UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW HAMPSHIRE

ALFREDO VALENTIN **Plaintiff,** **v.** **CITY OF MANCHESTER, ET AL.** **Defendants.**	**Case No.: 1:15-cv-00235-PB**

[CORRECTED] PLAINTIFF'S OBJECTION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court must summarily deny Defendants' Motion for Summary Judgment because Defendants have failed to comply with Rule 56's requirement to "construe the record evidence in the light most favorable to, and [draw] all reasonable inferences in favor of, the non-moving party." *See ATC Realty, LLC v. Town of Kingston*, 303 F.3d 91, 94 (1st Cir. 2002) (citation and internal quotations omitted). Plaintiff Alfredo Valentin testified repeatedly at deposition that he audio recorded Defendants Sgt. LeVeille and Sgt. Sanders openly by holding his phone "chest high." At deposition, a picture was taken showing how he was recording the Officer Defendants:

See Defs.' *Ex. K; see also* Valentin Depo. 59:6-21, 63:7-20, attached to Second Bissonnette Decl.

("Second Biss. Decl.") at *Ex. TT*. Despite this clear requirement in Rule 56, Defendants' Motion fails to credit this testimony. Instead, Defendants' Motion almost exclusively relies on Defendants' disputed testimony that Plaintiff engaged in surreptitious recording. Defendants spend only one sentence of their brief (on page 13) crediting Plaintiff's testimony that he was recording openly. This is not a case where Plaintiff is required to comb through the record to locate a single piece of evidence supporting a dispute of material fact. To the contrary, the record is replete with repeated and continuous assertions, including the deposition photograph shown above, clearly and unambiguously indicating a material dispute of fact. Defendants' Motion for Summary Judgment chooses to ignore this factual dispute.

This factual dispute is not material to Plaintiff's Motion for Summary Judgment because the First Amendment protects the recording that occurred in this case whether it was done openly or secretly. Indeed, a Massachusetts federal court recently held that a First Amendment claim exists in the context of secretly recording the police performing their duties in public when the recording does not interfere with those duties. *See Martin v. Evans*, No. 16-11362-PBS, 2017 U.S. Dist. LEXIS 37156, at *20 (D. Mass. Mar. 13, 2017) (Docket No. 50) (Saris, C.J.), Second Biss. Decl. at *Ex. UU* ("Evans argues that the plaintiffs fail to state a claim under the First Amendment because the First Amendment does not provide any right to secretly record police officers. Existing First Circuit authority holds otherwise."). However, this dispute concerning the open or secretive nature of Plaintiff's recording is material to Defendants' Motion for Summary judgment, which argues that the First Amendment only protects the "open" recording of police officers publicly performing their official duties. If Plaintiff's recording was done openly—as this Court must assume for the purposes of Defendants' Motion—it would squarely fall within the protections that even Defendants recognize are provided in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) and

Gericke v. Begin, 753 F.3d 1 (1st Cir. 2014). Thus, if Defendants are correct that the First Amendment only protects the open recording of police officers publicly performing their official duties—and they are not—then there is an obvious material factual dispute that precludes this Court from granting judgment in their favor.

The importance of this case has also been confirmed by a recent event in late March 2017 where a MPD officer informed a citizen openly recording the police in the publicly-accessible hallway of the Manchester City Hall that he could not record the officers. The officer stated that: "You have to advise us that you are recording us [and] you cannot record audio." *See* YouTube video (at 0.28 second mark), at https://www.youtube.com/watch?v=xzF_Ab49IFE&app=desktop. Notwithstanding two First Circuit decisions, the Superior Court decision from October 21, 2015, and the pendency of this case, the MPD is still violating the First Amendment. An injunction is necessary to prevent future abuses from occurring.

Accordingly, Defendants' Motion must be denied. In further support of this Objection, Plaintiff incorporates by reference his Memorandum of Law in Support of his Motion for Summary Judgment as to All Claims (Docket No. 66-1).

STATEMENT OF MATERIAL FACTS CONSTRUED IN FAVOR OF THE PLAINTIFF

I. Response to Defendants' "Facts Believed to be Uncontested"

Attached to this pleading as an addendum is *Exhibit 1*, which constitutes a chart specifically identifying each and every statement of fact contained in Defendants' Motion, and the Plaintiff's Response indicating whether the facts asserted are contested, uncontested, or partially contested.

II. Counter Statement of Facts

Defendants have ignored Rule 56's requirement that all disputed facts be construed in favor of the non-moving party. Instead, Defendants repeatedly assert a right to summary judgment based

on Defendants' version of events that are fully contested.

Plaintiff incorporates by reference Sections I, III, and IV of his Statement of Material Facts in Support of his Motion for Summary Judgment (Docket No. 66-1 at Pages 2 through 10). Plaintiff adds the facts below, construed in his favor, concerning the arrest that occurred on March 3, 2015. Additional facts are presented here to emphasize the degree to which many facts presented by Defendants are obviously contested.

On March 3, 2015, Mr. Valentin received a call on his cell phone, informing him that his dog was loose. *See* Valentin Depo. 30-31, Second Biss. Decl. at *Ex. TT*. He picked up his dog and went to his house on Lawton Street. *Id.* at 31. Mr. Valentin then approached his house and observed a police officer outside his home. *Id.* at 33. Mr. Valentin walked up to the officer and learned that there was a raid being conducted at the house. *Id.* at 33-34. Mr. Valentin asked to see the warrant authorizing the search of his home and was eventually told by Defendant Officer Sanders that he was not permitted to see it and that he should return in about an hour. *Id.* at 36-37. At the time the officers first entered Plaintiff's home on March 3, 2015, there was a sign on Plaintiff's window stating: "THESE PREMISES PROTECTED BY VIDEO SURVEILLANCE." *See id.* at 92-93; LeVeille Depo Ex. 13, Biss. Decl. at *Ex. PP*.

Consistent with the officer's instruction, Mr. Valentin left his house and returned an hour later. *See* Valentin Depo. 38, Second Biss. Decl. at *Ex. TT*. Upon his return, Mr. Valentin turned on the audio recorder built into his cell phone and began recording when he left his car and approached his house. *Id.* at 58. He began recording to "protect [himself] because Manchester has been known to violate certain people's rights" based on YouTube videos he saw. *Id.* at 78. There were no officers outside his house so Mr. Valentin walked in through the door while holding his cell phone "chest high." *Id.* at 56-58. He took one step in the house. When the police saw Mr.

Valentin, they ordered him out of his home. *Id.* at 56-57. Mr. Valentin immediately complied and exited the house. *Id.*

Defendant Officer Sanders then came outside. *Id.* at 57. Sgt. Sanders spoke to Mr. Valentin for a few moments, and then went inside to get Sgt. LeVeille. *Id.* As Mr. Valentin spoke to Sgt. LeVeille, Mr. Valentin held his phone "chest high" in front of himself. *Id.* at 58-59, 63:7-20. Questioned repeatedly about this at his deposition, Mr. Valentin estimated that he was holding his cell phone chest high 95% of the time, intimating that the other 5% of the time was due to the animated nature of the conversation. *Id.* at 58. Mr. Valentin did not specifically inform the officers that he was recording them, as they had no expectation of privacy during this conversation taking place in the middle of the street in front of his driveway. *Id.* at 60. Under continued deposition questioning, Mr. Valentin repeatedly maintained that he held his cell phone chest high and never held the phone down by his leg. *Id.* at 63. Though irrelevant to this case, Plaintiff had no awareness of Mr. Chapman's drug activities. *Id.* at 72:17-19, 73:23, 48:1-2.

As set forth more fully in the Plaintiff's previously filed Motion for Summary Judgment, Defendants arrested Mr. Valentin and aggressively pursued his prosecution under the wiretapping statute simply for recording their activities and statements. An indictment brought against him was ultimately dismissed by the Hillsborough County Superior Court because his actions were protected under the First Amendment.

STANDARD

Summary judgment is only appropriate when the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In ruling on a motion for summary judgment, the court must "view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable

inferences in that party's favor." *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990). Summary judgment is appropriate when the record reveals "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In this context, "a fact is 'material' if it potentially affects the outcome of the suit and a dispute over it is 'genuine' if the parties' positions on the issue are supported by conflicting evidence." *Int'l Assn of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 199-200 (1st Cir. 1996) (citations omitted). While a reviewing court must consider all properly documented facts, it may ignore bald assertions, unsupported conclusions, and mere speculation. *See Serapion v. Martinez*, 119 F.3d 982, 987 (1st Cir. 1997).

MUNICIPAL LIABILITY/*MONELL* CLAIMS AGAINST THE CITY

If Plaintiff openly recorded the Defendants Officers—which this Court must assume for the purposes of Defendants' Motion—municipal liability is not even necessary in this case, as it would be without a doubt that the Defendant Officers violated the clearly-established First Amendment principles in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) and *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014), as well as the wiretapping statute.

As explained in Plaintiff's Motion for Summary Judgement, Plaintiff raises two independent *Monell* claims against the City of Manchester, but these claims focus on the surreptitious recording of the police, not the open recording of the police. First, Plaintiff raises an official policy claim. In fact, Defendants concede that the MPD, at the time of Plaintiff's arrest on March 3, 2015, had a policy in place that deemed the secret recording of the police to be without constitutional protection (even if the recording was of officers engaging in public duties and done without interference) and in violation of New Hampshire's wiretapping statute. *See* Mar. 8, 2017 Reardon Aff. ¶ 4 (Docket No. 68-4); Defs.' Memo. at pp. 6, 19. This policy was memorialized in

an April 5, 2012 training memo that Captain Robert Cunha of the MPD sent to all its sworn officers—including Sgts. LeVeille and Sanders. It stated that the New Hampshire wiretapping statute "prohibits someone from secretly audio recording" the police. *See* Cunha Depo. Ex. 4/LeVeille Depo Ex. 17, Biss. Decl. at *Ex. B*. It is not disputed that Sgts. LeVeille and Sanders acted pursuant to this policy when arresting Plaintiff. As Defendants acknowledge in their Motion, Sgts. LeVeille and Sanders were aware of this guidance and were complying with it at the time of the arrest. *See* Defs.' Memo. at p. 5 ¶ 10. As explained in Plaintiff's Motion for Summary Judgment, this policy, on its face, violates the First Amendment. It is also inconsistent with the wiretapping statute because a person *can* secretly record a police officer under this statute if the officer does not have a reasonable expectation of privacy in the recorded communication. *See* RSA 570-A:1, II (defining "oral communication").

