DO OFFICERS HAVE A CONSTITUTIONAL DUTY TO DISMISS WARRANTS IF THEY RECEIVE INFORMATION THAT MAY NEGATE PROBABLE CAUSE?

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On June 7, 2017, the Fourth Circuit Court of Appeals of decided *Safar v. Tingle*[i], in which the court discussed whether an officer and a prosecutor violated the Fourth Amendment when they failed to dismiss arrest warrant after the victim told them that that no crime had been committed. The relevant facts of *Safar,* taken directly from the case, are as follows:

> Plaintiffs Eshow and Safar are married residents of Alexandria, Virginia. In September 2012, Eshow purchased around $1,000 of home flooring from Costco in Pentagon City, Virginia. Shortly thereafter, while browsing another Costco store, he saw that the same flooring was on sale. After learning that he could take advantage of the sale price at the store of purchase, on October 17, 2012 Eshow returned to the Pentagon City Costco to get the discount. Store personnel explained that he should purchase the identical flooring at the current markdown and then immediately return it, using his initial sales receipt as the basis for the refund. Eshow followed these instructions and obtained a refund on the joint account he shared with Safar.
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> A few hours later, Costco called the Arlington County Police Department to report—mistakenly—that Eshow and Safar had fraudulently secured a refund on goods they never purchased. Officer Stephanie Rodriguez, along with another colleague, responded to the report and reviewed a video showing Eshow seeking the refund. Rodriguez filed an affidavit requesting arrest warrants for both plaintiffs, and a magistrate judge issued the warrants.
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> The next day, Costco representatives contacted Rodriguez and notified her that the allegations against Eshow and Safar were unfounded—no fraud had in fact occurred. Rodriguez did not take any steps to correct her affidavit or withdraw the arrest warrants.
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> Eight months went by without incident until Eshow was pulled over for speeding in Fairfax County, Virginia. Based on the outstanding arrest warrant, the police officers handcuffed

> Eshow in front of his family and placed him under arrest. On July 31, 2013, Eshow appeared before the Arlington County General District Court to contest the fraud charge. At the hearing, a Costco representative explained to Rodriguez and Lisa Tingle, the assistant commonwealth's attorney, that the charge was erroneous and should be dropped. Tingle moved for *nolle prosequi* and the court dismissed the case against Eshow.
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> Both Rodriguez's investigative notes and Tingle's case file indicated that identical charges were pending against Safar, but neither took any action to withdraw her arrest warrant. Rodriguez and Tingle had previously been trained in the standard procedures for withdrawing warrants from statewide law enforcement databases. In particular, "an attorney for the Commonwealth may at any time move for the dismissal and destruction of any unexecuted warrant or summons issued by a magistrate." VA. CODE ANN. § 19.2-76.1 (West 2011).
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> In late 2013, Eshow and Safar applied for American citizenship. After passing her citizenship test, Safar turned to the next requirement and sought clearance letters from local police in counties where she previously resided. On December 23, 2013, Safar reported to the police headquarters in Prince George's County, Maryland to get a clearance letter. Upon reviewing her file, an officer informed her that she was under arrest pursuant to an active warrant. Safar was incarcerated in Maryland, and a magistrate advised her that a transfer to Arlington, Virginia could not be arranged until the county judges returned from the holiday.
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> As part of the incarceration process, Safar was strip searched and inspected for smuggled contraband. She was the primary caregiver for three young children at the time and was denied the opportunity to use a breast pump. Safar remained in jail for three days until December 26, 2013, when she was transferred to Arlington, Virginia and released. The following day the case against her was dismissed *nolle prosequi* by a different assistant commonwealth's attorney.[ii]

Safar and Tingle filed suit in district court and alleged claims under the Fourth and Fourteenth Amendments and under Virginia law for gross negligence. The district court dismissed all claims and the plaintiffs appealed to the Fourth Circuit Court of Appeals.

The first issue on appeal was whether the plaintiffs had a right under the Due Process Clause of the Fourteenth Amendment that was violated when the officer and prosecutor failed to dismiss the warrants against them after Costco told them that the allegations were unfounded. Regarding this claim, the court of appeals noted that the Fourteenth Amendment is not implicated pre-trial. Specifically, the court stated

> **As an initial matter, we are mindful of the Supreme Court's injunction that the Due Process Clause is not the proper lens through which to evaluate law enforcement's pretrial missteps**. Compared to the "more generalized notion" of due process, the Fourth Amendment "provides an explicit textual source of constitutional protection against [unreasonable seizures and arrests]," *Graham*, 490 U.S. at 395, and "define[s] the 'process that is due' for seizures of persons or property in criminal cases," *Gerstein v*.

> *Pugh*, 420 U.S. 103, 125 n.27 (1975). **Consequently, a police officer who withholds exculpatory information does not violate the Fourteenth Amendment unless the officer's failure to disclose deprived the plaintiff of the "right to a fair trial**." *Taylor v. Waters*, 81 F.3d 429, 436 n.5 (4th Cir. 1996). **Further, insofar as plaintiffs' claims sound in generic negligence, the Due Process Clause "is simply not implicated" by acts of official carelessness.** *Daniels v. Williams*, 474 U.S. 327, 328 (1986). **The Fourth Amendment, then, is the only actionable ground for relief**.[iii] [emphasis added]

The second issue on appeal was whether Officer Rodriguez violated the Fourth Amendment by failing to dismiss the warrants against Safar and Eshow after Costco called and informed her that the allegations were unfounded.

It is important to note that in order to defeat qualified immunity for officers being sued for constitutional violations, the plaintiff must show that (1) the officer did in fact violate the constitutional right, and (2) the right was clearly established such that another reasonable officer in the same situation would have known that he was violating the law. For law to be clearly established there must be case law factually similar enough from the Supreme Court, Fourth Circuit Court of Appeals or highest court in the state to put a reasonable officer on notice that his conduct is unlawful.

Thus, the court set out to determine if the law regarding an officer's alleged affirmative duty to dismiss a warrant after a magistrate has made a finding of probable cause and issue a warrant was clearly established such that Officer Rodriguez should have known not doing so would violate the plaintiff's rights.

The court, in analyzing the law pertaining to this issue first stated

> Although plaintiffs assure us that this is an exceptional circumstance where probable cause had completely dissipated, we must be careful not to make bad law out of an ostensibly "easy" case. "[T]he intuitively sensed obviousness of a case induces a rush to judgment, in which a convenient rationale is too readily embraced without full consideration of its . . . future ramifications." *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 804 (1980) (Blackmun, J., concurring in the judgment). To say that an affirmative duty attached here fails to emphasize the limits of such an obligation and how it might function in practice. **Probable cause is fluid; after an arrest warrant is sworn out there often comes to light additional evidence that may be more or less exculpatory. Sometimes a victim may recant, as Costco did here. Or perhaps a complaining witness offers new or conflicting testimony. In either case, an officer is forced to make a discretionary call about whether the subsequent information undermines a magistrate's finding of probable cause and, if so, how best to proceed.**
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> **Given the vagaries of these evidentiary judgments, courts should not lightly enter the business of micromanaging police investigations and impose a categorical duty on officers governing the termination of allegedly stale arrest warrants**. Indeed, if every failure of a police officer to act in some unspecified way on the basis of new information gave rise to liability, we would invite a legion of cases urging us to

> second-guess an officer's decision about whether to second-guess a magistrate's finding of probable cause.
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> **In any event, to the extent that plaintiffs struggle to define a Fourth Amendment right, they face an even bigger obstacle demonstrating that such a duty was clearly established…**
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> **The absence of controlling cases suggests that Rodriguez did not have a clearly established affirmative duty to take steps to revoke the arrests warrants**.[iv] [emphasis added]

The court also examined case law from the Fourth Circuit that seems to be contrary to the plaintiff's position that the officer had a duty to dismiss the warrant. In *Taylor v. Waters*[v], the court held that a police detective did not violate the Fourth Amendment when the plaintiff's roommate told him that the plaintiff was not involved in the drug activity for which he was charged. The court stated

> **Once a neutral magistrate finds probable cause and issues an arrest warrant, we reasoned, "the Fourth Amendment does not impose any further requirement of judicial oversight or reasonable investigation to render pretrial seizure reasonable**." *Id*. at 436. Accordingly, **an officer's failure to act upon allegedly exculpatory evidence "does not render the continuing pretrial seizure of a criminal suspect unreasonable under the Fourth Amendment**." *Id*. at 437.[vi]

Further, in *Brooks v. City of Winston-Salem*[vii], an officer failed to dismiss charges after learning that the plaintiff had not committed the suspected offenses. The court stated

> [W]e took notice of the initial process provided by a neutral magistrate and in the continuing ability of judicial proceedings to test the strength of a case against those detained. **Thus, when "a pretrial seizure has been rendered reasonable by virtue of a probable cause determination," any "continuing pretrial seizure of a criminal defendant . . . is [also] reasonable**." *Id*. at 184. **Any other rule would subject those in law enforcement to the prospect of suits for an endless variety of supposed pretrial failures or omissions**.[viii] [emphasis added]

Therefore, the Fourth Circuit held, in *Safar*, that the law was not clearly established such that a reasonable officer would have known he or she should dismiss the warrant and thus affirmed the district court's grant of qualified immunity to Officer Rodriguez.

The court then turned to the third issue, which was whether the prosecutor, Tingle, was entitled to absolute prosecutorial immunity for failing to dismiss the charges against Eschow after dismissing the same charges against Safar.

The court first stated

> **It is well settled that prosecutorial activities that are "intimately associated with the judicial phase of the criminal process" are absolutely immune from civil suit**. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). Recognizing that "harassment by unfounded

> litigation" could "cause a deflection of the prosecutor's energies from his public duties" and lead the prosecutor to "shade his decisions instead of exercising the [appropriate] independence of judgment," the Supreme Court in *Imbler* determined that the protection afforded by qualified immunity was inadequate. *Id*. at 423. … **In light of the "substantial danger of liability even to the honest prosecutor" that such suits pose when they survive the pleadings, the immunity that a prosecutor enjoys is absolute**. *Id*.
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> **At the same time, the *Imbler* Court was careful to note that absolute immunity may not attach when a prosecutor is acting as an "administrator and investigative officer" rather than as "an officer of the court**." *Id*. at 430-31 & n.33.[ix]

The plaintiffs argued that dismissing the charges against Eschow was an administrative or ministerial duty for which prosecutorial immunity should not attach. However, the court of appeals noted that the prosecutor cannot simply dismiss a case. The prosecutor must file a motion to dismiss with the court and the judge must dismiss the case. As such, this demonstrates that this action is intertwined with the court and prosecutorial and advocacy function. The court of appeals then stated

> **[D]eciding whether or not to withdraw an arrest warrant is one of those advocacy functions "to which the reasons for absolute immunity apply with full force**." *Imbler*, 424 U.S. at 430.[x]

Thus, the court of appeals affirmed the grant of absolute immunity to Tingle in this case.

As for the state law claims of gross negligence, the court of appeals dismissed the claims in federal court without prejudice such that the cases could be sent back to state court and decided there. The court of appeals reasoned that there is an extensive body of state case law relate to gross negligence and the state court would be in a better position to interpret such case law.

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[i] No. 16-1420 (4th Cir. Decided June 7, 2017)
[ii] Id. at 2-4
[iii] Id. at 6
[iv] Id. at 9-11
[v] 81 F.3d 429 (4th Cir. 1996)
[vi] Safar at 11
[vii] 85 F.3d 178 (4th Cir. 1996)
[viii] Safar at 11
[ix] Id. at 12
[x] Id. at 15