UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:20-cv-351-BO

GERARD ATKINSON, Plaintiff, v. CITY OF FAYETTEVILLE, a political subdivision of the State of North Carolina and ANTOINE KINCAID, TRESSA S. AUGBURNS, DYLAN KETTELL, GABRIEL RINCON, PATRICK STRICKLAND, and DAVID MILLER, in their official capacities as Fayetteville Police Officers and in their individual capacities, and W. DAVID SMITH, ESQ. and BERNARD CONDLIN, ESQ. and THE OFFICE OF INDIGENT DEFENSE SERVICES, an administrative agency/subdivision of the State of North Carolina Defendants.	)	FAYETTEVILLE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

This matter is before the Court on a motion by Defendants City of Fayetteville, Officer Tressa S. Augburns, Officer Gabriel Rincon, Officer Patrick Strickland, and Officer David Miller, in their individual and official capacities (the "Fayetteville Defendants"), for entry of an Order dismissing Plaintiff's claims against them, pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff's Complaint should be dismissed for the following reasons:

- Plaintiff's claims against the Defendant Officers in their official capacity should be dismissed as they are redundant claims against the City.
- Plaintiff's common law claims against the Defendant Officers and the City should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1), (2) and (6) as the City and its officers

sued in their official capacity are protected by governmental immunity, which has not been waived by the purchase of insurance.

- Plaintiff's malicious prosecution, false imprisonment and Section 1983 claims should be dismissed as there existed probable cause for an arrest, and Plaintiff's sworn allegations in his Verified Complaint demonstrate that he entered a guilty plea to two criminal offenses arising out of the same incident at issue in this lawsuit. Plaintiff's guilty plea and conviction (which has not been invalidated) conclusively establish: (a) the existence of probable cause; and (b) that Plaintiff cannot show a "favorable termination" of the criminal proceedings against him.
- Plaintiff's Section 1983 claims are barred pursuant to Heck v. Humphrey, 512 U.S. 477 (1994) and the subsequent case law applying the rule from Heck.
- Plaintiff's Section 1983 Monell claim against the City should be dismissed as there exists no constitutional violation or underlying Section 1983 claim against the Defendant Officers.
- Plaintiff's intentional infliction of emotional distress claim should be dismissed as there is no extreme or outrageous conduct when an arrest is made with probable cause.
- Plaintiff's intentional and negligent infliction of emotional distress claims are barred by public official immunity and should be dismissed pursuant to Rule 12(b)(2) and (6), because an arrest supported by probable cause is not corrupt, malicious or contrary to a law officer's duties.
- Plaintiff's defamation claims are barred by the one-year statute of limitations contained in N.C. Gen. Stat. § 1-54.

STATEMENT OF THE CASE

Plaintiff initially filed his verified Complaint in Superior Court, Cumberland County, on or about January 24, 2020. [DE 1-3]. On July 2, 2020, the case was timely removed to this Court by Defendants Strickland and Kettell (who were not served until late June 2020) based on federal question jurisdiction. [DE 1]

Plaintiff's lawsuit is primarily a Fourth Amendment case alleging wrongful arrest and malicious prosecution. Plaintiff claims he was unlawfully arrested after he admittedly discharged his firearm in the direction of three Fayetteville police officers who had been dispatched to a suicide call at Plaintiff's residence. Plaintiff alleges he fired the weapon accidentally, and did not actually intend to shoot at the officers. Plaintiff's Complaint shows that the Fayetteville police officers were involved in Plaintiff's detention and arrest for less than 48 hours before his arraignment. The remainder of Plaintiff's allegations are related to his attorney-client relationship with the public defenders appointed to represent him, which resulted in almost three-years of incarceration. Plaintiff ultimately pled guilty to lesser misdemeanor charges related to the incident and was released.

Plaintiff's Complaint is not entirely clear, but it appears that the following claims are being asserted against the Fayetteville Defendants: (1) malicious prosecution; (2) false imprisonment; (3) a 42 U.S.C. § 1983 claim alleging violation of Fourth Amendment rights against the officers; (4) a 42 U.S.C. § 1983 Monell claim alleging improper/deficient training as to the City of Fayetteville; (5) intentional or negligent infliction of emotional distress; and (6) a state common law claim for defamation. [DE 1-3]

Plaintiff's Complaint also asserts legal malpractice claims against his court-appointed criminal defense attorneys; however, Plaintiff has recently filed a voluntary dismissal without prejudice as to those defendants. [DE 27]

The matter is now before the Court on the Fayetteville Defendants' Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(1), (2), and (6). [DE 29]

STATEMENT OF FACTS AS ALLEGED BY PLAINTIFF

This lawsuit arises out of an incident that occurred on the evening of January 6, 2017 in Fayetteville, North Carolina. [Compl. ¶ 1]. Plaintiff claims that he was home alone that evening, sitting in the dark and drinking alcohol due to troubles with his military career and marriage. Plaintiff was suffering a "mental health crisis" and was contemplating shooting himself, so he decided to call a suicide hotline. [Compl. ¶¶ 21-22].

The suicide hotline called "911," which resulted in an EMS crew and three Fayetteville Police Department officers (Defendant Officers Kettell, Rincon and Miller) being dispatched to Plaintiff's residence. [Compl. ¶ 23]. Plaintiff alleges that he was unaware that anyone had been dispatched to his home, and that Officers Kettell, Rincon and Miller parked three houses down the street, slowly approached Plaintiff's home, and did not announce their presence as they approached Plaintiff's residence. [Compl. ¶¶ 23-25].

Plaintiff claims that meanwhile, he had decided to go to sleep to "calm himself down," and, as he was putting down his loaded handgun, the weapon "accidentally" discharged just as the Officers were approaching his house. A bullet from Plaintiff's handgun punctured a window blind in Plaintiff's living room, went through a glass window, and then passed through a post on Plaintiff's front porch. [Compl. ¶¶ 27-28]. [1]

Plaintiff alleges that the three officers actually heard the gunshot, but they were not yet in Plaintiff's front yard when the shot rang out. [Compl. ¶ 29]. According to the Complaint, Plaintiff claims that one of the officers, Officer Kettell, did not actually believe

[1] Plaintiff's Complaint conveniently fails to state where the bullet traveled after it passed through the front porch post.

that Plaintiff was shooting at them, but in any event, Plaintiff states that the officers "retreated to safe locations until backup arrived."[2] [Compl. ¶¶ 30, 32]. Once backup officers arrived, officers from the Fayetteville Police Department approached Plaintiff's home and took him into custody "without incident." Plaintiff did not resist. [Compl. ¶ 32]. He claims that when the officers were arresting him, he was asked about firing the handgun. Plaintiff told the officers that it had been discharged "accidentally." [Compl. ¶¶ 29-33].

According to the Complaint, Officers Kincade, Augburns, and Strickland were assigned to investigate the matter and Plaintiff was taken by patrol vehicle to the Fayetteville Police Department for questioning. [Compl. ¶¶ 34, 36]. [3] Plaintiff claims that Officer Kincade became "agitated" when Plaintiff invoked his Fifth Amendment rights and refused to be interviewed, and that Officer Kincade responded by telling Plaintiff he would be charged with attempted murder for trying to kill three police officers. [Compl. ¶¶ 34-37].

Plaintiff alleges that Officer Kincade "knew that Plaintiff had not attempted to kill or assault anyone," but the very next day, January 7, 2017, the Fayetteville Police Department reported on its Facebook page (and to local media) the "false and defamatory" allegations that Plaintiff had attempted to murder three officers. [Compl. ¶¶ 39-40].

Plaintiff then claims that on January 9, 2017, at Plaintiff's arraignment, the District Attorney asked Officer Kincade about Officer Kettell's police report, which suggests that he did not believe at the time he first heard the shot, that Plaintiff had been shooting at Officer

[2] Defendants note the allegation that the officers "retreated to safe locations" would seem to conflict with any assertion that Officer Kettell did not believe the shot had been fired at him. The Complaint contains no allegations that the other two officers present, Officers Rincon and Miller, did not believe they had been shot at by Plaintiff.

[3] This is the only allegation in the Complaint that mentions Officers Augburns and Strickland. The are no allegations that refer specifically to any conduct or actions taken on the part of these two officers related to Plaintiff or the investigation. For that reason alone, the claims against them should be dismissed pursuant to Rule 12(b)(6).

Kettell. [Compl ¶ 40].[4] Plaintiff claims that Officer Kincade told the District Attorney that he would ask Officer Kettell about his statement. Plaintiff alleges that Officer Kincade then persuaded Officer Kettell to amend the report to state that he had changed his mind and now believed that Plaintiff had attempted to shoot him. Plaintiff also alleges that Officer Kincade attempted to "conceal" from the District Attorney that Officer Kettell had made other contemporaneous exculpatory statements. [Compl. ¶¶ 40-46].

