

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DANIEL ESTEVEZ,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, et al,	:	No. 06-3168
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J.

March 2, 2007

Plaintiff Daniel Estevez brings this action against Defendants the City of Philadelphia, police officers Joseph Jonas and Anthony Desher, and Detective Thomas Clancy alleging, *inter alia*, violations of his civil rights in connection with his arrest and subsequent prosecution. Presently before the Court is Defendants' motion for summary judgment. For the following reasons, Defendants' motion is granted in part and denied in part.

I. BACKGROUND

Although the most pertinent details surrounding Plaintiff's claims are in dispute, certain background facts appear uncontested. Plaintiff was the owner and operator of the VIP barbershop located at 3221 North Front Street in Philadelphia, Pennsylvania. (Pl.'s Mem. of Law in Resp. to Defs.' Mot. for Summ. J. [hereinafter Pl.'s Mem.] at 3.) On February 19, 2004, a group of people were creating a disturbance in front of the shop. (*Id.* Ex. B [hereinafter Estevez Dep.] at 10-12.) Plaintiff, along with the help of police officers he had flagged down, was able to disperse the crowd. (*Id.*) Once the officers left, however, the throng returned and, according to Plaintiff, began to

threaten him and his customers. (*Id.* at 3-4.)¹ Plaintiff called 911, reported the situation, and explained that he believed the situation could turn violent. (*Id.* Ex. C (Tr. of 911 Tape)).

The subsequent events are the subject of considerable disagreement. Plaintiff asserts that one of the men in the group, later identified as Miguel Torres, forced his way inside the barbershop and pulled out a gun. (*Id.* at 3; Estevez Dep. at 16-25.) In response, Plaintiff reached for his own .45 caliber handgun that was located in a nearby drawer, fired two warning shots into the floor, and admonished the group not to come any closer. (*Id.* at 3.) The entire group retreated toward the front door of the shop except Torres, who shot Plaintiff in the chest. (*Id.*) Plaintiff then fired two shots back at Torres as Torres was fleeing. (*Id.*) At some point after that, Plaintiff was struck by gunfire coming from outside his shop. (*Id.*) Plaintiff retreated to the basement of his store and was eventually arrested by the police. (*Id.*) Although he claims he was unaware of it at the time, the second shooters turned out to be Defendants, Officer Jonas and Officer Desher. None of the civilian witnesses present at the scene remembered seeing any police officers inside the barbershop. (*Id.* Ex. I).

The Defendants' version of the facts is quite different. They assert that when they arrived at the barbershop they saw a group of people trying to exit through the vestibule toward the street. (*Id.* Ex. E (Statement of Officer Jonas) Ex. F (Statement of Officer Desher)). After assisting those people, they entered the shop with guns drawn and identified themselves as police officers. (*Id.*) The officers then ordered Plaintiff three times to drop his gun, but instead Plaintiff raised the gun and fired twice at the officers while they were standing inside the front door. (*Id.*) Jonas and Desher

¹ Plaintiff asserts that the group wanted to confront one of his male employees regarding the pregnancy of a member of the group. (Am. Compl. ¶ 3.)

ran out the front door and shot at Plaintiff through the front plate glass window. (*Id.*) Plaintiff returned fire twice, to which the officers responded with an additional two shots of their own. (*Id.*)

Plaintiff asserts that Officers Jonas and Desher, along with Detective Clancy, a detective assigned to investigate the event, concocted a coverup to hide the fact that Officers Jonas and Desher shot Plaintiff without justification. On February 7, 2006, Plaintiff filed a Complaint in the Court of Common Pleas for Philadelphia County alleging civil rights violations pursuant to 42 U.S.C. § 1983² and state law claims of assault and battery, malicious prosecution, false imprisonment, defamation, intentional infliction of emotional distress, abuse of process, and civil conspiracy. Defendants removed the case to federal court on July 18, 2006 and filed an Answer three days later. On November 16, 2006, Plaintiff filed an Amended Complaint substituting Detective Clancy for Defendant John Doe and adding a claim for invasion of privacy. On January 29, 2007, Defendants filed a joint motion for summary judgment, which is presently before the Court.

