment rights by searching their vehicle because there is a genuine dispute of material fact regarding whether Mrs. Sherrods' consent was coerced. It is inappropriate to resolve this factual dispute on summary judgment.

"It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant is 'per se unreasonable.'" *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (quoting *Katz v. United States*, 389 U.S. 347, 257 (1967)). Equally clear is "that a consent [must] not be coerced, by explicit or implicit means, by implied threat or covert force. For, no

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[206] Vashti Sherrod Dep. at 192:3–5.
[207] Vashti Sherrod Dep. at 192:3–5. ("We were detained the whole time in the living room. We were not allowed to move around.").
[208] Vashti Sherrod Dep. at 193:5–15 (explaining that a concerned female officer attempted to bring Mrs. Sherrod additional clothing, but told Mrs. Sherrod "I couldn't get any clothes because the detective is in your closet and master bedroom.").
[209] Vashti Sherrod Dep. at 196:2.

matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Id.*

Mrs. Sherrod maintains that she was unlawfully coerced into signing the consent form proffered by Det. McHugh, which rendered her "consent" invalid and the resulting warrantless search *per se* unreasonable. The District Defendants contest this assertion, alleging that Mrs. Sherrod's consent was valid. Dist. Defs.' Mem at 29.

To determine whether consent was coerced, courts employ a totality-of-the-circumstances test, assessing factors such as age, education or low intelligence, lack of advice concerning constitutional rights, length of any detention before consent was procured, the repeated or prolonged nature of questioning, the use of physical punishment, the setting where consent was obtained, and the actions of the parties. *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (citations omitted); *United States v. Price*, 558 F.3d 270, 278 (3d Cir. 2009) (internal citations omitted).

Application of this totality-of-the-circumstances test is inherently a fact-based endeavor. The Sherrods have produced sufficient evidence which would enable a reasonable jury to find Mrs. Sherrod's consent was coerced. This evidence includes: (1) Det. McHugh threatened Mrs. Sherrod, stating to her "[i]f you don't sign it, I will seize your car;"[210] (2) Mrs. Sherrod's fear that she would be arrested if she refused to comply; (3) Mrs. Sherrod's stress and anxiety from being detained at gunpoint and the setting in which the encounter occurred—on the side of Independence Avenue at noon surrounded by a crowd of onlookers; (4) the Sherrods' advanced age; and (5) Mr. Sherrod's blindness. Accordingly, a disputed issue of material fact exists about whether Mrs. Sherrod voluntarily consented to the search of her vehicle, precluding summary judgment on this issue. *See, e.g.*, *Ducey v. Meyers*, 144 Fed. Appx. 619 (9th Cir. 2005) (finding that summary judgment was precluded because a genuine issue of material fact existed as to

[210] Vashti Sherrod Dep. at 149:10-13.

whether a police officer had free and voluntary consent to enter patron's hotel room to conduct a search without a search or arrest warrant); *Hudson v. Hall*, 231 F.3d 1289, 1297 (11th Cir. 2000) ("Because a disputed issue of material fact exists about whether Hudson and Gaston consented at all to a search of their persons, the district court correctly denied qualified immunity for the searches of Hudson and Gaston . . . . At the summary judgment stage, we must accept Hudson's and Gaston's testimony.").

F. The District Defendants Are Not Entitled To Summary Judgment Because There Is Ample Evidence That Detective McHugh Violated Mrs. Sherrod's Clearly Established Fourth Amendment Rights By Engaging In Malicious Prosecution, As Alleged In Count Two.

In 2007, in *Pitts v. District of Columbia*, the D.C. Circuit "join[ed] the large majority of circuits in holding that malicious prosecution is actionable under 42 U.S.C. § 1983." 491 F.3d 494, 511 (D.C. Cir. 2007). Accordingly, since 2007, it has been "clearly established" in this jurisdiction that malicious prosecution is actionable under § 1983 in situations where an officer "deprive[s] [an individual] of their constitutional rights by initiating criminal proceedings against [them] without probable cause." *Id.* at 510. Specifically, the *Pitt* court held "that malicious prosecution is actionable under the Fourth Amendment to the extent that the defendant's actions cause the plaintiff to be 'seized' without probable cause." *Id.* (holding the plaintiff was seized without probable cause when there was a lack of any reliable evidence tying him to the crime, yet based on the "officers' affidavit-which contained several misstatements and omissions [the plaintiff] was detained in a halfway house for ten days.") (citations omitted).

As has been discussed at length, at every step of his investigation, Det. McHugh lacked probable cause to continue the criminal investigation of Mrs. Sherrod, as Ms. Schulz was unreliable and inconsistent, the video evidence clearly demonstrated that Mrs. Sherrod was not holding a gun, and every objective piece of information Det. McHugh discovered pointed to the

conclusion that Mrs. Sherrod was innocent.[211] Notwithstanding this utter lack of probable cause, Det. McHugh continued to pursue a criminal investigation against the Sherrods, which included, among other things: (1) a stop by the Capitol Police at gun point, (2) a search of the Sherrods' car, (3) a search of the Sherrods' home, (4) intentionally false and misleading affidavits, and (5) several warrantless arrests of both Plaintiffs. Ultimately, Det. McHugh's unfounded investigation culminated in Mrs. Sherrod's arrest pursuant to an invalid arrest warrant. After hearing the testimony of Det. McHugh and Ms. Schulz, the Grand Jury refused to indict Mrs. Sherrod and the USAO thereafter dismissed all charges pending against her.

Given the explicit clarity with which the *Pitts* court held that the Fourth Amendment is violated when an officer prosecutes an individual in the absence of probable cause, there can be no doubt that Mrs. Sherrod's right to be free from the unfounded criminal investigation, unreasonable searches, and unjustified seizures that she suffered at the hands of Det. McHugh was clearly established by 2015. Accordingly, summary judgment is inappropriate of Mrs. Sherrod's § 1983 malicious prosecution claim.

III. The District Defendants Are Not Entitled To Common Law Qualified Privilege On Mrs. Sherrod's Claims For False Arrest And False Imprisonment And Mr. Sherrod's Claims For False Arrest Because There Is Ample Evidence That Supports These Claims.

The District Defendants seek summary judgment on Plaintiffs' District of Columbia common law claims, set forth in Counts Four, Five, and Eleven of the Second Amended Complaint. Dist. Defs.' Mem at 38. Plaintiffs' Count Four concerns "Defendant McHugh's False Arrest And False Imprisonment of Plaintiff Vashti Sherrod;" Count Five pertains to "Defendant McHugh's False Arrest of Plaintiff Eugene Sherrod;" and Count Eleven concerns

[211] As discussed in greater detail *supra*, among the numerous pieces of evidence suggesting that Mrs. Sherrod did not own a gun were: (1) the video recording, (2) Mrs. Sherrod's denial of the allegations, (3) the lack of any weapon registered to the Sherrods, (4) the failure to uncover a weapon in the Sherrods' car and (5) the failure to discover a gun in the Sherrods' home.

"Defendants McHugh and Schulz's Liability for Punitive Damages."

At the outset, it is important to note that the District Defendants do not dispute, and therefore concede, that Plaintiffs have adduced sufficient evidence to satisfy each and every element of the common law claims asserted in Counts Four, Five, and Eleven of their amended pleading. Instead, the District Defendants maintain that Plaintiffs' three common law claims are barred as a matter of law, averring that "Det. McHugh is entitled to the common law qualified privilege on Plaintiff Vashti Sherrod's False Arrest/Imprisonment and Plaintiff Mr. Sherrod's False Arrest claims." Defs.' Mem at 38. Once again, the District Defendants are impermissibly asking the Court to resolve a disputed issue of fact in a summary judgment proceeding.[212]

"Under D.C. law, a police officer is not liable for the tort of false arrest if the police officer had probable cause to make the arrest, or "if the officer can demonstrate that (1) he or she believed, in good faith, that his [or her] conduct was lawful, and (2) this belief was reasonable." *Wesby v. District of Columbia*, 816 F.3d 96, 113 n.7 (D.C. Cir. 2016), *rev. on other grounds*, 2018 WL 491521, ___ S.Ct.___ (Jan. 22, 2018) (Kavanaugh, J. dissenting from the denial of rehearing en banc in the D.C. Circuit) (citing *Bradshaw v. District of Columbia,* 43 A.3d 318, 323 (D.C. 2012) (alteration in original) (internal quotation marks omitted)). "As the D.C. Court of Appeals has held, 'that standard resembles the section 1983 probable cause and qualified immunity standards,' with 'the added clear articulation of the requirement of good faith.'" *Wesby*, 816 F.3d at 113 n.7 (quoting *District of Columbia v. Minor,* 740 A.2d 523, 531 (D.C. 1999)).

[212] The District Defendants, without any citation to the record, baldly and wrongly assert: "In this case, the evidence is clear, Detective McHugh had a good faith belief that his conduct was lawful under the facts and circumstances he faced, probable cause existed to arrest the Plaintiff Vashti Sherrod…." Dist. Defs.' Mem. at 40.

"Under D.C. law, then, a police officer is entitled to immunity from a false arrest suit if the officer both (i) *reasonably could have believed* that there was probable cause to arrest and (ii) *subjectively believed in good faith* that there was probable cause to arrest." *Wesby*, 816 F.3d at 113 n.7 (emphasis in the orginal). Thus, the District's common law immunity test contains both an objective component (what the officer "reasonably could have believed') and a subjective component (what the officer "subjectively believed in good faith"), and proof of both is required as a matter of law for immunity to attach.

Here, whether Det. McHugh "reasonably could have believed that there was probable cause to arrest" Mrs. Sherrod (on Capitol Hill during the traffic stop, in her home during the search, and later at the police station when she surrendered pursuant to the warrant Det. McHugh had secured) or arrest Mr. Sherrod (on Capitol Hill during the traffic stop and in his home during its search) is inherently an issue of fact for the jury to decide. The evidence of record could easily permit a jury to conclude that no objectively reasonable police officer would have believed there was ever probable cause to either investigate or arrest the Sherrods for any crime. *See Curley v. Klem*, 298 F.3d 271, 279 (3d Cir. 2002) ("[A] jury can evaluate the objective reasonableness [of an officer's "beliefs or actions"] when relevant factual issues are in dispute."). Accordingly, the District Defendants are not entitled to summary judgment on their common law qualified immunity defense.

IV. The District Defendants Are Not Entitled To Summary Judgment As To Plaintiffs' Assault Claims Asserted In Count Seven Because There Is Ample Evidence Of Record To Support This Claims.

In Count Seven of the Second Amended Complaint, Plaintiffs allege that Det. McHugh and the District of Columbia are subject to liability for the common law tort of assault because: (1) "[o]n June 29, 2015, Defendant McHugh and/or police officers acting on his behalf and/or direction, without provocation or a reasonable or valid basis to do so, engaged in harmful and

offensive conduct towards both Plaintiffs Vashti Sherrod and Eugene Sherrod when they pointed shotguns at Plaintiffs who sat terrified in their car" [¶ 91]; and (2) "[o]n July 7, 2015, Defendant McHugh and police officers acting on his behalf and/or direction, without provocation or a reasonable or valid basis to do so, engaged in harmful and offensive conduct towards both Plaintiffs Vashti Sherrod and Eugene Sherrod when they kicked down the door to Plaintiffs' home in the middle of the night, without first announcing themselves and allowing Plaintiffs the opportunity to answer, in order to execute a search warrant that Defendant McHugh knew, or should have known, was invalid." ¶ 92.