Defendants attempt to avoid *Monell* liability here by arguing that this arrest was a "single incident of misconduct." *See* Defs.' Memo. at p. 23. However, under an official policy claim, a plaintiff can establish liability—even for a single incident—simply by showing (i) the policy is facially unlawful and (ii) the policy was applied to the plaintiff. *See Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 404 (1997) ("Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, resolving [the] issues of fault and causation is straightforward."); *Rossi v. Town of Pelham*, 35 F. Supp. 2d 58, 74 (D.N.H. Sept. 28, 1997) (same); *Szabla v. City of Brooklyn Park, MN*, 486 F.3d 385, 389-90 (8th Cir. 2007) (same). These elements are satisfied here.[1]

[1] Municipal liability under this theory—in which the policymaker directs unlawful conduct in a written policy—is distinct from municipal liability based on the municipality's failure to prevent constitutional violations by training its employees. Only the latter requires a showing that the municipality was "deliberately indifferent" to the violations. *See Brown*, 520 U.S. at 404-05 ("the conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains"); *Haley v. City of Boston*, 657 F.3d 39, 52 (1st Cir. 2011) (describing these two ways of establishing *Monell* liability); *see also Williams v. Kaufman Cnty.*, 352 F.3d 994, 1014 n.66 (5th Cir.

Second, as an alternative theory of municipal liability, Plaintiff asserts that the MPD failed to train its officers that both the First Amendment and the wiretapping statute allow such "secret" recordings where the officers are performing their official duties in public and where the recording is done without interference. This too is apparent given that the training provided to MPD officers directly contradicts this expression of a citizen's constitutional and statutory rights. Given this failure to train on what the law requires—and, in fact, by providing the opposite guidance in its training—it was highly predictable that an officer would violate the civil rights of a person like Plaintiff alleged to be secretly recording the police. *See Brown*, 520 U.S. at 399 (even where a pattern does not exist, municipal liability exists for a failure to train where "a violation of federal rights [was] a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations"); *see also Young v. City of Providence*, 404 F.3d 4, 28 (1st Cir. 2005) (same). Plaintiff's arrest is indicative of this predictability, as is the recent unconstitutional instruction not to record provided by a MPD officer at City Hall. *See* YouTube video (at 0.28 second mark), at https://www.youtube.com/watch?v=xzF_Ab49IFE&app=desktop.

CLAIMS AGAINST THE INDIVIDUAL OFFICERS

I. First Amendment (Count I)—Pre and Post-Indictment Claim

A. If Plaintiff Recorded Openly, Which This Court Must Assume, the Officer Defendants Violated Clear First Amendment Principles

If Plaintiff's assertion that he recorded the Defendant Officers openly is credited—again, which the Court must do at this stage—then it cannot be seriously disputed that the Defendant Officers violated clearly established law. On August 26, 2011, the First Circuit Court of Appeals held in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) that members of the public have a First

2003); *Rossi v. Town of Pelham*, 35 F. Supp. 2d 58, 78 n.1 (D.N.H. Dec. 18, 1997) ("Thus, for a municipal policy that is either facially unlawful or directs unlawful conduct, plaintiffs need not further establish 'deliberate indifference.'").

Amendment right to video and audio record law enforcement officers in a public place when the officers are acting in the course of their official duties, provided that the recording is done peacefully and does not interfere with the officers' performance of their duties. *Gericke* affirmed this principle. Defendants have asserted throughout this case that this First Amendment rule is limited to the "open" recording of police. Though Defendants are incorrect, this recognition means that, if Plaintiff's version of events is credited, then the Defendant Officers violated the First Amendment. Defendants attempt to escape this obvious result by claiming that (i) Defendants did not subjectively believe they were being recorded, (ii) Plaintiff had an impermissible motive when he recorded Defendants, and (iii) Plaintiff interfered with the Defendants' activities. Each of these arguments must be rejected.

1. The Officer Defendants' Knowledge of Being Recorded

Defendants contend that "[e]ven if Plaintiff's version is credited in accordance with the way he claimed to be holding his phone [shown in the picture] [i]t is undisputed that he made no assumptions that the police officers knew that he was recording, they made no gestures or other evidence to show that they believed they were being recorded and holding his phone in that manner is simply not the typical way that individuals hold out their phone when videotaping anything with their phone including police officers." *See* Defs.' Memo. at p. 13. However, the First Amendment right to record is not dependent on the recorder verbally informing the officer that he is recording or assuming that the officer knows he is recording. Nor is this right dependent on an officer subjectively believing that he is being recorded. *Glik* and *Gericke* impose no such limitations. This is for good reason: requiring the police officer's subjective awareness of the recording would render illusory the right to record because aggrieved police officers will often not be independently aware that they are being filmed while engaging in their duties, thereby making criminal all acts

of recording prior to the officer's discovery. Under this theory, for example, the 1991 Rodney King video likely would not be protected under the First Amendment.

If this Court adopts Defendants' open/secret distinction under the First Amendment—which it should not—*Glik*'s Fourth Amendment analysis is instructive. There, the Court was tasked with determining whether the plaintiff engaged in "secret" recording under the Massachusetts wiretapping statute. The Court explained:

> "[A]ctual knowledge" can be proven by objective manifestations of knowledge to avoid the problems involved in speculating as to the [subject's] subjective state of mind. Moreover, the court has noted that "actual knowledge" does not require that there be any explicit acknowledgment of or reference to the fact of the recording. …. The unmistakable logic of [Massachusetts court decisions] is that the secrecy inquiry turns on notice, i.e., whether, based on objective indicators, *such as the presence of a recording device in plain view, one can infer that the subject was aware that she might be recorded*.

Glik, 655 F.3d at 86-87 (internal citations and quotations omitted) (emphasis added). *Glik*'s interpretation of the Massachusetts' wiretapping statute is instructive where it explains that "the use of a recording device in 'plain sight,' … constitutes adequate objective evidence of actual knowledge of the recording." *Id.* at 87. Here, Plaintiff placed his phone at chest level, which was "in plain sight" and therefore "constitutes adequate objective evidence of actual knowledge of the recording." As Sgt. LeVeille volunteered at deposition, if a phone is "held up," then a person does not need to tell you he is recording because "you can interpret from that that you're most likely, probably getting recorded." *See* LeVeille Depo. 139:11-22, Biss. Decl. at *Ex. Q*. Defendants, in fact, appear to acknowledge that officers need not affirmatively consent. Defs.' Memo. at p. 9.

2. Irrelevancy and Mischaracterizations of Plaintiff's Motive

Defendants also claim that Plaintiff's recording was not protected on the basis that "he was recording the police officers to gather evidence because he feared the potential for a charge arising out of the drug activity in his home." Defs.' Memo. at p. 8-10. This is legally wrong and

mischaracterizes Plaintiff's deposition testimony.

First, Defendants are incorrect to limit *Glik*'s holding to "citizen journalists" or people with the specific intent to engage in newsgathering. Defendants' position implies that even the open recording of the police is unprotected if the recorder is not intending to be a "citizen journalist." Plaintiff's "motive" in deciding to record, however, has no bearing on the claims or defenses raised in this case. *Glik*, itself, does not hinge First Amendment protection on the motivation of the person doing the recording. *See Glik*, 655 F.3d at 82 ("[I]s there a constitutionally protected right to videotape police carrying out their duties in public? Basic First Amendment principles, along with case law from this and other circuits, answer that question unambiguously in the affirmative."). This is because gathering information about government officials, irrespective of a recorder's motive, "serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs." *Id.* For example, with respect to a bystander who spontaneously takes out a cellphone camera when spotting a commotion, the bystander may not know the value and potential use of her work until the scene she captures has played itself out. Its significance may not emerge until much later—when the event subsequently stirs controversy. *See, e.g.*, *Lambert* v. *Polk Cnty.*, 723 F. Supp. 128, 130-131 (S.D. Iowa 1989) (noting bystander's video of a street fight became newsworthy when a participant later died).

Second, Defendants' claim that Plaintiff "was recording the police officers to gather evidence because he feared the potential for a charge arising out of the drug activity in his home" is a mischaracterization. *See* Fed. R. Civ. P. 56(e) (court may reject an assertion of fact that is not properly supported). As Plaintiff's deposition—which must be deferred to here—demonstrates, he recorded the Defendant Officers for precisely the government accountability reasons that the *Glik* Court held justified the right to record the police under the First Amendment. Plaintiff

engaged in the recording to "protect himself" in the event that the MPD violated his rights in taking any action against him. He testified that he did not trust the MPD. He is under no duty to do so. It turns out that his concern was entirely reasonable given the MPD's decision to unconstitutionally arrest and charge him. Plaintiff's complete testimony was follows:

> Q. Why were you recording the police officers on that day?
> A. To protect myself.
> Q. And protect yourself how?
> A. *To protect myself because Manchester has been known to violate certain people's rights. And I found that out having seen/observed a few videos on Youtube and television and all that good stuff. Specifically, I don't know exactly which, but I know I have seen them.*
> Q. So how would audio recording these two police officers protect yourself?
> A. There's no "he said/she said."
> Q. So if there was some kind of charge against you, you could use that as evidence; correct?
> A. Correct. He said/she said.

See Valentin Depo. 78:14-79:7, Second Biss. Decl. at *Ex. TT* (emphasis added). Of course, it is understandable that a person would be concerned and skeptical of police power as the police is exercising a search of their most intimate possessions. *See* LeVeille Depo. 141:1-4, Biss. Decl. at *Ex. Q* (understanding that Plaintiff's reaction "wasn't irrational" and "why somebody would feel the way he appeared to feel"). Simply put, though Plaintiff's motive is irrelevant, he recorded the Defendant Officers to ensure that his rights would be protected. This falls squarely within the government accountability underpinnings of *Glik*.

3. Lack of Interference

Defendants also assert in a single sentence that Plaintiff's recording interfered with the performance of their duties and therefore was not protected. *See* Defs.' Memo. at 17. As explained on pages 20-21 of Plaintiff's Memorandum of Law in Support of His Motion for Summary Judgment, this argument is baseless, was rejected by the Superior Court, and can be rejected once again.

B. If Plaintiff Recorded Secretly, the Officer Defendants Still Violated Clear First Amendment Principles

Defendants' Motion incorrectly asks the Court to discount Plaintiff's version of events and assume that the recording was done surreptitiously. Even if the Court considers Defendants' version of events—which it cannot under Rule 56—Defendants' Motion fails and judgment must be entered in Plaintiff's favor. This is for the reasons stated in Plaintiff's Motion for Summary Judgment, as well as the additional reasons stated below.

1. Defendants' Reliance on *Hyde* Is Misplaced

Defendants' reliance on the Massachusetts Supreme Judicial Court's decision *Commonwealth v. Hyde*, 750 N.E. 2d 963 (Mass. 2001) is misplaced. *See* Defs.' Memo. at 10. *Hyde* does not support the MPD's position that the First Amendment fails to protect the secret recording of the police. *Hyde*'s focus was on the text of Massachusetts' wholly different wiretapping statute, not whether there is a First Amendment right to secretly record the police in public. While openness may impose a limiting principle on the right to record under the elements of Massachusetts' distinct wiretapping statute, openness does not impose a limiting principle under the First Amendment rule articulated in *Glik* and *Gericke*. As the Superior Court noted in the underlying criminal case, any reliance on *Hyde* is "misplaced":

> The defendant's challenge in *Hyde* was based on statutory interpretation of Massachusetts' wiretap statute. The case did not address the First Amendment. Notably, *Hyde* was decided before *Glik* and *Gericke* clarified the First Circuit's position that the First Amendment protects the recording of police officers.

Dismissal Order, Biss. Decl. at *Ex. H*. The HCAO also conceded this point in the underlying criminal case. *See* Oct. 13, 2015 Oral Argument Transcript at 11:20-22 ("The openness discussion is contained in the *Glik* decision under their Fourth Amendment analysis, not First Amendment analysis."), Biss Decl. at *Ex. AA*.

2. Whether Probable Cause Existed is Irrelevant to Plaintiff's First Amendment Claim

Under Plaintiff's First Amendment claim, it is immaterial whether there was probable cause to arrest Plaintiff under the wiretapping statute or any other criminal statute. Thus, the June 18, 2015 indictment and July 8, 2015 search warrant are irrelevant.

Plaintiff's core First Amendment claim is that Defendants violated the right-to-record principles of *Glik*—regardless of whether the elements of the criminal wiretapping statute were satisfied. To adopt Defendants' view that the First Amendment is not violated simply if the elements of the wiretapping statute are satisfied would allow a clearly unconstitutional application of this statute to immunize an officer's behavior. It is blackletter law that the Constitution provides rights that are independent of legislative statutes. *See, e.g.*, *Grossman v. City of Portland*, 33 F.3d 1200, 1203-04 (9th Cir. 1994) ("Dr. Grossman's constitutional claim does not stem from an absence of probable cause to arrest, but from the alleged unconstitutionality of the ordinance justifying the arrest. Therefore, a finding of probable cause under the ordinance in no way renders the arrest 'privileged,' or immunizes the defendants from liability."); *Lowden v. Cty. of Clare*, 709 F. Supp. 2d 540, 550, 564 (E.D. Mich. 2010) ("Deputies Kahsin and Woodcock are not entitled to qualified immunity on Plaintiffs' as applied claims because viewing the complaint in the light most favorable to Plaintiffs, it was clearly established that enforcing the Michigan statute in the factual circumstances that are alleged violated Plaintiffs' constitutional rights."); *Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1157 (8th Cir. 2014) (where probable cause warrant was issued by judge to arrest a person under unconstitutional state flag desecration statute, qualified immunity did not apply on First Amendment claim against the arresting officer despite the fact that the statute applied remained on the books); *Roska ex rel. Roska v. Sneddon*, 437 F.3d 964, 972 (10th Cir. 2006) ("When a statute authorizes conduct that patently violates the Constitution, however,

officials are not entitled to turn a blind eye to its obvious unconstitutionality and then claim immunity based on the statute."); *see also Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) ("It is clear, of course, that no Act of Congress can authorize a violation of the Constitution."). *Glik*'s First Amendment analysis did not concern whether probable cause existed under a criminal statute; rather, *Glik* recognized an independent constitutional right to record under the First Amendment.

In addition, to adopt Defendants' bootstrapping argument that the wiretapping statute acts as a time, place, and manner limitation on the First Amendment principle in *Glik* and *Gericke* would not only conflict with those decisions, but also would seriously undermine the government accountability purpose behind them. *See* Defs.' Memo. at p. 9-12. To foster government accountability, the *only* limitation on the right to record referenced in *Glik* and *Gericke* concern situations where the recording "interfere[s] with the police officers' performance of their duties." *Glik*, 655 F.3d at 8. As the *Gericke* Court explained: "[A] police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed *only* if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties." *Gericke*, 753 F.3d at 8 (emphasis added). But allowing New Hampshire's wiretapping statute to act as a First Amendment litmus test would ban the secret recording of the police performing their public duties even in the absence of interference—a result which runs afoul of *Glik* and *Gericke*. Moreover, under Defendants' interpretation of the wiretapping statute, it would also ban the open recording of the police performing their public duties where the police are engaging in one-on-one conversations with a recorder and simply do not want to be recorded—again, even in the absence of any interference. As the First Circuit and one recent Massachusetts district court have made clear, a state wiretapping

statute cannot swallow the independent protections of the First Amendment. *See Martin v. Evans*, No. 16-11362-PBS, 2017 U.S. Dist. LEXIS 37156, at *20 (D. Mass. Mar. 13, 2017) (Docket No. 50) (Saris, C.J.), Second Biss. Decl. at *Ex. UU*.[2]

3. The June 18, 2015 Indictment and July 8, 2015 Search Warrant Are Irrelevant to Plaintiff's First Amendment Claim

The June 18, 2015 indictment and July 8, 2015 search warrant say nothing about whether the law was clearly established or whether the actions of the Defendant Officers were reasonable under the First Amendment. This is for two reasons.

First, courts have routinely held that an after-the-fact indictment does not immunize an arrest that has already taken place. Defendants' attempt to obtain qualified immunity based on this post-arrest indictment ignores this well-established principle. *E.g., Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 308 n.13 (6th Cir. 2005) ("after-the-fact grand jury involvement cannot serve to validate a prior arrest"; rejecting qualified immunity, and noting that an indictment only conclusively establishes the existence of probable cause "where the arrest of the plaintiff was *pursuant* to a grand jury indictment") (emphasis in original); *Jones v. Cannon*, 174 F.3d 1271, 1285 n.8 (11th Cir. 1999) ("[A] subsequent grand jury indictment does not retroactively provide probable cause for a false arrest that had already taken place."); *Ojo v. Lorenzo*, 164 N.H. 717, 722-23 (2013) (Lynn, J.) ("it is equally true that post-arrest indictments do not operate retroactively

[2] Defendants make much of an ABA article concerning the right to record the police secretly. Defs. Memo. at p. 18. This speaker quoted in the article added the following: "She added that police expectations of privacy should not differ from public or secret recording—in practicality there is no real expectation of privacy—if something occurs in a public place, it can be observed by witnesses, the police officer is not acting in his or her private capacity, and the information can easily be disseminated." Additionally, the law review article cited by Defendants rejects the open/secretly distinction they ask this Court to make. There, the author concludes that the right to secretly record is constitutionally protected. *See* Jesse Harlan Alderman, Before You Press Record: Unanswered Questions Surrounding the First Amendment Right to Film Public Police Activity, 33 N. Ill. U. L. Rev. 485, 524-531 (2013) ("[T]he distinction [between open and secret] is unnecessary because the balance in favor of the important free speech justifications for invalidating the laws vis-à-vis recording of police in public, and against the comparatively more modest privacy interests of other conversants, is not tipped in the opposite direction when the recording is concealed.").

to establish the existence of probable cause at the moment of arrest"; rejecting official immunity as to false arrest claim); *Garmon v. Lumpkin County, Ga.*, 878 F.2d 1406, 1409 (11th Cir. 1989) (same, and rejecting qualified immunity); *Kent v. Katz*, 146 F. Supp. 2d 450, 460 n.8 (D. Vt. 2001) (same; rejecting qualified immunity as to false arrest claim); *see also Earle v. Benoit*, 850 F.2d 836, 849 (1st Cir. 1988) ("Whether or not an arresting officer had probable cause depends on the facts and circumstances known to police at the time of the arrest."). This same principle applies to the July 8, 2015 search warrant, as it was secured over four months after the arrest.

This rule is important. Otherwise, an officer could always obtain qualified immunity for an unconstitutional arrest simply by obtaining a post-arrest indictment or warrant through a non-adversarial proceeding. *See Kent*, 146 F. Supp. 2d at 460 n.8. If Defendants are able to obtain qualified immunity based simply on a post-arrest indictment or warrant, it would be impossible in such cases to challenge an officer's unconstitutional application of a criminal statute on First Amendment grounds—even if the application violated clearly established free speech principles. Put another way, Defendants' position, if embraced by the Court, would permit a post-arrest indictment or warrant to become an "escape hatch" that immunizes an officer and its department for an arrest that clearly violates the independent protections of the First Amendment. This Court cannot delegate its responsibility to determine whether qualified immunity applies to these non-adversarial procedures and layman grand juries.

Second, there is no evidence that the grand jury even considered the First Amendment in making the indictment decision. No recording or transcript of the grand jury proceedings exist. The Hillsborough County Attorney's Office ("HCAO") has refused to be deposed in this case. However, Sgt. Sanders was present at those proceedings. He could not remember the HCAO ever discussing the Constitution or the First Amendment before the grand jury. Instead, the grand jury's

indictment decision was based exclusively on whether it believed that the elements of the wiretapping statute were met, not on the independent protections provided under the First Amendment. *See* Sanders Depo. 74:2-19 (not recalling discussion of the First Amendment before the grand jury), Biss. Decl. at *Ex. I*.[3] The July 8, 2015 search warrant contains the same problem. The application upon which it was based says nothing about the First Amendment. *See* LeVeille Depo. Ex. 11, Biss. Decl. at *Ex. Z*. Defendants, in fact, should have been well aware of these constitutional issues because the warrant was sought after this federal civil rights action was filed.

4. The "Advice" the Police Officer Defendants Received After the Arrest Is Irrelevant

Any input Sgt. LeVeille received by phone from HCAO Attorney Brett Harpster at the police station or Lt. Reardon at the scene *after* he arrested Plaintiff is irrelevant in considering the lawfulness of Defendants' actions or whether the law was clearly established. This is for four reasons.[4]

First, these communications are irrelevant because they occurred after the arrest. Determining liability for an unlawful arrest centers exclusively on what facts the officers knew at the time of the arrest. An arresting officer cannot immunize himself by acquiring previously-unknown information after the arrest in an attempt to justify it. *E.g.*, *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) ("Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest."); *Earle*, 850 F.2d

[3] Plaintiff has not yet been able to depose HCAO Attorney Andrew Ouellette. Following a hearing on October 21, 2016 on HCAO's Motion to Quash Plaintiff's deposition subpoenas of Attorneys Ouellette and Harpster, deposition discovery as to the HCAO has been stayed until the Court resolves Plaintiff's Motion in Limine concerning the relevancy of such testimony. *See* Docket Nos. 48, 50, 58, 60. This Motion is still pending. If this Court is inclined to grant judgment for Defendants based on the indictment or communications between the MPD and Attorney Ouellette, it should not do so without giving Plaintiff the opportunity to depose this witness.

[4] Plaintiff has also not yet been able to depose HCAO Attorney Brett Harpster. *See supra* note 3. The first draft of Attorney Harpster's June 7, 2016 affidavit was written by Defendants' counsel based on his recollection of his interview of Attorney Harpster on January 18, 2016. *See* May 31, 2016 Email from R. Meagher to C. Kirby, Docket No. 44-4.

at 849 (same); *United States v. Collins*, 532 F.2d 79, 82 (8th Cir. 1976) (explaining that the question of whether there was probable cause or reasonable suspicion justifying the "initial detention or seizure [is] … based on the arresting officer's knowledge at the time of the stop"); *Crockett v. Cumberland Coll.*, 316 F.3d 571, 580 (6th Cir. 2003) (probability of criminal activity is "based on an examination of all facts and circumstances within an officer's knowledge at the time of an arrest") (internal quotation marks omitted). Following this principle, courts have routinely deemed as irrelevant information uncovered after an arrest proffered by police departments to justify the arrest. *E.g.*, *Banushi v. City of N.Y.*, No. 08-CV-2937 (KAM) (JO), 2010 U.S. Dist. LEXIS 109903, at *16 (E.D.N.Y. Oct. 15, 2010) (in evaluating a false arrest/imprisonment claim, stating that "evidence, obtained after plaintiff's arrest, is irrelevant to the court's task in determining whether there is a disputed issue of material fact regarding the existence of probable cause at the time of plaintiff's arrest"); *Shamir v. City of New York*, 804 F.3d 553, 557 (2d Cir. 2015) (in evaluating a false arrest claim, stating: "What [plaintiff] admitted several months after his arrest cannot be used to show what the officers knew at the time of the arrest.").

Second, these communications cannot be considered in determining whether qualified immunity exists under *Cox v. Hainey*, 391 F.3d 25 (1st Cir. 2004). There, the First Circuit explained that, while a favorable ***pre-arrest*** opinion from a prosecutor does not equate to per se reasonableness, it is one factor comprising the "totality of the circumstances relevant to the qualified immunity analysis." *Id.* at 35. But *Cox* makes clear that this rule is limited to a pre-arrest prosecutorial opinion received by a police officer that is then relied upon to make an arrest. *Id.* ("We agree ... that there is some room in the qualified immunity calculus for considering both the fact of a ***pre-arrest*** consultation and the purport of the advice received.") (emphasis added).

Here, the Officer Defendants decided on-the-spot to arrest Plaintiff without consulting anyone. And then they arrested him. Only after Plaintiff was arrested did Sgt. LeVeille, while at the police station, try to acquire legal input from Attorney Harpster concerning the arrest. Such post-arrest legal communications are irrelevant under *Cox* for good reason: otherwise, an officer could immunize himself by obtaining a favorable legal opinion from a prosecutor after a clearly unconstitutional arrest has occurred.

Third, this advice cannot be relied upon in assessing qualified immunity because it did not meaningfully address the constitutionality of Plaintiff's arrest under the *Glik/Gericke* decisions—the central question for this Court to decide—but rather addressed whether probable cause existed under the wiretapping statute. *See Johnston v. Koppes*, 850 F.2d 594, 596 (9th Cir. 1988) (advice received not credited where the advice "did not address the constitutionality of [the defendant's] action," which was the focus of the litigation). Attorney Harpster's affidavit says nothing about the First Amendment and whether it was discussed with Sgt. LeVeille; instead, the advice focused exclusively on whether Plaintiff's actions created probable cause to justify the arrest under the wiretapping statute. *See* June 7, 2016 Harpster Aff. ¶ 3 (Docket No. 68-6). In Sgt. LeVeille's affidavit reciting this discussion with Attorney Harpster there is also no mention of the First Amendment. *See* Mar. 7, 2017 LeVeille Aff. ¶ 9 (Docket No. 68-3). As Sgt. LeVeille testified at deposition, the conversation with Attorney Harpster "wasn't very long" and lasted "five minutes max." *See* LeVeille Depo. 132:7-133:9, 135:20-136-12, Biss. Decl. at *Ex. Q*. Similarly, Lt. Reardon's affidavit makes no reference to the First Amendment in recalling his discussion with Sgt. LeVeille; instead the focus was on whether there was probable cause to arrest Plaintiff under the wiretapping statute. *See* Mar. 8, 2017 Reardon Aff. ¶ 2 (Docket No. 68-4). In Sgt. LeVeille's affidavit summarizing this discussion with Lt. Reardon there is also no mention of the First

Amendment. *See* Mar. 7, 2017 LeVeille Aff. ¶ 8 (Docket No. 68-3). This conversation lasted "a few moments." *See* Reardon Depo. 30:1-8, Biss. Decl. at *Ex. II*.

Fourth and finally, the qualified immunity question of whether a rule has been clearly established is, at its core, a legal one to be decided by this Court. This question is not to be outsourced to those who provided misguided and ill-advised advice to Sgt. LeVeille immediately following the arrest. As explained in Plaintiff's Motion for Summary Judgment, the law is clear that Plaintiff's recording activities were protected under the *Glik*/*Gericke* decisions. The Officer Defendants are presumed to know this law, regardless of the incorrect advice they may have received. *See Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1382 (9th Cir. 1989) ("We assume that officials are aware of available decisional law."); *Henry v. Purnell*, 652 F.3d 524, 534 (4th Cir. 2011) (en banc) ("Although officers are only human and even well-intentioned officers may make unreasonable mistakes on occasion, the doctrine of qualified immunity does not serve to protect them on those occasions."). Whether the Defendants subjectively believed that they were acting lawfully is irrelevant. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

5. This Court Need Not Be Worried About Defendants' Parade of Horribles

Finally, this Court need not be concerned with line drawing or the parade of horribles Defendants contend will result from a finding in Plaintiff's favor. *See* Defs.' Mot. at p. 10. The inquiry here is only whether Plaintiff's recording in this case was protected. And, of course, the right to openly and secretly record public law enforcement activities can be subjected to reasonable restrictions necessary to prevent interference with police activities or protect officer safety. *See Gericke*, 753 F.3d at 8. But these limitations are inapplicable here. As the Superior Court and HCAO have acknowledged, there was no interference or concern for officer safety at the time of the arrest.

Granting judgment in Plaintiff's favor based on the facts of this case would not, as the Defendants fear, interfere with police officers' ability to interview witnesses or suspects standing in public. First, this case does not concern a suspect or witness interacting with the police who is being secretly recorded by someone else. This case is about the person involved in the police communication doing the recording. There is no private third party witness or suspect involved. Second, if the presence of the person doing the recording is causing an interference with the officer's ability to conduct an interview with a private third party—e.g., because the discussion is sensitive, concerns confidential information, or would chill the person speaking to the police, etc.—then *Glik*/*Gericke* would explicitly allow for a reasonable limitation on that person's right to record. *See Gericke*, 753 F.3d at 8. The police, of course, may take all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations. None of those factors are present here. This is why the Superior Court ruled in Plaintiff's favor in dismissing the indictment. The sky has not fallen in the 18 months since this decision, and this Court should reach the same result.