II. STANDARD OF REVIEW

Summary judgment is appropriate when the admissible evidence fails to demonstrate a dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When the moving party

² Section 1983 provides in relevant part:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”

42 U.S.C. § 1983 (2000).

does not bear the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thereafter, the nonmoving party demonstrates a genuine issue of material fact if sufficient evidence is provided to allow a reasonable jury to find for him at trial. *Anderson*, 477 U.S. at 248. In reviewing the record, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994). Furthermore, a court may not make credibility determinations or weigh the evidence in making its determination. *See Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000); *see also Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 665 (3d Cir. 2002).

III. DISCUSSION

A. Section 1983 Claims

Section 1983 enables a plaintiff to bring an action against any person who, under color of law, deprives him of his constitutional rights. 42 U.S.C. § 1983. To establish the claim, a plaintiff must show both a deprivation of a federally protected right and that the deprivation was committed by someone acting under color of state law. *Lake v. Arnold*, 112 F.3d 682, 689 (3d Cir. 1997). Plaintiff claims that Defendants violated his rights under the Fourth and Fourteenth Amendments in connection with the shooting and subsequent coverup.

1. Excessive Force

"[C]laims that law enforcement officers have used excessive force . . . in the course of an arrest . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . ."

Graham v. Conner, 490 U.S. 386, 395 (1989). The excessive force inquiry assesses whether the officers' actions were "'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397; *Kopec v. Tate*, 361 F.3d 772, 776-77 (3d Cir. 2004). This assessment must be made from the perspective of a reasonable officer at the scene during the incident. *Graham*, 490 U.S. at 396-97. Careful attention must be paid "to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. Other factors include "the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time." *Sharrar v. Felsing*, 128 F.3d 810, 822 (3d Cir. 1997). Whether an officer's actions constitute excessive force is a reasonableness inquiry usually sent to the jury. *Kopec*, 361 F.3d at 777.

a. Qualified Immunity in Connection with Excessive Force

Qualified immunity protects police officers from having to defend lawsuits if their conduct did not violate clearly established statutory or constitutional law. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). The Third Circuit has established a framework for addressing the qualified immunity defense. *Curley v. Klem*, 298 F.3d 271, 277 (3d Cir. 2002). First, the court must decide whether the facts alleged show that a defendant's conduct violated a constitutional right; here, the Fourth Amendment right to be free from excessive force. *Id.* The court then must determine whether such right was "clearly established" at the time the defendants acted. *See id.* A right is clearly established if "it would be clear to a reasonable officer that his conduct was unlawful in the

situation he confronted.” *Saucier v. Katz*, 533 U.S. 194, 202 (2001). When an officer’s conduct violates a clearly established constitutional right, the court must reject the qualified immunity defense. *Curley*, 298 F.3d at 277. Both the question whether the law was clearly established and whether the officer’s actions were objectively reasonable are matters of law. *Sharrar*, 128 F.3d at 828. Only where there are disputes of historical fact regarding the officer’s conduct does the case go to the jury. *Id.*

The intersection of qualified immunity and excessive force presents an uncommon scenario for purposes of summary judgment because both qualified immunity and use of excessive force turn on the concept of reasonableness. Although the question whether an officer’s use of force was excessive is generally jury question, a district court may nonetheless grant summary judgment on the basis of qualified immunity if “the officer’s use of force was objectively reasonable under the circumstances.” *Kopec*, 361 F.3d at 777; *see also Mellott v. Heemer*, 161 F.3d 117, 121 (3d Cir. 1998) (right to be free from excessive force clearly established, but qualified immunity still protects officers “if, at the time they acted, they reasonably could have believed that their conduct” was not excessive). Thus, the questions for the Court are: (1) whether the facts, taken in the light most favorable to Plaintiff, establish that Defendants used excessive force; (2) whether the right not to be subjected to excessive force was clearly established; and (3) whether a reasonable officer would have believed that Defendants’ conduct deprived Plaintiff of his clearly established constitutional rights. *See Reynolds v. Smythe*, 418 F. Supp. 2d 724, 734-35 (E.D. Pa. 2006).

b. Officers Jonas and Desher and not Entitled to Summary Judgment on Plaintiff’s Excessive Force Claim