The District Defendants do not seek summary judgment on Plaintiffs' assault claim set forth in ¶ 91 of Count Seven, regarding the Capitol Hill incident. For this reason alone, the District Defendants' motion for summary judgment seeking dismissal of Count Seven must be denied.

The District Defendants' summary judgment motion is limited to the assault described in ¶ 92, involving the nighttime home invasion by law enforcement officers of the Sherrods' residence orchestrated and directed by Det. McHugh. The District Defendants base their motion on the same specious grounds they relied upon when they sought and were denied dismissal of Count Seven earlier in this litigation: (1) "Detective Simmons of the Prince George's County Police Department secured the search warrant to search Plaintiffs' residence based on probable cause;" and (2) "Det. McHugh did not execute nor direct the forced entry of the Sherrods' front door." Dist. Defs.' Mem. at 40. As already discussed: (1) the evidence of record demonstrates a lack of probable cause for the warrant to search the Sherrods' home that Det. McHugh obtained and (2) the issue of probable cause is a jury question that precludes summary judgment as a matter of law.

At the outset of this litigation, the Court rejected the District Defendants' motion to dismiss Plaintiffs' assault claims set forth in Count Seven. The Court's resolution of this issue did not turn (as the District Defendants again wrongly claim) on whether Det. McHugh kicked in the Sherrods' front door: "Plaintiffs have sufficiently pleaded that Det. McHugh, through fraudulently seeking a search warrant and leading a search of Plaintiffs' home that involved the unannounced kicking in of their door, knew with substantial certainty that the Sherrods would fear that they were imminently going to be harmfully touched." *Sherrod v. McHugh*, C.A. No. 16-0816 (RC), 2017 WL 627377, *5 (D.D.C. Feb. 17, 2017). As the Court noted:

> To successfully plead assault, a plaintiff must plausibly show that the defendant intentionally created an imminent apprehension of ... a harmful or offensive ... contact, and that the plaintiff did indeed experience such an apprehension. … A defendant acts intentionally if he knows with substantial certainty that a harmful or offensive apprehension will result from his action. ... *A tortfeasor may intentionally create such an apprehension through the actions of a third party. … Thus, if a defendant acts knowing with substantial certainty that his actions will cause a third party to create the apprehension of imminent harmful or offensive contact in another, he is liable for assault.*

Id.

The District Defendants disingenuously attempt to excuse Defendant McHugh's misconduct by arguing that "Det. McHugh did not execute nor direct the forced entry of the Sherrods' front door." Dist. Defs.' Mem. at 40. Whether Defendant McHugh personally kicked down Plaintiffs' front door is beside the point—the evidence of record demonstrates that Det. McHugh led what was, in essence, an illegal nighttime home invasion of Plaintiffs' residence that terrified Mr. and Mrs. Sherrod and made them fear for their safety.

Thus, a reasonable jury could conclude that Det. McHugh's misconduct placed Mr. and Mrs. Sherrod in reasonable fear of bodily harm or, at a minimum, gave rise to a reasonable or well-founded apprehension of injury or imminent contact on their part. Indeed, the District Defendants no longer question (as they initially did in their motion to dismiss) that the Sherrods

reasonably feared physical harm as a result of Det. McHugh's conduct, though this too is a question for the jury to decide. *See Bassi v. Patten,* No. 07-1277, 2008 WL 4876326, at *1 (D.D.C. Nov. 12, 2008) (Bates, J.) ("Bassi's contention that he felt apprehension of imminent harm presents a factual issue to be decided by the jury.").

Finally, Plaintiffs have also adduced sufficient evidence from which a jury could infer that Det. McHugh knew with substantial certainty that he or other officers would engage in offensive touching of the Sherrods through handcuffing them during the search of their home and handcuffing Mrs. Sherrod at the time of her arrest pursuant to the arrest warrant that Det. McHugh obtained. Because Det. McHugh acted in bad faith and without probable cause in each instance, he was not justified in engaging in or ordering such force. *Sherrod*, 2017 WL 627377, *6 n.10 (citing *Jackson v. District of Columbia*, 412 A.2d 948, 954 (D.C. 1980)). Thus, in each instance, the handcuffing of the Sherrods gave rise to actionable common law assault claims that also preclude the grant of summary judgment on Count Seven.

V. The District Is Not Entitled To Summary Judgment As To Plaintiffs' Negligence Claim Asserted In Count Thirteen Because There Is Ample Evidence Of Record To Support This Claim.

A. The National Police Procedure Standard Of Care and Plaintiffs' Expert Philip P. Hayden, Ed.D.

The District is not entitled to summary judgment on Plaintiffs' negligence claim because there is sufficient evidence from which a reasonable jury could conclude that Det. McHugh's investigation fell below the national standard of acceptable police practices. To prevail under a negligence theory, Plaintiffs "must prove the applicable standard of care, a deviation from that standard of care by the defendant, and a causal relationship between that deviation and the plaintiff's injury." *District of Columbia v. Chinn*, 839 A.2d 701, 706 (D.C. 2003) (quoting

Holder v. District of Columbia, 700 A.2d 738, 741 (D.C. 1997) (quoting *Etheredge v. District of Columbia*, 635 A.2d 908, 917 (D.C. 1993)).

To establish the applicable standard of care and a deviation from such standard, expert testimony is required if the issue is beyond the keen of the average lay juror. *Hill v. Metro. African Methodist Episcopal Church*, 779 A.2d 906, 908 (D.C. 2001). Due to the specialized nature of police work, expert testimony is generally required on issues related to police policy and procedure. *See, e.g.*, *Smith v. District of Columbia, et al.*, 882 A.2d 778, 792–93 (D.C. 2005).

The District Defendants allege that, as a matter of law, Plaintiffs' negligence claim fails because the opinions of their expert are not admissible at trial to establish the relevant national standard of care. Dist. Defs.' Mem. at 43. Contrary to the District's assertions, Plaintiffs' police procedures expert, Philip P. Hayden, Ed.D., offers relevant and admissible opinions that are sufficient to permit a reasonable jury to conclude that Det. McHugh's investigation fell below a national standard of acceptable police practices.

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence. Rule 702 of the Federal Rules of Evidence provides for the admissibility of expert testimony in federal courts, subject to the following guidelines: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702, as amended to reflect the Supreme Court's holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, provides that in order for expert testimony to be admissible: (1) the testimony must be based on the special knowledge of the expert, and (2) it must be

helpful to the finder of fact. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 508 U.S. 579, 589–91 (1993)); *see also United States v. Jackson*, 425 F.2d 574,576 (D.C. Cir. 1970) ("'To warrant the use of expert testimony. . . two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.'" (quoting McCormick, Evidence § 13)).

Thus, the *Daubert* Court held "that Rule 702 of the Federal Rules of Evidence imposes a 'special obligation' on the trial court to make sure that any and all scientific testimony is both relevant and reliable." *25.202 Acres of Land & Building Affixed to Land Located in Town of Champlain, Clinton County,* 860 F.Supp.2d at 172 (citing *Daubert*, 509 U.S. at 589). In *Kuhmo Tire Co., Ltd. v. Carmichael*, the Supreme Court extended this gatekeeping obligation to *all* expert testimony. 526 U.S. 137, 147–49 (1999). Therefore, "[b]efore a district court may allow a witness to testify as an expert, it must be assured that the proffered witness is qualified to testify by virtue of his 'knowledge, skill, experience, training, or education.'" *United States v. Cooks*, 589 F.3d 173, 179 (5th Cir. 2009) (quoting Fed. R. Evid. 702).

Under Rule 702, Dr. Hayden is qualified to offer expert testimony on the national standard of care for criminal investigations and Det. McHugh's failure to comply with such standard. The District Defendants do not challenge Dr. Hayden's qualifications as an expert on police policy and procedure. Defendants therefore concede that by virtue of his "knowledge, skill, experience, training, or education," Dr. Hayden is qualified to testify on the issue of police procedure in criminal investigations. *United States v. Cooks*, 589 F.3d 173, 179 (5th Cir. 2009) (quoting Fed. R. Evid. 702).

Moreover, the District Defendants not only concede that Dr. Hayden is qualified to testify as an expert, they concede that IACP policies that Dr. Hayden relies on are relevant to establish the national standard of care for police conduct. Dist. Defs.' Mem. at 46 ("The Defendants are not arguing that all IACP policies are insufficient to establish the standard of care as to some issues relating to police practices because case law shows that they can.")

Rather than argue that IACP policies are not relevant to the national standard of care, the District Defendants assert that the policies Dr. Hayden relied upon cannot be relied upon in the articulation of a national standard of care because they "have not been adopted by the IACP as that organizations [sic] official policies." Dist. Defs.' Mem. at 46. However, whether the policies have been adopted as the IACP's "official policies" is entirely irrelevant. As Dr. Hayden explains in both his report and declaration, the IACP does not by itself set the national standard of care for police conduct. Rather, "the IACP's policies for search and arrest warrants and for the conducting of criminal investigations have been adopted by a substantial number of police departments throughout the United States and reflect the prevailing national standards for police conduct for such activities in this country."[213] Therefore, the IACP policies are relevant because they reflect a nationwide consensus on the issues of police procedure of moment to this litigation. Accordingly, whether the IACP has adopted these specific model policies as their "official position" is irrelevant to whether they are substantially similar to the policies of law enforcement agencies across the United States, and thus reflect the national standard of care for criminal investigations and other police procedures.

B. Dr. Hayden's Qualifications.

Plaintiffs have designated Dr. Hayden as their expert on police policy and procedure, in part, to opine whether Det. McHugh and the MPD failed to investigate the incident between Ms.

[213] Hayden Decl. at 2–3.