Most of the remainder of Plaintiff's Complaint relates to his interactions (or lack thereof) with his public defender. Essentially, Plaintiff claims that his public defenders (Mr. Smith and Mr. Condlin) were dilatory in their efforts to secure Plaintiff's release. Plaintiff claims he was offered various plea arrangements, but the agreements were either not acceptable to him or were not consummated. [Compl. ¶¶ 48-76].

Plaintiff alleges that in November 2019, a new public defender, Cindy Black, was appointed to represent him. [Compl ¶ 66]. Plaintiff then verifies that Ms. Black negotiated a plea agreement on behalf of Plaintiff whereby he pled guilty to two misdemeanor offenses in exchange for dismissal of all of the felony charges against him. [Compl. ¶¶ 67-68]. Pursuant to this plea agreement, Plaintiff entered a guilty plea to: (1) a violation of N.C. Gen. Stat. §14-223 (Resist, Delay and Obstruct a police officer); and (2) a "Violation of Local Ordinance—City Code 17.4(a)." [Compl. ¶¶ 65-68].

Plaintiff spent approximately 1,065 days in jail awaiting trial before pleading guilty to the two misdemeanor offenses. [Compl. ¶ 69].

[4] Plaintiff's Complaint omits that on January 7, 2017 – two days prior to the arraignment -- a Cumberland County Magistrate Judge issued an arrest warrant for Plaintiff, finding probable cause existed for the arrest. The Court can take Judicial Notice of the Magistrate's Order without converting the motion to dismiss into a motion for summary judgment. Philips v. Pitt County Memo. Hosp., 572 F.3d 176, 180 (4th Cir. 2009); Lytle v. Parsons, 2013 WL 6816601 at *3 (E.D.N.C. Dec. 24, 2013). Further, Plaintiff's Complaint refers to Plaintiff's criminal file. [Compl. ¶ 70].

STANDARD OF REVIEW

The Fayetteville Defendants have moved to dismiss Plaintiff's tort claims on the grounds that they have governmental immunity. Although a defense of governmental immunity presents a question of jurisdiction, the North Carolina Supreme Court has yet to resolve whether governmental immunity challenges personal jurisdiction or subject matter jurisdiction. J.W. v. Johnston Cnty. Bd. of Educ., 2012 WL 4425439, at *5 (E.D.N.C. 2012) (citing Frye v. Brunswick Cnty. Bd. of Educ., 612 F.Supp.2d 694, 700–01 (E.D.N.C. 2009) (cataloging cases). Where, as here, defendants seek dismissal under both Rule 12(b)(1) and Rule 12(b)(2), the court analyzes the motion under both governing standards. Frye, 612 F.Supp.2d at 701.

Under Rule 12(b)(1), the plaintiff has the burden of proving subject matter jurisdiction. Richmond, Fredericksburg & Potomac R.R. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). In reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) based on governmental immunity, "the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings ... to show that a genuine issue of material fact exists." Id., 945 F.2d at 768. In that regard, the court "should apply the standard applicable to a motion for summary judgment, under which the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists." Id. The moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law. Id.

Under Rule 12(b)(2), the plaintiff must prove by a preponderance of the evidence that the court can exercise personal jurisdiction. Combs v. Bakker, 886 F.2d 673, 676 (4th Cir. 1989). When the court rules on a Rule 12(b)(2) motion without an evidentiary hearing, the

plaintiff need only establish a prima facie case. Id. When determining whether the plaintiff has met this burden, courts resolve all factual disputes and draw all reasonable inferences in the light most favorable to the plaintiff. Id. (citing Mylan Labs., Inc. v. Akzo, N.V., 2 F.3d 56, 60 (4th Cir. 1993)).

The Fayetteville Defendants also move to dismiss Plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(6). The purpose of a motion to dismiss under Rule 12(b)(6) is "to test the legal sufficiency of the complaint." Randall v. U.S., 30 F.3d 518, 522 (4th Cir. 1994), cert. denied, 514 U.S. 1107 (1995). As the United States Supreme Court has made clear, "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true 'to state a claim for relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombley, 550 U.S. 544, 570 (2007)). While the court must accept all well-pleaded factual allegations as true and must construe the facts in the light most favorable to the plaintiff, a "pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" Id. (quoting Twombley, 550 U.S. at 555). Moreover, a court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences" or "allegations that contradict matters properly subject to judicial notice or by exhibit." Jefferson v. Sch. Bd. of City of Norfolk, 452 F. App'x 356, 357 (4th Cir. 2011) (citing Veney v. Wyche, 293 F.3d 726, 730 (4th Cir. 2002)).

ARGUMENT

I. PLAINTIFFS' COMMON LAW CLAIMS AGAINST THE CITY OF FAYETTEVILLE AND THE OFFICERS IN THEIR OFFICIAL CAPACITIES ARE BARRED BY GOVERNMENTAL IMMUNITY AND SHOULD BE DISMISSED PURSUANT TO RULES 12(b)(1), (2) and (6).

"Municipalities in North Carolina are immune from liability for their negligent acts arising out of governmental activities unless the municipality waives such immunity by

purchasing liability insurance." Anderson v. Town of Andrews, 127 N.C. App. 599, 600, 492 S.E.2d 385, 386 (1997). "Clearly, North Carolina municipalities enjoy governmental immunity from state common-law tort claims arising out of their performance of governmental, as opposed to proprietary, functions." Evans v. Chalmers, 703 F.3d 636, 655 (4th Cir. 2012) cert. denied sub nom. Evans v. City of Durham, N.C., 134 S. Ct. 98 (2013) and cert. denied sub nom. McFadyen v. City of Durham, N.C., 134 S. Ct. 617 (2013) (citing Patrick v. Wake Cnty. Dep't of Human Servs., 188 N.C. App. 592, 655 S.E.2d 920, 923 (2008)). "Just as clearly, the provision of police services constitutes a governmental function protected by governmental immunity." Id. (citing Arrington v. Martinez, 215 N.C. App. 252, 257, 716 S.E.2d 410, 414 (2011). Plaintiff's Complaint specifically alleges that, "said Defendant Officers, at all times relevant hereto, were sworn law enforcement officers employed by and about the business of Defendant City." (Compl. ¶ 100). As such, the City of Fayetteville and Officers Augburns, Miller, Rincon and Strickland, in their official capacity, are protected by the doctrine of governmental immunity as to Plaintiff's tort claims unless they have waived immunity through the purchase of insurance.

Plaintiff alleges that the City of Fayetteville has waived its governmental immunity through the purchase of insurance pursuant to N.C. Gen. Stat. § 160A-485. (Compl. ¶ 12). The City of Fayetteville has purchased a Retained Limit Policy with Argonaut Insurance Company, which is the only insurance policy purchased by the City. (See, Hewett Aff., ¶¶ 4-6, DE 29-1.)[5] However, the mere fact that the City has purchased insurance does not waive

[5] Defendants have attached a true and accurate copy of the policy in effect on January 6, 2017 to the affidavit of the City Manager, Douglas Hewett. When a court is reviewing a motion to dismiss for lack of subject matter or personal jurisdiction pursuant to Rule 12(b)(1) and (2), a trial court may properly consider and weigh matters outside the pleadings. See, Smith v. Privette, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998); Williams v. Institute for Computational Studies, 85 N.C. App. 421, 428, 355 S.E.2d 177, 182 (1987). Accordingly, this Court may review the City Manager's affidavit and the policy of insurance secured by the City without converting this motion to dismiss into a motion for summary judgment.

immunity. In order to waive immunity, the policy must provide coverage for claims which would otherwise be barred by governmental immunity. "A municipality may waive its governmental immunity for civil liability in tort for negligent or intentional damage by purchasing liability insurance, but only to the extent of the insurance coverage." Estate of Earley ex rel. Earley v. Haywood Cnty. Dep't of Soc. Servs., 204 N.C. App. 338, 341, 694 S.E.2d 405, 408 (2010) (emphasis added)). "A governmental entity does not waive sovereign immunity if the action brought against them is excluded from coverage under their insurance policy." Patrick v. Wake Cnty. Dep't of Human Servs., 188 N.C. App. 592, 595-96, 655 S.E.2d 920, 923 (2008); Doe v. Jenkins, 144 N.C. App. 131, 135, 547 S.E.2d 124, 127 (2001) ("Because the insurance policy does not indemnify defendant against the negligent acts alleged in plaintiff's complaint, defendant has not waived its sovereign immunity...."). Further, "waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." Guthrie v. N.C. State Ports Authority, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983).

In the present case, the City's Retained Limit Policy does not provide coverage for any claims for which governmental immunity would apply. The policy contains a Common Policy Conditions Endorsement, which contains the following unambiguous non-waiver endorsement:

> 12. Sovereign Immunity and Damages Caps
>
> For any amount for which the Insured would not be liable under applicable governmental or sovereign immunity but for the existence of this Policy; the issuance of this insurance shall not be deemed a waiver of any statutory immunities by or on behalf of any insured, nor of any statutory limits on the monetary amount of liability applicable to any insured were this Policy not in effect; and as respects to any 'claim', we expressly reserve any and all rights to deny liability by reason of such immunity, and to assert the limitations as to the amount of liability as might be provided by law.