Genuine disputes of historical fact prevent summary judgment as to Plaintiff’s excessive

force claim against Officers Jonas and Desher. *See Rusch v. Versailles Borough*, Civ. A. No. 05-0138, 2006 WL 2659275, at *5-*6 (W.D. Pa. Sept. 15, 2006) (denying summary judgment on excessive force claim where plaintiff's version of events amounted to violation of clearly established law); *Pagan v. Twp. of Raritan*, Civ. A. No. 04-1407, 2006 WL 2466862, at *6-*7 (D.N.J. Aug. 23, 2006) (same). Construing the evidence in the light most favorable to Plaintiff a reasonable jury crediting Plaintiff's account of the facts could conclude that no one was in danger of death or serious bodily harm when Plaintiff was shot. *See Cowan v. Breen*, 352 F.3d 756 (2d Cir. 2003) (“[A]n officer's decision to use deadly force is objectively reasonable only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officers or others”) (citations omitted). Moreover, if Plaintiff's allegations are true, Defendants would not be entitled to qualified immunity because the right not to be subject to excessive force was clearly established and Defendants could not reasonably have believed that their use of force was lawful. *Couden v. Duffy*, 446 F.3d 483, 497 (3d Cir. 2006). In particular, the parties dispute whether: (1) whether the officers were inside the barbershop at any point prior to shooting Plaintiff and (2) whether the officers witnessed Plaintiff firing his weapon at anyone.³ Thus, the Court denies Defendants summary judgment with respect to Plaintiff's excessive force claim against Officers

³ Defendants argue that it is immaterial whether Plaintiff was firing at the officers, as they assert, or merely firing in close proximity to others, because officers are justified in using deadly force to protect others from imminent death or serious bodily harm. (Defs.' Mem. of Law in Supp. of Mot. for Summ. J. [hereinafter Defs.' Mem.] at 6 n.2, 8-9); *see Abraham v. Raso*, 183 F.3d 279, 288 (3d Cir. 1999) (citing *Tennessee v. Garner*, 471 U.S. 1, 7 (1985)). Defendants' recitation of the legal standard is accurate. Summary judgment is still inappropriate, however, because according to Plaintiff, the officers were not even present while Plaintiff was firing his weapon but instead came upon the scene when the gun fight was over. (Pl.'s Mem. at 8-9.) In other words, if Plaintiff's version of events is accurate, no one was in imminent danger of death or serious bodily injury when the Officers shot him through the front window.

Jonas and Desher.

2. *False Arrest*

The parties do not agree when Plaintiff was legally arrested for purposes of his false arrest claim. On the one hand, Defendants' argue that Plaintiff was arrested when the Officers handcuffed him at the scene. (Defs.' Reply Mem. at 6-7.) On the other hand, by using the language of *Franks v. Delaware*, 438 U.S. 154 (1978), Plaintiff implies that he was arrested pursuant to an arrest warrant issued in response to an affidavit of probable cause. (Pl.'s Mem. at 10-11.) The Court agrees with Defendants that Plaintiff was legally arrested when he was placed in handcuffs at the scene and accordingly will grant Defendant Clancy summary judgment on Plaintiff's false arrest claim because Plaintiff was already arrested when Clancy filled out the arrest report.⁴ This ruling does not insulate Officers Jonas and Desher, however, who, as arresting officers, were required to have probable cause to arrest.

“[P]robable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested.” *Rogers v. Powell*, 120 F.3d 446, 453 (3d Cir. 1997) (quoting *Orsatti v. N.J. State Police*, 71 F.3d 480, 483 (3d Cir. 1995)). The probable cause determination is made under the totality of the circumstances on the basis of the information known by the officers at the time the arrest was made. *See United States v. Harris*, 482 F.2d 1115, 1117 (3d Cir. 1973). “Typically, the existence of probable cause in a section 1983 action

⁴ Plaintiff provides as an exhibit a “Philadelphia Police Department Arrest Report”. (Pl.'s Mem. Ex. L.) That Report, filled out by Detective Clancy, states in the “Facts of the Case” section that Plaintiff “was arrested after a brief struggle.” (*Id.*) Moreover, no arrest warrant is included with Plaintiff's submission. As such, the Court has no evidentiary basis to believe that Plaintiff was arrested at any time other than at the scene.

is a question of fact.” *Sherwood*, 113 F.3d at 401. Nevertheless, a court can find that probable cause existed as a matter of law if the evidence, viewed in the light most favorable to the plaintiff, could not reasonably support a contrary factual finding. *Id.*