Schulz and Mrs. Sherrod according to the national standard of care for criminal investigations. Dr. Hayden has become qualified as an expert on issues of police policy and procedure throughout his over forty-eight years of law enforcement experience.[214] Dr. Hayden began his extensive career as a law enforcement officer as a military officer serving in combat in Vietnam.[215] Subsequently, Dr. Hayden worked for ten years in the FBI as an investigator and assistant commander of a Special Weapons and Tactics (SWAT) team making hundreds of arrests of violent criminals.[216] Additionally, Dr. Hayden served for sixteen years as an instructor at the FBI Academy in police tactics, including SWAT and other tactical programs. As an instructor at the FBI Academy, Dr. Hayden developed the Law Enforcement Training for the Safety and Survival Program and implemented it into the FBI's Violent Crimes Task Force and other police programs dealing with violent crimes. [217] During that period, Dr. Hayden also instructed over 8,000 federal, state, city, and county law enforcement officers in police procedures and tactics.[218] After retiring from the FBI, during the past eighteen years, Dr. Hayden's work has included serving as a police instructor, both nationally and internationally, teaching police policies and procedures, tactics, and the use of force.[219]

C. Dr. Hayden Applied A Reliable Methodology To Reach His Conclusions.

Dr. Hayden reliably determined the national standard of care and properly analyzed Det. McHugh's conduct at issue in this litigation by comparing his conduct to the national standard for criminal investigations. "To establish the national standard of care, an expert must do more than rely on his own experience or 'simply . . . declare that the District violated the national

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[214] Hayden Decl. Ext. at 3.
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*

standard of care.'" *Butera v. District of Columbia*, 235 F.3d 637, 659 (D.C. Cir. 2001) (quoting *Clark v. District of Columbia*, 708 A.2d 628, 635 (D.C. 1997)). "The expert must refer to commonly used police procedures, identifying specific standards by which the jury could measure the defendant's actions." *Id.* (citing *Doe v. Dominion Bank of Washington*, 963 F.2d 1552, 1563 (D.C. Cir. 1992)); *Phillips v. District of Columbia*, 714 A.2d 768, 775 (D.C. 1998); *District of Columbia v. Bethel*, 567 A.2d 1331, 1333 (D.C. 1990); *Toy v. District of Columbia*, 549 A.2d 1, 7–8 (D.C. 1988); *District of Columbia v. Peters*, 527 A.2d 1269, 1273 (D.C. 1987). In *Butera*, the court held that an expert had presented sufficient evidence to establish a national standard of care for police conduct because rather than relying solely on his twenty-five years of experience as a police officer, "[the expert] set forth concrete bases for his expert testimony: his consultation with police officers in Prince George's County, his review of the MPD's General Orders, and his examination of the U.S. Department of Justice Drug Enforcement Administration Handbook and Manual, University of North Florida, which provides training for police officers." *Butera*, 235 F.3d at 660.

As discussed fully in his report,[220] in formulating the national standard of care for criminal investigations, Dr. Hayden not only relied on his extensive experience, he also assessed the principles of police practices, policies, and procedures as thoroughly discussed by several national law enforcement organizations, including: The IACP, Federal Bureau of Investigation the Force Science Research Center, the National Officer Tactical Association, the Commission on Accreditation for Law Enforcement Agencies, Inc., the Institute for the Prevention of In-Custody Deaths, Inc. and Americans for Effective Law Enforcement.[221]

[220] Dr. Hayden's report is attached as Exhibit 1 to his declaration that is part of the evidentiary record here.
[221] Hayden Decl. at 2.

Dr. Hayden analyzed the IACP's policies regarding the conducting of criminal investigations and compared them to the internal operating procedures of law enforcement agencies nationwide.[222] This comparison led Dr. Hayden to the conclusion that the IACP policies on criminal investigation have been adopted by a substantial number of police departments throughout the United States and reflect the prevailing national standards for police conduct for such activities.[223] Following this analysis, Dr. Hayden determined that the IACP policies reflected an accurate expression of the national standard of care for criminal investigations and obtaining warrants to which he could compare Detective McHugh's conduct.

Moreover, Dr. Hayden specifically analyzed the internal operating procedures of the MPD and determined that the MPD policies were substantially similar to the IACP policies, and thus were part of the national consensus on the standard of care. *Accord Austin v. District of Columbia*, 2007 WL 1404444, No. 05–2219 (D.D.C. 2007) (finding that an expert appropriately established the national standard of care and that MPD policies were relevant to a determination of whether an officer breached the standard of care because as "[the expert] explained in his deposition testimony [ ] the General Orders are 'in line with' the national standard of care.").

Accordingly, in his report, Dr. Hayden not only noted how Det. McHugh's conduct violated the national standard of care, but also pointed out the specific MPD policies that Det. McHugh violated. In this regard, Dr. Hayden did not suggest that a single general order can set the standard of care for a law enforcement officer's conduct because "violation of [police] General Orders does not, in and of itself, demonstrate breach of a binding standard of care." *Austin v. District of Columbia*, 2007 WL 1404444, No. 05–2219 (D.D.C. 2007) (citing *Abney v. District of Columbia*, 580 A.2d 1036, 1040–41 (D.C. 1990)). Rather, as the MPD policies are

[222] *Id.* at 2–3.
[223] *Id.*

part of a consensus among police departments across the country, the internal operating procedures are relevant to establishing the national standard of care. *See Austin v. District of Columbia*, 2007 WL 1404444, No. 05–2219 (D.D.C. 2007) ("Showing that an officer failed to comply with the terms of a General Order does not, in other words, suffice under a negligence *per se* theory of liability. But that is not the theory advanced by Austin [the plaintiff], who relies instead on the proposition that General Orders-like other evidence of proper police procedures-may constitute part of the proof used to establish the governing local and national standards of care.").

Given the numerous "concrete bases for his expert testimony," under District of Columbia law, Dr. Hayden's analysis of the policies of police departments nationwide and the model policies of the IACP is sufficient to establish the national standard of care. *Butera*, 235 F.3d at 660. Dr. Hayden's analysis and formulation of the national standard of care will be helpful to the jury in determining what standard of care Det. McHugh's conduct is to be measured against and is therefore admissible at trial and properly considered by the Court on summary judgment.

D. Dr. Hayden's Opinions.

After comparing Det. McHugh's conduct to the national standard of care for criminal investigations, Dr. Hayden reached several conclusions about Det. McHugh's investigation that will aid the jury in determining whether Det. McHugh breached the national standard of care for criminal investigations. As elaborated upon in his report and subsequent declaration, Dr. Hayden opined that Det. McHugh inappropriately introduced bias into his investigation and failed to conduct an objective, fact-driven investigation, contrary to the national standard for criminal

investigation.[224] Further, Dr. Hayden opined that Det. McHugh breached the national standard of care for criminal investigations by failing to "search for new witnesses; complete background checks on witnesses, victims, and suspects, as appropriate; and seek additional information on officers."[225] In this regard, several aspects of Det. McHugh's investigation fell below the national standard, including: his failure to interview Kenneth Wright, his failure to thoroughly interview Ms. Schulz, and his failure to check Ms. Schulz' social media early in his investigation.[226]

Dr. Hayden also determined that Det. McHugh was negligent not only in relying solely on the word of one complaining witness, but also in his failure to re-interview Ms. Schulz after he had viewed the video recording of the May 14, 2015 incident and confront her with the "obvious inconsistences between her story about what occurred during the incident… and the starkly contrary video evidence."[227] Had Det. McHugh thoroughly interviewed and vetted Ms. Schulz, confronting her with the inconsistencies between her story and the video, he would have uncovered that Ms. Schulz never saw a gun in Mrs. Sherrod's hand at any time during the May 14, 2015 incident.[228]

Dr. Hayden further opined that Det. McHugh breached the national standard of care in several additional instances with respect to his handling of the video surveillance of the May 14, 2015 incident. First, Det. McHugh "failed to realize that the video not only failed to corroborate Ms. Schulz' retelling of the events to Det. McHugh in his interview of her, but that the videotape contradicted her story."[229] Dr. Hayden determined that not only did Det. McHugh fail to

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[224] Hayden Decl. Ex. 1 at 4.
[225] *Id.*
[226] *Id.* at 4–7.
[227] *Id.* at 6.
[228] *Id.* (citing Schulz Depo. 64:7–20).
[229] *Id* at 4.

appreciate that the videotape contradicted Ms. Schulz's story, he affirmatively made material misrepresentations of fact regarding the content of the video in order to mislead others into believing the tape supported Ms. Schulz's version of events and to obtain search and arrest warrants.[230] Dr. Hayden determined that Det. McHugh's written statements that: (1) Mrs. Sherrod bent into her car "just prior" to pointing her arm at Ms. Schulz; (2) Ms. Schulz left "immediately" after Mrs. Sherrod pointed her arm at her; and (3) the video tape "corroborated" Ms. Schulz' story all violated the national standard of care for criminal investigations and obtaining warrants by repeatedly making false statements about the events objectively depicted in the video.[231]

Moreover, Dr. Hayden opined that no reasonable officer, "would have come to the conclusion that Mrs. Sherrod was pointing a weapon simply by seeing the way she was holding her arm."[232] Despite Det. McHugh's allegation that the video was too "grainy" to see whether Mrs. Sherrod had a gun in her hand, Dr. Hayden opines that the video was sufficiently clear that a reasonable officer would conclude that no gun was used. Further, because no reasonable officer could conclude Mrs. Sherrod was pointing a gun, Dr. Hayden opined that at no point in time did Det. McHugh have probable cause to pursue a criminal investigation against Mrs. Sherrod.[233]

Dr. Hayden opined that the NCIC felony lookout that Det. McHugh posted, which included the statement "[a] suspect occupying the vehicle brandished a firearm at the victim," made the "car Mrs. Sherrod was driving a high-risk stop for any law enforcement officer who stopped the car."[234] Due to the high-risk nature of such a stop, officers would approach the Sherrods' car with weapons drawn, meaning that "one mistake by the Sherrods or a

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230 *Id.*
231 *Id.* at 4–5.
232 *Id.* at 5.
233 *Id.* at 5.
234 *Id.* at 6.

miscalculation by one of the officers could have resulted in the officers discharging their weapons at the Sherrods."[235] Det. McHugh again put the Sherrods' lives "in danger without good cause" when his negligence caused a search warrant of the Sherrods' home to be executed. Drawing upon his extensive experience as a law enforcement officer and knowledge of how police-suspect interactions unfold, Dr. Hayden offered his expert opinion that the execution of a search warrant in the Sherrods' home "placed the Sherrods at risk of being seriously injured or killed if they had not acted properly when the police entered their home."[236]

In light of the foregoing, Dr. Hayden summarized his expert opinions as follows: (1) the criminal investigation performed by Det. McHugh was flawed and fell below the standard of care set by the IACP; (2) Det. McHugh failed to determine any level of probable cause to conduct a felony investigation of Mrs. Sherrod for an assault with a dangerous weapon; (3) no objectively reasonable police officer would believe that the actions Det. McHugh took during his follow-up investigation of the May 14, 2015 incident were appropriate under the circumstances; (4) Det. McHugh's actions were contrary to national police standards for probable cause in determining justification for a search warrant for the Sherrods' residence and the arrest of Mrs. Sherrod; (5) Det. McHugh, in his reports and actions during his follow-up investigation, submitted police reports that were misleading, contained false information, and took actions that were contrary to national police standards for such activities, no objectively reasonable police officer would believe this to be proper; and (6) Det. McHugh, in continuing to attempt to prosecute Mrs. Sherrod, despite the information obtained during his follow-up investigation,

[235] *Id.*
[236] *Id*. at 5–6.

acted contrary to national police standards, and no objectively reasonable officer would believe this to be proper.[237]

Accordingly, Dr. Hayden's expert opinions are admissible at trial because Dr. Hayden is qualified to offer expert opinions on police policy and procedure, Dr. Hayden applies a reliable methodology to establish the national standard of care, Dr. Hayden applies a reliable methodology to compare Det. McHugh's actions to the national standard of care, and his opinions regarding Det. McHugh's negligence will be helpful to the jury.

E. The District Defendants' Arguments Regarding Dr. Hayden's Opinions Fail To State A Valid Rationale For Excluding Dr. Hayden's Testimony.