[DE 29-1, Ex A p 13]

North Carolina courts have routinely recognized that purchasing insurance with a non-waiver endorsement such as the one in the Retained Limit Policy does not waive governmental immunity. See, e.g., Patrick v. Wake Cnty. Dep't of Human Servs., 188 N.C. App. 592, 655 S.E.2d 920 (2008); Estate of Earley v. Haywood Cty. Dep't of Soc. Servs., 204 N.C. App. 338, 694 S.E.2d 405 (2010). As the non-waiver provision contained in the City's Retained Limit Policy establishes that no coverage is provided for any claim for which the defense of governmental immunity is available, the policy cannot be considered a waiver of governmental immunity.

Additionally, the City's retained limit of $500,000 does not constitute a waiver of immunity, as the City has not purchased any "insurance policy" or "insurance coverage" for any amount below the retained limit of $500,000. (Hewett Aff. ¶ 12). If the City were required to pay a claim within its $500,000 retained limit, any such payment would come from the City's own municipal funds or coffers. Id. at ¶ 13. The North Carolina Court of Appeals has consistently held that a self-insured retention does not waive governmental immunity. See, e.g., Kephart v. Pendergraph, 131 N.C. App. 559, 563, 507 S.E.2d 915, 918 (1998); Cunningham v. Riley, 169 N.C. App. 600, 602-03, 611 S.E.2d 423, 424 (2005).

As such, the City has not waived governmental immunity through the purchase of insurance pursuant to N.C. Gen. Stat. § 160A-485. Plaintiff cannot otherwise establish that the City has waived governmental immunity. The City and Defendant Officers in their official capacities are entitled to dismissal of Plaintiff's state law claims based on governmental immunity.

II. PLAINTIFF'S OFFICIAL CAPACITY CLAIMS AGAINST THE OFFICER DEFENDANTS SHOULD BE DISMISSED AS DUPLICATIVE.

Official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." Kentucky v. Graham, 473 U.S. 159, 165

(1985). The Fourth Circuit has held that official capacity claims are essentially the same as a claim against the entity, and should be dismissed as duplicative when the entity is also named as a defendant. See, Love-Lane v. Martin, 355 F.3d 766, 783 (4th Cir. 2004); See also, Hill v. Robeson County, 733 F. Supp. 2d 676, 682 (E.D.N.C. 2010) ("A claim against a government employee in his official capacity is tantamount to a claim against the government entity for which he works and should be dismissed as duplicative."). North Carolina state courts have also held that when governmental employees are sued in their official capacities, "the claim is against the office the employee holds rather than the particular individual who occupies the office." May v. City of Durham, 136 N.C. App. 578, 584, 525 S.E.2d 223, 229 (2000) (citing Kentucky v. Graham, 473 U.S. 159 (1985)). "Therefore, in a suit where the plaintiff asserts a claim against a governmental entity, a suit against those individuals working in their official capacity for this governmental entity is redundant." Id. (citing Moore v. City of Creedmoor, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997).

Based on the above, the official capacity claims against Officers Rincon, Augburns, Miller and Strickland, should be dismissed. Because the City of Fayetteville is named as a defendant in this case, the official capacity claims are redundant, duplicative, and unnecessary.

III. PLAINTIFF'S FIRST, SECOND AND THIRD CLAIMS FOR RELIEF SHOULD BE DISMISSED DUE TO HIS PLEA BARGAIN AND CONVICTION.

A. Probable Cause Is A Complete Bar To Plaintiff's Claims.

Plaintiff's first and second claims for relief are North Carolina common law claims for malicious prosecution and false imprisonment. Plaintiff's third claim is a 42 U.S.C. § 1983 claim against the Defendant Officers alleging that his rights under the Fourth Amendment were somehow violated. [Compl. pp 11-15]. All three claims fail for the same reason:

Plaintiff's guilty plea conclusively establishes probable cause, which is a complete bar to these claims.

Based on Plaintiff's Complaint, it appears that Plaintiff has a fundamental misunderstanding about the existence of probable cause. More specifically, in paragraph 104 of the Complaint, Plaintiff alleges that the Defendant Officers "lacked probable cause to arrest/seize the Plaintiff and to proceed with prosecuting him upon the aforementioned felony charges . . . ". Similarly, in paragraph 105, Plaintiff again references only the felony charges: "The aforementioned felony charges were dismissed by the District Attorney in Plaintiff's favor." (Id.). The fundamental legal flaw with Plaintiff's allegations is that probable cause was not negated merely because some of the charges against Plaintiff were later dismissed in connection with his plea bargain.

1. Lack of probable cause is a required element for all of Plaintiff's claims challenging his arrest and prosecution.

Under North Carolina law, to state a claim for malicious prosecution, a plaintiff must prove: "(1) the defendant initiated the earlier proceeding; (2) malice on the part of the defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff." Spivey v. Norris, 731 Fed. App'x 171, 175 n.4 (4th Cir. 2018) (citing Beroth Oil Co. v. Whiteheart, 173 N.C. App. 89, 99, 618 S.E.2d 739 (2005)).

A common law claim for false imprisonment "has been defined as the illegal restraint of the person of any one against his will." Fowler v. Valencourt, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993). In North Carolina, "[a] false arrest, i.e., one without proper legal authority, is one means of committing a false imprisonment." Adams v. City of Raleigh 245 N.C. App. 330, 334-35, 782 S.E.2d 108, 112 (2016). North Carolina law provides that police officers have a privilege, both statutory and under the common law, to arrest a person if the officer

has probable cause to believe that person has committed a criminal offense. See N.C. Gen. Stat. § 15A-401; see also Adams, 245 N.C. App. at 335, 782 S.E.2d at 112.

Plaintiff's 42 U.S.C. § 1983 claim alleges generally that his Fourth Amendment rights were violated because "the Defendant Officers lacked probable cause to arrest/seize the Plaintiff and to proceed with prosecuting him . . . ." [Compl. ¶ 104]. The Fourth Circuit has held that the essential elements of such a claim are: "[1] the defendants have seized plaintiff pursuant to legal process that was not supported by probable cause; and [2] that the criminal proceedings have terminated in plaintiff's favor." Durham v. Horner, 690 F.3d 183, 188 (4th Cir. 2012) (quoting Brooks v. City of Winston-Salem, 85 F.3d 178, 183-84 (1996)).

2. "Probable cause" means probable cause for any offense, not just the offense originally charged.

The United States Supreme Court has established that the probable cause inquiry is based upon whether the facts known by the arresting officer at the time of the arrest provided probable cause to make an arrest. Devenpeck v. Alford, 543 U.S. 146, 153 (2004). In Devenpeck, the Court stated that "[b]ecause probable cause is an objective standard, an arrest is lawful if the officer had probable cause to arrest for any offense, not just the offense cited at the time of arrest or booking." Id. at 153-56 & n.2.; accord District of Columbia v. Wesby, 138 S.Ct. 577, 584 n.2 (2018). The Court rejected the view that probable cause to arrest must be predicated upon the offense invoked by the arresting officer, or even upon an offense closely related. In other words, so long as probable cause existed for <u>any offense</u>, it does not matter whether a suspect is arrested or charged with an incorrect offense. Id. The Fourth Circuit, and other federal circuit and district courts, have consistently applied this standard to civil cases. Humbert v. Mayor and City Council of Baltimore City, 866 F.3d 546, 555-56 (4th Cir. 2017) (probable cause to make an arrest exists even if an officer has cause to reasonably believe the suspect has committed <u>any</u> offense) ; Pegg v. Herrnberger, 845 F.3d 112, 120 (4th

Cir. 2017) (same); Shrieve v. Limpert, 2019 WL 6115038 at *12 (E.D.N.C. Nov. 15, 2019) (an officer's selection of charges is immaterial to the probable cause analysis); Jaegly v. Couch, 439 F.3d 149, 153-54 (2d. Cir. 2006) (following Devenpeck, a claim for false arrest turns only on whether probable cause existed to arrest a defendant, and it is not relevant whether probable cause existed with respect to the charge actually invoked by the arresting officer at the time of the arrest); United States v. Jones, 432 F.3d 34, 41 (1st Cir. 2005) (probable cause inquiry is not necessarily based on the offense actually invoked by the arresting officer); Wright v. City of Philadelphia, 409 F.3d 595, 603-04 (3d Cir. 2005) (noting it is irrelevant to the probable cause analysis what crime a suspect is charged with at the time of the arrest).