II. First Amendment Retaliatory Arrest Claim (Pre-Indictment Claim)

Plaintiff is also entitled to judgment as to his First Amendment retaliatory arrest claim. *See* Second Am. Compl. ¶ 135.[5] To assert a First Amendment retaliatory arrest claim, the plaintiff must show that "he was engaged in activity protected by the First Amendment," and he must "show that the officer's intent or desire to curb the expression was the determining or motivating factor" for her actions, "in the sense that the officer would not have [taken those actions] 'but for' that determining factor." *Kean v. City of Manchester*, No. 14-cv-428-SM, 2016 U.S. Dist. LEXIS

[5] This retaliatory arrest claim is distinct from Plaintiff's First Amendment claim that the arrest violated the provisions of *Glik* even if probable cause existed under RSA 570-A. *Compare* Second Am. Compl. ¶ 133 (First Amendment *Glik* claim) with ¶ 135 (First Amendment retaliation claim). Otherwise, as explained above, the probable cause inquiry would potentially swallow the independent protections provided by the First Amendment.

13835, at *21 (D.N.H. Feb. 4, 2016). As explained in Plaintiff's Motion for Summary Judgment, these elements are easily satisfied. If Plaintiff's recording was open—which the Court must assume—then there can be no genuine disagreement that the First Amendment rule in *Glik* and *Gericke* was violated, and that the Defendant Officers had no reasonable expectation of privacy under the wiretapping statute. For the same reasons explained in Section I.B.2-3 *supra*, the post-arrest indictment is irrelevant to this claim and the qualified immunity analysis.[6]

Under this claim, it is unclear whether Plaintiff is required to prove the absence of probable cause. *See, e.g., Turkowitz v. Town of Provincetown*, 914 F. Supp. 2d 62, 73 (D. Mass. 2012) ("Whether a plaintiff must establish that the police lacked probable cause in order to state a claim for retaliatory arrest remains an open question."); *Human v. Colarusso*, No. 13-cv-296-SM, 2015 U.S. Dist. LEXIS 4866, at *14 n.2 (D.N.H. Jan. 15, 2015) (same). The First Circuit has not addressed this question, and there is a circuit split. *Compare Ford v. City of Yakima*, 706 F.3d 1188, 1194 (9th Cir. 2013) (lack of probable cause not a required element in First Amendment claim) *with Galarnyk v. Fraser*, 687 F.3d 1070, 1076 (8th Cir. 2012) (lack of probable cause a required element) and *Williams v. City of Alexander*, 772 F.3d 1307, 1310 (8th Cir. 2014) (same); *see also Peraica v. McCook*, 124 F. Supp. 3d 816, 823 n.11 (N.D. Ill. 2015) (referencing circuit split).

The absence of probable cause is not a required element under this claim. Otherwise, the probable cause inquiry would—in cases like this addressing the unconstitutional application of a

[6] Defendants rely on the *Kean I* decision in an effort to rebut this. Defs.' Memo. at p. 14. But this case is inapposite. In *Kean v. City of Manchester*, No. 14-cv-428-SM, 2015 U.S. Dist. LEXIS 40339 (D.N.H. Mar. 30, 2015) (hereinafter, "*Kean I*") the Court dismissed the malicious and retaliatory prosecution claims based on the post-arrest indictment secured (counts 1, 3, 5, and 8). However, the Court did not dismiss the plaintiff's First Amendment retaliatory arrest claim (count 2) based on the post-arrest indictment. This makes sense because the indictment and anything else not known to the Defendant Officers at the time of the arrest is irrelevant to this claim, including the qualified immunity analysis. *See, e.g., Radvansky*, 395 F.3d at 308 n.13.

statute—swallow the independent protections provided by the First Amendment. Put another way, this would permit an unconstitutional application of a statute to bar relief for a clear First Amendment violation. Here, as *Glik* makes clear, one can engage in clearly-established First Amendment protected recording whether or not the elements of a wiretapping statute are satisfied.

In any event, this Court need not decide this question. Under either Plaintiff's or Defendants' version of events, there was clearly no probable cause under the wiretapping statute to arrest Plaintiff because—as explained below in Section III.A *infra* and in Pages 21-24 and 29-30 of Plaintiff's Memorandum of Law in Support of his Motion for Summary Judgment—the Officer Defendants did not have a reasonable expectation of privacy in this recorded communication. *See* RSA 570-A:1, II. Nor was there probable cause to arrest Plaintiff under Defendants' manufactured common nuisance theory for the reasons explained below in Section III.B *infra*.

III. Fourth Amendment False Arrest Claim (Pre-Indictment Claim)

A. Wiretapping Statute

If Plaintiff openly recorded the Defendant Officers, it is even more obvious that the arrest violated the wiretapping statute. Under New Hampshire's wiretapping statute, a person is guilty of a felony or a misdemeanor if he willfully or knowingly, respectively, intercepts an "oral communication" "without consent of all parties to the communication." *See* RSA 570-A:2, I(a) (felony), I-a (misdemeanor). An "oral communication" is limited to "any verbal communication uttered by a person *who has a reasonable expectation that the communication is not subject to interception*, under circumstances justifying the exception." RSA 570-A:1, II (emphasis added). Defendants' Motion must be rejected and judgment must be granted for Plaintiff for six reasons.

First, it is clear that a police officer has a diminished expectation of privacy when performing official duties, especially in public. This exists regardless of whether the officer knows or should know that he is being recorded. This proposition has been clearly established by the First Circuit in *Jean v. Mass. State Police*, 492 F.3d 24, 29-30 (1st Cir. 2007), which held that an officer had no expectation of privacy as to secretly-recorded communications made within a suspect's home while engaging in a search. If an officer has no expectation of privacy with respect to secret communications recorded in a private home, then it is obvious that the Defendant Officers had no expectation of privacy here with respect to a conversation occurring in public. *Fisher v. Hooper*, 143 N.H. 585 (1999) and *Cuviello v. Feld Entm't, Inc.*, 304 F.R.D. 585 (N.D. Cal. 2015) are inapposite, as they deal with the recording of private citizens, not police officers. *See* Defs.' Memo. at p. 11-12.

The First Circuit has also clearly held that there is no expectation of privacy with respect to one-on-one communications with the police in the back of a patrol car. *See United States v. Dunbar*, 553 F.3d 48, 57 (1st Cir. 2009) (no expectation of privacy with respect to secret recording in police cruiser); *see also United States v. Lario*s, 593 F.3d 82, 93 (1st Cir. 2010) (no expectation of privacy with respect to secret recording done by law enforcement in motel where person recorded was there for minutes to conduct a brief transaction with an undercover officer). If a private person has no expectation of privacy in a one-on-one conversation with a police officer in such an enclosed setting, then it is obvious that a police officer cannot have an expectation of privacy in a similar one-on-one conversation occurring in public. Relatedly, the Officer Defendants had no reasonable expectation of privacy given that Plaintiff was exercising a First Amendment right clearly established by the First Amendment in *Glik/Gericke*.

Second, the June 18, 2015 indictment and the July 8, 2015 search warrant are irrelevant to this Fourth Amendment analysis or qualified immunity for the same reasons explained in Section I.B.2-3 *supra*. Determining liability for an unlawful arrest centers exclusively on what facts the officers knew at the time of the arrest on March 3, 2015. Once again, a post-arrest indictment has no immunizing effect on an arrest, including for a false arrest claim. *E.g.*, *Radvansky*, 395 F.3d at 308 n.13. Moreover, Sgt. Sanders, who was present at the grand jury, could not recall if the HCAO presented or explained to the grand jury the "reasonable expectation of privacy" limitation that exists in the wiretapping statute. *See* Sanders Depo. 73:5-12, Biss. Decl. at *Ex. I*. Similarly, the search warrant application engaged in no meaningful inquiry into this reasonable expectation of privacy limitation.

Third and relatedly, Defendants' reliance on *Kean II* is to no avail. *See* Defs.' Memo. at 20. In *Kean v. City of Manchester*, No. 14-cv-428-SM, 2016 U.S. Dist. LEXIS 13835 (D.N.H. Feb. 4, 2016) (hereinafter "*Kean II*"), the federal district court granted qualified immunity on a false arrest claim based, in part, on a state Superior Court's post-arrest finding in the underlying criminal case, following *an adversarial evidentiary hearing*, that probable cause existed at the time of the arrest. This case is easily distinguishable. Unlike in *Kean II*, there critically was no adversarial hearing in the underlying criminal case in which the Superior Court found probable cause. The June 18, 2015 indictment and July 8, 2015 search warrant were not the product of any adversarial process where Plaintiff had an opportunity to be heard. Indeed, the MPD actively avoided an adversarial probable cause hearing on the arrest (which had been scheduled for May 20, 2015) by dismissing the initial felony charge on May 15, 2015. *See* First Prosecution Case Summary, Biss. Decl. at *Ex. K*. The MPD and the HCAO then opted to initiate a new criminal action through the grand jury process, which of course was not adversarial. *See, e.g., Ojo*, 164

N.H. at 723 ("A grand jury proceeding is not an adversary hearing."). In fact, *Kean II* actually requires the rejection of Defendants' qualified immunity claim. In the only adversarial proceeding held in the underlying criminal case, the Superior Court actually dismissed the charge as violating the First Amendment. *See* Doc. No. 46-13. If Defendants wish to rely on the proceedings in the underlying criminal case, they cannot ignore the Superior Court's complete rejection of their unconstitutional decision to arrest and charge Plaintiff.

Fourth, the indictment and search warrant are irrelevant because they were secured based on a statutory provision Plaintiff was not arrested for. Plaintiff was arrested on March 3, 2015 for felony wiretapping. This charge was dismissed by the MPD on May 15, 2015. On June 18, 2015, the grand jury explicitly rejected a felony charge, and only issued an indictment on misdemeanor wiretapping. *See* June 18, 2015 Indictment, Biss. Decl. at *Ex. L*; *see also* Second Prosecution Case Summary, Biss. Decl. at *Ex. M*; June 19, 2015 HCAO Attorney Andrew Ouellette Notes (reflecting that "The felony was a 'No True Bill"), Biss. Aff. at *Ex. Y*; *see also* RSA 570-A:2, I(a) (felony offense requiring that interception be "willful"), I-a (misdemeanor requiring that interception be done "knowingly"). An indictment or search warrant cannot immunize an arrest for a different offense.

Fifth, the statements made by Lt. Reardon and Attorney Harpster are irrelevant to this analysis because, once again, they were made after the arrest and therefore were not known to the Defendant Officers at the time of the arrest. *See Cox*, 391 F.3d at 35; *Banushi*, 2010 U.S. Dist. LEXIS 109903, at *16. Defendants have conceded that Attorney Harpster's communications have no bearing on Plaintiff's false arrest claim. *See* Defs.' Mot. In Limine Obj. at p. 7 ¶ 11 (Docket No. 50). The same must also be true with respect to Lt. Reardon's post-arrest communications. Moreover, these communications did not even address the reasonable expectation of privacy

limitation that exists in the statute's definition of "oral communication." *See* LeVeille Depo. 135:10-13 (not discussing police expectation of privacy "in that detail" with Attorney Harpster), Biss. Decl. at *Ex. Q*; *id*. at 141:11-14 (not recalling discussing the "expectation of privacy" language in the statute with Lt. Reardon); Reardon Depo. 56:17-57:1, Biss. Decl. at *Ex. II* (acknowledging no discussion of "expectation of privacy" element); *see also Johnston*, 850 F.2d at 596 (advice received not credited where the advice "did not address the constitutionality of [the defendant's] action," which was the focus of the litigation).

Sixth and finally, at the time the Defendant Officers first entered Plaintiff's home, there was a sign on Plaintiff's window stating: "THESE PREMISES PROTECTED BY VIDEO SURVEILLANCE." This fact—which too must be deferred to in examining Defendants' Motion—further confirms that the Defendant Officers had no reasonable expectation of privacy concerning their communications with Plaintiff outside his home. *See* LeVeille Depo Ex. 13, Biss. Decl. at *Ex. PP*; LeVeille Depo. 128:21-129:2 (testifying that he would have no reason to contest any assertion that this sign was there on Plaintiff's property on the date of the search), Biss. Decl. at *Ex. Q*; Valentin Depo. 92-93, Second Biss. Decl. at *Ex. TT*.

B. After-the-fact Alternative Probable Cause Common Nuisance Theory

In an attempt to create a sideshow and avoid liability in the face of clear First Circuit precedent, Defendants have manufactured an alternative basis for the arrest wholly unrelated to the reason Plaintiff was arrested on March 3, 2015. Under this affirmative defense, Defendants claim that there was alternative probable cause to arrest Plaintiff on March 3, 2015 on the basis that Plaintiff allegedly "*knowingly* [kept] or maintain[ed] a common nuisance" by renting a room in his home to Christopher Chapman who was selling drugs. *See* RSA 318-B:16 (emphasis added); *see also State v. Fedor*, 168 N.H. 346, 351-52 (2015) (holding that there was sufficient evidence

to conclude that defendant's residence was used for the selling of a controlled drug under the common nuisance statute when defendant admitted that she allowed a tenant to move into the house knowing that the tenant sold heroin and with the agreement that he could continue selling heroin while he lived there). This defense was first raised in Defendants' May 27, 2016 Answer (Docket No. 18). As this is an affirmative defense, Defendants bear the burden of proof.

The probable cause inquiry here is not what Plaintiff knows now or at the time of the arrest (though irrelevant, Plaintiff disputes Defendants' allegation that he knew about Mr. Chapman's drug activities at the time of the arrest[7]). Rather, the inquiry is whether, based on the facts that the Defendant Officers knew *at the time of the arrest*,[8] they had probable cause to arrest Plaintiff under RSA 318-B:16. *See United States v. Centeno González*, No. 15-346 (FAB), 2015 U.S. Dist. LEXIS 177547, at *33 (D.P.R. Dec. 31, 2015) ("While the term 'probable cause' evades precise definition, the First Circuit has stated that it 'means a reasonable likelihood.'"); *Philbrook v. Perrigo*, 637 F. Supp. 2d 48, 53 (D. Mass. 2009) (probable cause requires something more than "bare suspicion"); *see also* Pl.'s Obj. to Mot. to Compel. At pp. 6-8 (Docket No. 41). "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person." *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

Here, all the Defendant Officers have is a "hunch" or bare suspicion that Plaintiff was aware of Mr. Chapman's activities. Fortunately, under the Fourth Amendment, we do not allow arrests or make probable cause determinations based on hunches. Paragraphs 11 and 12 of the affidavit of Defendant Brian LeVeille (Docket No. 68-3) and Paragraphs 12 and 13 of the affidavit of Defendant Christopher Sanders (Docket No. 68-2) should also be stricken for the reasons in

[7] *See* Valentin Depo. 72:17-19, 73:23, 48:1-2, Second Biss. Decl. at *Ex. TT*.
[8] Again, whether there was alternative probable cause to arrest Plaintiff centers exclusively on what facts the officers knew at the time of the arrest. An arresting officer cannot rely on previously-unknown information. *E.g.*, *Banushi*, 2010 U.S. Dist. LEXIS 109903, at *16.

Plaintiff's Motion to Strike filed contemporaneously herewith.

1. Sgt. LeVeille Admitted That There Was No Probable Cause

This manufactured theory was destroyed by Defendant Sgt. LeVeille during his January 23, 2017 deposition. At deposition, while Sgt. LeVeille spoke to his "suspicion" that Plaintiff was aware of Mr. Chapman's drug activity[9], he testified repeatedly in the face of extensive questioning that he did not have *probable cause* to believe that Plaintiff was aware that drug activity was being conducted in his home—an element that is necessary to satisfy RSA 318-B:16. As Sgt. LeVeille correctly understood at deposition, "suspicion" is different from having "probable cause." Sgt. LeVeille testified:

> Q. Okay. And at the time he came back and you showed him the warrant, you had no *probable cause* to believe that he was engaged in drug activity?
> A. No.
> *Q. And you didn't have **probable cause** either that he was aware that drug activity was being conducted in his home, correct?*
> *A. Correct.*

LeVeille Depo. 38:19-39:3, Biss. Decl. at *Ex. Q* (emphasis added); *see also id.* at 24:16-25:1 ("We were unable to confirm that [Plaintiff] was engaged in drug activity" … which is "why he was never charged"). Sgt. LeVeille offered this testimony while knowing that, in order for probable cause to exist under this common nuisance statute, the MPD would "have to have evidence that Mr. Valentin knew that Mr. Chapman was using his residence to sell drugs." *Id.* at 159:11-15. This should end this Court's inquiry.

This lack of probable cause was further confirmed by Sgt. LeVeille later at deposition in response to questioning from Plaintiff's counsel after Defendants' counsel conducted his examination:

> Q [PLAINTIFF'S COUNSEL]. You didn't have *probable cause* to know that—to believe

[9] *See* LeVeille Depo. 23:13-23 (referring to it as a "suspicion"), 158:22-159:2, Biss. Decl. at *Ex. Q*; *see also* Sanders Depo. 10:18-23, Biss. Decl. at *Ex. I* (same).

> he was involved any way, right?
> MR. MEAGHER: Object to the form. You can answer that if you can.
> A. *Yeah, I think I already spoke to this earlier, is that we were never able to confirm any of his involvement in any of this*.
> Q. BY MR. LEHMANN: Right. And at the time of the arrest, you had no *probable cause* to believe that he was engaged in drug activity in any way, right?
> A. *Correct. I think that's like the third time you've asked me that and I've answered it*.
> Q. Okay.
> MR. LEHMANN: It will be the last time for now.

Id. at 157:16-158:6 (emphasis added). In response to questioning from his own counsel, Sgt. LeVeille subsequently acknowledged that he "didn't have probable cause to believe that [Plaintiff] was actively engaged in selling drugs." *Id.* at 158:18-21.

Defendants made clear at deposition that they arrested Plaintiff for one and only one reason: because Plaintiff was secretly recording them in public while they were performing their official duties. *See* LeVeille Depo. 25:21-26:1 (Plaintiff not the target), 67:20-68:1 (noting that Plaintiff's secret recording is "what makes this different, and that's why I acted the way I did"), 154:10-14 ("Q: [W]hen you were discussing the search warrant with Mr. Valentin, if he had held his phone up or just let you know that he was recording, would you have had any problem with that? A: No, I wouldn't have arrested him."), Biss. Decl. at *Ex. Q*. At deposition, the Defendant Officers admitted that they had never used this statute before, discussed it with anyone, or even contemplated its application. Rather, at the time of the arrest, their focus was exclusively on Mr. Chapman. *See* LeVeille Depo. 76:7-10, 115:7-17, 135:6-19, 141:15-17, 160:5-10, Biss. Decl. at *Ex. Q*; Sanders Depo. 56:3-7, Biss. Decl. at *Ex. I*.

2. Inadmissible Hearsay Confidential Informant Statements Lacking Foundation; Defendants' Failure to Produce Information

As Defendants acknowledged at deposition, the only "evidence" they had that could attribute knowledge of Mr. Chapman's drug activities to Plaintiff was anonymous, hearsay-upon-hearsay oral statements—the contents of which are unknown—from confidential informant(s) that

are unreliable, inadmissible, undisclosed, and conflict with the documents describing the informants' transactions. Sgt. LeVeille testified at deposition that his suspicion was based on one or two confidential informants who indicated that Plaintiff was aware of Mr. Chapman's drug activities. *See* LeVeille Depo. 23:13-23; 24:16-25:1, Biss. Decl. at *Ex. Q* (emphasis added).[10] Sgt. Sanders similarly testified to his suspicion at the time of the arrest that Plaintiff was aware of Mr. Chapman's activities, but he stated that this belief was based exclusively on Plaintiff having opened the door for an informant on one occasion—possibly on February 20, 2015. That is it. *See* Sanders Depo. 10:18-12:6, 13:16-14:23, Biss. Decl. at *Ex. I*; *see also* Five Confidential Informant Transaction Documents, at CI009-12, Second Biss. Decl. at *Ex. VV* (February 20, 2015 transaction in which Sgt. Sanders conducted surveillance).

The Informants' Alleged Statements Lack Foundation, and Defendants Have Failed to Produce Responsive Information. Even if considered by this Court, these confidential informant statements articulated at deposition, on their face, are of no value, as they lack foundation and say nothing specific about the basis for the informants' alleged belief. *See Garmon*, 878 F.2d at 1408-09 (statements disregarded in assessing probable cause that did not contain information providing the basis for the speaker's belief). Defendants have not stated with any specificity what exactly the informant(s) said about Plaintiff's alleged awareness. Nor do we know what the informant(s) claim to have seen, if anything, in the house that would justify any informants' belief that Plaintiff had awareness of Mr. Chapman's activities.

Defendants' "awareness" theory must be rejected not only because Sgt. LeVeille testified that no probable cause existed, but also because the documents produced reflecting five confidential informant transactions say *nothing* about Plaintiff, let alone whether he had

[10] Defendants' counsel attempted to expound upon this question, though he did so through inadmissible questions. LeVeille Depo. 153:4-154:9, Biss. Decl. at *Ex. Q*.

knowledge of Mr. Chapman's activities. *See* Five Confidential Informant Transaction Documents, Second Biss. Decl. at *Ex. VV*. Indeed, only three of these five confidential informant transactions occurred in 6 Lawton Street (the remaining two took place elsewhere outside the residence). *See id.* at 01-02 (July 31, 2014 transaction), 03-04 (August 14, 2014 transaction), and 09-12 (February 20, 2015 transaction). At least two of these three transactions (on July 31, 2014 and August 14, 2014) occurred in either the second bedroom belonging to Mr. Chapman or the "garage." *Id.* at 002, 004. The third transaction occurred on February 20, 2015 with an informant who was provided monetary compensation by the MPD. Based on the MPD's report, the location of this specific transaction within the house is unclear. Even if it occurred on the first floor, there is no indication that Plaintiff was present inside or had awareness of it. *Id.* at 009-012.

Critically, Defendants have never disclosed to Plaintiff the identity of these informants. Defendants failed to identify these individuals in response to an interrogatory request specifically asking for the identities of persons likely to have discoverable information relevant to this case. *See also* Manchester Int. Resp. No. 2, Biss. Decl. at *Ex. GG* (not disclosing confidential informants). Defendants also have not produced the recordings made of the five confidential informant transactions with Mr. Chapman, including the February 20, 2015 transaction that Sgt. Sanders appears to have testified about at his deposition.[11] *See* Five Confidential Informant Transaction Documents, Second Biss. Decl. at *Ex. VV* (indicating that informants wore a wire in each transaction). This is the case despite the fact that Plaintiff sent Defendants multiple document requests, including a specific request for information in Defendants' possession concerning their

[11] Plaintiff does not dispute the right of the MPD under the wiretapping statute to record the communications between the confidential informants and Mr. Chapman. *See* RSA 570-A:2, II(e). That said, the irony of Defendants' position should not be lost on this Court. They claim that the Defendant Officers could not be recorded because they had a reasonable expectation of privacy with respect to their "one-on-one" communications done in public, while the MPD simultaneously thought it was permissible to record the private "one-on-one" communications of Mr. Chapman with informants.

contention that Plaintiff knew about Mr. Chapman's drug activities at the time of the arrest. *See* Defs.' Response to Second Doc. Request and Correspondence, Second Biss. Decl. at *Ex. WW*; Defs.' Doc. Responses Nos. 9 and 18, Second Biss. Decl. at *Ex. XX* (seeking information concerning Plaintiff and Defendants' defenses). As a result, Plaintiff has not been able to examine these informants, their history, their credibility, their actual statements, and what, if anything, they said to the MPD concerning Plaintiff. The February 20, 2015 informant, in particular, received monetary compensation from the MPD. Defendants' unwillingness to disclose the informants' identities and specific recorded statements—while perhaps understandable—means, of course, that Defendants cannot rely on these alleged statements in meeting their burden to establish their alternative probable cause affirmative defense. Defendants cannot have it both ways. They cannot rely on these confidential informant statements while, at the same time, not produce these informants' identities and their recorded communications. And now it is too late.

Defendants' Lack of Personal Knowledge. Not only do these alleged informants' statements lack foundation, but the Defendant Officers have no direct personal knowledge of them. *See Garmon*, 878 F.2d at 1408-09 (statements disregarded in assessing probable cause where the speaker lacked personal knowledge of the circumstances surrounding the alleged commission of the crime). Sgt. LeVeille apparently has no idea what specifically the informants said about Mr. Chapman's alleged awareness. Sgt. LeVeille did not know if any of the confidential informant reports made any reference to Plaintiff, nor did Sgt. LeVeille know whether Plaintiff was even present during the drug buys. *See* LeVeille Depo. 156:7-15, Biss. Decl. at *Ex. Q*. As his counsel acknowledged at deposition, Sgt. LeVeille "might not have firsthand knowledge." *See id.* at 152:21-153:2; *see also* LeVeille Aff. ¶ 13 (Docket No. 68-3) (stating that this information was "within the collective knowledge of the police officers involved in the investigation"). Sgt.

LeVeille acknowledged that the *only* link he had between Plaintiff and Mr. Chapman was the fact Mr. Chapman lived at 6 Lawton Street. That is it. *See* LeVeille Depo. 156:16-21, Biss. Decl. at *Ex. Q*. And Sgt. Sanders could not testify at deposition as to what specifically the informant may have said; instead, Sgt. Sanders acknowledged that his suspicion was based solely on his understanding that Plaintiff simply opened the door once for an informant (likely on February 20, 2015). *See* Sanders Depo. 13:16-14:23, Biss. Decl. at *Ex. I* ("Q. What does it mean—was he in the—in the room where the sale happened? A. I don't recall if he was in the room, but he may or may not have—I shouldn't say he. He let people into the house when they came."; later acknowledging that it was only one instance). Of course, it is a normal occurrence for a resident in a multi-unit house to open the door for a guest of another resident. There is also no evidence in the record that the Defendant Officers even listened to the informants' communications during the drug buys, which were recorded by the MPD.

Anonymous Double Hearsay. These purported confidential informant statements recited by Sgts. LeVeille and Sanders at deposition are also inadmissible hearsay. They consist of an out-of-court statement—here, by confidential informant(s) to another MPD officer—offered for the truth of the matter asserted—here, that Plaintiff was supposedly aware of Mr. Chapman's drug selling. *See* Fed. R. Evid. 801(c). The unreliability of these statements is heightened by three additional considerations.

First, the speakers of these statements—confidential informants—are totally anonymous. Anonymous, uncorroborated hearsay is even more unreliable than traditional hearsay.

Second, these statements from confidential informants also are inadmissible hearsay-within-hearsay/double hearsay. Sgt. Sanders conducted surveillance related to two confidential informant transactions on February 20, 2015 and February 24, 2015, and Sgt. LeVeille conducted

surveillance related to the confidential informant transaction occurring on February 20, 2015. *See* Five Confidential Informant Transaction Documents, at CI009-12 (February 20, 2015 transaction), at CI013-016 (February 24, 2015 transaction), Second Biss. Decl. at *Ex. VV*. However, only MPD investigating officer Thomas F, Gonzales was the party to these two informant communications, not the Defendant Officers. And only one of these two transactions actually occurred in Plaintiff's house—the February 20, 2015 transaction. There is also no evidence that the Defendant Officers listened to these recorded informant communications. Again, Sgt. LeVeille could not name the confidential informant(s) at deposition. *See* LeVeille Depo. 24:1-15, Biss. Decl. at *Ex. Q*. Similarly, Sgt. Sanders could not testify as to these specific confidential informant communications concerning "awareness" other than to state that the Plaintiff opened the door for one of the informants—presumably referring to the February 20, 2015 transaction. *See* Sanders Depo. 12:17-23; 13:8-9, Biss. Decl. at *Ex. I*.

Third and finally, this reliability problem is compounded by the fact that the confidential informant affidavits and the Chapman Search Warrant say absolutely nothing about Plaintiff and whether he knew or had any involvement in Mr. Chapman's illicit drug activities. *See* Five Confidential Informant Transaction Documents, Second Biss. Decl. at *Ex. VV*; *Ex. G* to Defs.' Motion for S.J. ¶¶ 3, 5, 9-19 (Chapman Search Warrant). This seriously undermines the reliability of any oral statement from any anonymous informant relied upon by Defendants to obtain judgment in this case.

To summarize: These informant statements not only lack foundation and are hearsay, but they are anonymous double hearsay undermined by the documents produced in this case. And Defendants are attempting to use these unreliable informant statements while simultaneously having not disclosed the identities of these informants and all their recorded communications with

the MPD.

3. Beyond the Informants' Statements

Beyond this confidential informant testimony offered at deposition, Defendants have proffered no other evidence existing at the time of the arrest indicating that Plaintiff was aware of Mr. Chapman's activities. Instead, all Defendants proffer are conclusory statements and speculation.

Plaintiff does not dispute the fact that Mr. Chapman lived in the same house (though in separate rooms), drugs and money were secured in the search exclusively from Mr. Chapman's room (an area not in Plaintiff's control and was secured by a lock installed by Mr. Chapman[12]), and Mr. Chapman sold drugs to three confidential informants at 6 Lawton Street (two of which we know occurred in Mr. Chapman's bedroom and the garage). But this is not evidence that Defendants had probable cause to believe at the time of the arrest that Plaintiff had knowledge of these drug selling activities. This is only evidence that Mr. Chapman had a private living space at Plaintiff's home, kept drugs in that private living space, was engaging in drug selling activities, and engaged in three sales from the residence (at least two of which occurred in Mr. Chapman's bedroom and the garage). Indeed, (i) the confidential informant statements (Second Biss. Decl. at *Ex. VV*), (ii) the Chapman Search Warrant (which also discuss confidential informants at *Ex. G* to Defs.' Motion for S.J. ¶¶ 3, 5, 9-19), (iii) the police reports and affidavits documenting the search of Plaintiff's house on March 3, 2015 (Second Biss. Decl. at *Exs. YY and ZZ*), and (iv) the trial testimony from Mr. Chapman's trial (Second Biss. Decl. at *Ex. AAA*) all *say absolutely nothing* about whether Plaintiff had knowledge of Mr. Chapman's activities. The MPD even searched Plaintiff's room and found nothing drug related. And to the extent a scale was found in the living

[12] *See* Valentin Depo. 29:9-30:4, Second Biss. Decl. at *Ex. TT* (discussing locks on bedroom doors).

room under a coffee table, Sgt. LeVeille said nothing about such a scale providing a basis for probable cause during extensive questioning at deposition from both counsel. This only comes from Sgt. LeVeille's self-serving post-deposition affidavit which must be stricken for the reasons stated in the accompanying Motion to Strike. There is also no evidence that, at the time of the arrest, the MPD knew that such a scale was used to weigh drugs or that Plaintiff even had knowledge of it or what it was used for. This scale was the only item on the MPD's search log that was not in Mr. Chapman's private bedroom, and it was not listed in the MPD's arrest affidavit of Mr. Chapman indicating evidence of criminality. *See* Search Log, Second Biss. Decl. at *Ex. BBB*; Gonzalez Police Report, at 2nd RFP at 58, Second Biss. Decl. at *Ex. YY*; Chapman Arrest Affidavit, Second Biss. Decl. at *Ex. ZZ*.

In sum, unlike in *Fedor*, there was no admissible evidence in the Officer Defendants' possession at the time of the arrest establishing probable cause that Plaintiff ever saw drugs in his house, knew they were there (they were only found in Mr. Chapman's room), or allowed Mr. Chapman to live at 6 Lawton Street with the understanding that he could sell drugs from there. This lack of probable cause is, as Sgt. LeVeille conceded at deposition, precisely why he was not arrested for engaging in drug activities. *See* LeVeille Depo. 38:23-39:3, Biss. Decl. at *Ex. Q*. Accordingly, summary judgment is appropriate in rejecting Defendants' common nuisance theory because, given this complete lack of evidence, no reasonable jury could find that the officers had probable cause to arrest under this manufactured offense. *See McKenzie v. Lamb*, 738 F.2d 1005, 1007-08 (9th Cir. 1984) (summary judgment is appropriate if "no reasonable jury could find that the officers did or did not have probable cause to arrest").

IV. First Amendment Retaliatory Prosecution and Fourth Amendment Malicious Prosecution Claims (Post-Indictment Claims)

Plaintiff has raised a Fourth Amendment malicious prosecution claim and a First Amendment retaliatory prosecution claim. *See* Second Am. Compl. ¶ 170 (malicious prosecution claim), ¶ 135 (retaliatory prosecution claim). With respect to these claims, Plaintiff incorporates by reference pages 31 to 33 of his Memorandum of Law in support of his Motion for Summary Judgment.

Three additional points are worth noting. First, Defendants' alternative probable cause common nuisance theory has no bearing on this claim. *See Banks v. Harrison*, No. 3:15-0693, 2016 U.S. Dist. LEXIS 115308, at *21-27 (M.D. Pa. Aug. 29, 2016) (malicious prosecution claim challenging disorderly conduct charge emanating from cursing not barred when plaintiff was also charged with and pled guilty to separate offense for kicking a car). Second, Plaintiff's First Amendment retaliatory prosecution claim is different from Plaintiff's First Amendment retaliatory arrest claim. Plaintiff's retaliatory arrest claim is a pre-process claim that focusses on the constitutionality of the arresting decision at the time of the arrest on March 3, 2015. Plaintiff's retaliatory prosecution claim focuses on whether Defendants are liable after process was secured through the June 18, 2015 indictment. Third and finally, here—unlike in *Kean v. City of Manchester*, No. 14-cv-428-SM, 2015 U.S. Dist. LEXIS 40339 (D.N.H. Mar. 30, 2015) ("*Kean I*") relied upon by Defendants where only malicious and retaliatory prosecution claims were dismissed—Sgt. LeVeille engaged in impropriety in securing the indictment that imposes malicious and retaliatory prosecution liability in this case. The evidence here reveals that the Defendant Officers—particularly Sgt. LeVeille—exerted pressure on the HCAO in an effort to use the justice system to prosecute Plaintiff in violation of his clearly-established constitutional rights.

PLAINTIFF'S EMPLOYMENT DAMAGES CLAIM

Defendants argue that partial summary judgment should be granted as to Plaintiff's damages claim that Defendants' decision to arrest and charge Plaintiff for felony wiretapping on March 3, 2015 caused him to be terminated from his position as an accounts payable manager at Longchamps Electric on Friday, March 6, 2015. It is not in dispute that the events of March 3, 2015 caused Plaintiff's arrest. On March 4, 2015, Plaintiff's boss, Kevin Duffy, read an online article describing the MPD's version of what transpired, including the fact that Plaintiff was arrested for felony wiretapping.[13] However, what is in dispute is whether this termination decision was triggered by Plaintiff's (unconstitutional) arrest for felony wiretapping by the MPD or whether it was triggered by the fact that one of Plaintiff's tenants had been arrested by the MPD for possession and distribution of heroin.

During his deposition, Mr. Duffy testified that the termination decision was made because of the arrest of Mr. Chapman and the fact that he was living in Plaintiff's house. This is disputed. Mr. Duffy also admitted that he knew nothing about heroin sales that would inform any opinion as to whether or not Plaintiff was aware of Mr. Chapman's activities. *See* Defs.' Ex. J, Duffy Depo. 23:1-3. Indeed, Plaintiff's recollection of the March 6, 2015 meeting with Mr. Duffy in which he was terminated and the subsequent April 14, 2015 meeting with his former attorney is different. As Plaintiff testified at deposition, Mr. Duffy informed him that he was fired on March 6, 2015 because he was arrested for felony wiretapping, as Longchamps could not have "couldn't have someone charged with a felony." Plaintiff explained that March 6, 2015 meeting where he was informed of his termination: "I came in. We sat down. We talked about my lengthy

[13] *See* Pat Grossmith, "Three Arrested After Undercover Drug Investigation," *Union Leader*, Mar. 4, 2015, *available at* http://www.unionleader.com/apps/pbcs.dll/article?AID=/20150304/NEWS03/150309630.

employment with the company, because I was there for eleven years. *He said he liked me, but he just can't have anyone with a felony work for him like that*. It makes the company look bad. And then he said, you know, 'We're going to post your termination today.' We discussed the severance packet which included insurance and my 401(K) vet, and that's it. *See* Valentin Depo. 133:21-134:11, Second Biss. Decl. at *Ex. TT* (emphasis added). This was reiterated at the April 14 meeting, where Mr. Duffy "referenced the felony again." *Id.* at 136:1-2. In addressing Defendants' Motion for Summary Judgment, Plaintiff's version must be credited.

This is a classic factual dispute that must be left to the jury. Issues of damage causation—and any credibility issues related thereto—are traditionally jury questions. *See First Data Merch. Servs. Corp. v. SecurityMetrics, Inc*., Civil Action No. RDB-12-2568, 2014 U.S. Dist. LEXIS 178091, at *35-39 n.24 (D. Md. Dec. 30, 2014) ("Because First Data has demonstrated evidence directly linking SecurityMetrics' reporting practices to its claimed damages, this Court finds that summary judgment on the basis of lack of proximate cause is inappropriate."); *Packer v. Skid Roe, Inc.*, 938 F. Supp. 193, 196 (S.D.N.Y.1996) ("Issues of proximate cause are normally questions of fact for the jury to decide, unless the court concludes that a reasonable jury could reach only one conclusion."). It is also worth noting that any perception that Mr. Duffy had about Plaintiff's knowledge of Mr. Chapman's activities came from news stories—possibly a *Union Leader* article—which were based on the MPD's press release concerning the arrest. *See* Press Release, Biss. Decl. at *Ex. G*; March 3, 2015 Email from B. LeVeille, Biss. Decl. at *Ex. N* (press release email). Because the MPD had arrested Plaintiff, its press release linked Plaintiff to Mr. Chapman's arrest. This is significant, as Plaintiff's arrest was clearly unconstitutional. In short, any such perception Mr. Duffy had about the situation was created by the MPD itself due to its unconstitutional decision to arrest Plaintiff for felony wiretapping and issue a press release.

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Deny Defendants' Motion for Summary Judgment; and

B. Grant any other relief that is just or equitable.

Respectfully submitted,

Alfredo Valentin,

By and through his attorneys,

/s/ Gilles R. Bissonnette
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Date: April 11, 2017

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded this date by ECF to:

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