In support of their motion for summary judgment, the District Defendants incorrectly assert that even if Dr. Hayden sufficiently established the applicable standard of care, "Mr. [sic] Hayden fails to meet his burden of proving that Det. McHugh's conduct during his criminal investigation deviated from the standard of care relating to police practices." Dist. Defs.' Mem. at 47. In support of this assertion, the District Defendants lob several criticisms at Dr. Hayden's opinions, predominantly challenging the factual basis for his conclusions or misinterpreting his arguments. In response to the District Defendant's allegations, Dr. Hayden prepared a declaration, which is of record here, in which he further explains his methodology, considers the new information made available by the District Defendants, and rebuts their criticisms. Contrary to the District's assertions, there is no valid basis to exclude the testimony of Dr. Hayden on the basis that he has failed to establish Det. McHugh's breach of the standard of care.

As a threshold matter, it is inappropriate at the summary judgment stage of the proceedings for the District Defendants to challenge Dr. Hayden's interpretation of the facts that form the basis of his opinions. "Federal Rule of Civil Procedure 56 makes clear that summary

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[237] *Id*. at 10-11.

judgment is appropriate only if there is 'no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Rothe Development, Inc. v. Department of Defense*, 107 F. Supp.3d 183, 205 (D.D.C. 2015) (quoting Fed. R. Civ. P. 56(a)) (elaborating on the applicable standard of a motion for summary judgment in which the admissibility of expert testimony is challenged). "In determining whether there is a genuine dispute about material facts, the court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inference in that party's favor." *Id.* (citing *Grosdidier v. Broad. Bd. of Governors, Chairman*, 709 F.3d 19, 23–24 (D.C. Cir. 2013); *Wiley v. Glassman,* 511 F.3d 151, 155 (D.C. Cir. 2007)). Accordingly, at the summary judgment stage, this Court "*must* draw reasonable factual inferences in the light most favorable to [], the nonmovant." *Scott v. Harris*, 550 U.S. 372, 378 (2007) (emphasis added).

Because the Court must draw all reasonable factual inferences in favor of the Plaintiffs, it is inappropriate for the Defendants to base their motion for summary judgment on challenges to Dr. Hayden's interpretation of the facts that form the basis of his expert opinions, which for present purposes, the Court must accept as valid. *See Tolan*, 134 S.Ct. at 1868 ("By weighing the evidence and reaching factual inferences contrary to the [non-movant's] competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party."). Moreover, by dedicating a substantial portion of their Memorandum of Law in Support of their Motion for Summary Judgment to challenging Dr. Hayden's factual interpretations, the District Defendants highlight that there is a genuine dispute as to material facts, rendering summary judgment inappropriate. Dist. Defs.' Mem. at 47–61. In sum, the Plaintiffs, through the introduction of Dr. Hayden's expert report and declaration, have met their burden of producing evidence on which a reasonable jury could reasonably find in their favor on the negligence count.

However, assuming *arguendo* that the District may appropriately challenge Dr. Hayden's factual analysis at this stage of the litigation, none of their arguments establish a valid basis for excluding the testimony of Dr. Hayden.

1. Reclassification Of The Police Report.

Dr. Hayden reviewed the new facts asserted by Det. McHugh in his declaration that accompanies the District Defendants' motion and determined that the reclassification of Officer Patel's original report did not violate the national standard for criminal investigations to the extent that the change was not made without supervisor approval.[238] However, Dr. Hayden determined that Det. McHugh violated the national standard when, as the record suggests, Det. McHugh recommended the classification change without having any additional evidence to support the felony charge against Mrs. Sherrod.[239] Further, there is a factual dispute as to when Det. McHugh recommended the reclassification of the report, which is a fact material to whether Det. McHugh violated the national standard by injecting bias into his criminal investigation of Mrs. Sherrod.[240]

2. Bias.

The District Defendant's arguments with respect to bias misunderstand Dr. Hayden's use of the term by assuming it had a racial connotation. Dist. Defs.' Mem. at 49. To the contrary, Dr. Hayden's use of the term "is meant to indicate that Det. McHugh made a determination at the beginning of his investigation that Mrs. Sherrod had committed assault with a dangerous weapon and his entire investigation was colored by this mindset:"[241]

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[238] Hayden Decl. at 8.
[239] *Id.* at 8-9.
[240] *Id.* at 8–9 (summarizing the conflict between the testimony of Officer Patel and the testimony of Det. McHugh regarding when they discussed the reclassification).
[241] *Id.* at 10.

> Because Detective McHugh wrongly decided early in the investigation that Mrs. Sherrod was guilty of ADW, he proceeded on an assumption of guilt and failed to conduct the proper, thorough, and open-minded investigation that could and should have been pursued. Accordingly, because Detective McHugh was biased by his conclusion that Mrs. Sherrod had committed assault with a deadly weapon, he had a tainted perception of the evidence and ignored objective evidence suggesting that Mrs. Sherrod did not, in fact, have a gun. … *In summary, Detective McHugh's investigation improperly asked the question "how do I prove there was an assault with a dangerous weapon," rather than asking "did an assault with a dangerous weapon actually occur?"*[242] (emphasis added)

Dr. Hayden's opinion that Det. McHugh introduced bias into his investigation of Mrs. Sherrod is well supported by evidentiary record of this case.

3. Kenneth Wright.

The District Defendants incorrectly assert that Det. McHugh had no duty to interview Kenneth Wright because: (1) Mr. Wright is only shown in the video recording of the May 14, 2015 incident for approximately seven seconds and (2) Mr. Wright allegedly "does not claim to have witnessed the entire exchange" between Ms. Schulz and Mrs. Sherrod. Dist. Defs.' Mem. at 53. The District Defendant's argument is factually incorrect. Mr. Wright's declaration indicates that he did, in fact, witness the entire May 14, 2015 incident.[243] Moreover, the District Defendants cannot explain how any police officer could possibly be excused for failing to interview the only eyewitness to the serious felony that he is investigating to determine the truthfulness of the alleged victim's account -- even if that witness' view of the events was only fleeting.

4. Sergeant Architzel's determination that the case should be "investigated" as a misdemeanor.

The District's argument that Dr. Hayden was factually incorrect in stating that Sergeant Architzel originally determined the case should be "investigated" as a misdemeanor is purely

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[242] *Id*.
[243] Wright Decl. at ¶ 4.

semantics. Dist. Defs.' Mem. at 52. As the classification of an offense dictates how that offense is investigated, there is no material difference between deciding an offense should be "classified" as a misdemeanor or "investigated" as a misdemeanor.[244]

5. The absence of a gun registered to the Sherrods.

It is Dr. Hayden's opinion that in the absence of a gun registered to the Sherrods, the national criminal investigations standard mandates that an officer has sufficient evidence to believe that a gun was truly used by an alleged suspect before the officer takes the drastic step of obtaining a felony arrest warrant for the suspect.[245] Here, it is Dr. Hayden's opinion that at all times Det. McHugh lacked the necessary level of information because there was absolutely no evidence corroborating Ms. Schulz's story or suggesting the Sherrods had a gun.[246]

6. Detective McHugh's false statements.

The District Defendants challenge Dr. Hayden's opinion that Det. McHugh made materially false statements in his application for an arrest warrant by asserting there is "no material difference" between Det. McHugh's statements and the truth. Dist. Defs.' Mem. at 54. It remains Dr. Hayden's opinion that there is a significant, material difference between Det. McHugh's statement that Mrs. Sherrod bent into her vehicle "just prior to" pointing her arm at Ms. Schulz and the truth that Mrs. Sherrod bent into her car "forty-five seconds prior to" extending her arm towards Ms. Schulz.[247] Similarly, it remains Dr. Hayden's opinion that there is a material difference between "Detective McHugh's statement that Ms. Schulz got in her car and left the scene immediately after Mrs. Sherrod pointed her arm at her" and his assessment that Ms. Schulz actually left "twenty-one seconds after Mrs. Sherrod pointed her arm at Ms. Schulz."

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[244] Hayden Decl. at 13.
[245] Hayden Decl. at 13–14.
[246] *Id.*
[247] Hayden Decl. at 14.

Dist. Defs.' Mem. at 54; Hayden Decl. at 14–15. Accordingly, the evidentiary record establishes that Det. McHugh made several significant false statements of material fact.

Further, the District Defendants contend that Dr. Hayden is wrong is his assessment that Det. McHugh made a materially false statement when he alleged that the "video corroborates [Ms. Schulz's] series of events" as a false statement. Dist. Defs.' Mem. at 55. Dr. Hayden has considered the arguments advanced by the District Defendants and it remains his opinion that the video recording did not corroborate Ms. Schulz's version of events, and, in fact, the video contradicts her story from beginning to end.[248] Therefore, by stating that the video corroborated Ms. Schulz's story and relying on the video to bolster Ms. Schulz's allegations against Mrs. Sherrod in his affidavits seeking warrants, Det. McHugh made a materially false statement on an essential fact of this case.

7. No reasonable officer would conclude that Mrs. Sherrod was pointing a gun.

The District Defendants argue that Dr. Hayden's opinion that no reasonable officer would have come to the conclusion that Mrs. Sherrod was pointing a weapon simply by seeing the way she was holding her arm, without any objective new information to support this conclusion, is incorrect because Det. McHugh considered various other factors. Dist. Defs.' Mem. at 55-56. However, the Defendants misunderstand Dr. Hayden's opinion in this regard. Dr. Hayden maintains that whether Det. McHugh considered evidence in addition to the video tape is entirely irrelevant because looking solely at the video, any reasonable officer would have determined that Mrs. Sherrod was not pointing a gun.[249]

[248] Hayden Decl. at 15.
[249] Hayden Decl. at 16.

8. Emotional distress and other possible dangers.

The District Defendants assert that Dr. Hayden is not qualified to offer an opinion on the emotional distress and potential physical harm that could befall Plaintiffs from their encounters with the police because he is not a therapist. Dist. Defs.' Mem. at 56–57. The Defendants are incorrect in their assertion that Dr. Hayden is not qualified to opine on these issues because as an experienced law enforcement officer, he has first-hand knowledge of the danger of death or serious bodily injury that occurs during armed traffic stops and the execution of search warrants. Dr. Hayden is "particularly aware of how quickly and easily these encounters can escalate and seriously injure individuals in the Sherrods' position."[250] Accordingly, Dr. Hayden is qualified to "explain how severe this potential harm is, how dangerous these situations are, and how Mrs. Sherrod's emotional damage is reasonable under the circumstances."[251]

9. The District's contention that Dr. Hayden applied the wrong standard.

The District Defendants contend that Dr. Hayden "applie[d] the wrong standard" in evaluating Det. McHugh's conduct. Dist. Defs.' Mem. at 58–59. However, when Dr. Hayden uses the term "gross negligence," he is not using it "in the legal sense that the District Defendants' arguments take issue with. Rather, [Dr. Hayden] use[s] the term in the laymen's sense to mean extremely negligent."[252] Accordingly, Dr. Hayden is not applying the wrong standard, and his opinions are admissible.

