

with prejudice and he was released from custody on August 28, 2007. (Id., ¶ 30.) Dail's wrongful imprisonment would have ended many years earlier if Defendants maintained proper policies and procedures for preserving and inventorying evidence in criminal cases, or if Defendants had conducted a proper search for the evidence. (Id., ¶¶ 41-42, 50-51, 54-55.)

Dail brought this action against the City of Goldsboro and responsible officials within the Goldsboro Police Department to recover damages associated with his wrongful incarceration. Dail asserts a Monell claim pursuant to 42 U.S.C. § 1983, and state-law claims for obstruction of justice, negligence, negligent infliction of emotional distress, negligent loss of evidence, and deprivation of rights guaranteed under the North Carolina Constitution.¹

STATEMENT OF THE CASE

Plaintiff filed his Complaint in Wayne County Superior Court on August 26, 2010, and an Amended Complaint on September 17, 2010. Defendants removed the action to this Court on October 21, 2010. On November 22, 2010, Defendants filed a Motion to Dismiss, seeking the dismissal of Plaintiff's action in its entirety. On November 29, 2010, the Court granted Plaintiff's motion to extend the time for his response to January 3, 2011.

STATEMENT OF FACTS

Underlying Crime

During the early morning hours of September 4, 1987, a man cut through the screen of Tameisha Carrington's bedroom window at the Jefferson Park Apartments in Goldsboro, North Carolina. (Amended Complaint, ¶ 17.) Tameisha, just 12 years old at the time, was awakened by the noise and ran for her bedroom door. The intruder stopped her and closed the door. (Id., ¶

¹ Dail does not contest the dismissal of his state law claims for false arrest/false imprisonment (Third Cause of Action) and his federal claims against individual defendants in their individual capacities (Seventh and Eighth Causes of Action).

17.) The intruder ordered Tameisha back to bed, and then molested and raped her. The intruder then climbed out the window, running around the corner of the apartment building. (Id., ¶ 18.) Tameisha had only caught a glimpse of her attacker and would later describe him as a white man with long, dusty or light brown hair, and a beard. (Id., ¶ 17.)

Tameisha immediately told her mother what had happened. (Id., ¶ 18.) Tameisha's mother called 911, and police officers from the City of Goldsboro Police Department arrived within minutes. Tameisha was taken to the hospital for examination and treatment, while police investigators collected evidence at the apartment. (Id., ¶ 18.)

During the next few weeks, the authorities were unable to identify a suspect. (Id., ¶ 19.) Tameisha's mother saw a man drive past the apartment building who appeared to look at the apartment window. She gave the vehicle's license plate number to police. About three weeks later, the mother saw the man she had previously identified in the apartment complex parking lot with some friends. (Id., ¶ 20.) With Tameisha in tow, the mother walked through the parking lot. Sensing that Tameisha seemed to tense up as they approached the crowd of teenagers, the mother asked the child if she saw the man who had raped her and Tameisha responded affirmatively. (Id., ¶ 20.)

Investigation And Prosecution Of Dwayne Dail

Examination of the rape kit by the North Carolina State Bureau of Investigation ("SBI") revealed the presence of sperm on the vaginal swabs and panties. However, because both Dail and Tameisha Carrington are "non-secretors," ABO blood-typing could not be conducted. (Id., ¶ 21.) On a throw rug which had been purchased second-hand years before, investigators found 40 Negroid hairs and three Caucasian hairs. (Id., ¶ 21.) Of the Caucasian hairs, two pubic hairs were inconsistent with those of Dail and one head hair was "found to be microscopically

consistent with the head hair of Dwayne Dail.” Thus, investigators concluded that the single Caucasian head hair “could have” originated from Dail. (Id., ¶ 21.)

Based on a single head hair found to be consistent with the hair of Dwayne Dail (along with countless other Caucasian males) and the child’s identification, Dail was charged with first-degree burglary, first-degree sexual offense, first-degree rape, indecent liberties, and lewd and lascivious acts. (Id., ¶ 22.) In a racially charged atmosphere, the trial against Dail proceeded. The prosecution’s evidence consisted of a child’s identification six weeks after the rape² and a single Caucasian head hair that “could have originated from Dwayne Dail,” found on a second-hand rug. (Id., ¶ 24.) Dail was found guilty of all counts³ and was sentenced to two life sentences plus 18 years. (Id., ¶ 24.)