In the instant case, the evidence viewed in the light most favorable to Plaintiff could support a jury determination that probable cause did not exist for any of the crimes for which Plaintiff was arrested. The arrest report listed five crimes: possession of an instrument of crime, simple assault, aggravated assault, recklessly endangering another person, and terroristic threats. (Pl.’s Mem. Ex. L (Arrest Report)). If the jury believes Plaintiff and determines that Officers Jonas and Desher came upon Plaintiff while he was merely holding a gun at his side, the key facts supporting probable cause on the charges of assault, endangerment, and possession of an instrument of crime are undermined.⁵ *See Blaylock v. Reynolds*, Civ. A. No. 05-1649, 2006 WL 1582308, at *6-*7 (E.D. Pa. June 6, 2006) (declining to grant summary judgment on false arrest claim in part because trustworthiness of officer’s account was subject to debate and holding that factual disputes had to be resolved by jury). Moreover, if Plaintiff was merely attempting to exercise his right as owner of the premises to remove unwanted people from his store, an arrest for terroristic threats is simply inapposite.

Nor are Defendants Jonas and Desher entitled to qualified immunity at the summary judgment stage. It was a violation of clearly established law at the time Plaintiff was arrested for police officers to arrest someone without probable cause. *Wilson v. Russo*, 212 F.3d 781, 786 (3d Cir. 2000). Moreover, if the facts are as described by Plaintiff, no reasonable officer would have believed that probable cause existed to arrest Plaintiff. *See Wright v. City of Philadelphia*, 409 F.3d

⁵ Defendants assert in their Reply brief that “the defendant officers saw plaintiff fire a weapon.” (Reply at 3.) A jury might reasonably reach this conclusion, but Plaintiff does not admit that fact, and none of the witnesses remembers seeing officers inside the barbershop.

595, 599-600 (3d Cir. 2005) (describing qualified immunity analysis); *Blaylock*, 2006 WL 1582308, at *7-*8 (rejecting qualified immunity because of fact questions regarding the reasonableness of officer's belief as to the existence of probable cause); *see also Sornberger v. City of Knoxville*, 434 F.3d 1006, 1016 (7th Cir. 2006) (noting that "reasonable avenues of investigation must be pursued" before arresting someone and declining to grant summary judgment on false arrest claim); *Sevigny v. Dicksey*, 846 F.2d 953, 957-58 (4th Cir. 1988) (objective inquiry into probable cause requires consideration of information reasonably discoverable under the circumstances).⁶

3. Fourteenth Amendment Claim

Plaintiff includes a claim under the Fourteenth Amendment for a violation of his due process rights, alleging that Defendants' brought criminal charges based on false and fabricated evidence and used that evidence against Plaintiff at his trial. Defendants respond that Plaintiff cannot raise a Fourteenth Amendment claim because, under *Graham*, 490 U.S. at 395, where other constitutional provisions provide an explicit textual source of protection those provisions govern the legal analysis. Although the parties each devote less than one page of analysis to Plaintiff's Fourteenth Amendment claim, it raises a number of complex legal issues that require mention.

The law concerning the permissible use of the Fourteenth Amendment in section 1983 cases is not an ideal of clarity. *See, e.g., Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003). In *Castellano*, a divided *en banc* panel of the Fifth Circuit permitted a section 1983 plaintiff to proceed with a Fourteenth Amendment claim that the state had manufactured evidence and used perjured

⁶ The parties should submit proposed special interrogatories for the jury to resolve disputes of historical fact that may impact the qualified immunity defenses, including those pertinent to the false arrest claim. *See Blaylock*, 2006 WL 1582308, at *8. At the conclusion of the trial, Defendants may renew their motion for judgment as a matter of law on the basis of qualified immunity. *Id.*

testimony during trial – essentially Plaintiff’s claim here. The decision rests on two key points. First, that the use of fabricated evidence violates due process rights. *Id.* at 957-58. Second, that *Parratt v. Taylor*, 451 U.S. 527 (1981), which bars section 1983 claims founded on procedural due process violations where an adequate post-deprivation remedy exists, did not apply, presumably because a state malicious prosecution action did not constitute an adequate post-deprivation remedy. *Id.* at 957.⁷ Other appellate courts follow similar analyses in permitting procedural due process claims to proceed despite *Parratt*. See *Newsome v. McCabe*, 256 F.3d 747, 752 (7th Cir. 2001); *Carroccia v. Anderson*, 249 F. Supp. 2d 1016, 1025-26 (N.D. Ill. 2003) (“[T]he state law actions[, including malicious prosecution,] . . . offer no remedy for the *Brady* violations that form the basis of [the plaintiff’s] § 1983 due process claims.”).