10. Detective McHugh should have discovered that Ms. Schulz had never actually seen a gun earlier in his investigation.

The District Defendants argue that Dr. Hayden is incorrect to assert that Det. McHugh should have uncovered that Ms. Schulz had not seen a gun in Mrs. Sherrod's hand earlier in his

[250] Hayden. Decl. at 17.
[251] *Id.*
[252] Hayden Decl. at 18.

investigation and, if he had, the criminal investigations into Mrs. Sherrod would have ceased. Dist. Defs.' Mem. at 59–60. The District Defendants contend**:** (1) that Ms. Schulz' inconsistent deposition testimony is irrelevant because her earlier statements were all consistent, and (2) even if Det. McHugh had discovered earlier that Ms. Schulz had not actually seen a gun, the investigation would not necessarily have stopped. *Id*.

In fact, Ms. Schulz' statements about the gun were inconsistent on the very day of the incident. Critically, within hours of the May 14, 2015 incident, Ms. Schulz told her son that she "wasn't quite sure whether she had seen a gun or not."[253] Dr. Hayden maintains that if Det. McHugh had conducted a more thorough interview of Ms. Schulz, "he would have discovered Ms. Schulz's uncertainty at the initial stage of his investigation, more than likely changed the course of his subsequent actions."[254] However, because Det. McHugh failed to conduct a proper criminal investigation, Ms. Schulz was not seriously questioned about her seeing a gun in Mrs. Sherrod's hand until she was interviewed by Assistant U.S. Attorney Walters before her grand jury testimony, at which point Ms. Schulz admitted she never saw a gun.[255] Second, it is Dr. Hayden's expert opinion that even if Det. McHugh had continued to investigate after learning Ms. Schulz had never seen a gun, "with no witnesses claiming a gun was used, the investigation would have inevitably continued along a different path."[256]

11. Detective McHugh's failure to check Ms. Schulz's social media early in the investigation.

The District Defendants take issue with Dr. Hayden's opinion that Det. McHugh violated the national standard for criminal investigations by failing to check Ms. Schulz's social media accounts early in his investigation. Dist. Defs.' Mem. at 50–61. The District seeks to excuse Det.

[253] Carafano Dep. at 32:9–34:3.
[254] Hayden Decl. at 19.
[255] *Id.* at 19–20.
[256] *Id.* at 20.

McHugh's failure in this regard by alleging: (1) that Det. McHugh checked Twitter in preparation for his grand jury testimony and found no postings there regarding the May 14, 2015 incident and (2) that Ms. Schulz' mental health records are protected. *Id*.

Dr. Hayden has considered the District's contentions and maintains "that Det. McHugh failed to conduct a proper investigation and inappropriately handled the information contained in Ms. Schulz' Twitter postings" for several reasons.[257] First, Det. McHugh should have checked Ms. Schulz' social media long before his grand jury preparation, ideally before his first interview of her.[258] Second, if Det. McHugh had checked Ms. Schulz' social media, he would have discovered her Tweets that clearly stated she suffered from severe bipolar depression. It is Dr. Hayden's opinion that if Det. McHugh had discovered these Tweets during his investigation, the course of the investigation would have changed because "[a]s Ms. Schulz was the only complaining witness, her reliability was a crucial factor in the investigation that would have been called into question by the discovery of her Twitter postings detailing her mental illness."[259] Finally, the District Defendants' argument that Ms. Schulz's mental health records are protected is entirely irrelevant because Dr. Hayden's opinion is based on Ms. Schulz's own publicly available Tweets and not on information in her protected medical records.[260]

VI. Mrs. Sherrod's Common Law Malicious Prosecution Action Against Defendant McHugh, Asserted in Count Six, And Her Vicarious Liability Claims Against The District Of Columbia, Asserted In Count Thirteen, Are Both Actionable Because There Is Ample Evidence To Support Both Claims.

The District Defendants seek summary judgment on Count Six, in which Mrs. Sherrod asserts a District of Columbia common law claim for malicious prosecution against Det. McHugh, and Count Thirteen of the amended pleading, in which Mrs. Sherrod asserts*, inter alia*,

[257] Hayden Decl. at 21.
[258] Hayden Decl. at 21.
[259] Hayden Decl. at 21.
[260] *Id.*

that the "District of Columbia is vicariously liable for the actions taken by Defendant McHugh in maliciously prosecuting Plaintiff Vashti Sherrod under the doctrine of respondeat superior." Second Amended Compl. ¶ 143; Dist. Defs.' Mem. at 61.

Quoting *DeWitt v. District of Columbia*, 43 A.3d 291, 296 (D.C. 2012) the District Defendants aver that in order to succeed on her claim for malicious prosecution against Defendant McHugh (Count Six), Mrs. Sherrod must prove: "(a) a criminal proceeding instituted or continued by the defendant against the plaintiff, (b) termination of the proceeding in favor of the accused, (c) absence of probable cause for the proceeding, and (d) 'malice,' or a primary purpose in instituting the proceeding other than that of bringing an offender to justice." *DeWitt v. District of Columbia*, 43 A.3d 291, 296 (D.C. 2012) (quoting *Jarett v. Walker*, 201 A.2d 523, 526 (D.C. 1964)). Dist. Defs.' Mem. at 61.

The District Defendants do not question, and therefore concede, that Mrs. Sherrod has adduced sufficient evidence to establish the first two elements of her malicious claim against Det. McHugh, *i.e*. "(a) a criminal proceeding instituted or continued by the defendant against the plaintiff, and (b) termination of the proceeding in favor of the accused."

The District Defendants argue, however, that Mrs. Sherrod's malicious prosecution claim is not actionable, averring that "Det. McHugh had probable cause to believe that Mrs. Sherrod assaulted Ms. Schulz by pointing a gun at her during their encounter in front of Gingko Garden flower shop" and "for the additional reason that Plaintiff cannot prove malice." Dist. Defs.' Mem. at 62. As already discussed: (1) the evidence of record would support the jury concluding that Det. McHugh never had probable cause to charge Mrs. Sherrod with a crime; (2) the issue of the existence of probable cause is a material issue of fact for the jury to decide; and (3) therefore, the probable cause issue cannot be resolved in this summary judgment proceeding.

As to the fourth element (malice) the District Defendants overlook the well-settled

District of Columbia law that in malicious prosecution actions "[m]alice may be presumed from the lack of probable cause, if not inconsistent with other facts in the case." *Chapman v. Anderson*, 3 F.2d 336, 339–40 (D.C. Cir. 1925). Here, it is beyond cavil that the lack of probable cause is entirely consistent with the other facts of this case. Moreover, "[t]he question of malice is a question of fact for the jury." *Id*.

Finally, the District Defendants offer no legal arguments to support their challenge to Mrs. Sherrod's claim (asserted in Count Thirteen) that the District is vicariously liable for the malicious prosecution and other torts committed by its employee, Det. McHugh, at issue in this litigation. On this issue, the District of Columbia's law is also well-settled. In *Evans-Reid v. District of Columbia*, 930 A.2d 930, 937 (D.C. 2007) the D.C. Court of Appeals held: "The District is vicariously liable for the intentional and negligent acts of its officers acting within the scope of their employment."

VII. Mrs. Sherrod's Common Law Malicious Prosecution Claim in Count Six Against Defendant Schulz Is Actionable.

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the [record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23 (1986) (internal quotation marks omitted). Moreover, it is well settled that the Court may not consider, and must disregard, factual assertions in legal memoranda for which there is no evidentiary support in the record. *Glass v. Lahood,* 786 F. Supp. 2d 189, 198 (D.D.C. 2011) (disregarding factual assertions made in a legal memorandum that lacked evidentiary support, noting that "legal memoranda are not evidence.") Defendant's motion for summary judgment regarding Count Six fails for this reason alone. There is *no*

evidentiary support for any of the factual allegations made by counsel for Defendant Schulz in support of his client's motion for summary judgment on Count Six.

Ms. Schulz' counsel urges that: (1) "[Schulz] has denied the absence of probable cause and has denied malicious intent;" (2) "the actions of defendant Schulz in simply making a police report …cannot be considered extreme and outrageous conduct and/or intentionally reckless conduct to support a claim of malicious prosecution;" (3) "Schulz's act of making a police report cannot be considered the 'proximate cause' of plaintiffs' claim of injury and damage," as "a plaintiff must prove that it is more likely than not that the defendant's act or failure to act caused the harm; an act or failure to act causes harm if it played a substantial part in bringing about the harm;" and (4) "Schulz is not liable for plaintiffs' injuries and damages based upon unforeseeable intervening actions of Det. McHugh…. It cannot be expected that Ms. Schulz would foresee that an 'investigation' would entail an armed vehicle search, a home search, and an arrest by police." Schulz Mem. at 10-11. None of these assertions have any factual or legal basis. There is nothing in the evidentiary record before the Court that supports Ms. Schulz's contention that she has "denied the absence of probable cause and has denied malicious intent." In fact, in deposition, Ms. Schulz admitted that she never had probable cause to accuse Mrs. Sherrod of brandishing a gun during the May 14, 2015 incident because **she conceded she never saw a gun in Mrs. Sherrod's hand at any time during the incident**.[261]

Ms. Schulz's act of filing a false criminal police report without any probable cause for her claims is exactly the sort of maliciousness that is considered the extreme and outrageous or intentionally reckless conduct required to support a claim of malicious prosecution." *Chapman*, 3 F.2d at 339–40 ("Malice may be presumed from the lack of probable cause, if not inconsistent with other facts in the case"). Further, as to the malice requirement, Schulz's use of the racial

[261] Schulz Dep. 63:17-64:21, 67:11-17.

epithet "nigger" during her confrontation with Mrs. Sherrod supports a finding of malice in a malicious prosecution claim. *Dormu v. District of Columbia*, 795 F. Supp. 2d 7, 32 (D.D.C. 2011) ("As to the malice requirement, the Court finds that Janczyk's alleged use of the racial epithet "nigger" could support a finding of malice [in a malicious prosecution case involving false criminal charges]"). The issues of probable cause and malice are issues of fact for the jury to decide and cannot be resolved by the court, as Schultz's counsel wrongly appears to contend on summary judgment.

"Proximate cause is 'that cause, which in natural and continued sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred.'" *District of Columbia v. Harris*, 770 A.2d 82, 92 (D.C. 2001) (quoting *Lacy v. District of Columbia,* 424 A.2d 317, 320 (D.C. 1980) (internal quotation omitted)). In order to establish proximate causation, "'[t]he defendant need not have foreseen the precise injury, nor should [he] have had notice of the particular method in which a harm would occur, if the possibility of harm was clear to the ordinary prudent eye.'" *Harris*, 770 A.2d 92 (quoting *Spar v. Obwoya,* 369 A.2d 173, 177 (D.C. 1977); *Lacy*, 424 A.2d at 323.

The District of Columbia adheres to the "substantial factor" test of proximate causation, "a proximate cause is one which is a material element or a substantial factor in causing the injury." *Lacy*, 424 A.2d at 321. "More than one person can be a legal or proximate cause of an injury, provided that the individual's action is a substantial factor in bringing about the injurious result." *Estate of Kurstin v. Lordan*, 25 A.3d 54, 69 (D.C. 2011). The substantial factor test "is properly applicable whenever there are concurring causes of a single injury, regardless of whether the other causes are relatively passive or preexisting, such as a physical condition, or relatively active and occur subsequently, such as intervening negligent or criminal acts." *Lacy*, 424 A.2d at 317.