Efforts To Preserve Crime Scene Evidence For Testing

From the time of his conviction, Dail followed the developments associated with the testing of biological evidence and understood that DNA testing of the evidence in his case could exonerate him. (Id., ¶ 25.) In 1995, through his attorney, Dail requested that the physical evidence from the case be preserved for DNA testing. (Id., ¶ 26.) The Goldsboro City Attorney told Dail that the Wayne County Clerk’s Office had destroyed the rape kit in 1994. (Id., ¶ 26.) In the years after 1995, volunteers with the Innocence Project® teams and The North Carolina Center on Actual Innocence (“The Center”) made repeated inquiries to Defendants regarding the evidence in Dail’s case. (Id., ¶ 26.) On each occasion, officials with the Goldsboro Police Department told them that the rape kit was destroyed in 1994, that there was no physical

² The identification bore many of the classic hallmarks of a questionable identification: (i) night-time incident and only a brief glimpse of perpetrator with poor lighting; (ii) cross-racial identification; (iii) child victim; (iv) child having been awakened from sleep and subjected to traumatic event; and (v) weapon focus. (Amended Complaint, ¶ 36.)

³ The State dismissed the charge for lewd and lascivious acts during trial.

evidence left in the case, and that the Goldsboro Police Department only kept evidence from murder cases from the 1980s. (Id., ¶ 27.)

In June 2007, the officer in charge of the Goldsboro Police Department's evidence team responded to an inquiry by a Center staff member and reported that evidence in several old cases, including Dail's, had been "found." (Id., ¶ 28.) To date, no one has offered an official explanation as to how and where the supposedly destroyed evidence was found.

Dail's Exoneration

When he learned that evidence from his case had in fact not been destroyed, Dail insisted that all evidence be tested against his DNA. (Id., ¶ 29.) The evidence was transported to the SBI lab for testing, where it was determined that there remained biological evidence in sufficient quantity and quality to test. (Id.) On August 27, 2007, the Wayne County District Attorney informed Center staff that there was a complete DNA profile from the sperm on the nightgown and that it did not match Dail. (Id.) The DNA did, however, match the profile of someone else who was incarcerated in the North Carolina prison system.⁴ (Id., ¶ 30.) In the face of this irrefutable evidence, the Wayne County District Attorney dismissed all charges against Dail with prejudice on the basis of innocence and Dail was finally freed. (Id., ¶¶ 29-30.)

STANDARD OF REVIEW

A complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) only where a plaintiff's claims fail as a matter of law. When ruling on a motion to dismiss, the Court must accept as true all well-pled factual allegations and should consider whether "they plausibly give

⁴ While the Goldsboro Police Department was seeking to link Dail to the victim in 1987, they ignored multiple indications that they should have instead been investigating William Neal, the perpetrator of the crimes for which Dail was arrested. See Amended Complaint, ¶¶ 31-37. The same law enforcement agency that misplaced the evidence from 1994 to 2007 had earlier failed to recognize the significance of other evidence that should have led it to investigate and arrest Neal in 1987, thus preventing him from committing similar crimes, and sparing Dail his 20-year ordeal.

rise to an entitlement to relief.” Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009). Dismissal is not appropriate where the complaint contains “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). In assessing the legal sufficiency of a complaint, the factual allegations must be construed in the light most favorable to the plaintiff. Smith v. Smith, 589 F.3d 736 (4th Cir. 2009) (reversing 12(b)(6) dismissal of § 1983 claim). “When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” Iqbal, 129 S. Ct. at 1950. Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. Id. The purpose of a motion to dismiss, under Rule 12(b)(6), is to test the legal sufficiency of the complaint, not to resolve conflicts of fact or to decide the merits of the action. Harrison v. United States Postal Serv., 840 F.2d 1149, 1152 (4th Cir. 1988). A dismissal on the pleadings should be granted sparingly and with caution. Id.

SUMMARY OF ARGUMENT

Dail has properly stated cognizable claims for relief arising from his wrongful incarceration. Dail has stated a valid claim for municipal liability under 42 U.S.C. § 1983 and Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S. Ct. 2018 (1978), because Defendants had a policy or practice of failing to properly inventory and safeguard evidence, including the evidence that ultimately exonerated Dail. Defendants’ unconstitutional conduct arbitrarily denied Dail’s liberty interest and resulted in his continued wrongful incarceration. Unlike the plaintiff in District Attorney’s Office for Third Judicial District v. Osborne, 129 S. Ct. 2308 (2009), the principal case upon which Defendants rely, Dail

has not impermissibly used § 1983 to seek access to potential evidence, but instead properly invokes § 1983 to redress Defendants' unconstitutional failure to reasonably maintain evidence.

Dail has also properly brought state law claims for negligence and obstruction of justice, which are not time-barred. Those claims did not accrue until August 27, 2007, when Defendants first notified Dail of the results of the DNA testing, or on August 28, 2007, when Dail was finally released from custody, and thus were timely filed on August 26, 2010. Finally, Dail has stated valid claims under the North Carolina Constitution based on Defendants' violations of his rights to procedural due process and entitlement to exculpatory evidence.

This case presents weighty issues of constitutional significance in an evolving area of law. Consideration of the merits of the claims asserted in this action should follow development of a full factual record.

ARGUMENT

I. PLAINTIFF HAS PROPERLY STATED A CLAIM FOR RELIEF UNDER 42 U.S.C. § 1983.

A. Plaintiff Has Stated a Valid § 1983 Claim for Municipal Liability Under *Monell and Osborne*.

“Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” Mathews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 901 (1976). An individual’s rights to due process are violated when he has a “liberty . . . interest which has been interfered with by the State” and “the procedures attendant upon that deprivation were [not] constitutionally sufficient.” Kentucky Dep’t of Corrections v. Thompson, 490 U.S. 454, 460, 109 S. Ct. 1904, 1908 (1989). Liberty interests “may arise from two sources – the Due Process Clause itself and the laws of the States.” Id.

“The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.” Wyatt v. Cole, 504 U.S. 158, 161, 112 S. Ct. 1827, 1830 (1992). A suit under § 1983 against a municipality must be premised upon deprivation of a constitutional right pursuant to some municipal “policy” or “custom.” Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 2035-36 (1978). In this case, Defendants had a policy or practice of failing to properly inventory and safeguard evidence, including the evidence that ultimately exonerated Dail. Defendants’ conduct deprived Dail of his constitutional rights because it arbitrarily denied him his liberty interest in accessing exculpatory DNA evidence, and resulted in his continued wrongful incarceration.

In District Attorney’s Office for Third Judicial District v. Osborne, 129 S. Ct. 2308 (2009), the Supreme Court established that when a state provides convicted defendants access to evidence and a procedure for accessing the evidence, the State has created a liberty interest that is entitled to due process protection. Id. at 2319-20. While the bulk of the Osborne opinion concerns whether there is a constitutional right to access DNA evidence, the portion of the decision relevant to this case concerns the rights created when a state already provides a means for a convicted defendant to access evidence.

In Osborne, the plaintiff brought a section 1983 action to compel the release of biological evidence so that it could be subjected to DNA testing. Id. at 2315, 2319. The plaintiff claimed both a substantive and procedural due process right to the evidence under the federal constitution and a procedural due process right stemming from an Alaska state statute that provided for post-conviction access to evidence. Id. The Supreme Court expressly rejected the plaintiff’s argument that post-conviction defendants have a substantive or procedural due process right to

post-conviction DNA testing. *Id.* at 2322-23. However, the Court concluded that when a state provides a procedure for post-conviction defendants to access evidence, the state has created a liberty interest that is entitled to due process protection. *Id.* at 2319-20. The Court could not fully evaluate Alaska's procedures for accessing evidence because the plaintiff had not pursued those procedures to test their adequacy. *Id.* at 2321.

In this case, Dail had a protected liberty interest in accessing evidence to prove innocence based on North Carolina's post-conviction relief statute and the City of Goldsboro's established procedure for requesting DNA evidence. North Carolina allows convicted defendants to challenge their conviction and incarceration with new evidence:

Notwithstanding the time limitations herein, a defendant at any time after verdict may by a motion for appropriate relief, raise the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, including recanted testimony, and which has a direct and material bearing upon the defendant's eligibility for the death penalty or the defendant's guilt or innocence. A motion based upon such newly discovered evidence must be filed within a reasonable time of its discovery.

N.C. Gen. Stat. § 15A-1415(c).⁵ Based on the post-conviction statute, Dail has "a liberty interest in demonstrating his innocence with new evidence under state law." *Osborne*, 129 S. Ct. at 2319 (reaching same conclusion based on Alaska's post-conviction statute that provides relief for defendants with new evidence of their innocence). Moreover, "this 'state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent

⁵ This subsection was inserted into the post-conviction statute in 1996. The prior version of the statute was substantially similar, providing that post-conviction relief was available upon a showing that "Evidence is available which was unknown or unavailable to the defendant at the time of the trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant." N.C. Gen. Stat. § 15A-1415(b)(6) (1995).

right.” Id. (quoting Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 463, 101 S. Ct. 2460, 2464 (1981)).

Here, procedures to access exculpatory DNA material were essential to Dail’s right to demonstrate his innocence with new evidence. The City of Goldsboro provided procedures to realize this right by giving Dail and his representatives a method for requesting DNA evidence. Over the years between his conviction and exoneration, the Goldsboro Police Department entertained the requests of Dail’s representatives to access retained evidence, and denied the requests only because they believed the evidence no longer existed. Responding to another similar request in 2007, the Police Department produced the crime scene evidence for testing when it was found in June 2007. Goldsboro thus had an established practice of producing DNA evidence upon request. Moreover, if Defendants had opposed Dail’s requests for access to the evidence, Dail could have obtained the material through North Carolina’s post-conviction relief procedures. See N.C. Gen. Stat. § 15A-1415(c); N.C. Gen. Stat. § 15A-1420(c) (entitling defendant to evidentiary hearing on a post-conviction motion for appropriate relief); State v. Taylor, 327 N.C. 147, 154, 393 S.E.2d 801, 806 (1990) (holding that courts “have the inherent power to compel disclosure of relevant facts regarding a post-trial motion [for appropriate relief] and may order such disclosure prior to a hearing on such motion”).

Dail’s liberty interest in proving his innocence and accessing exculpatory evidence, however, was thwarted by Defendants’ unreasonable failure to properly maintain the evidence. Because Defendants had a deficient policy and practice with respect to inventorying and safe-keeping evidence, Defendants falsely informed Dail that the evidence was unavailable for at least 12 years. As a result, Dail was unable to obtain evidence that at all times was under the exclusive control of Defendants, the testing of which would have led to his release pursuant to

North Carolina's procedures for post-conviction relief. Defendants' evidence-retention practices were manifestly deficient, and unconstitutionally deprived Dail of his liberty interest in proving his innocence, violating his right to procedural due process. See Osborne, 129 S. Ct. at 2319; Thompson, 490 U.S. at 460. Because the Amended Complaint alleges – and the evidence to be developed through discovery will demonstrate – that the Goldsboro Police Department had a policy or custom of not properly storing and inventorying evidence,⁶ depriving Dail of due process, Dail has stated a valid § 1983 claim for municipal liability under Monell.

A recent federal case is directly on point. In Newton v. City of New York, 681 F.Supp.2d 473 (S.D.N.Y. 2010), the plaintiff was released from prison after more than twenty-two years of incarceration for a rape and assault that DNA testing proved he did not commit. Id. at 476. For eleven of those years, the plaintiff repeatedly requested access to the rape kit that contained the ultimately exonerating DNA. Id. His requests were denied, not because he was not entitled to the rape kit, but because the government could not find it. Id. When the rape kit was eventually found, the plaintiff, like Dail, was exonerated and released from prison. The plaintiff filed a § 1983 action against the City of New York and various government actors based, in part, on the defendants' failure to produce and examine the exculpatory DNA evidence. Id.

At summary judgment, the defendants moved to dismiss the plaintiff's claims based on Osborne, making many of the arguments that Defendants make here. The court's rejection of

⁶ The Goldsboro Police Department acknowledged in June 2007 that it had uncovered misplaced evidence in "several cases." (Amended Complaint, ¶ 28.) Dail anticipates developing evidence to meet the requirement of Monell and its progeny that a deprivation of a constitutional right was accomplished by an established policy or custom. Disposition of this claim must await development of a factual record regarding the policies and procedures at issue, and evidence of attempts by others to obtain access to evidence mishandled by the Goldsboro Police Department. Furthermore, "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." Pembaur v. City of Cincinnati, 475 U.S. 469, 480, 106 S. Ct. 1292, 1298 (1986).

their motion with respect to the plaintiff's § 1983 Monell claim is instructive. The court found that the plaintiff had a protected liberty interest in proving his innocence and accessing exculpatory evidence pursuant to state procedures and the prosecutor's policy of consent for DNA requests. Id. at 489, 491. The court concluded that "once a state determines that a post-conviction defendant is entitled to evidence . . . , the defendant's due process rights have been violated if attempts to locate the evidence are frustrated due to a poor or non-existent evidence management system." Id. at 491.

The plaintiff in Newton produced evidence that "his continued, wrongful, imprisonment for 12 years after his first request for the rape kit in 1994 was a direct result of the City's failure to create and enforce a coherent evidence management system." Id. at 491. The plaintiff was denied access to the rape kit for DNA testing because the police department "could not find the rape kit even though it was always in the City's possession." Id. Therefore, the plaintiff had "raised a question of material fact as to whether New York's procedures for access to evidence for DNA testing violated principles of fundamental fairness such that he was wrongfully deprived of his right to procedural due process." Id.

In this case, as in Newton, Defendants wrongfully interfered with Dail's "liberty interest in demonstrating his innocence with new evidence under state law," Osborne, 129 S. Ct. at 2319, because they did not properly inventory and safeguard the evidence from Dail's criminal case. Defendants' unconstitutional acts are properly redressable under § 1983, as stated in the Amended Complaint.

B. Plaintiff's § 1983 Claim Is Not Barred by Osborne.

Contrary to Defendants' arguments, Osborne does not foreclose Dail's § 1983 claims. Unlike the plaintiff in Osborne, Dail is not seeking access to DNA evidence for the first time, but

instead seeks to redress Defendants' unconstitutional failure to properly maintain evidence that ultimately exonerated him.

In Osborne, the inmate-plaintiff, post-conviction, sought to sidestep established procedures under Alaska state law for requesting evidence in the state's possession. Ignoring Alaska's established procedures, the inmate chose to file a § 1983 action, and sought a judicially-created right to the evidence under the Due Process Clause. Osborne, 129 S. Ct. at 2315, 2319. The Supreme Court ruled that, while the inmate had "a liberty interest in demonstrating his innocence with new evidence under state law . . . [and] 'this state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right,'" courts cannot create a new judicially-created right to evidence in the possession of the state unless and until the inmate can "demonstrate the inadequacy of the state-law procedures available to him in state post-conviction relief." Id. at 2319.⁷

This case is significantly different. Dail has not brought this action under § 1983 to establish a new right to access evidence. Dail has already obtained access to the DNA evidence that exonerated him. Nor is Dail attempting to use § 1983 as an end run around established post-conviction procedures. Dail's innocence has been conclusively established and he has been released from prison. Instead, Dail seeks damages for his lengthy wrongful incarceration that was due to Defendants' failure to properly maintain evidence. Such a deprivation of constitutional rights is redressable under 42 U.S.C. § 1983.

The district court in Newton reached the same conclusion. The facts presented in Newton were distinguishable from those in Osborne as the plaintiff in that case had tested New

⁷ The two other cases cited by Defendants similarly involved inmates seeking the release of DNA evidence outside of established procedures. In both cases, the inmate filed a § 1983 action solely for the purpose of obtaining potentially relevant DNA evidence. Grier v. Klem, 591 F.3d 672, 675 (3rd Cir. 2010); Cunningham v. Dist. Attorney's Office of Escambia Cty., 592 F.3d 1237, 1241 (11th Cir. 2010).

York's DNA-access procedures and "shown them to fail," whereas the plaintiff in Osborne did not test Alaska's procedures for accessing requested evidence. Newton, 681 F. Supp. 2d at 490. Similarly, the constitutional right at issue differed. The Newton court's recognition of a valid § 1983 claim did "not confer a due process right to access evidence for DNA testing on all post-conviction defendants. To do so would directly contradict Osborne." Id. at 491. Rather, the valid § 1983 claim was premised on the recognition that "once a state determines that a post-conviction defendant is entitled to evidence . . . , the defendant's due process rights have been violated if attempts to locate the evidence are frustrated due to a poor or non-existent evidence management system." Id. at 491.

Therefore, as both Osborne and Newton demonstrate, Dail's § 1983 claim is not foreclosed by the decision in Osborne.

C. North Carolina's DNA-Access Statute Does Not Bar Plaintiff's § 1983 Claim Because He Had No Need to Invoke It.

In 2001, North Carolina enacted a statute, N.C. Gen. Stat. § 15A-269, to provide post-conviction defendants with a procedure to obtain potentially exculpatory DNA evidence. Dail had no need to use this procedure, however, because the Goldsboro Police Department already had a practice of providing DNA evidence upon request. Therefore, contrary to Defendants' arguments, Dail's decision not to invoke N.C. Gen. Stat. § 15A-269 has no bearing on his § 1983 claim.

North Carolina's post-conviction DNA statute provides that a trial court shall grant a motion for DNA testing of any biological evidence if the testing is material to the defendant's defense and had not been tested previously to the same degree. N.C. Gen. Stat. § 15A-269(a). The statute provides that "DNA testing ordered by the Court pursuant to this section shall be done as soon as practicable." Id. § 15A-269(e).

Neither Defendants nor any other person within or outside the Goldsboro Police Department ever told Dail that they would not make the crime scene evidence available for testing. Rather, Dail was repeatedly told that the evidence had been destroyed when, in fact, the evidence at all times remained under the exclusive custody of Defendants. When the officer in charge of the Police Department's evidence team reported that the evidence in several old cases, including Dail's case, had been found, that officer voluntarily faxed back an acknowledgement that the evidence was in the Department's possession. (Amended Complaint, ¶ 28.)

When the evidence was found, neither the City of Goldsboro nor the District Attorney insisted that Dail file a formal motion pursuant to N.C. Gen. Stat. § 15A-269, and the testing was conducted with the consent of all concerned. If Defendants had informed Dail or those acting on his behalf that the crime scene evidence had been retained, and if Defendants had denied an informal request for testing of the evidence, Dail would have filed a formal motion pursuant to the statute.

Defendants make much of the fact that Dail did not file a formal motion pursuant to N.C. Gen. Stat. § 15A-269. Quite simply, there was no need for Dail to file a formal motion because Defendants repeatedly, though erroneously, informed him that the evidence had been destroyed. The basis for Defendants' refusal to test the evidence was not that they objected to making the evidence available or that Dail failed to file a motion, but instead that they mistakenly thought the evidence no longer existed. Until Defendants "found" the evidence in June 2007, a motion under N.C. Gen. Stat. § 15A-269 would have been to no avail. The law does not require a person to perform a futile act. Norman v. Nash Johnson & Sons Farms, Inc., 140 N.C. App. 390, 408, 537 S.E.2d 248, 261 (2000) ("the law does not require a person to do a vain, or futile, act"); accord Brooks v. Southern Nat. Corp., 131 N.C. App. 80, 86-87, 505 S.E.2d 306, 310-11 (1998).

Therefore, Dail's decision not to invoke N.C. Gen. Stat. § 15A-269 has no bearing on his § 1983 claim.

If anything, the enactment of N.C. Gen. Stat. § 15A-269 further demonstrates that Dail had a protected liberty interest in proving his innocence and accessing exculpatory DNA evidence. See Osborne, 129 S. Ct. at 2319; Newton, 681 F.Supp.2d at 489, 491. Defendants wrongfully deprived Dail of this liberty interest because they did not properly inventory and safeguard the evidence from Dail's criminal case. Dail has thus stated a valid § 1983 claim.

II. PLAINTIFF'S STATE LAW CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.

Dail's state law claims for negligence and obstruction of justice are not barred by the statute of limitations because they did not accrue until August 27, 2007, when Dail was informed of the DNA test results, exonerated, and released from prison. All of Dail's claims arise from his wrongful imprisonment, and those claims did not accrue until his imprisonment was shown to be wrongful by the DNA test results. Therefore, Dail's state law claims were timely filed within three years of accrual.

North Carolina law imposes a three-year statute of limitations for negligence actions. N.C. Gen. Stat. § 1-52(5); Pompano Masonry Corp. v. HDR Architecture, Inc., 165 N.C. App. 401, 409, 598 S.E.2d 608, 613 (2004). Under the discovery rule in N.C. Gen. Stat. § 1-52(16), the "negligence action accrues at the time the plaintiff discovers, or reasonably should have discovered, the injury or damage, as long as it is within ten years of the defendant's negligence." Id. Similarly, an obstruction of justice claim "must be brought within three years from the time the cause of action accrues, and an action accrues when a plaintiff becomes aware or reasonably should have become aware of the fraud or harm." Self v. Yelton, 688 S.E.2d 34, 38-39, ___ N.C. App. ___ (2010) (citing N.C. Gen. Stat. § 1-52(9), (16)).

Analyzing the similar, previous version of N.C. Gen. Stat. § 1-52(16), the North Carolina Supreme Court held that the statute of limitations “does not begin to run until plaintiff discovers, or in the exercise of reasonable care, should have discovered, that he was injured as a result of defendant’s wrongdoing.” Black v. Littlejohn, 312 N.C. 626, 639, 325 S.E.2d 469, 478 (1985) (emphasis added) (holding that plaintiff’s claim did not accrue until she discovered that she had been harmed by defendants’ conduct); see also Meisenheimer v. Burris, 360 N.C. 620, 623, 637 S.E.2d 173, 175-76 (2006) (holding that the discovery rule is remedial in nature and should be interpreted liberally).

In this case, Dail did not discover that he was injured by Defendants’ negligence and obstruction of justice until the DNA testing of the evidence from his case proved that he was innocent. Had the DNA evidence not exonerated Dail, his imprisonment would not have ended, and Defendants’ negligence and obstruction of justice concerning the DNA evidence would not have harmed him in any way. Thus, under N.C. Gen. Stat. § 1-52(16), Dail’s state law claims did not accrue until he learned of the DNA test results on August 27, 2007. Therefore, Dail’s state law claims were timely filed on August 26, 2010.

The accrual of latent disease claims is analogous. Though an individual may have been exposed to a toxic substance for many years, the individual has no way of knowing that he or she sustained injury due to the exposure until the injury becomes manifest. In that situation, the legal claims do not accrue until diagnosis, when the injury or damage in the form of the disease is revealed. Wilder v. Amatex Corp., 314 N.C. 550, 561-62, 336 S.E.2d 66, 72-73 (1985). The statute of limitations for those claims is triggered by the diagnosis, the point at which the injured person becomes aware that the exposure caused injury. Id. Similarly, Dail had no claim for damages until it was revealed that the “lost” evidence had exonerated him.

In addition, the United States Supreme Court has established that claims based on the invalidity of one's conviction or imprisonment do not accrue until the conviction or imprisonment is overturned. Under the doctrine established by Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364 (1994), if a state prisoner's successful claim for damages under 42 U.S.C. § 1983 "would necessarily imply the invalidity of his conviction or sentence," such a claim is not cognizable unless and until the prisoner can demonstrate that his conviction or sentence has been invalidated. Young v. Nickols, 413 F.3d 416, 418-19 (4th Cir. 2005) (quoting Heck, 512 U.S. at 487). Therefore, causes of action that involve "challenges that necessarily would implicate the validity of a plaintiff's conviction or sentence do not accrue until that conviction or sentence is reversed." Brooks v. City of Winston-Salem, 85 F.3d 178, 182 (4th Cir. 1996) (citing Heck, 512 U.S. at 486-87). The framework in Heck can and should be applied to North Carolina state law claims. See Parish v. City of Elkhart, 614 F.3d 677, 683-84 (7th Cir. 2010) (applying Heck to state law claim for intentional infliction of emotion distress and concluding that the claim did not accrue until the plaintiff was exonerated).

In this case, Dail's state law claims necessarily implicate the validity of his imprisonment because Plaintiff alleges that Defendants' negligence and obstruction of justice prevented him from sooner obtaining evidence that would have exonerated him, overturned his conviction, and ended his imprisonment. Therefore, under Heck, Dail's state law claims did not accrue until he was exonerated and released from prison on August 28, 2007. Dail's state law claims were thus timely filed on August 26, 2010.

III. PLAINTIFF'S CLAIM UNDER THE NORTH CAROLINA CONSTITUTION SHOULD NOT BE DISMISSED.

Dail has stated valid claims under the North Carolina Constitution based on Defendants' violations of his rights to procedural due process and entitlement to exculpatory evidence. "Both the Fourteenth Amendment to the U.S. Constitution and Article I, Section 19 of the North Carolina Constitution provide protection against deprivation of liberty or property interests secured by the Bill of Rights or created by state law . . ." Toomer v. Garrett, 155 N.C. App. 462, 474, 574 S.E.2d 76, 87 (2002). "Decisions as to the scope of procedural due process provided by the federal constitution are highly persuasive with respect to that afforded under [the North Carolina] state constitution." Id. (citing State v. Young, 140 N.C. App. 1, 535 S.E.2d 380 (2000)). Because Defendants unreasonably failed to maintain the evidence in Dail's case and deprived Dail of his liberty interest in proving his innocence with new evidence, Dail has brought valid federal constitutional claims for violations of procedural due process. See Section I, supra. Therefore, for the same reasons, Dail has a valid state constitutional claim for the violation of procedural due process.

Dail also has a valid claim under the North Carolina Constitution based on the Defendants' failure to disclose exculpatory evidence. While post-conviction Brady claims may be foreclosed under the federal constitution because of the holding in Osborne, 129 S. Ct. at 2320, that case does not determine Dail's rights under the North Carolina Constitution. "Despite the fact that [North Carolina] Courts are bound by federal court decisions construing the Due Process Clause of the United States Constitution, such decisions do not control an interpretation by [North Carolina] Courts of the Law of the Land Clause contained in the North Carolina Constitution." State v. Cunningham, 108 N.C. App. 185, 195, 423 S.E.2d 802, 808 (1992). Thus, criminal defendants in North Carolina have rights beyond those recognized in Brady v.

Maryland, 373 U.S. 8, 83 S. Ct. 1194 (1963). See Cunningham, 108 N.C. App. at 195-96, 423 S.E.2d at 808-09. For example, criminal defendants have the right to discover certain expert-related documents under the North Carolina Constitution even if that material is not exculpatory. Id. at 196, 423 S.E.2d at 809. Similarly, the Court should conclude that, under the North Carolina Constitution, Dail had a right to the exculpatory DNA evidence even after his conviction, and that Dail's claim based on Defendants' prolonged failure to disclose the DNA-laden material is a valid state constitutional claim.

Dail has direct claims under the North Carolina Constitution only "in the absence of an adequate state remedy." Corum v. Univ. of North Carolina, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). If Dail's state law claims are barred by governmental or official immunity, then those claims will not be adequate, and Dail can proceed with his state constitutional claims. See Craig v. New Hanover County Bd. of Educ., 363 N.C. 334, 340, 678 S.E.2d 351, 355 ("Plaintiff's common law cause of action for negligence does not provide an adequate remedy at state law when governmental immunity stands as an absolute bar to such a claim."). Accordingly, Dail's state constitutional claims should not be dismissed before all immunity-related issues regarding the other state law claims are addressed.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that Defendants' Motion to Dismiss be denied except with regard to the state law claims for false arrest/false imprisonment (Third Cause of Action) and federal claims against individual defendants in their individual capacities (Seventh and Eighth Causes of Action).

This the 3rd day of January, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2011, I electronically filed the foregoing **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Scott C. Hart, Esq.

/s/ G. Christopher Olson _____
G. Christopher Olson