The First Circuit has taken the seemingly contrary position that procedural due process claims based on conduct at trial *are* barred under *Parratt* by the presence of a state law malicious prosecution tort. See *Perez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 42-43 (1st Cir. 1994) (“[T]he availability of an adequate remedy for malicious prosecution under commonwealth law . . . is fatal to appellants’ procedural due process claim) (citations omitted); see also *Meehan v. Town of Plymouth*, 167 F.3d 85, 88 (1st Cir. 1999) (same).⁸

⁷ The majority panel in *Castellano* never states whether the due process right at issue is procedural or substantive. By acknowledging the potential applicability of *Parratt*, however, it seems fair to assume that the majority recognized the right – to be free from the use of fabricated and perjured evidence at trial – as a procedural one. This view is bolstered by the fact that the type of rights discussed in *Castellano* have historically been understood as procedural. See *Albright v. Oliver*, 510 U.S. 266, 273 n.6 (1994).

⁸ The fact that some jurisdictions do not recognize federal malicious prosecution claims at all does not reveal how those jurisdictions would treat a section 1983 claim based exclusively on a procedural due process violation. *Castellano*, 352 F.3d at 949. Indeed, in the same opinion in which it recognized such a claim, the Fifth Circuit specifically rejected the practice – utilized in

The Third Circuit has not directly addressed whether there is a procedural due process claim under the Fourteenth Amendment that survives a *Parratt* analysis. The court has, however, stated that a plaintiff can maintain a constitutional malicious prosecution action on the basis of “the procedural component of the Due Process Clause”⁹ *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 792 (3d Cir. 2000). Moreover, the court has recently held that certain due process claims against prosecutors and officers for alleged improprieties in evidence collection, presentation, and disclosure were permissible. *See Yarris v. County of Delaware*, 465 F.3d 129, 136 (3d Cir. 2006). While *Yarris* did not discuss *Parratt*, the case provides reason to believe that the Third Circuit would allow a section 1983 procedural due process claim to proceed, at least where a plaintiff can survive the formidable obstacles presented by absolute immunity for a great deal of the trial related conduct. *Id.* at 134-36.

Nevertheless, the Court will grant Defendants’ motion for summary judgment as to Plaintiff’s Fourteenth Amendment claim because it suffers from a threshold deficiency. As is well established, the Due Process Clause protects against *deprivations* of life, liberty, or property accomplished without due process of law. *Parratt*, 451 U.S. at 536-37. Because Plaintiff was acquitted of the charges levied against him, he was never deprived of a protected interest and accordingly cannot make out a due process violation. *See Jean v. Collins*, 221 F.3d 656, 659-60 (4th Cir. 2000) (noting that alleged procedural due process violations “do not implicate constitutional rights where no

the Third Circuit, among others – of labeling as “malicious prosecution” the “violation of rights locatable in constitutional text” *Id.* at 953-54.

⁹ It is important to note that although Plaintiff has included a state law malicious prosecution claim, he has *not* presented a constitutional malicious prosecution claim. *See Johnson v. Knorr*, – F.3d –, 2007 WL 465704, at *5 (3d Cir. 2007) (describing elements of claim).

constitutional deprivation results therefrom.”); *Burke v. Town Walpole*, Civ. A. No. 00-10376, 2004 WL 507795, at *25 (D. Mass. Jan 22, 2004) (noting that the requisite threshold of constitutional injury in a procedural due process claim is a conviction resulting in loss of liberty).

Absent a conviction, Defendant could only establish the requisite deprivation of a liberty interest due to the alleged due process violations if his compelled attendance at the criminal trial constituted a deprivation. Such an argument is foreclosed, however, by Third Circuit case law that treats compulsory attendance at a criminal trial as raising a potential Fourth Amendment seizure issue. *See Gallo v. City of Philadelphia*, 161 F.3d 217, 222-23 (3d Cir. 1998). Moreover, because “the accused is not ‘entitled to judicial oversight or review of the decision to prosecute,’” *Albright* 510 U.S. at 274 (citations omitted), it would stretch precedent to allow a section 1983 plaintiff to frame what would usually be conceived of as a substantive due process issue as a procedural one. Therefore, because Plaintiff has failed to establish the deprivation of a constitutionally protected liberty interest that resulted from the alleged due process violations, his Fourteenth Amendment claim fails as a matter of law.