A reasonable jury could conclude that the filing of a false police report by Ms. Schulz -- whether it be deemed an intentional or negligent act -- was a substantial factor in causing the Sherrods' injuries because it set in motion a chain of events that culminated in the Capitol Hill traffic stop, the search of the Sherrods' home and the arrest and jailing of Mrs. Sherrod. Moreover, a reasonable jury could also conclude that Det. McHugh's actions were concurring and not intervening causes of the Sherrods' injuries. Indeed, given Schulz's false 911 report of a gun crime purportedly committed by Mrs. Sherrod, followed by Ms. Schulz's false report to Det. McHugh of the same gun crime and Schulz's knowledge that Det. McHugh intended to investigate Mrs. Sherrod for the gun crime she alleged Mrs. Sherrod had committed, it is difficult to understand how it is that Ms. Schulz now claims that Det. McHugh's arrest of Mrs. Sherrod was an "unforeseeable intervening act[] [by] Det. McHugh."

While Ms. Schulz disputes the foreseeability of the consequences of her falsely pursuing criminal charges against Mrs. Sherrod, the issues of foreseeability and proximate causation are factual questions that are for the jury to decide and cannot be resolved on summary judgment. *DeRienzo v. Metro. Transp. Auth.,* 237 Fed.Appx. 642, 646 (2d Cir. 2007) (holding that disputed questions of material fact existed as to the issue of foreseeability and, therefore, it was inappropriate for the district court to grant summary judgment as to this issue*); Colonial Parking, Inc. v. Morley*, 391 F.2d 989, 990 (D.C. Cir. 1968) ("The issue of proximate cause ordinarily is one for the jury.")

VIII. The District Defendants Are Not Entitled To Summary Judgment On The Claims Asserted In Counts Ten And Sixteen Because There Is Ample Evidence To Support The Intentional Infliction Of Emotional Distress Claims Asserted Therein.

In Count Ten of the Second Amended Complaint, Plaintiffs allege that "the conduct of [Defendants McHugh and Shultz]… complained of [in the Complaint], was extreme and outrageous and intentionally and/or recklessly caused Plaintiffs Vashti Sherrod and Eugene

Sherrod severe emotional distress" (¶ 119) and that "Defendants McHugh and Schulz knew, or should have known, that Plaintiffs were particularly susceptible to emotional distress due to their advanced age and Plaintiff Eugene Sherrod's disability." ¶ 120.[262] Count Sixteen repeats Mrs. Sherrods' intentional infliction of emotional distress allegations against Defendant McHugh, set forth in Count Ten, and in that sense, is duplicative of Count Ten.

The District Defendants argue that "to prevail on an [Intentional Infliction of Emotional Distress] claim, plaintiff[s] must establish that the defendant [Det. McHugh] engaged in '(1) extreme and outrageous conduct ... which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress.'" Dist. Defs' Mem. at 63 (quoting *Minch v. District of Columbia*, 952 A.2d 929, 940 (D.C. 2008)). The District does not challenge, and therefore concedes, that Plaintiffs' have proven elements two and three -- that Defendant McHugh acted "intentionally or recklessly" toward Plaintiffs (Element 2)[263] and "cause[d] plaintiff[s] severe emotional distress." (Element 3).

Instead, the District contends that Det. McHugh's actions [did not] r[i]se to the level of extreme and outrageous conduct" and, therefore, Plaintiffs have failed to establish Element 1 of their common law intentional infliction of emotional distress claim against Det. McHugh.

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[262] In a footnote to ¶ 120, Plaintiffs included the following authority: "*Hedgepeth* [*v. Whitman Walker Clinic,* 22 A.3d 789, 796 (D.C. 2011)], 22 A.3d at 816 ("We have held that in a suit for intentional infliction of emotional distress, 'acts which are not generally considered outrageous may become so when the actor knows that the other person is peculiarly susceptible to emotional distress.'" (quoting *Drejza v. Vaccaro*, 650 A.2d 1308, 1313 (D.C. 1994)); *Fox v. Hayes*, 600 F.3d 819, 842 (7th Cir. 2010) ("[B]ehavior that might otherwise be considered merely rude, abrasive, or inconsiderate, may be deemed outrageous if the defendant knows that the plaintiff is particularly susceptible to emotional distress." (quoting *Kolegas v. Heftel Broad. Corp*., 154 Ill. 2d 1, 21 (1992))."

[263] "[S]ubjective intent can rarely be proven directly; therefore, the requisite intent must be inferred, either from the very outrageousness of the defendant's acts or, for example, when the circumstances are such that 'any reasonable person would have known that (emotional distress and physical harm) would result,'" *Waldon v. Covington*, 415 A.2d 1070, 1077 (D.C. 1980) (quoting *Wood v. United Air Lines*, Inc., 404 F.2d 162, 165 (10th Cir. 1968)).

The District's argument fails immediately by its citation to and reliance on *Kotsch v. District of Columbia*, 924 A.2d 1040, 1046 (D.C. 2007). Dist. Defs.' Mem. at 63. There, the D.C. Court of Appeals held that because the police "officers had probable cause to arrest [the plaintiffs], the arrest itself cannot form the basis for a claim of extreme or outrageous conduct." *Kotsch*, 924 A.2d at 1046. It therefore follows that because Det. McHugh ***never*** had probable cause to arrest either Mr. or Mrs. Sherrod at any time, but nevertheless arrested them multiple times, in so doing he engaged in the "extreme or outrageous conduct" that triggers liability for intentional infliction of emotional distress under District of Columbia law. As already discussed, the issue of whether Det. McHugh had probable cause to investigate or arrest Plaintiffs at any time is a material issue of fact that only the jury can decide and precludes the entry of summary judgment on Plaintiffs' intentional infliction of emotional distress claims.

Moreover, "[o]utrageous conduct may consist of the abuse of a position of authority, particularly by, *inter alia,* police officers" and supports an award of damages for the intentional infliction of emotional distress under District of Columbia law. *Drejza v. Vaccaro*, 650 A.2d 1308, 1314 (D.C. 1994) (internal quotation marks and brackets omitted) (citing *Carter v. District of Columbia,* 254 U.S.App.D.C. 71, 94, 795 F.2d 116, 139 (D.C. Cir. 1986) citing Restatement (Second) of Torts § 46, comment e (1965)). At the outset of this litigation, this Court observed: "This case involves allegations that, if true, drastically undermine the integrity of a District of Columbia police officer and illustrates the damage that the unscrupulous use of power can inflict upon citizens of the state." *Sherrod*, 2017 WL 627377, *1. Plaintiffs' evidentiary record now before the Court proves that the allegations set out in the Second Amended Complaint that led the Court to make its observation just quoted are, in fact, true. That evidence alone is more than sufficient to support an award of damages for intentional infliction of emotional distress against Det. McHugh and in favor of Plaintiffs.

There is no question that Defendants' wrongful conduct caused Plaintiffs extreme emotional distress. Plaintiffs here set forth Mr. Sherrod's response to Defendant Schulz's Interrogatory No. 3, which asked him to describe Plaintiffs' injuries:

> The trauma of having Capitol Police officers point shotguns at me during the search of our car on Capitol Hill; the kicking down of our front door by Prince George's County police officers, who came into our home with guns drawn; and having to accompany my wife to turn herself in to the District of Columbia police, leaving her there, and seeing her shackled in Court has significantly and forever impacted me emotionally and physically. The trauma, fear, and panic caused by these events were even more distressing because I am legally blind. I couldn't fully see what was happening during these events, so the danger that I felt was magnified even greater than it would have been for a sighted person. The events caused confusion, disorientation, humiliation, and shame. I also experienced insomnia, depression, crying spells, anger, stress, nervousness, and loss of interest in my day-to-day normal activities. To this day, just talking or writing about this experience makes me feel sickened, angry, and tearful.
>
> My wife's depression, anxiety, fears, frustrations, and sadness greatly affected our relationship and our life, which still have not returned to normalcy. She wasn't, and still isn't, the same happy, vibrant, joyful, loving person that I knew. She awoke in the middle of the night in fits of crying from nightmares. Our home was a field of sadness, depression and dark, and lacked the normal intimacies that we used to have. The experience affected our relationship then, and still does to this very day because it isn't over. The alienation and loss of affection was a direct result of the horror of my wife being falsely accused by Diane Schulz of felony assault with a deadly weapon; the lies and harassment by Detective McHugh; and the trauma of being arrested and jailed for a crime for which she was completely innocent.
>
> Our home just wasn't the same after it was infiltrated, searched, and damaged. It used to be a source of pride for us. I was ashamed and humiliated in my own neighborhood. I avoided my neighbors because I was so embarrassed. I couldn't protect my wife, and as a result I felt hopeless, powerless, and weak. And to see my wife's face, pain, and utter despair hurt me to my core as a man. For the first time in our marriage, my wife did not want to celebrate Christmas. It broke my heart that she was so depressed and was suffering so much that she didn't want to decorate our home. I could hardly bear to see her in such pain.
>
> Our social life disappeared because my wife didn't want to leave the house. Even going to church became a rarity as a result of her unwillingness to get dressed and leave the house. She was so afraid that Det. McHugh would hurt her. Because of these fears, and in order to protect my wife, I moved our bedroom into the basement of our home because she felt someone would shoot through our bedroom window. I now too am very distrustful of the police and have fears that

> we may be injured as a result of this lawsuit. I've never felt this kind of paranoia before and worry about our overall safety.
>
> As my wife suffered emotionally and physically, I was right there supporting her, by her side without fail. The stress and fear that I saw in her eyes everyday was difficult for me to bear. I watched her tortuously go to the mailbox everyday looking for a letter from the Court until the day she called them and found out that the charges had been dropped. Until January 6, 2016, she cried every day, and I suffered along with her.[264]

Mrs. Sherrod continues to receive psychiatric treatment for the injuries that she suffered as a result of Defendants' wrongful conduct.[265]

IX. Defendant Schulz Is Not Entitled To Summary Judgment On Count Ten, As There Is Ample Evidence To Support Plaintiffs' Intentional Infliction Of Emotional Distress Claim Asserted Therein.

Ms. Schulz never had probable cause to accuse Mrs. Sherrod of a gun crime but nevertheless pursued criminal charges against Mrs. Sherrod that led to her arrest and jailing. Ms. Schulz thereby engaged in the "extreme or outrageous conduct" that triggers liability for intentional infliction of emotional distress under District of Columbia law. *Kotsch v. District of Columbia*, 924 A.2d 1040, 1046 (D.C. 2007). As already discussed and shown, the probable cause issue is a material issue of fact that only the jury can ultimately decide and precludes the entry of summary judgment on Plaintiffs' intentional infliction of emotional distress claims.[266]

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[264] Resp. of Pl. Eugene Sherrod to the Interrogs. of Def. Diane Lee Schulz (Jan. 13, 2017), Resp. to Inter. No. 3.

[265] Suppl. Resp. of Pl. Vashti Sherrod to the Interrogs of Def. Diane Lee Schulz (Jan. 16, 2018), Resp. to Inter. No. 5.

[266] Counsel for Defendant Schulz offers no evidentiary support for his assertion: "[i]n the present case it is undisputed that a confusing, emotionally charged, verbal altercation took place involving a person depressed, anxious, and troubled acting reluctantly after reassurance from her son." As already discussed, the Court may not consider, and must disregard, factual assertions in legal memoranda for which there is no evidentiary support in the record. *Glass v. Lahood,* 786 F. Supp. 2d 189, 198 (D.D.C. 2011). Moreover, the purported facts offered by defense counsel are irrelevant to the issue of Defendant Schulz' liability for the intentional infliction of emotional distress on Plaintiffs.

There is no question that Ms. Schulz's wrongful conduct caused Plaintiffs extreme emotional distress, that both Mr. and Mrs. Sherrod were in the zone of danger proximately caused by Ms. Schulz's misconduct, as set forth above in Mr. Sherrods' response to Defendant Schulz's Interrogatory No. 3. *See Shillington v. K-Mart Corp*., 102 N.C. App. 187, 197–98, 402 S.E.2d 155, 161 (1991) (Neither physical injury nor the foreseeability of injury are elements of the tort of intentional infliction of emotional distress). Finally, all of the issues raised in Defendant Schulz's motion for summary judgment on Count Ten are material factual issues that cannot be resolved at the summary judgment stage.

X. The District Defendants Are Not Entitled To Summary Judgment As To The Negligent Infliction Of Emotional Distress Claim Asserted In Counts Nine And Fifteen, As There Is Ample Evidence To Support Both Claims.

In Count Nine of the Second Amended Complaint, Plaintiffs allege that: (1) "Defendant McHugh negligently subjected Plaintiffs to an unlawful search, seizure, and arrest made without probable cause and based on a false statement, in violation of the duty that he owed to Plaintiffs under MPD's internal written policies and procedures, when he filed a police report alleging that Plaintiffs' vehicle was a 'felony vehicle' without probable cause to believe his report was accurate and/or truthful" (¶ 107); (2) "Defendant McHugh's negligent acts or omissions caused police officers to seize Plaintiffs' vehicle and surround Plaintiffs with guns drawn, causing Plaintiffs extreme fear for their physical safety" (¶ 108);[267] (3) "Defendant McHugh negligently subjected Plaintiffs to an unlawful search, seizure and arrest made without probable cause and/or

[267] In a footnote to ¶ 108, Plaintiffs included the following authority: "*See Hedgepeth v. Whitman Walker Clinic,* 22 A.3d 789, 796 (D.C. 2011) (the "zone of physical danger rule … permits recovery for mental distress if the defendant's actions caused the plaintiff to be in danger of physical injury and if, as a result, the plaintiff feared for his own safety" (internal quotations omitted)); *Williams v. Baker*, 572 A.2d 1062, 1073 (D.C. 1990) (holding that "if the plaintiff was in the zone of physical danger and was caused by defendant's negligence to fear for his or her own safety, the plaintiff may recover for negligent infliction of serious emotional distress … regardless of whether plaintiff experienced a physical impact.")."

based on a false affidavit, in violation of the duty that he owed to Plaintiffs under MPD's internal written policies and procedures, when he sought, obtained, and executed a search warrant for Plaintiffs' home" (¶ 109); (4) "Defendant McHugh and other police officers under his direction and/or control negligently executed the warrant issued to search Plaintiffs' home by failing to announce their presence and give Plaintiffs the opportunity to open the door before forcibly entering their home" (¶110); (5) "(t)he negligent acts or omission of Defendant McHugh and other officers under his direction and/or control when executing the search warrant for Plaintiffs' home caused Plaintiffs extreme fear for their physical safety in their own home, as they believed they were experiencing a home invasion when the police team led by Defendant McHugh swarmed their home and broke down their door in the middle of the night without first announcing themselves as police officers" (¶ 111); (6) "Defendant McHugh negligently subjected Plaintiff Vashti Sherrod to an unlawful search, seizure, and arrest made without probable cause and/or based on a false affidavit, in violation of the duty that he owed to her under MPD's internal written policies and procedures, when he swore out the false complaint and affidavit that led to the issuance of a warrant for Plaintiff Vashti Sherrod's arrest and the execution of the arrest warrant" (¶ 112); (7) "[t]he negligent acts or omissions of Defendant McHugh caused Plaintiff Vashti Sherrod extreme fear for her physical safety when she was placed into custody and confined to jail and further caused Plaintiff Vashti Sherrod to experience extreme humiliation when she was forced to appear in shackles before the D.C. Superior Court, facing felony charges" (¶ 113); (8) "[t]he negligent acts and omissions of Defendant McHugh caused serious emotional distress to Plaintiffs that a reasonable person in Defendant's position would have foreseen under the circumstances (¶ 114); (9) "[t]he conduct of Defendant McHugh towards Plaintiffs constitutes the negligent infliction of emotional distress in violation of the common law of the District of Columbia" (¶ 115); (10) "[a]t the time Defendant McHugh

committed this negligent and unlawful conduct towards Plaintiffs, he was acting in the scope of his employment as a police officer employed by the District of Columbia Metropolitan Police Department and was acting on behalf of and in the interests of his employer, Defendant District of Columbia" (¶ 116); and (11) "as a direct and proximate result of Defendants' negligent and wrongful conduct, Plaintiffs suffered significant enduring emotional and physical pain and suffering, anxiety, fear and shame, and other damages. Specifically, Plaintiff Vashti Sherrod has experienced severe insomnia, persistent recurring nightmares, and acute anxiety which affected her to such a degree that she was forced to seek and obtain medical treatment, which is presently ongoing. Plaintiff Eugene Sherrod has experienced similar symptoms of emotional trauma as a result of Defendants' wrongful conduct" (¶ 117).[268]

The evidentiary record adduced in discovery by Plaintiffs, as presented and discussed in this memorandum, establishes a factual basis for (at a minimum, as a jury question) each and every factual assertion set forth in Plaintiffs' negligent infliction of emotional distress claim.

"In the District of Columbia, a plaintiff may recover for negligent infliction of emotional distress [NIED] if the plaintiff proves (1) that the plaintiff suffered either a physical impact or was within the zone of danger of the defendant's actions, (2) that the plaintiff suffered emotional distress that was serious and verifiable, and (3) that the defendant acted negligently." *David v. District of Columbia*, 436 F. Supp. 2d 83, 89 (D.D.C. 2006) (citations omitted).

At the early stages of this litigation, the Court rejected the District Defendants' motion to dismiss Plaintiffs' NIED claim. In its Memorandum Opinion, the Court discussed the key District of Columbia legal principals that apply to the NIED claims asserted by the Sherrods -- legal principals that the District Defendants largely ignored in their pending summary judgment

[268] Count Fifteen repeats Mrs. Sherrod's intentional infliction of emotional distress allegations against Det. McHugh set forth in Count Nine and, in that sense, is duplicative of Count Nine.

motion seeking the dismissal of Plaintiffs' NIED claims.

The Court observed that "[s]howing reasonable fear for one's safety suffices to satisfy the 'zone of danger' element" of Plaintiffs' NIED claims (*Sherrod*, 2017 WL 627377, *7 citing *Asare v. LM-DC Hotel, LLC*, 62 F. Supp. 3d 30, 35 (D.D.C. 2014)) and that "[s]uch a fear may be based upon 'a high risk of physical impact.'" *Sherrod*, 2017 WL 627377, *7 (quoting *Golden v. World Sec. Agency, Inc.*, 884 F. Supp. 2d 675, 697 (N.D. Ill. 2012) (ellipsis omitted). Especially significant here, the Court held that "[i]n the context of false arrests, 'a reasonable jury could conclude that an officer's negligent conduct in effecting a false arrest creates a zone of danger and causes the arrestee to fear for the arrestee's safety, resulting in emotional distress.'" *Sherrod*, 2017 WL 627377, *7 (quoting *David*, 436 F. Supp. at 90 (ellipses and bracketing removed)).

The District Defendants challenge the claim that Det. McHugh is liable for the emotional distress he caused Plaintiffs when the U.S. Capitol Police approached the Sherrods with shot guns or their service weapons pointed at the car, even though "Det. McHugh understood that if the Sherrods were stopped by law enforcement, the police would approach with caution" (*i.e.*, with guns drawn). Dist. Defs' Mem at 67.

As already discussed, Det. McHugh is liable for constitutional violations and common law torts that occurred when the U.S. Capitol Hill Police stopped the Sherrods pursuant to the felony lookout that Det. McHugh issued without probable cause. The stop and the events that followed constituted a false arrest of the Sherrods by Det. McHugh. "The unlawful detention of a person without a warrant for any length of time whereby he is deprived of his personal liberty or freedom of locomotion ... by actual force, or by fear of force, or even by words constitutes false imprisonment." *David*, 436 F. Supp. 2d at 88 (citing *Weishapl v. Sowers,* 771 A.2d 1014, 1020 (D.C. 2001) (quoting *Dent v. May Dep't Stores, Co.,* 459 A.2d 1042, 1044 (D.C. 1982)).

As the Court has already determined, "[i]n the context of false arrests, 'a reasonable jury could conclude that an officer's negligent conduct in effecting a false arrest created a zone of danger and caused the arrestee to fear for the arrestee's safety, resulting in emotional distress.'" *Sherrod*, 2017 WL 627377, *7 (quoting *David*, 436 F. Supp. at 90) (ellipses and bracketing removed)). The evidence of record set forth above plainly documents that the Sherrods feared for their safety throughout the Capitol Hill incident, which resulted in considerable emotional distress for them.

The District Defendants are likewise liable for NIED for the negligent, illegal nighttime raid of the Sherrods' home orchestrated by Det. McHugh. In rejecting the District Defendants' motion to dismiss on this issue, this Court held: "Given that the police allegedly did not announce their presence and conducted the search during the night, Plaintiffs have sufficiently alleged that Det. McHugh's fraudulent obtaining of a search warrant and subsequent search caused Plaintiffs to reasonably fear for their safety and expect unwanted physical touching during the course of a brazen home invasion." *Sherrod*, 2017 WL 627377, *8. Plaintiffs have adduced ample evidence and sufficient legal arguments to support their claims that the District Defendants are liable for the events that occurred during the illegal search of the Sherrods' home, conducted by Det. McHugh and the squad of law enforcement officers that he assembled to do his bidding.

The District Defendants also overlook the humiliation and fear that Mrs. Sherrod experienced when she was arrested and jailed by Det. McHugh pursuant to the arrest warrant he obtained without probable cause. And, of course, the District Defendants overlook the fact that Mrs. Sherrod sought, and is still receiving, psychiatric care for the emotional injuries that she suffered as a result of Det. McHugh's repeated and outrageous misconduct and the abuse of his authority and power that he visited upon her and her husband.

Finally, Plaintiffs do not seek to establish liability for NIED based on "a special relationship test," as the District Defendants wrongly claim. Dist. Defs.' Mem. at 67-68. The arguments advanced by the District on that issue are irrelevant and need not be considered by the Court.