This conclusion is also supported by the type of damages typically available to a plaintiff who brings a false arrest claim. A cause of action for false arrest accrues at the time of the arrest. Shrieve v. Limpert, 2019 WL 6115038 at *10 (E.D.N.C. Nov. 15, 2019). Damages for false arrest cover the time of detention up until issues of process or arraignment, but not more. Wallace v. Kato, 549 U.S. 384, 389-90 (2007); Brooks v. City of Winston-Salem, N.C., 85 F.3d 178, 181-82 (4th Cir. 1996). A plaintiff can recover for these damages only if the arrest itself, and not any individual charge, is not supported by probable cause. See Jaegly v. Couch, 439 F.3d 149, 154 (2d. Cir. 2006) (plaintiff's 1983 claim for false arrest fails because there was probable cause for an arrest; even if the initial charge was not supported by probable cause).

In this case, based on Plaintiff's allegations, it appears that he is contending that probable cause was lacking for the initial charges, because his subsequent plea arrangement resulted in the most serious charges (the felony charges of attempted murder) being dismissed, so that he was only convicted of misdemeanors as a result of the plea bargain. Plaintiff is mistaken. It does not matter whether the offenses of which he was ultimately

convicted were less serious, were different, or were even similar to the offenses which were initially charged.

As noted above, the United States Supreme Court addressed this very issue in Devenpeck. The Devenpeck Court held that it does not matter whether the offense initially charged (or articulated at the arrest) was "closely related" to the offense for which probable cause actually existed. Id. at 153-56 (unanimously rejecting Ninth Circuit's "closely related offense rule" because "an arresting officer's state of mind . . . is irrelevant to the existence of probable cause.").

North Carolina's appellate courts also follow this rule, holding that an officer's failure to articulate the correct offense when a suspect is arrested is irrelevant if there was probable cause for any offense. See, e.g., State v. Burwell, 256 N.C. App. 722, 733, 808 S.E.2d 583, 592-93 (2017) ("it is not necessary that defendant was arrested for the commission of the offense for which probable cause exists, so long as the facts known to the officer objectively provided probable cause to arrest him."); State v. Wilkes, 256 N.C. App. 385, 389 (2017) (same holding).

3. The existence of probable cause defeats each of Plaintiff's claims.

The Fourth Circuit has made it clear that the § 1983 "malicious prosecution" claim "is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort." Lambert v. Williams, 223 F.3d 257, 261-62 (4th Cir. 2000). Thus, since a § 1983 claim is "simply a claim founded on a Fourth Amendment seizure," a "malicious prosecution" claim is "wholly derivative of the false arrest claim" and should not be analyzed separately. Rogers v. Pendleton, 249 F.3d 279, 294 (4th Cir. 2001). "The Fourth Amendment prohibits law enforcement officers from making unreasonable seizures, and a seizure of an individual effected without probable cause is unreasonable." Brooks, 85 F.3d at 183; see also Brown v. Gilmore, 278 F.3d 362, 367 (4th Cir.

2002) ("To establish an unreasonable seizure under the Fourth Amendment, [the plaintiff] needs to show that the officers decided to arrest [her]…without probable cause").

Conversely, an arrest supported by probable cause is reasonable as a matter of law; thus, the existence of probable cause defeats a claim of "unreasonable seizure" under the Fourth Amendment. See e.g., United States v. Jabbour, 259 Fed. Appx. 564, 565 (4th Cir. 2007) ("So long as the arrest was supported by probable cause, there is no constitutional violation"); Street v. Surdyka, 492 F.2d 368, 372-373 (4th Cir. 1974) ("[T]here is no cause of action for 'false arrest' under Section 1983 unless the arresting officer lacked probable cause.").

Probable cause is also a complete bar to a North Carolina common law claim for false imprisonment or malicious prosecution. See Adams, 245 N.C. App. at 334-35, 782 S.E.2d at 112 ("probable cause is an absolute bar to a claim for "false arrest" and "necessarily defeats plaintiff's [malicious prosecution] claim."); Burton v. City of Durham, 118 N.C. App. 676, 682, 457 S.E.2d 329, 333 (1995).

4. Plaintiff's conviction conclusively establishes probable cause and bars his claims.

North Carolina has long followed the common law rule that a conviction, even if later overturned on appeal, conclusively establishes that probable cause existed for the criminal charges. See, e.g., Overton v. Combs, 182 N.C. 4, 108 S.E. 357 (1921); Smith v. Thomas, 149 N.C. 100, 101, 62 S.E. 772 (1908); Myrick v. Cooley, 91 N.C. App. 209, 213, 371 S.E.2d 492, 495 (1988); see also Gilliam v. Sealey, 932 F.3d 216, 231-32 (4th Cir. 2019) (discussing North Carolina rule that a district court conviction conclusively establishes probable cause, absent a showing that the conviction was procured by fraud or unfair means).

In this case, Plaintiff's own sworn allegations establish that he pled guilty and was convicted of two criminal offenses arising out of the incident at issue. [Compl. ¶¶ 67-68]. See

also Plaintiff's Judgment and Conviction pursuant to Plea Bargain, Ex. A. There are no allegations that this conviction has been set aside, nor are there any allegations that the conviction was procured by "fraud" or the like. Thus, Plaintiff's conviction is "conclusive evidence of probable cause for the prosecution." See Smith, 149 N.C. at 101, 62 S.E. at 773; see also Myrick, 91 N.C. App. at 213, 371 S.E.2d at 495.

5. The Magistrate Judge Found Probable Cause Existed for the Arrest.

As noted above, under Devenpeck, it is not relevant whether probable cause existed with respect to the charge actually invoked by the arresting officer at the time of the arrest. Nevertheless, even considering the initial charges, Plaintiff's claims cannot be saved. Plaintiff's Complaint conveniently omits the fact that Plaintiff's arrest was effectuated from a valid arrest warrant issued by a North Carolina Magistrate Judge.[6] See Magistrate Order, Ex. B. In fact, Plaintiff's Complaint contains no allegations about the arrest warrant process itself, and certainly does not allege that the arrest warrant was facially invalid.

On January 7, 2017, a Cumberland County magistrate judge found probable cause existed for the arrest. Under North Carolina law, a Magistrate Judge Order is prima facie evidence of probable cause for an arrest. Juarez-Martinez v. Deans, 108 N.C. App. 486, 492, 424 S.E.2d 154, 157 (1993). Likewise, the United States Supreme Court has long held that a facially valid arrest warrant provides the arresting officer with sufficient probable cause to arrest the individual identified in the warrant. Baker v. McCollan, 443 U.S. 137, 143-44 (1979); see also Porterfield v. Lott, 156 F.3d 563, 568 (4th Cir. 1998) (a public official cannot be charged with false arrest when he arrests a defendant pursuant to a facially valid

[6] The Court is allowed to take judicial notice of the magistrate judge's arrest warrant without converting the motion to dismiss into a motion for summary judgment. Sec'y of State of Defence v. Trimble Navigation Ltd. 484 F.3d 700, 705 (4th Cir. 2010); Philips v. Pitt County Memo. Hosp., 572 F.3d 176, 180 (4th Cir. 2009); Lytle v. Parsons, 2013 WL 6816601 at *3 (E.D.N.C. Dec. 24, 2013).

warrant); Anderson v. Caldwell County Sheriff's Office, 524 Fed. Appx. 854, 861 (4th Cir. 2013) (seizure of arrestee is reasonable once a neutral magistrate finds probable cause). The Fourth Circuit has expressed the importance of the neutral magistrate judge determination in the role of establishing probable cause. "We encourage law enforcement officers to seek warrants because magistrates from their detached perspective serve as the essential 'checkpoint between the Government and citizen'". Torchinsky v. Siwinski, 942 F.2d. 257, 262 (4th Cir. 1991) (quoting Steagald v. United States, 451 U.S. 204, 212 (1981)). Accordingly, when a police officer protects a suspect's rights by obtaining an arrest warrant from a neutral magistrate, the officer should, in return, receive protection from suit. Id. at 262.

Furthermore, because Plaintiff's Complaint completely ignores the role of the neutral magistrate in his arrest process, the Complaint contains no allegations challenging the warrant process itself. As a result, Plaintiff cannot establish the lack of probable cause. Sirak v. Collins, No. 5:07-CV-7-D, 2007 WL 9718657, at *2 (E.D.N.C. Oct. 3, 2007) ("Plaintiff does not challenge the validity of the warrants for his arrest. Thus, he cannot establish that the officers lacked legal authority to arrest him.")

In sum, Plaintiff's own Complaint conclusively establishes that his arrest and ultimate conviction were supported by probable cause. Therefore, his first, second, and third claims for relief must be dismissed. Brown, 278 F.3d at 367 ("To establish an unreasonable seizure under the Fourth Amendment, [the plaintiff] needs to show that the officers decided to arrest [her]…without probable cause"); Adams, 245 N.C. App. at 334-35, 782 S.E.2d at 112 ("probable cause is an absolute bar to a claim for false arrest" and "necessarily defeats plaintiff's [malicious prosecution] claim."); see also Burton, 118 N.C. App. at 682, 457 S.E.2d at 333 (same holding).

B. Plaintiff Cannot Show A "Favorable Termination."

As noted above, one of the essential elements of a North Carolina common law malicious prosecution claim is a "favorable termination" of the criminal charges against the claimant. Spivey, 731 Fed. Appx. at 175 n.4. This is also a requirement for Plaintiff's Fourth Amendment claims brought under § 1983. Durham, 690 F.3d at 188. In this case, Plaintiff cannot demonstrate a "favorable termination" of the charges against him because the Complaint alleges that he pled guilty to two offenses pursuant to a plea bargain. (Compl. ¶¶ 65-68); see Plaintiff's Criminal Conviction (Ex. A).

It is well-established that the dismissal of criminal charges as a result of a plea bargain or other compromise is not a "favorable termination" for the purposes of a malicious prosecution claim. Both North Carolina's Supreme Court and the Fourth Circuit have long followed this rule. See, e.g., Welch v. Cheek, 125 N.C. 353, 34 S.E. 531 (1899); Tucker v. Duncan, 499 F.2d 963, 965 (4th Cir. 1974) (citing Welch and reversing jury verdict on malicious prosecution claim against Belmont Police Department officers); Franklin v. Yancey County, No. 1:09-cv-199-MR-DCK, 2009 U.S. Dist. LEXIS 123455, at **13-14 (W.D.N.C. Dec. 28, 2009).

Plaintiff cannot satisfy the "favorable termination" requirement for either his common law malicious prosecution claim or his 42 U.S.C. § 1983 claim, so those claims must be dismissed. See Spivey, 731 Fed. Appx. at 175 n.4; Durham, 690 F.3d at 188.

IV. PLAINTIFF'S SECTION 1983 CLAIMS ARE BARRED BY HECK V. HUMPHREY.

Plaintiff is contending that his arrest and prosecution were not supported by probable cause, yet he admittedly plead guilty and was convicted on two related offenses: (1) obstructing, delaying and resisting a police officer (Officer Kittell); and (2) unlawfully

discharging a firearm in the city limits. [Compl. ¶ 68]. [7] See Ex. A. Neither of those two convictions have been declared invalid or set aside. Plaintiff's failure to demonstrate that the convictions have been invalidated bars his Section 1983 claims under Heck v. Humphrey, 512 U.S. 477, 487 (1994), because his civil claims are an impermissible collateral attack on his criminal convictions. See id. at 485.

> In Heck v. Humphrey, the United States Supreme Court held that:
>
> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

Id. at 486–87.

According to public records contained in his criminal file, on December 4, 2019 Plaintiff plead guilty to, and was thus convicted of, two criminal charges related directly to the incidents that occurred on the evening of January 7, 2017: (1) resisting, delaying and obstructing a public officer; and (2) discharging a firearm in the city limits. There is nothing in the criminal file, or the Complaint, to indicate that Plaintiff's convictions have been overturned or invalidated. Plaintiff's claims for relief for unlawful seizure, if granted, would therefore implicitly invalidate his two convictions. Specifically, by virtue of his plea of guilty to the crime of resisting, delaying and obstructing the duties of Officer Kettell, Plaintiff admits that he willfully and unlawfully fired his handgun toward the officers, and that he

[7] The Court can take judicial notice of the plea agreement evidencing Plaintiff's criminal conviction. See Drubetskoy v. Wells Fargo Bank, 2013 WL 6839508 at *2 (D.Md. Dec. 20, 2013).

knew or had reasonable grounds to believe they were officers. [Compl. ¶ 68]. [8] In doing so, Plaintiff assisted the North Carolina state courts in entering a criminal judgment against him that, by necessity, finds that Plaintiff's discharge of his weapon from his house on the evening of January 7, 2017 towards the Defendant Officers was not "accidental", but instead unlawful and intentional. To recover in this civil action, Plaintiff claims there was a lack of probable cause for the arrest because he did not believe officers were present and did not intend to discharge his weapon towards the officers. In order to prevail, Plaintiff would necessarily have to negate his plea bargain conviction. Therefore, any civil claim alleging that the Defendant Officers lacked probable cause to arrest the Plaintiff must be dismissed.

Moreover, this Court has routinely dismissed claims when the Complaint fails to demonstrate "that the underlying conviction has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus." Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). Here, Plaintiff has pleaded no facts from which the Court could find the requirements of Heck are satisfied. Accordingly, his Section 1983 claim is barred and should be dismissed. See, e.g., Sheridan v. Shekita, 2016 WL 9083355 at *2 (E.D.N.C. Oct. 31, 2016) (Section 1983 claim barred by Heck where plaintiff fails to allege the underlying conviction has been reversed, expunged or declared invalid); Ridgeway v. Warren, 2015 WL 12912373 at *2 (E.D.N.C. Aug. 4, 2015) (same); Branson v. Butler, 2013 WL 4666350 at *5 (E.D.N.C., Aug. 30, 2013) (same).

[8] Pursuant to NCGS 14-223: "If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." This statute essentially has five elements: 1) that the victim was a public officer; 2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer; 3) that the victim was discharging or attempting to discharge a duty of his office; 4) that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and 5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse. State v. Dammons, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612 (2003).

Finally, in the context of determining whether Plaintiff has met the "favorable termination" requirement for § 1983 claims from Heck v. Humphrey, a number of federal courts have also followed the common law rule that a plea or other compromise procured by the plaintiff or his attorney is not a favorable termination. See, e.g., Johnson v. Thibidoux City, 887 F.3d 726, 732 (5th Cir. 2018) (holding that "no contest" or "Alford plea" is not a favorable termination for the purposes of Heck); Curry v. Yachera, 835 F.3d 373, 378-79 (3d Cir. 2016) (Alford plea or no contest plea is not a favorable termination); Havens v. Johnson, 783 F.3d 776, 784 (10th Cir. 2015) (same holding); Smithart v. Towery, 79 F.3d 951, 952 (9th Cir. 1996) (same holding); Elkins v. Broome, 328 F.Supp.2d 596, 599-600 (M.D.N.C. 2004); Williams v. Christenson, No. 5:15-CT-3089-F, 2014 U.S. Dist. LEXIS 157771, at *3 & n.1 (E.D.N.C. Nov. 7, 2014).

V. PLAINTIFF'S § 1983 CLAIMS AGAINST THE CITY SHOULD BE DISMISSED AS PLAINTIFF CANNOT ESTABLISH THAT ANY CONSTITUTIONAL VIOLATION RESULTED FROM AN OFFICIAL POLICY OR CUSTOM.

In order to hold a public entity or its alleged "policy-maker" liable under the seminal case of Monell v. Department of Social Services, 436 U.S. 658, 691 (1978), Plaintiff must prove: (1) an underlying constitutional violation; (2) the identity of the officials or governmental bodies with final policymaking authority; and (3) proof that those individuals "have, through their decisions, 'caused the deprivation of rights at issue by policies which affirmatively command that it occur or by acquiescence in a longstanding practice or custom which constitutes the "standard operating procedure" of the local governmental entity.' " Simmons v. City of Phila., 947 F.2d 1042, 1062 (3d Cir. 1991) (quoting Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989)). Here, Plaintiff's derivative Monell claim fails as a matter of law because he cannot establish an underlying constitutional violation.

It is well established that absent a constitutional violation in the first instance–of which there was none here–the derivative issue of a deficient custom, practice or policy is

irrelevant. See Collins v. City of Harker Heights, 503 U.S. 115, 123 (1992) ("city may be liable for a policy or custom of failing to train employees only "if a city employee violates another's constitutional rights."). Indeed, the Fourth Circuit has made clear that a municipality cannot be held liable in the absence of an underlying constitutional violation. See e.g. Evans v. Chalmers, 703 F.3d 636, 654 (4th Cir. 2012) ("Because we hold that all plaintiffs failed to state predicate § 1983 claims against the individual officers, we must also hold that all plaintiffs have failed to state supervisory liability."); Young v. City of Mt. Ranier, 238 F.3d 567, 579 (4th Cir. 2001) ("The law is quite clear...that a section 1983 failure to train claim cannot be maintained against a governmental employer in a case where there is no underlying constitutional violation by the employee.").

Because Plaintiff is unable to establish that any of his constitutional rights were violated, as set forth above, he cannot establish an underlying constitutional violation. As a result, his § 1983 claim against the City of Fayetteville itself is subject to dismissal.

VI. PLAINTIFF'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM FAILS BECAUSE THERE IS NO EXTREME OR OUTRAGEOUS CONDUCT.

