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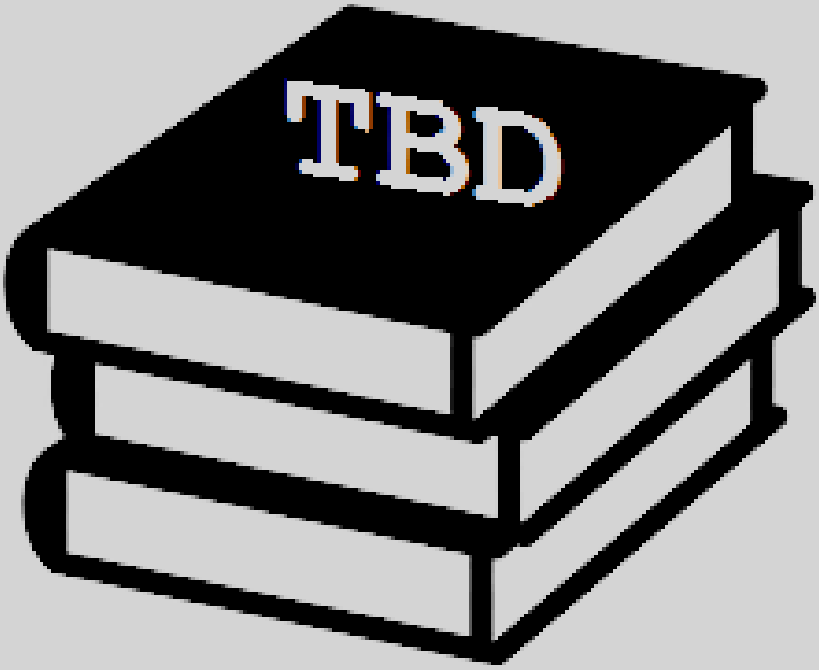




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**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF NEW YORK**

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| **DOUGLAS WARNEY,** | |
| **Plaintiff,** | **Case No. 07-CV-06246 (DGL)** |
| **v.** | **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS MONROE COUNTY, GREEN, BERNSTEIN, AND LEHMANN'S MOTION TO DISMISS** |
| **THE CITY OF ROCHESTER et al.,** | |
| **Defendants.** | |

Plaintiff Douglas Warney, by and through his undersigned counsel, hereby opposes the motion to dismiss filed by defendants Monroe County, Michael C. Greene, Larry Bernstein, and Wendy Evans Lehmann.

## INTRODUCTION

Plaintiff Douglas Warney was wrongfully imprisoned for a murder he did not commit until his conviction was vacated and the charges against him were dismissed when DNA testing of the blood found at the crime scene proved his innocence and led to the identification of another individual as the only perpetrator of the crime. This gross miscarriage of justice was caused by the concerted efforts of at least six Rochester Police Department ("RPD") officers who ensured Mr. Warney's conviction by subjecting him to a coercive interrogation, fabricating inculpatory evidence, withholding exculpatory evidence, and failing to investigate other leads. The injustice against Mr. Warney was prolonged, however, by the post-conviction misconduct of the Monroe County District Attorney Michael C. Green and his subordinates, Larry Bernstein and Wendy Evans Lehmann, who, in a manner that shocks the conscience, knowingly and

deliberately let an innocent man languish in prison for months, after in bad faith denying his requests for DNA testing, secretly conducting the testing themselves, and concealing the exculpatory results. The prosecutors' actions were not isolated to Mr. Warney's case, but rather were the result of the unconstitutional policies and practices of the Monroe County District Attorney's Office ("DA's Office") to arbitrarily and in bad faith deprive inmates access to potentially exculpatory DNA evidence, withhold the exculpatory results of any testing conducted, and fail to train and supervise prosecutors with respect to their obligation to disclose exculpatory evidence to defense or post-conviction counsel.

On May 11, 2007, plaintiff filed this civil rights action against the City of Rochester, Monroe County, the RPD officers involved the investigation of Mr. Warney, and the individual prosecutors who concealed the exculpatory DNA evidence that led to Mr. Warney's exoneration. The defendant prosecutors now move to dismiss all the claims against them,[1] arguing that they are entitled to absolute immunity for their misconduct that plainly involved no prosecutorial advocacy in a pending criminal proceeding. Instead, their conduct can only be characterized as administrative or investigatory actions that simply amounted to the knowing and intentional misuse and concealment of the evidence establishing that an innocent man was imprisoned for a crime he did not commit. The defendant prosecutors therefore simply have not met their burden of establishing an entitlement to absolute immunity from liability under *Imbler v. Pachtman,* 424 U.S. 409 (1976), and its progeny. Nor have they established that they are entitled to qualified

[1] Without conceding that the defendant prosecutors are entitled to either absolute or qualified immunity for this misconduct, plaintiff withdraws Count VI of the complaint, which alleges that the defendant prosecutors violated plaintiff's due process rights through their bad-faith denial of post-conviction access to DNA testing. However, plaintiff continues to assert an unconstitutional policy and practice of such conduct against the county in Count IX.

immunity. Monroe County also seeks dismissal of plaintiff's *Monell* claim, but misstates plaintiff's claims and misapprehends the standard for municipal liability under § 1983. Thus, the Court should dismiss the motion in its entirety.

## STATEMENT OF FACTS

On January 3, 1996, William Beason was reported missing by his roommate. (Compl. ¶ 33.) Upon arriving at Beason's home, RPD officers forced the door to Beason's bedroom suite open and found him dead on his bed with numerous stab wounds to his neck and chest and a large quantity of blood on and around his body. (*Id.*) RPD evidence technicians processed the scene and found, among other things, several blood-stained objects, including a knife, towel, and tissue. (Compl. ¶ 34.) The medical examiner found defensive wounds on Beason's left hand indicating a close-range struggle with his assailant and, as a result, collected his fingernail clippings, which revealed human blood. (Compl. ¶¶ 36, 75.) Based on this evidence, it was apparent that Beason died after a violent struggle, during which the assailant was cut and bled at the scene. (Compl. ¶ 36.)

Shortly after the investigation began, the police turned their attention to Mr. Warney—an individual with an IQ of 68 who was suffering from and heavily medicated for AIDS. (Compl. ¶ 37.) Mr. Warney was in fact severely mentally impaired at the time and had just been released from a psychiatric facility. (*Id.*) On January 6, 1996, RPD officers and named defendants Gropp and Beaudrault brought Mr. Warney into the precinct and coerced a false confession from him by threatening and intimidating him, taking advantage of his mental impairment and severely weakened physical condition, and feeding him nonpublic facts that only the real perpetrator or police would know. (Compl. ¶¶ 45–58.) Aside from alleged confession, which was coerced,

fabricated, and plagued with numerous inconsistencies, there was little evidence implicating Mr. Warney in the crime. (Compl.¶¶ 79–86.) In fact, most of the objective physical evidence indicated that Mr. Warney was innocent of the crime. (Compl. ¶¶ 72–74, 76, 86.) Blood group and enzyme testing showed that the victim's blood was on the knife and excluded Mr. Warney and the victim as the source of the blood found on the tissue and towel. (Compl. ¶¶ 72–74.) However, the critical blood evidence found at the scene—the blood found under the victim's fingernails—was never tested before trial due to insufficient quantity. (Compl. ¶¶ 75.) Mr. Warney also was excluded as the source of the full latent prints recovered from the scene and falsely included as a possible source of a partial print. (Compl. ¶¶ 76, 78.)

At trial, the prosecution's only theory was that Warney alone stabbed and killed Beason. (Compl. ¶ 80.) Their case rested almost exclusively on the coerced and fabricated confession elicited from Mr. Warney. (Compl. ¶ 79.) In February 1997, Mr. Warney was wrongly convicted of second degree murder and sentenced to twenty-five years to life in prison as a direct result of the misconduct of the defendant officers. (Compl. ¶¶ 87–88.)

Throughout his ordeal, Mr. Warney consistently maintained his innocence and sought to clear his name. (Compl. ¶ 89.) In the Fall of 2004, after discovering that the biological evidence collected at the crime scene was in storage, Mr. Warney requested access to it from the Monroe County DA's Office in order to conduct DNA testing to support his claim of factual innocence. (Compl. ¶¶ 90–91.) Pursuant to its policy and practice of bad-faith withholding of access to biological evidence and opposition to DNA testing, established by its final policymaker Green, the DA's Office denied Mr. Warney's request and refused to consent to DNA testing. (Compl. ¶ 111.) Mr. Warney's case is not isolated—many other inmates who have sought access to

biological evidence in control of the DA's Office, which if subjected to DNA testing could prove their innocence, have been frustrated by the bad-faith denial of their requests. (Compl. ¶¶ 110.)

Thereafter, Mr. Warney filed a motion under N.Y. C.P.L. § 440.30(1-a) to get access to the biological evidence, which was opposed by the DA's Office, as per its policy and practice. (Compl. ¶¶ 92–93, 110-11.) After Mr. Warney's motion was denied by the Supreme Court of New York in Monroe County on December 15, 2004, (Compl. ¶ 94), defendant Bernstein, with the actual and constructive knowledge of defendant Green, secretly submitted for testing the biological evidence to which Mr. Warney sought access. (Compl. ¶ 95.) Defendants Green, Bernstein, and Lehmann received a verbal report of exculpatory DNA results from the crime lab as early as 2005 and a written report in February 2006 showing that DNA testing from the key items from the crime scene revealed a single male profile consistent with the biological evidence found under the victim's fingernails. (Compl. ¶¶ 97–98.) This single male profile did not match Mr. Warney. (Compl. ¶ 98.) Rather, the defendant prosecutors were informed on March 2, 2006, that the profile matched Johnson, an inmate in the New York State prison system who had been convicted of murder and had a history of slashing/burglary-robberies. (Compl. ¶ 99.) Shortly thereafter, an RPD evidence technician examined the unidentified latent print and concluded that it too matched Johnson. (Compl. ¶ 100.) The defendant prosecutors concealed the fact of the testing and the exculpatory results from Mr. Warney, while he was sick with AIDS and continued to languish needlessly in prison, until May 1, 2006—at least two-and-half months after the DA's Office learned of the results. (Compl. ¶ 101.) The defendant prosecutors' actions were a direct and proximate result of the policy and practice of the DA's Office, by and through its final policymaker Green, of failing to adequately train or supervise prosecutors concerning

their obligations to disclose exculpatory material. (Compl. ¶¶ 112–13.)

On May 12, 2006, Green informed Mr. Warney and his counsel that Johnson was interviewed the previous day and confessed that he alone committed the crime and did not know Warney. (Compl. ¶ 102.) At this time, Green also disclosed that an unidentified fingerprint at the scene matched Johnson. (*Id.*) On May 16, 2006, Mr. Warney's conviction was vacated and the charges against him were dismissed, and he was released from prison. (Compl. ¶ 103.)

## ARGUMENT

### I. Standard of Review

Under Rule 8 of the Federal Rules of Civil Procedure, a complaint requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). In order to withstand a motion to dismiss under Rule 12(b)(6), the complaint must satisfy "a flexible 'plausibility standard.'" *Iqbal v. Hasty*, --- F.3d ----, 2007 WL 1717803, at *11 (2d Cir. June 14, 2007). That is, the Court does not require "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 127 S.Ct. at 1974. In making this determination, the Court "must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally." *Roth v. Jennings*, --- F.3d ----, 2007 WL 1629889, at *11 (2d Cir. June 6, 2007) (citation and internal quotation marks omitted). "[T]he bottom-line principle is that 'once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.'" *Twombly*, 127 S.Ct.

1955, 1960. "'This rule applies with particular force where the plaintiff alleges civil rights violations . . . .'" *Thompson v. Carter*, 284 F.3d 411, 416 (2d Cir. 2002) (quoting *Chance v. Armstrong*, 143 F.3d 698, 701 (2d Cir.1998)). Further, the Supreme Court has held that this liberal notice pleading standard applies equally to *Monell* claims. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167–69 (1993).

## II. Defendants Green, Bernstein, and Lehmann Are Not Entitled to Absolute Immunity for the Post-Conviction Withholding of Exculpatory Evidence

### A. Absolute Immunity Standard

"[A]bsolute immunity is of a rare and exceptional character." *Barrett v. United States*, 798 F.2d 565, 571 (2d Cir. 1986) (citation and quotation marks omitted). The court generally presumes "that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. 478, 486–87 (1991). Indeed, the Supreme Court has explicitly noted that it has "been 'quite sparing' in [its] recognition of absolute immunity' and [has] refused to extend it any 'further than its justification would warrant.'" *Id.* at 487. The reason for this is self-evident: "absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct." *Westfall v. Irvin*, 484 U.S. 292, 295 (1988).

Thus, "[n]ot all official actions of a state prosecutor are absolutely immune from Section 1983 liability." *Houston v. Partee*, 978 F.2d 362, 365 (7th Cir. 1992). Prosecutors are only granted absolute immunity for their conduct in "*initiating a prosecution and in presenting the State's case*" insofar as that conduct is "*intimately associated with the judicial phase of the criminal process*." *Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976) (emphasis added). In other words, absolute immunity is afforded to a prosecutor when he or she is acting as an

advocate in a particular criminal prosecution. *Buckley v. Fitzsimmons*, 509 U.S. 259, 278 (1993). Consequently, absolute immunity does not extend to "[a] prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings." *Id.*

To determine whether a prosecutor's actions involve advocacy in a criminal proceeding or are administrative or investigative in nature, the court must "examine 'the nature of the function performed, not the identity of the actor who performed it.'" *Kalina v. Fletcher*, 522 U.S. 118 (1997) (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)). It is the burden is of the official seeking absolute immunity to justify that he or she is entitled to such protection for the function in question. *Burns,* 500 U.S. at 486. In considering whether the official has met his or her burden, the Supreme Court has instructed that the first inquiry is one of a historical nature—to determine whether the official "perform[ed] 'special functions' which, because of their similarity to functions that would have been immune when Congress enacted § 1983 [in 1871], deserve absolute protection from damages liability." *Buckley*, 509 U.S. at 273 (quoting *Butz v. Economou*, 438 U.S. 478, 508 (1978)). At common law, absolute immunity only protected prosecutors from suits alleging malicious prosecution and defamation during trial. *Kalina*, 522 U.S. at 124. "[The] absence of this support is dispositive" because the court "'do[es] not have a license to establish immunities from § 1983 in the interests of what [it] judge[s] to be sound public policy.'" *Blouin v. Spitzer*, 356 F.3d 348, 357 (2d Cir. 2004) (quoting *Tower v. Glover*, 467 U.S. 914, 922–23 (1984)); *see also Burns*, 500 U.S. at 497 (Scalia, J., concurring) ("While we have not thought a common-law tradition (as of 1871) to be a sufficient condition for absolute immunity under § 1983, we have thought it to be a necessary

one.").

If the official can point to such common-law support, the next inquiry is whether absolute immunity is warranted by policy considerations, namely the "risk of vexatious litigation" in response to a prosecutor's decisionmaking in courtroom proceedings. *See Burns*, 500 U.S. at 494. In *Imbler*, the Supreme Court explained the threat of liability could undermine the performance of the prosecutor's in the courtroom where they "[f]requently act[] under serious constraints of time and even information" and make "many decisions that could engender colorable claims of constitutional deprivation." 424 U.S. at 425. The *Imbler* Court was also concerned that trial prosecutors may be hampered in their assessment of witness credibility, which could result in the denial of relevant evidence to the factfinder. *Id.* at 426. The Court has emphasized that "the concern with litigation . . . is not merely a generalized concern with interference with an official's duties, but rather is a concern with interference closely related to the judicial process," and "*[t]hat concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct.*" *Burns*, 500 U.S. at 494 (emphasis added).

Applying these principles, the Supreme Court has repeatedly distinguished between a prosecutor's role as an advocate in a pending criminal proceeding, on the one hand, and investigative or administrative actions that may overlap with litigation but nonetheless do not warrant such wholesale protection from suit. *See Kalina,* 522 U.S. at 129–31 (denying absolute immunity for filing of false affidavit because prosecutor was not performing a function uniquely limited to her advocacy role, but rather "performed an act that any competent witness might have performed"); *Buckley*, 509 U.S. at 273 (refusing to extend absolute immunity for fabrication of

evidence where "a prosecutor performs the investigative functions normally performed by a detective or police officer"); *Burns*, 500 U.S. at 492 (rejecting claim that prosecutor's legal advice to police is sufficiently connected to criminal proceedings to warrant absolute immunity).

### B. Defendants Have Failed to Satisfy Their Burden of Establishing an Entitlement to Absolute Immunity for the Post-Conviction Withholding of Exculpatory Evidence

In seeking the protection of absolute immunity, defendants Green, Bernstein, and Lehmann recognize the limited scope of absolute immunity and, thus, attempt to characterize their conduct as involving solely "traditional prosecutorial activities." (*See* Defs. Br. at 4.) But defendants oversimplify and mischaracterize the allegations in plaintiff's complaint, which they are not permitted to do at the motion to dismiss stage. *See Limone v. Condon*, 372 F.3d 39 (1st Cir. 2004) ("Courts must be equally careful, however, not to permit a defendant to hijack the plaintiff's complaint and recharacterize its allegations so as to minimize his or her liability."). The complaint alleges that the defendant prosecutors secretly submitted DNA evidence for testing well after the conviction was final, despite plaintiff's repeated efforts to gain access to the evidence and conduct testing himself, and then concealed the exonerating results while Mr. Warney suffered in prison. Such conduct has no connection whatsoever to the defendant prosecutors' advocacy on behalf of the state in a criminal prosecution, but instead involves investigative, administrative, and policymaking decisions with respect to the custody of evidence—actions that simply are not protected by the doctrine of absolute immunity.

#### 1) There Was No Ongoing Criminal Proceeding at the Time of the Conduct at Issue

Under *Imbler*, a prosecutor can only be acting as an advocate "intimately associated with the judicial phase of the criminal process" during a criminal prosecution. 424 U.S. at 430–31. Just as "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has

probable cause to have anyone arrested," *Buckley*, 509 U.S. at 274, so too a prosecutor cannot be an advocate after the conviction is considered final and his or her personal participation in the criminal case has concluded, *see Yarris v. County of Delaware,* 465 F.3d 129, 137 (3d Cir. 2006); *Spurlock v. Thompson*, 330 F.3d 791, 799 (6th Cir. 2003); *Houston*, 978 F.2d at 366–68. Here, the defendant prosecutors have failed to even establish that the criminal case was pending when they made the determination to withhold the exculpatory results of the DNA testing. Mr. Warney was convicted and judgment was entered against him in February 1997, (Compl. ¶¶ 87–88), and his application for leave to appeal to the Court of Appeals was denied in March 2003, *People v. Warney*, 99 N.Y.2d 633 (2003). Thus, the conviction was final and the prosecution was complete well before the conduct at issue here. Moreover, since none of the defendant prosecutors were personally involved in the prosecution or his direct appeal, they cannot claim any continued personal involvement in the criminal proceedings.[2]

Given this obvious fact, the defendant prosecutors suggest that their purported participation in the opposition of plaintiff's post-conviction motion under N.Y. C.P.L. § 440.30(1-a) to gain access to the biological evidence in the case affords them blanket immunity for all their actions. That proceeding, however, relates to the custody of evidence and is civil in nature. Section 440.30(1-a), while located in New York's penal code, is, as a matter of New York law, a limited proceeding that does not by itself challenge the validity of a criminal defendant's conviction. Rather, the provision merely allows an inmate to access and test DNA evidence if a sufficient showing is made. N.Y. C.P.L. § 440.30(1-a). If the testing results in an exclusion, the inmate must still move to vacate his conviction based on the discovery of new

[2] In fact, defendant Bernstein was not even personally involved in the § 440.30(1-a) proceeding.

evidence by filing a writ of coram nobis under N.Y. C.P.L. § 440.10, a separate statutory provision. The New York Court of Appeals has recognized that § 440.30(1-a) is a procedural provision entirely distinct from the statutory provisions that must be invoked to undermine or challenge the validity of a criminal conviction. *People v. Pitts*, 4 N.Y.3d 303, 310 (2005).[3]

Given that a motion seeking access to DNA evidence is not criminal in nature, a prosecutor's role in such a proceeding is materially different from his or her standard advocacy role in a coram nobis or habeas proceeding. The New York Court of Appeals explicitly recognized this point in *Pitts* when it concluded that the prosecutor acts as "the gatekeeper of the evidence" with respect to § 440.30(1-a) motions and further held that it is the prosecutor's duty under the provision "to inform defendants of any information in the prosecutor's possession regarding the current location of the evidence to be tested, whether the evidence still exists, and the last known physical location of the evidence." 4 N.Y.3d at 310–11. Thus, the prosecutor's function in these proceedings is akin to that of a custodian of evidence, whose duty are administrative, to identify, locate, and maintain evidence, not a traditional prosecutor whose duties pertain to the evaluation and presentation of evidence at trial. *Imbler*, 424 U.S. at 425–26.

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[3] In the federal context, the Second Circuit has held that seeking access to evidence is a claim that is civil, not criminal, in nature. In *McKithen v. Brown*, 481 F.3d 89 (2d Cir. 2007), the Second Circuit held that a prisoner may properly bring a claim seeking post-conviction access to DNA testing under a civil § 1983 action rather than in a habeas corpus proceeding because the testing itself does not "*necessarily demonstrate* the invalidity of the conviction or sentence." *Id.* at 102. "Such testing, of course, *'necessarily* implies nothing at all about the plaintiff's conviction'" because '[t]he results of any DNA tests that are eventually performed may be inconclusive, they may be sufficiently exculpatory, or they may even be inculpatory.'" *Id.* at 102–03 (quoting *Harvey v. Horan*, 285 F.3d 298, 308 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc)).

### 2) Defendants Cite No Basis for Extending Absolute Immunity to a Civil Proceeding Concerning Access to Evidence

The defendant prosecutors suggest they are entitled to absolute immunity simply by virtue of their purported involvement in what was essentially a civil proceeding to secure evidence. Yet they cite no such authority, common law or otherwise, extending immunity to the context of civil proceedings relating to the access to evidence. This should be dispositive of the issue before the Court, as the movants bear the burden of proving their entitlement to absolute immunity. *See Blouin,* 356 F.3d at 357. The majority of the cases cited by the defendants do not even involve prosecutorial misconduct during post-conviction proceedings, but rather relate to trial or appellate proceedings before the conviction is final.[4] In fact, in *Parkinson v. Cozzolino*, the primary case relied upon by the defendants, the Second Circuit refused "to decide whether absolute immunity extends to collateral proceedings, such as habeas petitions," 238 F.3d 145, 152 n.5 (2d Cir. 2001), much less a motion to gain access to evidence.

The defendants also rely on two appellate cases outside this Circuit for the proposition that absolute immunity can be extended to post-conviction conduct, *Carter v. Burch*, 34 F.3d 257 (4th Cir. 1994) and *Reid v. New Hampshire*, 56 F.3d 332 (1st Cir. 1995). Both cases are inapposite because they involved prosecutors who discovered exculpatory evidence while they

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[4] The two district court cases that extend absolute immunity to collateral proceedings are also inapposite. The extension of absolute immunity in *McGann v. Baranowicz*, 617 F. Supp. 845 (S.D.N.Y. 1985), to the filing of a false affidavit in a post-conviction proceeding is no longer good law after the Supreme Court in *Kalina* declined to extend absolute immunity to a prosecutor performing the same function in connection with an arrest warrant. 522 U.S. at 129–31. In addition, *Summers v. Sjogren*, 667 F. Supp. 1432 (D. Utah 1987), is distinguishable because the challenged conduct there involved the prosecutors' actual statements, indeed legal arguments, in a court proceeding, *id.* at 1433, which is like the advocative conduct recognized in *Imbler*, unlike the misconduct alleged here—i.e., investigation undertaken by the prosecutors outside the courtroom while no criminal proceeding was pending.

were directly involved in the criminal proceedings and did not involve the administrative or investigatory conduct alleged here (i.e., the safekeeping of evidence and the testing of DNA evidence). In *Carter*, a Fourth Circuit case not binding on this Court, absolute immunity was extended to the defendant prosecutor who allegedly learned of and failed to disclose exculpatory information about the investigation from a police officer while he was personally involved as the prosecutor at the trial and during the direct appeal. 34 F.3d at 262–63. Thus, in contrast to this case, the prosecutor in *Carter* was still functioning in an advocative role during the criminal proceedings and, moreover, did not affirmatively undertake investigative activity to ascertain the exculpatory evidence. Likewise, in *Reid,* the First Circuit held that the defendant prosecutor was entitled to absolute immunity for failing to disclose in post-conviction proceedings exculpatory evidence that had been discovered before trial when he was acting in his capacity as the trial prosecutor. 34 F.3d at 338 & n.12–13. The *Reid* Court specifically distinguished those circumstances, which directly implicate a prosecutor's advocative duties relating the evaluation and presentation of evidence *at trial*, *see Imbler*, 424 U.S. at 425–26, from situations where, as here, a prosecutor undertakes investigatory activities that lead to the discovery of exculpatory information *after a conviction is finalized*. *See id.* at 338 n.13.

**3) Post-Conviction DNA Testing and Concealing the Results Is Administrative or Investigative Conduct That Is Simply Not Entitled to Absolute Immunity**

Contrary to defendants' contention, in circumstances such as those alleged in the complaint, appellate courts have consistently rejected claims of absolute immunity for the failure to disclose exculpatory information discovered during post-conviction investigations. *Yarris*, 465 F.3d at 137; *Spurlock*, 330 F.3d at 798–801; *Houston*, 978 F.2d at 366–68. Indeed, even when an appeal is pending and a conviction is not final, courts have held that absolute immunity

is not warranted for a prosecutor's purely administrative or investigative conduct. Most notably, in *Yarris v. County of Delaware*, a case involving factual allegations strikingly similar to the those alleged in plaintiff's complaint, the Third Circuit denied the extension of absolute immunity to prosecutors' withholding of potentially exculpatory DNA samples, in response to plaintiff's numerous requests for access to such evidence, after he was convicted and sentenced to death. 465 F.3d at 137. It was immaterial to the Court that Yarris's criminal appeal was still pending at the time the defendant prosecutors refused his requests to access the DNA evidence. *Id.* What was critical was that the defendant prosecutors failed to make any "show[ing] that their response to Yarris's DNA test request [were] part of their advocacy for the state in post-conviction proceedings in which they were personally involved." *Id.* Absent such a showing, the Third Circuit concluded that

> a prosecutor acting merely as a custodian of evidence after conviction serves the same non-adversarial function as police officers, medical examiners, and other clerical state employees and—just as with certain police investigative work—'it is neither appropriate nor justifiable that, for the same act, [absolute] immunity should protect the one not the other[s].'

*Id.* at 138. Similarly, here, defendants have failed to even explain how their discovery of DNA results that excluded Mr. Warney and identified the real perpetrator and concealment of such information was at all associated with their advocacy role in a criminal proceeding.

The *Yarris* opinion relied on the principles set forth in *Houston v. Partee*, a Seventh Circuit opinion particularly relevant to the issues presented here. In *Houston*, Seventh Circuit held that prosecutors were not entitled to absolute immunity for failing to disclose exculpatory statements from a cooperating a witness and three confessions from the real perpetrators of the crime, which were all discovered after the plaintiffs' convictions while their appeals were

pending. 978 F.2d at 366–68. The Court reasoned that the prosecutors "were not functioning as prosecutors" at the time because they no longer were involved in the appeal and had discovered the information while they were investigating other crimes that were "hardly a percursor to a prosecution of [the plaintiffs]" who had already been convicted. *Id.* at 366–67. Instead, the prosecutors were simply in the same position as the police officers who also learned of and suppressed the exculpatory evidence in their capacities as investigators and, thus, were "only entitled to assert a qualified immunity." *Id.* at 367.

Like the defendant prosecutors in *Yarris* and *Houston*, defendants Green, Bernstein, and Lehmann have entirely failed to establish that their testing of the DNA evidence and concealment of the exculpatory results was advocative rather than adminstrative or investigative in nature. Their decision to test the DNA evidence and withhold the exculpatory results occurred outside judicial proceedings without the knowledge of the court or plaintiff and his counsel. (Compl. ¶¶ 95–96, 101.) The secretive nature of such conduct itself belies any claim that it was done within the purview of the prosecutor's traditional advocacy role in open court. Further, this action was directly contrary to the defendant prosecutors' formal position in opposition to the § 440.30(1-a) motion. (Compl. ¶ 93.) Indeed, the defendant prosecutors themselves did not believe that their conduct was related to the § 440.30(1-a) proceeding because, even after they learned of the exculpatory results of the DNA testing, they failed to promptly notify the court or plaintiff that his motion was moot. (Compl. ¶ 101.) Instead, they used the exculpatory information to conduct further investigation of the Beason murder—with knowledge that Mr. Warney was innocent of the crime—including running the DNA profile through the CODIS system, examining the latent prints lifted at the scene, and interrogating the real perpetrator of

the murder. (Compl. ¶¶ 95, 97–100, 102.) Accordingly, the defendant prosecutors simply were not performing an advocacy function when they submitted biological evidence for testing and withheld the exculpatory results. The defendant prosecutors cite no basis in common law, nor can they, for absolute immunity in this context, and extending absolute immunity to what is clearly an administrative or investigatory act finds no support in the traditional justification for absolute immunity under *Imbler* and its progeny.

**4) Absolute Immunity Is Not Warranted for Policymaking and Training**

Nor is defendant Green entitled to absolute immunity for claims against him in his individual capacity related to policymaking and training functions. The setting of office policy and training of subordinates, are administrative, not advocative, functions. *See Myers v. Orange County,* 157 F.3d 66, 77 (holding that creating and maintaining policy of not permitting cross-complaints in criminal actions was administrative rather than advocative in nature); *Walker v. City of New York*, 974 F.2d 293, 301 (2d Cir. 1992) (holding that failure to supervise or train assistant district attorneys on their obligations under *Brady* is an administrative not advocative). Therefore, absolute immunity is not warranted for such conduct. *See, e.g., Goldstein v. City of Long Beach*, 481 F.3d 1170 (9th Cir. 2007) (declining to extend absolute immunity to district attorney's failure to institute communication system among prosecutors regarding jailhouse informants, and failure to adequately train or supervise on communication concerning informants); *Carter v. City of Philadelphia*, 181 F.3d 339, 343 (3d Cir. 1999) (declining to extend absolute immunity for prosecutors' failure as administrators to establish training, supervision and discipline policies concerning credibility of eyewitnesses).

## III. The Defendants Prosecutors Are Not Entitled to Qualified Immunity

The defendant prosecutors also contend that they are entitled to qualified immunity on all the claims against them in their individual capacity solely on the grounds that the constitutional right to post-conviction DNA testing has not been clearly established under Supreme Court or Second Circuit precedent. (Defs Br. at 7.) Yet, the complaint clearly alleges that defendants violated many other longstanding and fundamental constitutional rights of which any reasonable official would be well aware, including the rights to substantive and procedural due process and access to the courts, by knowingly and deliberately concealing evidence of Mr. Warney's innocence while he remained imprisoned for a crime he did not commit, despite his repeated efforts to access the evidence and attempt to vindicate his innocence. As indicated above, *see supra* note 1, plaintiff has withdrawn Count VI of his complaint, which is the only claim against the individual defendants that invokes a post-conviction right of access to DNA testing. Defendants' qualified immunity argument disregards plaintiff's remaining claim in Count VII of the complaint, which alleges that the defendant prosecutors deprived him of liberty without due process through their knowing and intentional concealment of exculpatory evidence, and therefore waives the qualified immunity defense for that claim. Even if the claim is not waived, defendants are not entitled to qualified immunity for such conduct.

Individual defendants have qualified immunity only if their conduct, taking the allegations in the complaint as true, did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In order to determine whether qualified immunity applies, the Court must first determine "whether plaintiff's allegations, if true, establish a constitutional violation." *Hope v.*

*Pelzer*, 536 U.S. 730, 736 (2002). If so, the Court must then ask whether the right was clearly established such that a reasonable officer would have been on notice that the conduct alleged was unlawful. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). With respect to the second part of the inquiry, the Supreme Court has explicitly held that

> officials can still be on notice that their conduct violates established law even in novel factual circumstances. Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding . . . [T]he salient question . . . is whether the state of the law [at the time of the alleged misconduct] gave [defendants] fair warning that their alleged [conduct] was unconstitutional.

*Hope*, 536 U.S. at 741. Knowingly and intentionally keeping an innocent person in prison for many months, after denying him access to evidence that would exonerate him and then secretly obtaining and concealing conclusive evidence of his innocence, is clearly conduct that is so egregious and such an abuse of power that any reasonable official in 2005 was clearly on notice that such conduct "shocks the conscience" in a manner that deprived plaintiff of liberty without due process of law. *See Rochin v. California*, 342 U.S. 165, 209–10 (1952).

Likewise, it has long been held that officials who suppress or conceal material exculpatory or impeachment evidence violate a criminal defendant's clearly established Fourteenth Amendment right to due process. *See Pyle v. Kansas*, 317 U.S. 213, 215-16 (1942); *see also Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In *Pyle v. Kansas*, the Supreme Court held that unlawful imprisonment resulting from the officials' knowing and deliberate suppression of evidence favorable to the defendant constitutes a deprivation of constitutional rights. 317 U.S. at 215–16. The Court elaborated on this principle in *Brady v. Maryland* by holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is

material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). "[T]he duty to disclose [exculpatory material] is ongoing," *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987), and extends post-conviction. *See High v. Head*, 209 F.3d 1257, 1265 (11th Cir. 2001) (concluding that duty to disclose extends to all stages of judicial process); *Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997) (same). Indeed, even defendants concede that the duty to disclose is ongoing. (Defs. Br. at 6.) Further, in *Arizona v. Youngblood*, the Supreme Court recognized that this duty extends to circumstances involving potentially exculpatory DNA evidence, concluding that an official's bad faith failure to preserve such evidence constitutes a due process violation. 488 U.S. 51 (1988).

Plaintiff alleges that the defendant prosecutors violated his Fourteenth Amendment due process rights in a manner that shocks the conscience and offends basic principles of justice when they knowingly and deliberately kept him in prison for at least two-and-half months, and potentially over a year, after secretly obtaining conclusive DNA evidence of his innocence and then concealing that evidence from him, despite his repeated requests to access it. Specifically, they concealed from plaintiff the fact that they submitted the biological evidence for testing in February 2005, despite in bad faith rejecting his requests to access the evidence.[5] (Compl. ¶ 95.) Most egregiously, as early as 2005, after learning that the DNA testing excluded plaintiff as the source of all the biological evidence submitted for testing, including the critical blood evidence

[5] Defendants claim that plaintiff fails to plead any facts to support his assertion that the defendant prosecutors acted in bad faith. (Defs. Br. at 10.) However, bad faith is a state-of-mind element that may be averred generally in a complaint. *Stern v. General Elec. Co.*, 924 F.2d 472, 476 (2d Cir. 1991). Moreover, it is obvious from the factual allegations in the complaint that plaintiff has pled sufficient facts supporting a finding of bad faith—i.e., that the defendant prosecutors deliberately kept plaintiff in prison and delayed his release by denying him access to and concealing evidence of his innocence.

under the victim's fingernails, (Compl. ¶ 75), the defendant prosecutors withheld this conclusive evidence of his innocence from plaintiff. (Compl. ¶¶ 98, 101.) The defendants' misconduct did not end there. On March 2, 2006, they learned that the DNA profile of the blood found at the scene matched Johnson, who had a history of violent crime, including slashings like the murder of William Beason, yet they also concealed this evidence from plaintiff. (Compl. ¶ 99, 101.) Similarly, despite learning that the unidentified fingerprint found at the scene matched Johnson on March 24, 2006, they concealed this exculpatory evidence from Mr. Warney as well. (Compl. ¶ 101.) Given that Mr. Warney was ultimately exonerated as a direct result of the foregoing evidence, there can be no doubt that the DNA results, the identification of Johnson, and the print match were material and sufficient to undermine the outcome of the verdict.

No reasonable official in 2005 would have believed these deliberate suppressions to be lawful and, in fact, defendants' conduct violated their clearly established duty not to conceal evidence set forth as long ago as *Pyle*. Indeed, the allegations, if proven, will establish that the concealment was not only intentional, but also in bad faith, as the defendant prosecutors learned of and concealed evidence of innocence while they were fully aware that their actions thwarted plaintiff's efforts at exoneration and resulted in his continued wrongful imprisonment. The defendant prosecutors' concealment of the conclusive evidence of plaintiff's innocence while he remained imprisoned for even a day, much less the months that plaintiff endured, was so egregious and inconsistent with fundamental fairness "implicit in any concept if ordered liberty," *Napue v. Illinois*, 360 U.S. 264, 269 (1959), that they cannot reasonably claim that they were not on fair notice that their conduct was unlawful. *Hope*, 536 U.S. at 741.

## IV. Plaintiff Has Pled Sufficient Facts to Establish a Cause of Action Under Section 1983 Against Defendant Monroe County

Defendant Monroe County claims that it is not liable for the unconstitutional policies and practices instituted by Monroe County District Attorney in his official capacity because "the alleged conduct falls within his role as prosecutor," which, according to the County, is a state role protected by sovereign immunity not a county role. (Defs. Br. at 11.) The county's argument fails to recognize that, consistent with plaintiff's allegations regarding Green's status as the final policymaker for the county,[6] New York and Second Circuit law recognize that the district attorney acts as a county actor for the management and policymaking conduct alleged in plaintiff's *Monell* claim and, thus, such claims are actionable against the county under § 1983.

Under *McMillian v. Monroe County*, 520 U.S. 781 (1997), the primary inquiry on this issue is "whether government officials are final policymakers for the local government in a particular area, or on a particular issue," which is an inquiry that "will necessarily be dependent on the definition of the official's function under relevant state law." *Id.* at 786. In *Myers v. Orange County*, the Second Circuit recognized that "under New York law, DAs and ADAs are generally presumed to be local county officers, not state officers." 157 F.3d at 76 (citations omitted). The *Myers* Court recognized that state law allowed for "a narrow exception to this general rule when a prosecutor makes individual determinations about whether to prosecute violations of state penal laws." *Id.* at 77 (citations omitted). Accordingly, the Second Circuit has held that the county cannot be held liable for specific acts associated with initiating a

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[6] Defendant Green argues that any official capacity claim against him should be dismissed. (Defs. Br. at 9.) Plaintiff named Green in his official capacity, out of an abundance of caution, to identify him as the county's final policymaker with respect to the *Monell* claim, but concedes that an official capacity claim against Green is the same the *Monell* claim against the county

prosecution, such as an ADA's improper filing of an indictment. *See Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir. 1988). This holding, however, has been explicitly "confined . . . to challenges to 'specific decision[s] of the District Attorney to prosecute.'" *Walker*, 974 F.2d at 301.

Thus, the presumption is that under New York law a county can be held liable under § 1983 for other actions taken by prosecutors. In *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir. 1991), for example, the Second Circuit concluded that a county could be held be liable for a county district attorney's practice of ignoring evidence of the misconduct of law enforcement personnel and the sanctioning and concealment of such wrongdoing. *Id.* at 152 n.5. More broadly, in *Walker v. City of New York*, the Court held that "[w]here the district attorney acts as the manager of the district attorney's office, the district attorney acts as a county policymaker" for the purposes of § 1983. 974 F.2d at 301. Based on this finding of law, the Court concluded that a county could be held liable for "the district attorney's management of the office—in particular the decision not to supervise or train ADAs on *Brady* and perjury issues." *Id.*

Here, the claims against the County do not fall into the narrow exception to the presumption that the district attorney acts as a county, not a state, actor. The complaint clearly alleges that Monroe County DA Green was the final policymaker of Monroe County at all times relevant to the instant case with respect to post-conviction access to and DNA testing of biological evidence in criminal cases and the training and supervision of his subordinates in the DA's Office. (Compl. ¶¶ 29–30.) Plaintiff's direct action *Monell* liability claim does not relate to Green's decision regarding whether to prosecute the State's penal law, but instead concern, as described above, the custody and handling of DNA evidence, the testing of DNA evidence, and the failure to disclose the exculpatory results in a post-conviction setting well after Mr. Warney's

completion was final. (Compl. ¶¶ 95–101, 165) The County cannot reasonably argue that Green's direct participation in the bad-faith withholding of access to DNA evidence and later the exculpatory results was in any way associated with his decision to prosecute when Mr. Warney was already in prison for the crime and had been for over a decade, and when the very evidence at issue proved his innocence. Plaintiff's remaining claims allege that Green maintained unconstitutional policies and practices with respect to the bad-faith opposition to access to DNA testing and failure to disclose exculpatory DNA results, (Compl. ¶¶ 111, 166), and failed to train, supervise, and discipline his subordinates on their duty to disclose exculpatory evidence, (Compl. ¶¶ 112–13, 167.) These allegations implicate office-wide policy determinations that are not related to the decisions concerning the prosecution of an individual case, but instead involve the management of the DA's Office. As a result, such claims are actionable against the County. *See Myers*, 157 F.3d at 77; *Walker*, 974 F.3d at 301.

The county also claims that plaintiff has not identified an underlying constitutional violation in support of the *Monell* claim, solely relying on their qualified immunity argument that the right to DNA testing s not clearly established. However, municipalities, unlike officials sued in their individual capacities, are not entitled to qualified immunity for constitutional violations that resulted from actions taken in good faith and, thus, whether the law was clearly established is irrelevant to *Monell* claims. *See Owen v. City of Independence*, 445 U.S. 622, 650 (1980). Defendants' claim that plaintiff has failed to allege an underlying constitutional violation is patently incorrect. Numerous courts have recognized that there is a constitutional right of access to DNA testing that is actionable under § 1983. *Savory v. Lyons,* 469 F.3d 667, 669 (7th Cir. 2006); *Bryson v. Macy*, 2007 WL 682030, at *5 (W.D.Okla. Mar. 01, 2007); *Breest*

*v. New Hampshire Atty. Gen*., 472 F. Supp. 2d 116, 120 (D.N.H. 2007); *Wade v. Brady*, 460 F. Supp. 2d 226, 243–51 (D. Mass. 2006); *Godschalk v. Montgomery Cty. District Atty. Off.*, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001); *Harvey v. Horan*, 119 F. Supp. 2d 581 (E.D. Va. 2000), *rev'd on other grounds*, 278 F.3d 370 (4th Cir. 2002), *reh'g en banc denied as moot*, 285 F.3d 298 (4th Cir. 2002). Indeed, the Second Circuit's opinion in *McKithen* recognized this fact. 481 F.3d at 99 (collecting cases). Moreover, defendants ignore the fact that the complaint also alleges that the DA's Office maintained an unconstitutional policy and practices with respect to numerous underlying constitutional violations, described in detail above, arising from the post-conviction concealment of exculpatory evidence in violation of plaintiff's Fourteenth Amendment due process rights.

## CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss should be denied in its entirety. In the alternative, should any portion of the complaint be dismissed for a pleading insufficiency, plaintiff respectfully requests leave to replead.

Dated: July 26, 2007

Respectfully submitted,

/s/ Monica R. Shah
Peter J. Neufeld
Monica R. Shah
COCHRAN NEUFELD & SCHECK, LLP
99 Hudson St., 8th Floor
New York, NY 10013
(212) 965-9081

Donald M. Thompson
West Main Street, Suite 243
Rochester, New York 14614
(585) 423-0060

**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF NEW YORK**

| | |
|---|---|
| **DOUGLAS WARNEY,** | |
| **Plaintiff,** | **Case No. 07-CV-06246 (DGL)** |
| **v.** | **DECLARATION IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS** |
| **THE CITY OF ROCHESTER et al.,** | |
| **Defendants.** | |

Monica R. Shah declares under the penalty of perjury as follows:

1. I am an attorney with the law firm Cochran, Neufeld & Scheck, LLP, and represent the plaintiff in the instant action, Douglas Warney. I am admitted to practice law in the State of New York and in the United States District Court in the Western District of New York.

2. I submit this declaration in support of plaintiff's opposition to the motion to dismiss, (Docket No. 2), filed on June 6, 2007 by defendants Monroe County, Michael C. Green, Larry Bernstein, and Wendy Evans Lehmann, (collective, "moving defendants").

3. Except as otherwise stated, this Declaration is made on the basis of the complaint and my review of the motion papers.

4. Plaintiff's complaint, (Docket No. 1), is referenced in support of plaintiff's opposition to the moving defendants' motion to dismiss.

5. The complaint alleges the following claims under 42 U.S.C. § 1983 against the

moving defendants:

- In Count VI, plaintiff alleges that defendants Green, Bernstein, and Lehman, in their individual capacities, violated plaintiff's Fourteenth Amendment due process rights based on their bad-faith denial of post-conviction access to biological evidence and DNA testing.

- In Count VII, Plaintiff alleges that defendants Green, Bernstein, and Lehman, in their individual capacities, violated plaintiff's Fourteenth Amendment due process rights through their post-conviction withholding of material exculpatory evidence.

- In Count IX, Plaintiff alleges that Monroe County, by and through its final policymaker District Attorney Michael C. Green, maintained unconstitutional policies and practices of bad faith withholding of DNA testing and exculpatory evidence and failed to train and supervise assistant district attorneys on their obligation to disclose exculpatory evidence to defense and post-conviction counsel.

6. In the motion to dismiss, the defendant prosecutors Green, Bernstein, and Lehmann claim that they are entitled to absolute and qualified immunity for the conduct alleged in Counts VI and VII of the complaint. (*See* Def. Mem. at 3–8.)

7. As set forth in his memorandum of law, without conceding that the defendant prosecutors are entitled to absolute or qualified immunity for the conduct alleged in Count VI, plaintiff now dismisses Count VI against defendants Green, Bernstein, and Lehmann. (S*ee* Pl. Mem. at 2 n.1). Thus, the moving defendants' arguments with respect to that cause of action are moot.

8. Plaintiff contends that defendants Green, Bernstein, and Lehmann are not entitled to absolute immunity for the cause of action set forth in Count VII, which alleges that they secretly tested the DNA evidence and concealed the exculpatory results, because such conduct is not advocative in nature, but instead constitutes investigatory or adminstrative conduct that is not protected by the doctrine of

absolute immunity. (*See* Pl. Mem. at 7–17.)

9. Plaintiff also contends that defendants Green, Bernstein, and Lehmann are not entitled to qualified immunity for the cause of action set forth in Count VII because the allegations in the complaint show that the defendant prosecutors violated plaintiff's clearly established constitutional right to be free from the deprivation of liberty without the concealment of exculpatory evidence and no reasonable official in their position in 2005 would have believed such conduct did not violated clearly established law. (*See* Pl. Mem. at 18–21.)

10. In the motion to dismiss, defendant Monroe County contends that the complaint fails to state a cause of action against it under § 1983. (*See* Def. Mem. at 10–12.)

11. Plaintiff contends that the allegations in the complaint adequately state a *Monell* claim under § 1983 against defendant Monroe County as District Attorney Michael C. Green was acting as a county actor not a state actor under New York law when created and implemented a policy and practice of bad faith denial of access to biological evidence for DNA testing, unilateral DNA testing of biological evidence, and concealment of the exculpatory results and when he failed to train, supervise, and discipline his subordinates on their obligations to disclose exculpatory evidence to defense and post-conviction counsel. Plaintiff also contends that complaint sufficient pleads underlying Fourteenth Amendment due process constitutional violations in support of his claim against the county. (*See* Pl. Mem. at 22–25.)

12. For the foregoing reasons, defendants' motion to dismiss should be denied in its

entirety. In the alternative, should any portion of the complaint be dismissed for a pleading insufficiency, plaintiff respectfully requests leave to replead.

Executed on July 26, 2007

/s/ Monica R. Shah
Monica R. Shah

**Certificate of Service**

I hereby certify that true and accurate copies of Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss and the Declaration in Support of Plaintiff's Opposition to the Motion to Dismiss was served electronically by ECF, on July 26, 2007, to:

Michael E. Davis, Esq.
Monroe County Attorney's Office
39 West Main Street, Suite 307
Rochester, NY 14614

/s/ Emily Gordon
Emily Gordon
Legal Assistant

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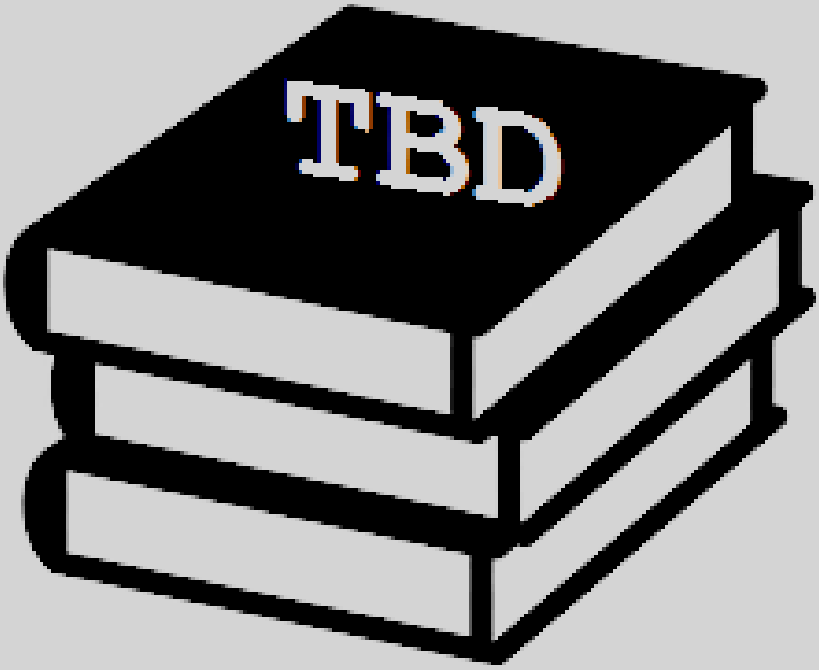




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