At a minimum, there are issues of material fact regarding Plaintiffs' NIED claims which require the denial of the summary judgment on this issue.

XI. Defendants' Motions For Summary Judgment On Plaintiffs' Punitive Damages Claims Asserted In Count Eleven Should Be Denied, As There Is Ample Evidence To Support The Claims.

In Count Eleven of the Second Amended Complaint, Mr. and Mrs. Sherrod both seek an award of punitive damages against Det. McHugh and Ms. Schulz, averring that: "[t]he individual tortious acts and omissions of each Defendant complained of herein were accompanied by fraud, ill will, recklessness, wantonness, oppressiveness, and willful disregard for Plaintiffs' rights." ¶ 125.

Det. McHugh failed to present any argument warranting the grant of summary judgment on Plaintiffs' punitive damages claim against him. Det. McHugh has therefore failed to carry his burden on summary judgment on this issue, and his motion seeking dismissal of Count 10 must be denied. *See Celotex Corp*., 477 U.S. at 322–23.

Ms. Schulz, however, argues that she is entitled to summary judgment on the Sherrods' punitive damages claim because "the undisputed facts in this case cannot be deemed 'clear and convincing' evidence of outrageous, grossly fraudulent or reckless conduct." Schulz Mem. at 13. Ms. Schulz's contentions are without merit.

Defendant Schulz's malicious prosecution of Mrs. Sherrod, her intentional infliction of emotional distress on Mr. and Mrs. Sherrod, and her use of the racial epitaph "nigger" during her

May 14, 2015 encounter with the Sherrods (both African-Americans) all warrant the imposition of punitive damages against Ms. Schulz.

Punitive damages are always appropriately considered by the jury in malicious prosecution and intentional infliction of emotional distress cases. *See Weisman v. Middleton*, 390 A.2d 996, 999 (D.C. 1978) ("[Defendants] also claim that it was error for the trial court to allow the jury to consider attorney's fees, compensatory damages, and punitive damages as proper elements of its damage award. We reject this contention; all of these traditionally have been held to be proper elements for the jury's consideration in malicious prosecution cases."); *Anderson v. The Islamic Republic of Iran*, 753 F. Supp. 2d 68, 87 (D.D.C. 2010) ("This is not to say, however, that plaintiff may not recover punitive damages in this action. …. where appropriate, punitive damages may be pursued as a remedy to an intentional tort… Here, as seen above, plaintiffs have set forth proper causes of action for intentional infliction of emotional distress-an intentional tort.") (internal citations omitted).

Further, in *Dormu v. District of Columbia*, 795 F. Supp. 2d 7 (D.D.C. 2011), a malicious prosecution action, the district court rejected the defendants' argument that they were entitled to summary judgment on the plaintiff's claim for punitive damages because the plaintiff had failed to offer any evidence that the police officers acted with malice. The court observed that "[d]irect evidence is not necessary to prove the requisite state of mind; rather, a defendant's state of mind 'may be inferred from all the facts and circumstances of the case.'" *Id.* at 34 (citing *Robinson v. Sarisky,* 533 A.2d 901, 906 (D.C. 1988)). The district court concluded that the plaintiff had presented sufficient facts in support of his punitive damages claim, in part, because the defendant "referred to [the plaintiff] as a 'nigger'" during the incident that gave rise to the litigation. *Id.* The court stated that a reasonable juror could conclude that the use of the epithet proved malice by defendant towards the plaintiff. *Id.* In support of its decision, the district court cited *Tolliver*

v. Amici, 800 F.2d 149, 151 (7th Cir. 1986) (finding racial slurs to constitute evidence of ill will or malice to support award of punitive damages).

In *District of Columbia v. Bamidele,* 103 A. 3d 516, 522 (D.C. App. 2014), the D.C. Court of Appeals discussed two prior cases in which it reached different conclusions regarding the appropriateness of punitive damages. The court noted that in the first case, *Croley v. Republican Nat. Committee,* 759 A.D. 2d 682 (D.C. App. 2000), in which the court found that punitive damages were not appropriate where defendants accosted the plaintiff but the plaintiff did not allege that the guards "delivered other blows, engaged in any sustained assaultive conduct, or committed any acts placing [Plaintiff] in physical danger prior to the assault ... [n]or did the guards *make any aggressive comments or gestures tending to reveal their malicious intent***.**" *Barnidele*, 103 A.3d at 523 (emphasis added).

In contrast, in the second case, *King v. Kirlin Enters.,* 626 A.2d 882, 884 (D.C. 1993), the court noted, "the defendant [assaulted the plaintiff] *yelling racial epithets* while [carrying out the assault]." *Id.* (emphasis added). In finding that the facts of the *Barnidele* case were more akin to those in *King*, and consequently that the Plaintiffs were entitled to punitive damages, the court specifically pointed out that the defendants had used derogatory language against the plaintiff during the attack. The Court noted that "[s]uch derogatory comments were absent in *Croley* ('[The plaintiff's]' account is devoid of comments or mention of gestures by [the defendants]...') but were present in *King* (noting that the defendant shouted 'racial epithets and obscenities')." *Id.*

Finally, where, as here, the "'clear and convincing' evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists [is] whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106

S. Ct. 2505, 2514 (1986). Here, there is ample evidence of record upon which a jury applying the clear and convincing evidentiary standard could find for the Sherrods on the issue of punitive damages. Therefore, Ms. Schulz's motion for summary judgment on this issue should be denied.

XII. Defendant Schulz's Motion For Summary Judgment On Plaintiffs' Negligence Claim Asserted In Count Seventeen Should Be Denied, As There Is Ample Evidence To Support The Claim.

In Count Seventeen, the Sherrods allege: (1) "Defendant Schulz owed a duty to Plaintiffs to act reasonably toward them and all other members of the community and prevent them from being unlawfully detained, arrested and prosecuted" (¶ 172); (2) "Defendant Schulz breached her duty to Plaintiffs by negligently relaying the details of the May 14, 2015 traffic incident to Defendant McHugh" (¶ 173); (3) "Defendant Schulz breached her duty to Plaintiffs at all times by negligently failing to withdraw her complaint against Plaintiff Vashti Sherrod when she knew, or should have known, that her account of the May 14, 2015 traffic incident to Defendant McHugh was more likely than not mistaken and or false" (¶ 174); and (4) "[a]s a direct and proximate result of Defendant Schulz' negligence, Plaintiffs were subjected to unlawful searches, seizures, arrests and/or detentions made without probable cause and thereby suffered significant emotional and physical pain, suffering, fear and shame, and other damages" ¶ 175.

Ms. Schulz maintains that "plaintiffs' Count 17 alleging negligence against [her] is a wastebasket legal theory asserting that defendant Schulz failed to 'act reasonably', that she negligently relayed details and that she negligently failed to withdraw her police report" and that "[t]hose allegations are defeated by an analysis of the elements of 'proximate cause', 'foreseeability', and 'intervening negligence', as referenced above in the undisputed circumstances of this case." Schulz Mem. at 13–14.

Plaintiffs have already addressed Ms. Schulz's instant arguments regarding proximate cause, foreseeability, and intervening negligence in Plaintiffs' analysis of Ms. Schulz's identical

arguments proffered in support of her motion for summary judgment on Plaintiffs' malicious prosecution claim in Count Seventeen of the Second Amended Complaint.

This Court has already determined that Plaintiffs have asserted a viable negligence action against Ms. Schulz in Count Seventeen of their amended pleading. The Court rejected Ms. Schulz's opposition to the Sherrods' motion to amend their complaint to add the negligence claim in its memorandum opinion reported in *Sherrod v. McHugh*, 249 F. Supp.3d 85, 87 (D.D.C. 2017). There, the Court observed:

> Ms. Schulz's second argument - that amending the complaint would be futile because the negligence count contradicts the intentional tort claim-fares no better than her first. "A party may state as many separate claims or defenses as it has, regardless of consistency." Fed. R. Civ. P. 8(d)(3). …A "plaintiff may continue to allege ... inconsistent theories so long as she does not recover damages on both claims." *Dingle v. District of Columbia*, 571 F.Supp.2d 87, 99 (D.D.C. 2008); *see also Harvey v. Kasco*, 109 F. Supp.3d 173, 179 (D.D.C. 2015). To add a negligence count to a complaint alleging intentional torts, the negligence cause of action must be "distinctly pled" and "'based upon at least one factual scenario that presents an aspect of negligence' distinct from the [intentional tort] itself." *Id.* at *7 (quoting *Dormu v. District of Columbia*, 795 F.Supp.2d 7, 30 (D.D.C. 2011)). Plaintiffs' amended complaint distinctly pleads the negligence count and the intentional torts counts. *See* Proposed Am. Compl. ¶¶ 84–89; 118–23; *88 171–75. The counts are also based upon distinct factual scenarios: the allegations of intentional torts allege that Ms. Schulz intentionally filed false police reports while the negligence count alleges that she owed a duty to the Sherrods to prevent them from being unlawfully arrested and to withdraw her false complaint. *See* Proposed Am. Comp. ¶¶ 171–75.
>
> …
>
> Schulz's final argument-that the negligence claim does not specifically describe the duty Ms. Schulz owed to Plaintiffs-also comes up short. "A uniform standard of care applies in actions for negligence [in the District of Columbia]: reasonable care under the circumstances." *Sherrod*, 2017 WL 627377 at *6 (quoting *O'Neil v. Bergan*, 452 A.2d 337, 341 (D.C. 1982)). A plaintiff need not further describe the applicable standard of care. *See id.* (citation omitted). The Court squarely addressed this issue in its previous memorandum opinion. *See Sherrod*, 2017 WL 627377 at *6. In fact, there the Court found Plaintiffs' claims plausible even though they did not explicitly state that the defendants owed District Defendants a duty of reasonable care under the circumstances. *See id*. There is no basis for Ms. Schulz's cursory argument that Plaintiffs are required to plead a more specific duty than the default "reasonable care under the circumstances."

Sherrod, 249 F. Supp. 3d at 87–88.

The Court's decision is the law-of-the case, and Ms. Schulz has offered no reason for the Court to reconsider its ruling that Plaintiffs have asserted a viable negligence action against her. "The law of the case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" S*loan v. Urban Title Services, Inc.*, 770 F. Supp. 2d 216, 223–24 (D.D.C. 2011) (quoting *Pepper v. United States,* 562 U.S. 476 (2011)). Accordingly, Ms. Schulz's motion for summary judgment on Count Seventeen should be denied.

XIII. Defendant Schulz Is Not Entitled To The Dismissal Of Mr. Sherrod's Action.

Ms. Schulz is not entitled to a dismissal of Plaintiff Eugene Sherrod's action on the grounds that he has not asserted a claim for which relief can be granted in his litigation. Quite the contrary, as thoroughly discussed above, Mr. Sherrod has actionable claims for intentional infliction of emotional distress, negligence, and punitive damages against Defendant Schulz -- claims that will survive summary judgment and be considered by the jury at trial.

CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on January 26, 2018, I served a copy of the foregoing *via* the CM/ECF system on:

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