Plaintiff asserts a claim for intentional infliction of emotional distress. Plaintiff's claim, however, fails as a matter of law because, as noted above, there was probable cause for an arrest and, therefore, no extreme or outrageous conduct. To support a claim for intentional infliction of emotional distress under North Carolina law, a plaintiff must establish: (1) extreme and outrageous conduct, (2) which was intended to cause and did cause (3) severe emotional distress. Hogan v. Forsyth Country Club, 79 N.C. App. 483, 340 S.E.2d 116 (1986); Hartsell v. Duplex Products, Inc., 123 F.3d 766, 774 (4th Cir. 1997). Liability will not be imposed for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Briggs v. Rosenthal, 73 N.C. App. 672, 676, 327 S.E.2d 308, 311 (1985). Rather, "[t]he conduct must be 'so outrageous in character, and so extreme in degree, as to go beyond

all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " Johnson v. Colonial Life & Accident Ins. Co., 173 N.C. App. 365, 373, 618 S.E.2d 867, 872 (2005) (quoting Guthrie v. Conroy, 152 N.C. App. 15, 22, 567 S.E.2d 403, 408–09 (2002)). North Carolina appellate courts have "set a high threshold for a finding that conduct meets the standard." Dobson v. Harris, 134 N.C. App. 573, 578, 521 S.E.2d 710, 715 (1999), rev'd on other grounds, 352 N.C. 77, 530 S.E.2d 829 (2000). "Whether the conduct complained of is sufficiently outrageous is a question of law that should be decided by the court on a motion to dismiss." Johnson v. Bollinger, 86 N.C. App. 1, 6, 356 S.E.2d 378, 381–82 (1987); Smith v. United States, 121 F.Supp.3d 112, 124 (D.D.C. 2015), aff'd, 843 F.3d 509 (D.C. Cir. 2016).

It is well-established in North Carolina and other jurisdictions that there is no extreme and outrageous conduct when, as here, probable cause exists for an arrest. Kling v. Harris Teeter Inc., 338 F.Supp.2d 667, 673-74 (W.D.N.C. 2002), aff'd, 86 F. Appx. 662 (4th Cir. 2004) (no extreme and outrageous conduct as a matter of law when there exists probable cause to arrest the plaintiff); See, e.g., Larkin v. Elk Grove Village, Ill., 433 Fed. Appx. 470 (7th Cir. 2011) (officer's actions to secure arrest based on probable cause is not extreme and outrageous conduct); Boykin v. Van Buren Tp., 479 F.3d 444 (6th Cir. 2007) (no claim for intentional infliction of emotional distress where arrest is made with probable cause); Ravalese v. Town of East Hartford, 2019 WL 2491657 at *14 (D.Conn. June 14, 2019) (holding that an arrest supported by probable cause generally cannot be the basis for an intentional infliction of emotional distress claim); D'Angelo-Fenton v. Town of Carmel, 470 F.Supp.2d 387, 399-400 (S.D.N.Y. 2007) (holding that seizure of one's person predicated on probable cause to believe that crime had been committed in no way offends a civilized society's senses of justice); Zalaski v. City of Hartford, 704 F. Supp. 2d 159, 176 (D. Conn. 2010) ("As a matter

of law—absent other factors that may constitute 'extreme and outrageous' conduct—an arrest will not be considered intentional infliction of emotional distress if the arresting officer has probable cause to make an arrest); Kowalevicz v. United States, 302 F. Supp.3d 68, 76 (D.D.C. 2018) (dismissing claim for intentional infliction of emotional distress as a matter of law where allegations of police overreach coupled with trumped-up charges, even if proven, are not so outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community).

Plaintiff's own Complaint establishes that probable cause existed for an arrest. To be sure, his plea bargain conviction alone establishes probable cause. (Compl. ¶¶ 65-68) Plaintiff's claim for intentional infliction of emotional distress, therefore, fails as a matter of law and must be dismissed.

VII. PLAINTIFF'S INTENTIONAL AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIMS ARE BARRED BY PUBLIC OFFICIAL IMMUNITY.

Plaintiff has also asserted an alternative state law claim for negligent infliction of emotional distress. Defendant Officers contend that, based on the facts as alleged in the Complaint, the emotional distress claims should be dismissed because they are entitled to public official immunity.[9]

Under North Carolina law, a public officer or official has common law immunity for his discretionary acts: "The law of public official's immunity is well established in North Carolina: As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority,

[9] Under North Carolina law, public official immunity is considered a matter of personal jurisdiction. See Leonard v. Bell, 254 N.C. App. 694, 698, 803 S.E.2d 445, 448 (2017). The Court should therefore consider Defendants' motion to dismiss on the basis of public official immunity under Rule 12(b)(2) and 12(b)(6).

and acts without malice or corruption, he is protected from liability." Thompson v. Town of Dallas, 142 N.C. App. 651, 655, 543 S.E.2d 901, 904 (2001). Officers Augburns, Miller, Rincon and Strickland, as a sworn police officers, are "public officials" for purposes of public official's immunity. Schlossburg v. Goins, 141 N.C. App. 436, 446, 540 S.E.2d 49, 56 (2000).

To rebut a claim of public official immunity and hold a public official liable in his individual capacity, a plaintiff's complaint must allege "that [the official's] act, or failure to act, was corrupt or malicious, or that [the official] acted outside of and beyond the scope of his duties." Doe v. Wake Cty., 826 S.E.2d 815, 819 (N.C. App. 2019). North Carolina's common law has a strong presumption that public officials discharge their duties in good faith:

> It is well settled that absent evidence to the contrary, it will always be presumed that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. This presumption places a heavy burden on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence.

Leete v. County of Warren, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995) (internal citations omitted).

Case law construing this requirement stresses that it is a heavy burden to overcome this presumption of good faith. "Evidence offered to meet or rebut the presumption of good faith must be sufficient by virtue of its reasonableness, not by mere supposition. It must be factual, not hypothetical; supported by fact, not by surmise." Strickland v. Hedrick, 194 N.C. App. 1, 10-11, 669 S.E.2d 61, 68 (2008).

North Carolina's appellate courts have repeatedly held that a plaintiff cannot overcome this "heavy burden" by merely reciting the words "malice" or "reckless indifference" in their complaint, even at the pleadings stage: "[A] conclusory allegation that a public official acted willfully and wantonly should not be sufficient, by itself, to withstand a Rule

12(b)(6) motion to dismiss. The facts alleged in the complaint must support such a conclusion." Meyer v. Walls, 347 N.C. 97, 114, 489 S.E.2d 880, 890 (1997); Doe, 826 S.E.2d at 819 (affirming dismissal under Rule 12(b)(6) because "conclusory allegations" of complaint did not support conclusion that defendants acted with malice or corruption); McCullers, 828 S.E.2d at 535 (affirming dismissal at pleadings stage because "conclusory allegation" that defendant "acted with malice" was not sufficient to overcome public official immunity); Mitchell v. Pruden, 251 N.C. App. 554, 561-62, 796 S.E.2d 77, 83 (2017) (holding that "bare conclusory allegations" that defendant acted "willfully and wantonly" or "acted with malice" were not sufficient to rebut presumption of good faith and overcome public official's immunity even at pleadings stage).

In this case, as in the Doe, McCullers, and Mitchell cases cited above, the actual facts alleged in the Complaint do not support the Plaintiff's conclusory allegations that the Defendant Officers acted with malice, corruption, or outside the scope of their duties. This is particularly true because, as noted above, Plaintiff's Complaint conclusively demonstrates that probable cause existed for Plaintiff's prosecution.

In Anderson v. Caldwell County, 524 Fed. Appx. 854 (4th Cir. 2013), the Fourth Circuit reversed the district court order denying qualified immunity and public official's immunity to a number of Caldwell County deputies in a false arrest and malicious prosecution case. See Anderson, 524 Fed. Appx. at 860-863. The deputies had asserted that the plaintiff's state law claims (false arrest, malicious prosecution and obstruction of justice) were barred by public official's immunity. Id. at 863. After concluding that the plaintiff's arrest and prosecution were supported by probable cause, the Fourth Circuit noted that "because probable cause existed, a person of reasonable intelligence would not know that his actions were contrary to his duty." Id. Based on this observation, the court held that the deputies

were entitled to public official's immunity. See Anderson, 524 Fed. Appx. at 683 (citing Beeson v. Palumbo, 220 N.C. App. 274, 285, 727 S.E.2d 343, 351 (2012) (holding that public officer's immunity should be granted on associated state law claims when officer has probable cause for the arrest).

The Fourth Circuit has specifically held that an intentional infliction of emotional distress claim is barred under public official immunity. Ayala v. Wolfe, 546 Fed. Appx. 197, 202 (4th Cir. 2013) (affirming district court's dismissal of claim for intentional infliction of emotional distress under public official immunity).

Because Plaintiff's "conclusory allegations" cannot overcome the presumption of good faith that attaches to the Defendant Officers' actions and because probable cause was present, the Defendant Officers are entitled to public official's immunity and the claims against them should be dismissed. Doe, 826 S.E.2d at 819; McCullers, 828 S.E.2d at 535; Mitchell, 251 N.C. App. at 561-62, 796 S.E.2d at 8; Anderson, 524 Fed. Appx. at 683.

VIII. PLAINTIFF'S DEFAMATION CLAIMS ARE TIME-BARRED.

Finally, the Defendant Officers respectfully contend that Plaintiff's defamation claims must be dismissed because they are time-barred. In North Carolina, the limitations period for a defamation claim is one year. See N.C. Gen. Stat. § 1-54(3). This one-year limitations period starts to run when the allegedly defamatory comments are first published. Merritt, Flebotte, Wilson, Webb & Caruso, PLLC v. Hemmings, 196 N.C. App. 600, 611, 676 S.E.2d 79, 87 (2009).

Here, Plaintiff's Complaint specifically alleges that the comments at issue were published on the Police Department's Facebook page on January 7, 2017. [Compl. ¶ 40]. This lawsuit was filed approximately 3 years after the publication of the allegedly slanderous

comments at issue, so the claim is clearly time-barred and it should be dismissed. Merritt et al., 196 N.C. App. at 611, 676 S.E.2d at 87.

CONCLUSION

For the above-stated reasons, the motion to dismiss filed by Defendants City of Fayetteville, Tressa S. Augburns, Gabriel Rincon, Patrick Strickland, and David Miller should be GRANTED and Plaintiff's claims should be DISMISSED WITH PREJUDICE.

This the 21st day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2020, I electronically filed the foregoing Defendants' Memorandum of Law in Support of Motion to Dismiss with the Clerk of Court using the CM/ECF system, which will send automatic notice to the following counsel of record:

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EXHIBIT A

STATE OF NORTH CAROLINA

Cumberland County

File No. 17CR 50239

In The General Court Of Justice
District Court Division

STATE VERSUS

Name Of Defendant: Gerard Alain Atkinson

DEFENDANT'S PLEA OF GUILTY OR NO CONTEST IN DISTRICT COURT

Plea (GU=Guilty NC=No Contest GA=Alford plea)	Offense(s)	G.S. No.	Class	Maximum Punishment
GU	Violation of city ordinance 17-4(a) - discharge firearm in city limits	14-4(a)	3	$50 fine
GA	Resist, delay or obstruct public officer	14.223	2	60 days

TOTAL MAXIMUM PUNISHMENT

MANDATORY MINIMUM FINES & SENTENCES (if any)

Terms Of Plea Agreement (if any)

Credit for time served.

to city ordinance violation

to Resist, delay or obstruct public officer

DEFENDANT'S STATEMENT WITH PLEA OF (GUILTY) (NO CONTEST)

I plead ☒ guilty (☒ pursuant to *Alford*) ☐ no contest to the charge(s) listed above. I understand that by entering this plea I am giving up the following constitutional rights, among others: (1) the right to plead not guilty and to be tried in district court by a judge, and to confront and to cross-examine the witnesses against me; and (2) the right to remain silent and not to be compelled to incriminate myself. I understand that I have the right to appeal to superior court and to be tried by a jury.

I am not now under the influence of any impairing substance. I understand the nature and elements of the charge(s) against me. I understand the maximum sentence(s) for the charge(s) against me and the minimum sentence(s), if applicable. I understand if I am not a citizen of the United States of America, my plea(s) of guilty or no contest may result in my deportation from this country, my exclusion from admission to this country, or the denial of my naturalization under federal law. Other than any plea agreement between the State and me, no one has made any promises or threats against me in any way to cause me to enter this plea. I enter this plea of my own free will, fully understanding what I am doing.

Date: 12-4-19 | Signature Of Defendant: [signature] | Witnessed By (if not represented):

CERTIFICATION BY LAWYER (If Any) FOR DEFENDANT

I certify that I have explained to the defendant and the defendant has acknowledged to me that the defendant understands the constitutional rights that the defendant waives by entering the plea shown above, the nature and elements of the charge(s) shown above, and the maximum sentence(s) and any mandatory minimum sentence(s) that may be imposed for the charge(s) shown above. I certify that the defendant signed this document in my presence and has acknowledged to me that: (1) the defendant is not now under the influence of any impairing substance; (2) other than any plea agreement between the State and the defendant, the defendant has not been made any promise or threatened to enter this plea against the defendant's wishes; and (3) the defendant enters this plea of the defendant's own free will, fully understanding what the defendant is doing.

Date: 12.4.19 | Signature Of Lawyer For Defendant: Cynthia P. Black

PLEA ADJUDICATION

Upon consideration of the statement of the defendant set out in this form, the certification set out in this form by the attorney (if any) for the defendant, evidence presented in court, and statements by the District Attorney, defendant, and the defendant's attorney (if any) in open court, the undersigned finds that there is a factual basis for the entry of the plea and that the plea is the informed choice of the defendant and is made freely, voluntarily, and understandingly. The defendant's plea is accepted by the Court and is ordered recorded.

Date: 12/4/2019 | Name Of Presiding Judge (Type Or Print): | Signature Of Presiding Judge: [signature]

A TRUE COPY
CLERK OF SUPERIOR COURT
CUMBERLAND COUNTY
BY [signature] ASSISTANT, DEPUTY

AOC-CR-322, Rev. 6/12

STATE OF NORTH CAROLINA
CUMBERLAND County FAYETTEVILLE Seat of Court

File No. 17CR 050239 04

In The General Court Of Justice
☒ District ☐ Superior Court Division

NOTE: *(Use AOC-CR-301 for sentences under G.S. 130A-25(b). Use AOC-CR-342 for DWI offense(s).)*

STATE VERSUS

JUDGMENT AND COMMITMENT - MISDEMEANOR ACTIVE PUNISHMENT (STRUCTURED SENTENCING) (For Convictions On Or After Oct. 1, 2014)

G.S. 15A-1301, -1340.20

Name Of Defendant			
ATKINSON,GERALD,ALAIN			
Race: B	Sex: M	Date Of Birth: 03/09/1987	
Attorney For State: DONDREA ALESE JACKSON	☐ Def. Found Not Indigent ☐ Def. Waived Attorney	Attorney For Defendant: CYNTHIA BLACK	☒ Appointed ☐ Retained
			Crt Rptr Initials:

The defendant was found guilty/responsible, pursuant to ☒ plea ☐ pursuant to *Alford*) ☐ of no contest) ☐ trial by judge ☐ trial by jury, of

File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	CL.	*Pun.CL.
17CR 050239	04	RESISTING PUBLIC OFFICER	01/06/2017	14-223	2	
17CR 050239	03	VIOLATION OF LOCAL ORDINANCE	01/06/2017	14-4(A)	3	

***NOTE:** Enter punishment class if different from underlying offense class (punishment class represents a status or enhancement).*

The Court has determined, pursuant to G.S. 15A-1340.20, the number of prior convictions to be 00. **Level:** ☒ I (0) ☐ II (1-4) ☐ III (5+)

☐ 1. The Court finds: ☐ (a) enhancement for ☐ G.S. 90-95(e)(4) (drugs). ☐ G.S. 14-3(c) (hate crime). ☐ G.S. 14-50.22 (gang misdemeanor).
☐ (b) enhancement from required suspended sentence to Class 2 misdemeanor. G.S. 90-95(e)(7).
This finding is based on a determination of this issue by the trier of fact beyond a reasonable doubt or on the defendant's admission.

☐ 2. The Court imposes mandatory punishment pursuant to G.S. 14-33(d). (assault in the presence of a minor)

☐ 3. The Court imposes the sentence pursuant to G.S. 15A-1340.20(c1). (active punishment exception)

☐ 4. The Court finds the above-designated offense(s) is a reportable conviction under G.S.14-208.6 and therefore makes the additional findings and orders on the attached AOC-CR-615, Side One.

☐ 5. The Court finds the above-designated offense(s) involved the physical, mental, or sexual abuse of a minor.
(NOTE: *If offense(s) is not also a reportable conviction in No. 4 above, this finding requires no further action by the Court.)*

☐ 6. The Court finds this is an offense involving assault, communicating a threat, or an act defined in G.S. 50B-1(a), and the defendant had a personal relationship as defined by G.S. 50B-1(b) with the victim.

☐ 7. The Court finds the above-designated offense(s) involved *(check one)* ☐ *(offenses committed Dec. 1, 2008 - Nov. 30, 2017)* criminal street gang activity
☐ *(offenses committed on or after Dec. 1, 2017)* criminal gang activity. G.S. 14-50.25.

☐ 8. The Court did not grant a conditional discharge under G.S. 90-96(a) because *(check all that apply)* ☐ the defendant refused to consent.
☐ *(offenses committed on or after Dec. 1, 2013, only)* the Court finds, with the agreement of the District Attorney, that the offender is inappropriate for a conditional discharge for factors related to the offense.

☐ 9. The Court finds that this was an offense involving child abuse or an offense involving assault or any of the acts as defined in G.S. 50B-1(a) committed against a minor. G.S. 15A-1382.1(a1).

☐ 10. The Court finds that the defendant refused to consent to conditional discharge under G.S. 14-204.

The Court, having considered evidence, arguments of counsel and statement of defendant, Orders that the above offenses, if more than one, be consolidated for judgment and the defendant be imprisoned for a term of 30 days in the custody of the: *(check only one)*

☒ Sheriff of CUMBERLAND County. ☐ Other: _____

☐ Misdemeanant Confinement Program *(sentences greater than 90 days for which a facility is not otherwise specified above).*

The defendant shall be given credit for 30 days spent in confinement prior to the date of this Judgment as a result of this/these charge(s).

☐ The sentence imposed above shall begin at the expiration of all sentences which the defendant is presently obligated to serve.

☐ The sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below:

File No.	Offense	County	Court	Date

Material opposite unmarked squares is to be disregarded as surplusage.
(Over)

A TRUE COPY
CLERK OF SUPERIOR COURT
CUMBERLAND COUNTY
BY _____
ASSISTANT DEPUTY

AOC-CR-602, Rev. 12/17

The Court further Orders: *(check all that apply)*

1. The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" shown below.

Costs	Fine	Restitution*	Attorney's Fees	SBM Fee	Appt Fee/Misc	Total Amount Due
$ 0.00	$	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$

*See attached "Restitution Worksheet, Notice And Order (Initial Sentencing)," AOC-CR-611, which is incorporated by reference.

☐ 2. The Court finds that restitution was recommended as part of the defendant's plea arrangement.

☒ 3. The Court finds just cause to waive costs, as ordered on the attached ☐ AOC-CR-618. ☐ Other: _____.

☐ 4. The Court finds that the defendant ☐ is ☐ is not suitable for placement in a county satellite jail/work release unit. G.S. 15A-1352(a).

☐ 5. Work release, with the consent of the defendant.

a. After any required processing, defendant shall be committed to: *[check (1) or (2)]*

☐ (1) _____ *(prison facility/local confinement facility/satellite jail/work release unit within this county)*

☐ (2) _____ *(local confinement facility/satellite jail/work release unit out of this county)*

The Sheriff or Board of County Commissioners has consented to commitment to the facility named in No. (2). G.S. 15A-1352(d).

b. The defendant's work release shall terminate on the date the offender loses his/her job or violates a condition of work release.

c. Work release earnings shall be paid to the Clerk for payment of the items and amounts set out above after deduction by the Division of Adult Correction and Juvenile Justice of the amounts allowed under G.S. 148-33.1(f).

☒ 6. Other: CONSOLIDATE FOR 1 JUDGEMENT. REMIT MONIES PER FACTS OF CASE, UNEMPLOYED, UNABLE TO PAY.

The Court recommends:

☐ 1. Substance abuse treatment. ☐ 2. Psychiatric and/or psychological counseling. ☐ 3. Work release ☐ should ☐ should not be granted.

☐ 4. Payment from work release earnings, if applicable, of the "Total Amount Due" set out above. ☐ but the Court **does not recommend** restitution be paid from work release earnings.

The Court further recommends:

ORDER OF COMMITMENT/APPEAL ENTRIES

☐ It is ORDERED that the Clerk deliver <u>two</u> certified copies of this Judgment and Commitment to the sheriff or other qualified officer and that the officer cause the defendant to be delivered with these copies to the custody of the agency named on the reverse to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.

☐ The defendant gives notice of appeal from the judgment of the District Court to the Superior Court.

☐ The current pretrial release order is modified as follows: _____.

☐ The defendant gives notice of appeal from the judgment of the Superior Court to the Appellate Division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

SIGNATURE OF JUDGE

Date	Name Of Presiding Judge (type or print)	Signature Of Presiding Judge
12/04/2019	THE HONORABLE ROBERT J STIEHL	

ORDER OF COMMITMENT AFTER APPEAL

Date Remanded To District Court	Date Appeal Dismissed	Date Withdrawal Of Appeal Filed	Date Appellate Opinion Certified

It is ORDERED that this Judgment be executed. It is FURTHER ORDERED that the sheriff arrest the defendant, if necessary, and recommit the defendant to the custody of the agency named in this Judgment on the reverse and furnish that agency <u>two</u> certified copies of this Judgment and Commitment as authority for the commitment and detention of the defendant.

Date	Signature Of Clerk	
		☐ Deputy CSC ☐ Asst. CSC ☐ Clerk Of Superior Court

CERTIFICATION

I certify that this Judgment and Commitment and attachment(s) marked below is a true and complete copy of the original which is on file in this case.

☐ Appellate Entries (AOC-CR-350)

☐ Restitution Worksheet, Notice And Order (Initial Sentencing) (AOC-CR-611)

☐ Additional File No.(s) And Offense(s) (AOC-CR-626)

☐ Judicial Findings And Order For Sex Offenders - Active Punishment (AOC-CR-615, Side One)

☐ Convicted Sex Offender Permanent No Contact Order (AOC-CR-620)

☐ Other: _____.

Date	Date Certified Copies Delivered To Sheriff	Signature Of Clerk		
			☐ Deputy CSC ☐ Asst. CSC ☐ Clerk Of Superior Court	SEAL

Material opposite unmarked squares is to be disregarded as surplusage.

EXHIBIT B

File No.
17CR 050239

Law Enforcement Case No. 2017-000518
FAYETTEVILLE POLICE DEPARTMENT

LID No.

SID No.

FBI No.

MAGISTRATE'S ORDER

STATE OF NORTH CAROLINA

CUMBERLAND County

In The General Court Of Justice
District Court Division

A TRUE COPY
CLERK OF SUPERIOR COURT
CUMBERLAND COUNTY
BY: ASSISTANT / DEPUTY

Offense
I F-ATTEMPT FIRST DEGREE MURDER
II F-AWDW GOVERNMENT OFFICIAL

THE STATE OF NORTH CAROLINA VS.

Name And Address Of Defendant
GERALD ALAIN ATKINSON

7328 REEDY CREEK DRIVE

FAYETTEVILLE NC 28314
CUMBERLAND

Race	Sex	Date Of Birth	Age
B	M	03/09/1987	

Social Security No.

Drivers License No. & State

Name Of Defendant's Employer

Offense Code(s)	Offense In Violation Of G.S.
I 0999	I 14-17
II 1356	II 14-34.2

Date Of Offense
01/06/2017 through 01/06/2017

Date Of Arrest & Check Digit No. (As Shown On Fingerprint Card)
01/06/2017

Arresting Officer (Name, Address Or Department)
ANTOINE J. KINCADE
FAYETTEVILLE POLICE DEPARTMENT
467 HAY ST
FAYETTEVILLE NC 28301
CUMBERLAND (910) 433-1856

Names & Addresses Of Witnesses (Including Counties & Telephone Nos.)
D KETTELL
FAYETTEVILLE POLICE DEPARTMENT
467 HAY ST
FAYETTEVILLE NC 28301
CUMBERLAND (910) 433-1856

☒ Misdemeanor Offense Which Requires Fingerprinting Per Fingerprint Plan

Date Issued
01/07/2017

I, the undersigned, find that the defendant named above has been arrested without a warrant and the defendant's detention is justified because there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did DELIBERATELY DISCHARGED A .45 CALIBER HANDGUN AT OFFICERS RESPONDING TO HIS ADDRESS LOCATED AT 7328 REEDY CREEK DRIVE WHILE LYING IN WAIT.

I, the undersigned, find that the defendant named above has been arrested without a warrant and the defendant's detention is justified because there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did assault DYLAN KETTELL, a government officer of FAYETTEVILLE POLICE DEPARTMENT, with a RUGER.45 CALIBER HANDGUN (SERIAL# 664-95416), which is a firearm, by DELIBERATELY DISCHARGING IT IN THE DIRECTION OF RESPONDING OFFICERS TO HIS ADDRESS LOCATED AT 7328 REEDY CREEK DRIVE. At the time of the assault, the officer was performing the following duty of that office RESPONDING TO CALL FOR A PERSON THREATENING SUICIDE.

VD per misd. statement of charges
BP 12/1/19

This act was in violation of the law referred to in this Magistrate's Order. This Magistrate's Order is issued upon information furnished under oath by the arresting officer(s) shown. A copy of this Order has been delivered to the defendant.

Signature
J L STAFFORD

☒ Magistrate ☐ Deputy CSC
☐ Assistant CSC ☐ Clerk Of Superior Court

Location Of Court
Cumberland Co. Detn; DETN
204 GILLESPIE ST
FAYETTEVILLE,NC 28301

Court Date
01/09/2017

Court Time
2:30 ☐ AM ☒ PM

AOC-CR-116, Rev. 4/14
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(over)

ORIGINAL COPY

VRA Case

Case 5:20-cv-00351-BO Document 30-2 Filed 07/21/20 Page 1 of 1