There is some Third Circuit jurisprudence that at first blush might appear to be in tension with this holding. However, a closer examination reveals that no actual conflict exists. In *Torres v. McLaughlin*, 163 F.3d 169, 173 (3d Cir. 1998), the Third Circuit held that “a section 1983 malicious prosecution claim may [] include police conduct that violates . . . the procedural due process clause.” Although Plaintiff does not present a section 1983 malicious prosecution claim,¹⁰

¹⁰ As mentioned above, Plaintiff pled malicious prosecution as a distinct state law cause of action and presented no indication in his response papers that he intended to “constitutionalize” the claim. Indeed, he placed his discussion of malicious prosecution under the “Pendent State Claims” section of his opposition to Defendants’ motion for summary judgment. (Pl.’s Mem. at 25.)

this line of jurisprudence is potentially relevant for what it says about the due process aspect of such a claim. The ambiguity results from the fact that, in addition to showing the constitutional violation required to trigger section 1983, the Third Circuit also requires a plaintiff alleging a constitutional malicious prosecution action to establish the state law elements. *Johnson*, – F.3d –, 2007 WL 465704, at *5. One of those elements is that the prosecution terminated in favor of the plaintiff. *Id.* But if there is no procedural due process violation absent a conviction, how does *Torres*, which requires for a malicious prosecution claim both a due process violation and that the criminal action be terminated in the now-plaintiff’s favor, make sense? The answer is that this component of *Torres* must apply to the universe of cases in which a section 1983 plaintiff has been convicted – thereby establishing the deprivation required for a due process violation – but the conviction has been invalidated either on direct or collateral review. *See Yarris*, 465 F.3d at 129 (involving procedural due process claims raised by a section 1983 plaintiff who was wrongfully convicted). This Court does not read *Torres* as standing for the proposition that a section 1983 procedural due process claim can exist absent a deprivation of liberty or property.

4. *Plaintiff’s Monell Claim*

Although there is no *respondeat superior* liability under section 1983, a municipality can be directly liable on a section 1983 claim if its actions cause a constitutional violation. *See Monell v. Dep’t of Social Serv. of N.Y.*, 436 U.S. 658, 694 (1978); *Bd. of Cty. Comm’rs of Bryan County v. Brown*, 520 U.S. 397, 403-404 (1997). Specifically, “when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts and acts may fairly be said to represent official policy, inflicts the injury . . . the government as an entity is responsible under Section 1983.” *Monell*, 436 U.S. at 694. A policy exists where a decisionmaker possessing final

authority to establish municipal policy issues an official proclamation, policy, or edict. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1480 (3d Cir. 1990) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986)). A “custom” can be proved by showing that a course of conduct, although not expressly enacted as a policy, that is so well-settled and permanent as to virtually constitute law. *Small v. City of Philadelphia*, Civ. A. No. 05-5291, at 3 (E.D. Pa. Mar. 2, 2007) (citing *Andrews*, 895 F.2d at 1480). However, a plaintiff must prove that the municipality was the “moving force” behind the alleged injury. *Id.* To be the “moving force,” the constitutional violation must “result[] from ‘deliberate indifference to the constitutional rights of [the municipality’s] inhabitants.’” *Gorman v. Twp. of Manalapan*, 47 F.3d 628, 637 (3d Cir. 1995) (quoting *City of Canton v. Harris*, 489 U.S. 378, 392 (1989) (alteration in *Gorman*)). When the plaintiff bases his *Monell* allegations on an alleged failure to train or discipline, deliberate indifference can be shown where the need for more training or discipline to prevent violations of constitutional rights was obvious. *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 216 (3d Cir. 2001) (citing *City of Canton*, 489 U.S. at 390).

Plaintiff has produced sufficient evidence of a custom of failing to train, discipline, investigate, and/or sanction officers in connection with shootings by police to survive Defendants’ motion for summary judgment. While Defendants are correct that “vague assertions” regarding a police department’s failure to investigate wrongdoings are insufficient to support a *Monell* claim, *Gorman*, 47 F.3d at 637, Plaintiff presents evidence from former IAO director Green-Ceisler that would enable a jury to find a custom, dating back at least as far as 1998, of a custom of biased investigations following police shootings.¹¹ (Pl.’s Mem. Ex. Q (Integrity and Accountability Office

¹¹ For example, the “Key Findings” section of the “Officer-Involved Shootings” February 2005 report from the Integrity and Accountability Office (“IAO”) provides:

(1) “Violations of important Departmental policies that occurred before, during, or

Report)); *see Bryan County*, 520 U.S. at 407 (1997) (holding that the existence of a program that fails to prevent constitutional violations, and a municipality’s continued adherence to that program, may establish the conscious disregard necessary to trigger municipal liability); *see also Brown*, 269 F.3d at 216. Additionally, Plaintiff’s expert Joseph Stine, the former Police Chief of New Britain Township, opined that there is “an inherent flaw in the design of the method in which investigations [into police shooting cases] are conducted in the City of Philadelphia.” (Pl.’s Mem. Ex. R (Expert Report of Joseph Stine at 17.)) Combined with the purportedly inadequate post-incident investigation conducted here, a jury could rationally conclude that a custom of biased investigations following shootings by police existed and caused a violation of Plaintiff’s constitutional rights.¹² *See Shilling v. Brush*, Civ. A. No. 05-871, 2007 WL 210802, at *15-16 (M.D. Pa. Jan. 22, 2007). Accordingly, genuine disputes of material fact exist as to Plaintiff’s *Monell* claim and summary judgment is denied. *Id.*

B. Plaintiff’s State Law Claims

1. Assault and Battery

after shooting incidents were not consistently identified or addressed.”

(2) Evidence collection “practices raise questions regarding the impartiality of some investigations.”

(3) “[O]utdated and ineffective methods of recording witness interviews are highly problematic and impact adversely on the quality of the investigations.”

(Pl.’s Mem. Ex. Q at 36.)

¹² In addition to the evidence Plaintiff has provided, he also asserts that Defendants failed to respond to his discovery request regarding police shooting cases in the last five years. Presumably those materials would have made it easier to prove the existence (or non-existence) of a custom of conducting improper post-incident investigations in cases involving shootings by police. Without taking a position on the propriety of an adverse inference instruction at trial, the Court is reluctant to give Defendants the benefit of their own intransigence in responding to discovery requests.

A police officer may be held liable for assault and battery if a jury concludes that he used unnecessary and excessive force in effectuating an arrest. *Renk v. City of Pittsburgh*, 641 A.2d 289 (Pa. 1994). The material facts surrounding Plaintiff's arrest are disputed, and accordingly summary judgment on Plaintiff's assault and battery claim is denied.

2. *Malicious Prosecution*

To prevail on a state law claim of malicious prosecution a plaintiff must establish that a defendant maliciously initiated criminal proceedings without probable cause and that the proceedings were terminated in the plaintiff's favor. *Kelley v. Local Union 249*, 544 A.2d 940, 941 (Pa. 1988). Disputed facts exist which prevent summary judgment.

3. *False Imprisonment*

For the reasons stated previously, genuine disputes of material fact exist as to whether probable cause existed when Plaintiff was arrested. Accordingly, summary judgment on Plaintiff's false imprisonment claim is improper.

4. *Defamation and Invasion of Privacy*

The Court grants Defendants summary judgment on Plaintiff's state law defamation and invasion of privacy actions because they are untimely under the applicable statute of limitations. Although Plaintiff concedes that the claims are time barred,¹³ he asserts that Defendants waived the statute of limitations defense by failing to raise it their responsive pleading as required by Federal Rule of Civil Procedure 8(c). (Pl.'s Mem. at 27.) However, because (1) Plaintiff exceeded the leave

¹³ The statute of limitations for the invasion of privacy claim is the same as for defamation, and the operative facts giving rise to both claims occurred at the same time. Therefore, Plaintiff's admission as to the untimeliness of his defamation action condemns his invasion of privacy claim as well.

granted by the Court in amending his Complaint, (2) Defendants' first substantive response after the Amended Complaint raised the statute of limitations, and (3) Defendant's Answer to the Amended Complaint also raised the statute of limitations, the Court rejects Plaintiff's waiver argument.

Some procedural background will elucidate the Court's reasoning. Defendants' original Answer did not raise the statute of limitations affirmative defense. (Docket Entry 2.) On November 16, 2006, after obtaining leave of the Court, Plaintiff filed an Amended Complaint. (See Docket Entries 9 & 10.) The Court granted leave to allow Plaintiff to substitute Defendant Clancy for the "John Doe" Defendant. In addition to making that switch, however, