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File No. 7348-JPS

FRANK ROGERS, Plaintiff, vs. DEON D. HENRY, SR., DENNIS MCKELVEY, SGT., JOHN CAMPO, DET., STEPHEN G. PARRIS, CAPT., CITY OF O.C., Defendants.	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY CAMDEN DOCKET NO. 02CV3495 (SMO) CIVIL ACTION **BRIEF IN SUPPORT OF NOTICE OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANTS**

STATEMENT OF FACTS

This matter arises out of a Complaint filed by the Pro Se Plaintiff, Frank Rogers, an inmate confined in New Jersey State Prison, alleging violations of 42 USC § 1983, 1985, under 28 USC § 1331, 1343, 2201, and F.R.C.P. 8(a) Rogers alleges that the defendants, John Campo, Stephen Parris, City of Ocean City, Richard Costigan, Laura Hall, Charles Prusack and William Wilent, among other defendants, acted with deliberate indifference and gross negligence, negligence, perjury, false arrest, false imprisonment, malicious prosecution, abuse of process, prima facie tort, conspiracy tort, conspiracy, intentional infliction of emotional distress, negligent infliction of emotional distress, outrageous conduct under the Laws of the State, outrageous conduct under the Laws of the United States of America, resulting in serious bodily and emotional

distress in violation of plaintiff's civil rights guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States of America in which the plaintiff was deprived of his liberty without due process and the privileges and immunities guaranteed him. (See plaintiff's Amended Complaint attached hereto as Exhibit "A" at p. 31).

In the Spring of 2000, plaintiff's friend, Deborah Moore, provided police officers employed by the City of Ocean City with credible information that Rogers was selling illegal drugs. Ms. Moore agreed to assist the police in an undercover operation On three occasions in the late Spring and Summer of 2000, Rogers sold illegal drugs to undercover police officers. The first controlled drug buy was authorized by the Ocean City Police Department. The later two undercover illegal drug buys took place in Atlantic County and were authorized by the Ocean City Police Department in conjunction with defendant Sgt. Dennis McKelvey of the Atlantic County Prosecutor's Office.

Rogers was subsequently convicted of the drug offenses and is presently incarcerated at Southern State Correctional Facility as a result of the sentence imposed by the State Criminal Court because of his conviction. Rogers admitted in sentencing documents that he committed the crime of selling illegal drugs. Specifically, the plea form completed by Rogers on July 23, 2001 indicates that Rogers was entering a guilty plea to three counts of distributing a controlled dangerous substance, a third degree crime and one count of terroristic threats also a third degree crime under New Jersey's Code of Criminal Justice. Each page of the plea form bears Rogers initials, along with his signature. (Dismissal of Counts, dep p. 19) According to Rogers responses noted

on the plea form, Rogers committed the offenses to which he pled guilty and understood what the charges meant. The plea form also specifically notes that Rogers was satisfied with the advice he had received from his attorney. (See plea form dated July 23, 2001 attached hereto as Exhibit "B"). After signing the plea form, Rogers appeared in Court and plead guilty to the charges. Thereafter a New Jersey Superior Court Judge in accordance with the plea agreement sentenced him to prison.

Rogers signed a criminal complaint against one of the officers involved in the drug buy, Officer John Campo. Rogers alleged that Officer Campo conspired against him and made the reports against him regarding the arrest and charge against Rogers on May 22, 2000 and July 23, 2001 (See transcript of probable cause hearing dated April 30, 2002 at p. 4, lines 9-25, p. 5, lines 1-12 attached hereto as Exhibit "C").

On April 30, 2002 Ocean City, New Jersey Municipal Court Judge Richard A. Russell held a probable cause hearing on the criminal charges pursuant to New Jersey Court Rules. Judge Russell determined that Rogers failed to produce sufficient proof to establish the existence of probable cause for the court to believe that Officer Campo manufactured any false statements or any false reports in regard to the charges that had already been issued. (See Exhibit "C" at p. 55). The Criminal Charges filed by the plaintiff in State Court against Officer Campo were dismissed based upon the lack of evidence of probable cause to believe that Officer Campo committed an offense.

On May 15, 2000 Patrolman Richard Costigan of the Ocean City Police Department arrived at the scene of an alleged assault where the victim, Deborah Moore, stated to Officer Costigan that she and Rogers, had an argument that became physical. Ms. Moore reported that she was pushed around a few times by Rogers and

she attempted to leave the house. While attempting to do so, Rogers kicked her in the stomach and punched her in the face several times. Patrolman Costigan noted Moore's face to have a swollen left black eye and swollen left cheek with a lump on her forehead. Ms. Moore declined medical treatment. Ms. Moore stated that she did not wish to sign a complaint at that time. Patrolman Costigan advised her that the statute of limitations for disorderly conduct under the New Jersey Criminal Code afforded her one year from the time of the incident to sign a complaint for simple assault under N.J.S.A. 2C:12-1 Significantly, Ms. Moore advised Patrolman Costigan that the accused, Rogers, was not her boyfriend and that they had just been friends for a long time. (See Exhibit "D" incident report form dated May 15, 2000). If Ms. Moore had a relationship with Rogers that would have permitted Patrolman Costigan to conclude that she was a "Victim of Domestic Violence" under N.J.S.A. 2C:25-21, Officer Costigan would have been required to arrest Rogers and file a Complaint for Domestic Violence because he observed evidence of injuries to Ms. Moore. However, since Ms. Moore told Patrolman Costigan that Rogers was not her boyfriend, there was no basis for arresting Rogers and charging him with a violation of the New Jersey Domestic Violence Act.

The deposition of Rogers was conducted on August 29, 2003 in State Prison. With regard to the nature of the plaintiff's lawsuit, Rogers testified that the defendants conspired over a three-month period to cause him to commit a crime that they manufactured and that they denied his rights to due process in New Jersey. Rogers alleges that Moore was not allowed to bring her claim against the Municipal Court of Ocean City and that the police conspired to file false reports. Rogers testified that over a three month course of time beginning May 15, 2000 and ending on August 15, 2000

the various defendants conspired to violate his Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights. (See transcript of the deposition testimony of Frank Rogers dated August 29, 2003 at p. 23, lines 5-25; p. 24, lines 1-13 attached hereto as Exhibit "E"). According to Rogers, he and Moore had a dating relationship since 1998. Over the course of their relationship the police had to become involved several times for arguments and fights between them. (See Exhibit "E" at p. 26, lines 4-23).[2]

Plaintiff claims that on August 15, 2000 he was preparing some materials for the Masonic Lodge of which he was a member, and sought to sign up "Joe" to be a member. Rogers claims that Moore and the driver "Boyd" and the car they used to go from Ocean City to Somers Point tried to set him up. At one point Moore suggested to Rogers that he give driver "Boyd" a package. Rogers claims that he refused, thinking that something was afoot. According to Rogers, he had gone into the house and actually gave "Joe" the lecture, explained to him the information on the Masonic Lodge. Rogers came back to the car and sat in the front next to (what appears now to have been the undercover police officer) "Boyd". At that time, plaintiff claims that Moore passed a package forward to him in the car. Rogers said that he felt that something was wrong and he did not personally hand the package to "Boyd". Later on, as they drove back from Somers Point to Ocean City, Rogers claims that "Boyd" opened up the package and asked if Rogers wanted some. In response, Rogers grabbed up "as much as possible" because he thought it was a set up. (See Exhibit "E" at p. 32, lines 7-12).

[1] Presumably, had Patrolman Costigan been advised of the "dating relationship", and therefore, concluded that Moore was a victim of domestic violence as defined by N.J.S.A. 2C:25-20(d), Rogers would have been arrested when Costigan observed evidence of physical injury to Moore, N.J.S.A. 2C:25-21(1).

[2] On or about May 4, 2004 plaintiff Frank Rogers amended his Complaint to include Ms. Moore as a defendant, coconspirator in the case.

With regard to this incident, Rogers stated that in fact "Boyd" had asked him to get cocaine at the Atlantis Apartments in Somers Point. Additionally, "Boyd" gave him $100.00 in cash, which Rogers admits to having had in his possession when he exited the car. Rogers testified that he never agreed to get him, "Boyd", cocaine, but never disagreed either, and in this resuscitation of the facts, plaintiff suggested that he went inside the Atlantis Apartments and returned "right away" back the car, and did not return the $100.00 to "Boyd". (See Exhibit "E" at p.p. 29-45, 50-51).[3]

Rogers also testified as to the incident that occurred on August 3, 2000, which forms the basis of plaintiff's prison sentence and to which the plaintiff pled guilty. Rogers testified that on August 3, 2000 he went to purchase marijuana for Ms. Moore because she was HIV positive and needed it, so that she could eat and maintain her weight, health and strength. (See Exhibit "E" at p. 99, lines 2-25). Rogers stated that a "friend" "Boyd"[4] of Ms. Moore's came to Ocean City to pick up plaintiff and to take him and Ms. Moore to get some marijuana and cocaine. Plaintiff agreed and directed "Boyd" and Ms. Moore to a place in Middle Township where they could get marijuana and cocaine. (See Exhibit "E" at p.p. 101, lines 6-22). Plaintiff directed "Boyd" to 7th Street and he further agreed that it was his purpose to get marijuana for Ms. Moore and cocaine for "Boyd". According to plaintiff, the drug contact at 7th Street was not there so they returned to Somers Point to the Atlantis Apartments. (See Exhibit "E" p. 102, lines 2-25; p. 103, lines 1-5; p. 104, lines 1-4). Plaintiff testified that he approached a friend

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[3] The incident involving "Boyd" was discussed in the beginning of plaintiff's deposition as having occurred on May 15, 2000 and was later clarified that the incident actually occurred on August 15, 2000.

[4] It is plaintiff's understanding that Ms. Moore's "friend" "Boyd" later turned out to be Detective Henry.

of his, whom he knew to sell baking soda and suggested that he "beep" this guy called "Boyd". He had taken $40.00 from "Boyd" and got out of the car to speak with "Tabuk". (See Exhibit "E" at p. 104, lines 5-25; p. 105, lines 1-25). Plaintiff denied knowing whether the contraband turned out to be cocaine or baking soda. (See Exhibit "E" at p. 108, lines 19-22).

Rogers further testified that the basis of his complaint for false arrest and false imprisonment against the defendants in this case is that they denied him and Ms. Moore their protection of the Domestic Violence Act. He claims that he is entitled to protection under the Domestic Violence Act even if he is not the Complainant under the Act and presumably even if he is the defendant named in a Complaint filed by a Police Officer. Rogers claims that the defendants conspired by sending Ms. Moore back to his house telling her to convince Rogers to trust her again so that she could somehow force Rogers to sell drugs so that he could be put in jail for a longer period of time. (See Exhibit "E" at p. 82, lines 4-25; p. 83, lines 1-7).

With respect to plaintiff's Complaint against defendant, Detective John Campo, Rogers alleges that from May 15 and for a three month period thereafter, Detective Campo conspired to get Rogers following the assault of Ms. Moore as it was defendant Campo's way of "getting revenge upon [him]". (See Exhibit "E" at p. 152, lines 13-18). Detective Campo was not directly involved in any of the C.D.S. transactions. Nonetheless, plaintiff claims that it was his investigation and that defendant Campo was directly involved each time Ms. Moore was "instructed" to go back to plaintiff's house wherein she would become a victim of domestic violence as well as the plaintiff himself. (See Exhibit "E" at p. 152, lines 19-25; p. 153, lines 1-15). Rogers alleges that

defendant Capt. Parris was negligent in allowing Detective Campo to take this approach to the investigation. Rogers testified that Capt. Parris knew he was not involved in any drug trade. Rogers testified that he had a conversation with Capt. Parris in 1998 and 1999 that he had reformed himself and had taken the job as the worshipful Master of Masonic Lodge 91, and therefore, he knew not to include Rogers in the group of people who would be distributing cocaine. Rogers testified that Capt. Parris knew that he was instrumental in the community in assisting the police with shootings in town. Rogers claims the Ocean City Police abused Ms. Moore in order to violate his Constitutional Rights. (See Exhibit "E" at p. 153, lines 17-25; p.p. 154-155).

It was represented to Rogers before he entered the guilty plea to the Criminal Charges that he was facing a substantial period of time in prison. The New Jersey Superior Court Sentencing Judge also asked plaintiff if he had the opportunity to meet with counsel. (See Exhibit "E" at p. 156, lines 2-16).

The deposition of Moore was conducted on September 15, 2004. Moore has had a seven-year history with Rogers. She testified that their relationship began in May of 1997 and that as of the time of the deposition in September of 2004, she continues to consider Rogers to be her boyfriend. (See Exhibit "F" deposition of Deborah Moore at p.p. 9-10). The first time Moore reported Rogers for domestic violence to the police was in May of 2000. She never reported Rogers to the police prior to that time because she was afraid of retaliation from Rogers. Rogers had been abusive since she knew him in 1997, but by May of 2000 she had enough. She testified that he would routinely be drunk and high on cocaine and he would physically beat her. (See Exhibit "F" at p. 12, 14). The incident in May of 2000 occurred the day after Mother's Day wherein she

suffered a bad beating at the hands of Rogers Ms. Moore testified that he "bracked" both of her eyes, busted her lip and kicked her in the ribs, breaking one of them. (See Exhibit "F" p. 13). Moore testified that in May of 2000 she went to the police station in Ocean City in person, having previously called to complain, but never filing a formal complaint. In the past, the police would come and let her out of the house, which Moore testified was something Rogers would not do. (See Exhibit "F" at p. 16) Moore was led to Detective Campo by a police officer and he told her to withhold the charges and set him up, so that Rogers would do more jail time. (See Exhibit "F" at p.p. 16-17). According to Ms. Moore, Detective Campo told her that he had heard that plaintiff was selling drugs. Moore testified that she did not tell the police that Rogers was a dealer, but rather told them that Rogers could get the drugs anytime he wanted. (See Exhibit "F" at p. 18). Detective Campo gave Ms. Moore his card and she returned two months later on approximately July 11, 2000 after another altercation with the Rogers. (See Exhibit "F" p. 19). Ms. Moore stated that the first buy was set up at Roger's house in Ocean City. The plan was for Moore to go inside the house and buy drugs from the Rogers. Ms. Moore testified that she knew that Rogers did not have any drugs and so she went past his place and up to his brother Rich's place to buy them directly. She came back outside and returned the drug purchase to Detective Campo, who was undercover, and told Detective Campo that she had gotten the drugs from Rogers, when in fact she had actually secured the illegal drugs from Rich Rogers. At no time did she ever tell Detective Campo that she obtained the drugs from anyone other than the Rogers. (See Exhibit "F" p.p. 21-25).

Ms. Moore stated that two weeks later, another buy was arranged. Again, Ms. Moore went to Roger's house to purchase the cocaine. When she went to plaintiff's house, his brother was not home so she did not get the cocaine. Ms. Moore told the police that Rogers did not have any cocaine. At that point in time, Ms. Moore did not tell the police anything about Roger's brother. Ms. Moore testified that as far as the police knew, she was going in to get cocaine from Rogers. (See Exhibit "F" p.p. 26-28). The third arranged buy occurred in August. Detective Campo wanted defendant Moore to arrange a purchase from Rogers directly to sell to someone else. Moore represented to Detective Campo that Rogers would sell the cocaine if he knew that the person was Moore's friend. Accordingly, it was arranged that one of the undercover officers would pose as a high school friend by the name of Kerry Newkirk. (See Exhibit "F" p.p. 28-31).

Approximately a week prior to the buy date, Moore told Rogers that she knew someone who wanted to get cocaine through him. Ms. Moore testified that they originally looked around in Ocean City, but eventually went to the Atlantis Apartments in Somers Point. They had obtained cocaine at the Elk's Club. (See Exhibit "F" p.p. 29-30).

The buy was arranged and Deon told plaintiff to get $100.00 worth of cocaine and Rogers agreed and accepted the money. The actual cash exchange was accomplished outside of the Atlantis Apartments in Somers Point, New Jersey and Moore, Rogers and the undercover officer all traveled together. The undercover officer passed plaintiff the $100.00 cash, Rogers accepted the money and went into the apartment where he stayed in there for about 15 minutes. Rogers came back to the car

and gave the bag to the undercover officer, who returned some of the cocaine to Rogers. Ms. Moore testified that later, she and Rogers tried to use the cocaine but they found out it was baking soda. (See Exhibit "F" p.p. 32-34). The last occasion where Ms. Moore cooperated with the police occurred a couple of weeks later wherein the undercover officer and Ms. Moore picked up Rogers at his mother's house and drove over to the Atlantis Apartments. The undercover officer told Rogers that he wanted $100.00 worth of cocaine. Rogers advised the undercover officer that he could get the cocaine and took money from the officer once they arrived in Somers Point. (See Exhibit "F" p.p. 36-39). Unbeknownst to Detective Campo, Ms. Moore testified that she had brought her own bag of cocaine, which she had held in her bra in the back seat of the car. When Rogers returned from the buy, having accepted the money and agreed to get the cocaine, Moore switched bags without either the plaintiff or Detective Campo knowing it. (See Exhibit "F" p.p. 41-43).

Significantly, Ms. Moore testified that she did not tell the police at any point in time that she had been lying to them and that Rogers did not sell drugs until the probable cause hearing. (See Exhibit "F" p.p. 45-46) Moore testified that Detective Campo never forced her to do what she did during any of the occasions from May through August. (See Exhibit "F" p.p. 68-69).

Rogers claims damages to include actual physical injuries, unlawful deprivation of liberty, violation of plaintiff's civil rights, pain and suffering, current and future medical expenses, including trauma and therapies, loss of future earnings and loss of concentration and enjoyment of life. Rogers also seeks compensatory damages and

punitive damages, as well as declaratory judgment. (See plaintiff's Amended Complaint, p. 32).

PROCEDURAL FACTS

On September 20, 2002, Rogers filed a Complaint against Detective John Campo, Captain Stephen G. Parris and the City of Ocean City, among other defendants. The defendants, Campo, Parris and the City of Ocean City filed an Answer on or about February 6, 2003. Plaintiff filed an Amended Complaint on May 4, 2004 naming the following additional defendants, Richard Costigan, Laura Hall, Charles Cusack, William Wilent and Deborah A. Moore.

As to the moving defendants in this matter, John Campo, Stephen G. Parris, the City of Ocean City, Richard Costigan, Laura Hall, Charles Cusack, and William Wilent, plaintiff alleges that acting under color of State Law the defendants acted with deliberate indifference and gross negligence, negligence, perjury, false arrest, false imprisonment, malicious prosecution, abuse of process, prima facie tort, conspiracy tort, conspiracy, intentional infliction of emotional distress, negligent infliction of emotional distress, outrageous conduct under the laws of the State, and outrageous conduct under the laws of the United States of America which resulted in serious bodily and emotional distress in violation of plaintiff's civil rights guaranteed by the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States of America in which the plaintiff was deprived of his liberty without due process and the privileges and immunities guaranteed him, rendering defendants liable to plaintiff under 42 USC § 1983, 1985, under 28 USC § 1331,1343, 2201, and F.R.C.P. 8(a).

LEGL ARGUMENT

POINT ONE

THE PLAINTIFF CANNOT PROVE THE NECESSARY ELEMENTS OF AN ACTION FOR MALICIOUS PROSECUTION, AND THEREFORE, THE PLAINTIFF'S CLAIM OF MALICIOUS PROSECUTION AGAINST THE DEFENDANTS SHOULD BE DISMISSED WITH PREJUDICE.

The elements of liability for the Constitutional tort of malicious prosecution pursuant to 42 USC §1983 coincide with those of the common law tort. Lee v. Mihalich, 847 F.2d. 66, 70 (3rd Cir. 1988). A civil action for malicious prosecution requires that:

1. The defendant initiate criminal proceedings;
2. Which ended in the plaintiff's favor;
3. Which was initiated without probable cause; and
4. Defendants acted maliciously or for a purpose other than bringing the defendant to justice. Id. at 69-70

Actual malice in the context of malicious prosecution is defined as either ill will in the sense of spite, lack of belief by the actor himself in the propriety of the prosecution, or its use for an extraneous improper purpose. Id. at 70.

The plaintiff's claim of malicious prosecution against the defendants should be dismissed because the plaintiff will be unable to satisfy the elements of a civil action for malicious prosecution. The defendants clearly had probable cause to arrest the plaintiff. Furthermore, the plaintiff will be unable to prove that the defendants acted with malice, ill will, or a lack of belief that the plaintiff violated a New Jersey Criminal Statute. Moreover, the proceeding did not terminate in plaintiff's favor, rather the plaintiff entered

a guilty plea to the criminal charges. Not every defendant initiated the criminal proceeding against Rogers

In view of the foregoing, the plaintiff's claim of malicious prosecution against the defendants is without merit.

POINT TWO

THE PLAINTIFF CANNOT PROVE THE NECESSARY ELEMENTS OF AN ACTION FOR MALICIOUS ABUSE OF PROCESS, AND THEREFORE, THE PLAINTIFF'S CLAIM OF MALICIOUS ABUSE OF PROCESS AGAINST THE DEFENDANTS SHOULD BE DISMISSED WITH PREJUDICE.

The elements of malicious abuse of process are:

> 1. The defendant has set legal process in motion for an improper ulterior purpose, and
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> 2. The defendant has committed a willful act in the use of process that perverts the regular conduct of the proceedings to accomplish the improper process.
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> Voytko v. Ramada Inn of Atlantic City, 445 F. Supp. 315, 325 (DNJ 1978).

The plaintiff's claim of malicious abuse of process against the defendants should be dismissed because the plaintiff will be unable to satisfy the elements of the civil action for malicious abuse of process. Clearly, the plaintiff's claims of malicious abuse of process are without merit. The plaintiff plead guilty to the criminal charges and has been sentenced to a term of imprisonment in State Prison. Nothing that the defendants did or failed to do can be described as a suggesting a perversion of the criminal process.

POINT THREE

THE PLAINTIFF DOES NOT HAVE A VIABLE CLAIM AGAINST THE CITY OF OCEAN CITY.

A municipality is liable under 42 USC § 1983 when a plaintiff can demonstrate that the municipality itself through the implementation of municipality policy or custom causes a Constitutional violation Monell v. New York City Dept. of Social Services, 436 U.S. 658, 691-695, (1978) Liability will only be imposed when the policy or custom itself violates the Constitution or when the policy or custom, while not unconstitutional itself, is the "moving force" behind the Constitutional tort of one of its employees. Polk County v. Dotson, 454 U.S. 312 (1981). Liability cannot be predicated, however, on a theory of respondeat superior or vicarious liability. Monell, at 693-694. Furthermore, a municipality may be liable under 42 USC § 1983 only if it can be shown that it's employees violated a plaintiff's civil rights as a result of the municipal policy or practice. Williams v. Borough of West Chester, PA, 891 F.2d 458, 466 (3d Cir. 1990)

Proof of the mere existence of an unlawful municipal policy or custom is not enough to maintain 42 USC § 1983 action Bielevicz v. Dubinon, 915 F.2d 845, 850 (1990) In a 42 U.S.C. § 1983 action the plaintiff bears the burden of proving that the municipal practice was a proximate cause of the injuries suffered. Losch v. Board of Parksburg, 736 F.2d 903, 910 (3d Cir. 1984). A sufficient causal relationship must be present between the challenged policy and the violation; (Saldana v. City of Camden, 727 F.Supp. 891, 894-95 (DNJ 1989)) that the policy made it possible for the violation to have occurred, a "but for" approach, is not enough. Id. [citing Talbert v. Kelly, 799 F.2d 62 (3d Cir. 1986)]. To establish the necessary causation a plaintiff must demonstrate a

plausible nexus or affirmative link between the municipal custom and the specific deprivation of Constitutional rights at issue. Bielevicz at 850. In this matter, the plaintiff has no evidence that the City of Ocean City implemented a policy or had a custom which violated the plaintiff's civil rights. Furthermore, the City of Ocean City cannot be held liable where there is no Constitutional injury at the hands of any individual police officer. The defendants respectfully submit that in view of the fact that the plaintiff has no actionable claim against the defendants for the reasons set forth below, the plaintiff does not have an actionable claim against the City of Ocean City.

POINT FOUR

THE PLAINTIFF CANNOT PROVE THE NECESSARY ELEMENTS OF AN ACTION FOR SUPERVISORY LIABILITY IN VIOLATION OF 42 USC § 1983 AS TO DEFENDANT CAPTAIN PARRIS, AND THEREFORE, THE PLAINTIFF'S CLAIM FOR SUPERVISORY LIABILITY AGAINST DEFENDANT PARRIS SHOULD BE DISMISSED WITH PREJUDICE.

A "supervisory official may be personally liable under [42 USC] § 1983, , where the official either "'directed others to violate [plaintiff's Constitutional Rights] or had knowledge of an acquiesced in his subordinate's violations." Hill v. Algor, 85 F. Supp 2d 391, 407 (DNJ 2000) (quoting Baker v. Monroe Twp., 50 F.3d 1186, 1190-91 (3d Cir. 1995) Plaintiff presents no evidence that Capt. Parris directed his arrest by the police officers. As plaintiff has proffered no evidence from which this Court can infer that Capt. Parris had actual knowledge of an acquiesced in the arrest on plaintiff, Summary Judgment should be granted

POINT FIVE

PLAINTIFF IS PRECLUDED FROM BRINGING A CIVIL DAMAGE ACTION AGAINST DEFENDANTS OR ANY OTHER OFFICIAL FOR FALSE ARREST AND FALSE IMPRISONMENT BECAUSE TO DO SO WOULD THROW INTO DOUBT THE VALIDITY OF THE UNDERLYING LAWFUL CONVICTION ENTERED BY VIRTUE OF HIS PLEA.

One may not commence a civil action that "would necessarily imply that the plaintiff's criminal conviction was wrongful". Heck v. Humphrey, 512 U.S. 477, 486-87 & n.6 (1994) In New Jersey, a guilty plea forms the basis for a conviction, and once entered upon a proper foundation, constitutes a conviction to the charge pled State v. Mitchell, 126 N.J. 565, 60 A.2d 198 (1991) Since plaintiff pled guilty to distributing CDS in the third degree and terroristic threats in the third degree, his plea constitutes a conviction for those offenses, he is barred from now bringing a claim for false arrest and false imprisonment. If plaintiff were allowed to bring any of these claims and succeeded, it would necessarily "imply that his convictions were wrongful". While additional charges were filed against plaintiff, plaintiff pled guilty and he must accept the circumstances of his knowing plea. Under Heck and its progeny, plaintiff's Complaint alleging false arrest and false imprisonment as to defendants John Campo, Stephen G. Parris, the City of Ocean City, Richard Costigan, Laura Hall, Charles Cusack, and William Wilent, should be dismissed with prejudice.

POINT SIX

ASSUMING ARGUENDO THAT PLAINTIFF'S COMPLAINT OF FALSE ARREST AND FALSE IMPRISONMENT WERE NOT BARRED, DEFENDANTS ARE IMMUNE FROM PLAINTIFF'S SUIT BECAUSE THE UNDISPUTED MATERIAL FACTS OF RECORD ESTABLISH THAT THEY WERE OBJECTIVELY REASONABLE IN CONCLUDING THAT PROBABLE CAUSE EXISTED TO ARREST THE PLAINTIFF FOR THE CRIME.

Under the Fourth Amendment to the United States Constitution, a policy officer may not arrest a citizen except upon probable cause. Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972). Probable cause to arrest requires more than mere suspicion; however, it does not require that the officer have evidence sufficient to prove guilty beyond a reasonable doubt. United States v. Glasser, 750 F.2d 1197, 1205 (3d Cir. 1984). Rather, probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested. United States v. Cruz, 910 F.2d 1072, 1076 (3d Cir. 1990) (citing Dunaway v. New York, 442 U.S. 200, 208 n. 9 (1979). When a police officer does arrest a person without probable cause, the officer may be liable in a civil rights suit. Pierson v. Ray, 386 U.S. 547 (1967).

Still, Government officials performing discretionary functions, generally are shielded from liability for civil damages so long as their conduct does not violate clearly established constitution rights that a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

As police officers, defendants are afforded qualified immunity, rather than absolute immunity for two important reasons: one, so that they can perform their duties without the fear of constantly defending themselves against insubstantial claims for damages; two, so that the public can recover when government officials unreasonably invade or violate individual rights under the Constitution. Anderson v. Creighton, 483 U.S. 635, 639 (1987).

According to Creighton, the district court should resolve any immunity question at the earliest possible stage of the litigation. And, when the material facts are not in dispute, the district court may decide whether a government official is shielded by qualified immunity as a matter of law. Id. at 646.

The right to be free from unreasonable restraint and the right to be free from arrest except upon probable cause were "clearly established" at the time of the arrests in this case. This court must next consider not just whether the defendants violated plaintiff's rights, but if they did, were their conclusions that probable cause to arrest plaintiff existed at the time a reasonable one? This analysis stems again from Creighton, which held that it is inevitable that law enforcement officers will in some cases reasonably but mistakenly conclude that probable cause to make an arrest was present, when in fact, it was not. When an officer is reasonable in his mistake, he will not be held personally liable. Id. at 641

Whether a police officer is immune is governed by the same standard of objective reasonableness that applies in the context of a suppression hearing under United States v. Leon, 468 U.S. 897 (1984). See Malley v. Briggs, 475 U.S. 335 (1986) An officer has the shield of immunity except when probable cause is "so lacking in

indicia as to render official belief in its existence unreasonable." Id. at 341. The standard for determining the reasonableness of an official's belief in the existence of probable cause is whether a reasonably well-trained officer would have known that the facts failed to establish probable cause under the conditions. Id. at 345. Applying this standard, the qualified immunity doctrine "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." Id.

Furthermore, "it is not the obligation of the police officer 'to conduct a mini-trial' prior to an arrest." Green v. City of Paterson, 971 F. Supp. 891, 900, 1997 U.S. Dist. LEXIS 10445, quoting Brodnicki v. City of Omaha, 75 F.3d 1261, 1264 (8th Cir.) cert. Denied, 117 S. Ct. 179 (1996). And, "evidence that may prove insufficient to establish guilt at trial may still be sufficient to find the arrest occurred within the bounds of the law." Henry v. United States, 361 U.S. 98, 102 (1959). "Probable cause falls somewhere between the poles of mere suspicion and evidence sufficient to prove guilty beyond a reasonable doubt." Green, supra at 900.

It is undisputed that plaintiff was arrested for distribution of CDS and terroristic threats.

The facts simply do not even approach the need to consider whether "indicia was so lacking" that the belief in the existence of probable cause was unreasonable. But, assuming arguendo that the Court was to consider the indicia so lacking, the next consideration would be whether a reasonably well-trained officer in the same circumstances would have known that he was violating the individual's constitutional rights.

Last, there is absolutely no basis to conclude from the facts available that the defendants are either incompetent or knew that probable cause did not exist.

Therefore, the Court should find now that the defendants were reasonable in their belief that probable cause to arrest the plaintiff for distribution of CDS and terroristic threats was reasonable. The Court should also find that probable cause to arrest plaintiff for distribution of CDS and terroristic threats did in fact exist at the time of his arrest. Rogers contends that Capt. Parris knew he was the Worshipful Master of the Masonic Lodge 91, and therefore, would not be involved in the selling of drugs. Plaintiff cites no legal authority for the proposition that certain individuals are immune for criminal activity due to their associations. See Green v. City of Paterson, 971 F.Supp. 891, 906 (DNJ 1997). Plaintiff's position as a Worshipful Master does not undermine the finding of probable cause for his arrest. In so doing, the Court should cloak the defendants in qualified immunity and hold them personally harmless from all charges under all counts asserted against them A finding that probable cause existed or that the defendants' belief that probable cause existed also works as a defense or legal justification to the charge of false arrest. See Hayes v. Mercer County, 217 N.J. Super 614, 623, 526 A.2d 737 (App. Div.) cert. Denied, 108 N.J. 643 (1987).

POINT SEVEN

PLAINTIFF'S SECTION 1985 CONSPIRACY CLAIMS MUST FAIL.

The elements of a cause of action under 42 USC § 1985(3) are:

1. A conspiracy by the defendants;
2. With a purpose of depriving the plaintiff of equal protection of the laws of equal privileges and immunity under the law;
3. A purposeful intent to discriminate;

4. Action by the defendant under color of State Law or authority; and
5. Injury to the person or property of the plaintiff or his deprivation of a right or privilege of a citizen of the United States resulting from acts in furtherance of the conspiracy.

Colon v. Grieco, 226 F.Supp. 414, 418 (DNJ 1964).

In Morales v. Busbe, 972 F.Supp. 254, 267 (DNJ 1997) the Court recognized that "one of the elements of a § 1985 claim is that the plaintiff must prove that there was "'some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action.'" United Brotherhood of Carpenters v. Scott, 463 US 825, 829 (1982) (quoting Griffin v. Breckenridge, 403 US 88, 102 (1971)).

In the case at bar, plaintiff's Complaint does not allege that defendants' alleged conduct was motivated by class based, invidiously discriminatory animus, and there is no evidence in this case that would support such a claim Therefore, Summary Judgment as to plaintiff's § 1985 conspiracy claims should be granted.

POINT EIGHT

PLAINTIFF PRESENTS NOT ONE SCINTILLA OF EVIDENCE THAT THE DEFENDANTS INTENDED TO OR WRECKLESSLY INFLICTED EMOTIONAL DISTRESS [illegible] LEAST SHOWING OF PROXIMATE OR PERMANENCY OF HIS EMOTIONAL AND THE COUNTS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS SHOULD BE DISMISSED WITH PREJUDICE

Plaintiff's Complaint alleges the state law claims of Intentional Infliction of Emotional Distress (IIED) and Negligent Infliction of Emotional Distress (NIED) by the defendants against the plaintiff. To establish a cause of action for IIED, a plaintiff must prove: 1) that defendant acted intentionally or recklessly; 2) that defendant's conduct

was extreme or outrageous, 3) that defendant's actions were the proximate cause of the plaintiff's distress; and 4) that the emotional distress suffered by plaintiff was severe. See Hill v. New Jersey Department of Corrections, 342 N.J. Super. 273, 297, 776 A. 2d 828 (App. Div. 2001).

To establish a cause of action for NIED, a plaintiff must prove 1) death or serious injury to another caused by defendant's negligence; 2) marital or intimate familial relationship between plaintiff and the injured person; 3) the observation of death or injury at the scene of the accident; and 4) resulting severe emotional distress. See Fertile v. St. Michael's Medical Center, 334 N.J. Super. 43, 53-54, 756 A.2d 1037 (App. Div. 2000).

Before this Court can consider whether Plaintiff has satisfied the elements of IIED, it must first consider whether Plaintiff has met the threshold limitation contained in the New Jersey Tort Claims Act, 59:9-1, et seq. ("NJTCA"). The NJTCA provides that:

> a. No interest shall accrue prior to the entry of judgment against a public entity or public employee.
> b. No judgment shall be granted against a public entity or public employee on the basis of strict liability, implied warranty or products liability.
> c. No punitive or exemplary damages shall be awarded against a public entity.
> d. ***No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $3,600.00.*** For purposes of this section medical treatment expenses are defined as the reasonable value of services rendered for necessary surgical, medical and dental treatment of the claimant for such injury, sickness or disease, including prosthetic devices and ambulance, hospital or professional nursing service. (Emphasis added).

In order to recover damages from a public entity or employee, "a plaintiff must prove by objective medical evidence that the injury is permanent." Brooks v. Odom, 150 N.J. 395, 406, 696 A.2d 619 (1997).

Given that Plaintiff has failed to proffer evidence that he underwent medical or psychological treatment (and accordingly has no monetary expenses), and fails to produce an expert on his behalf to establish proximate cause or any permanency of Plaintiff's alleged damages, Plaintiff clearly fails to meet the threshold for recovery of IIED or NIED by the defendants, specifically, or by any other officer of the Ocean City Police Department.

Even if, arguendo, Plaintiff could meet the threshold for either IIED or NIED, the undisputed material facts do not support the elements of either offense.

POINT NINE

THERE ARE NO MATERIAL ISSUES OF FACT IN DISPUTE WITH RESPECT TO THE ISSUES IN THIS MOTION, AND THEREFORE, SUMMARY JUDGMENT SHOULD BE GRANTED AS A MATTER OF LAW.

Under Fed.R.Civ.P. 56(c) "summary judgment is proper if the pleadings, depositions, answers to Interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986). And, in deciding whether there exists a disputed issue of material fact, the Court must view the evidence in favor of the non-moving party by extending any reasonable favorable inference to that party. See Aman v. Cort Furniture Rental Corp., 85 F. 3d 1074, 1080-81 (3d Cir. 1996). Summary Judgment is

appropriate where reading the record in a light most favorable to the non-moving party, there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Jones v. School District of Philadelphia, 198 F.3d. 403, 409 (3d Cir. 1999). A non-moving party may not rest upon mere allegations, general denials or vague statements in opposition to a Motion for Summary Judgment. If the non-moving party's evidence is merely colorable, or is not significantly probative, Summary Judgment may be granted. Bixler v. Central Penna. Teamsters Health and Welfare Fund, 12 F.3d. 1292 (3d Cir. 1993).

The substantive law governing the dispute will determine which facts are material, and only disputes over those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of Summary Judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A genuine issue of material fact for trial does not exist unless the party opposing the Motion can adduce evidence which, when considered in light of that party's burden of proof at trial, would be the basis for a jury finding in that party's favor. J.M. Mamiye and Sons, Inc. v. Fidelity Bank, 813 F.2d 610, 618 (3d Cir. 1987) (Becker, J., concurring)

Viewing the facts in this matter in a light most favorable to the plaintiff under both Federal and State Law, Plaintiff will not be able to prove an actionable claim against the defendants in this matter. Plaintiff's claims do not assert a viable Constitutional action against the defendants, and the plaintiff's alleged physical injuries do not meet New Jersey's Tort Threshold. Furthermore, given the facts in this case, the defendants are entitled to the good faith immunities under both Federal and State Law. Lastly, the plaintiff will be unable to prove any wanton or intentional conduct on behalf of the

defendants to support any claim for punitive damages. Accordingly, the defendants, John Campo, Stephen Parris, City of Ocean City, Richard Costigan, Laura Hall, Charles Prusack and William Wilent, are entitled to Summary Judgment as a matter of law as to all Counts alleged against them.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court enter an Order dismissing all claims and cross claims against the defendants, John Campo, Stephen Parris, City of Ocean City, Richard Costigan, Laura Hall, Charles Prusack and William Wilent, with prejudice and without costs.

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BY: _____
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Dated: March 2, 2005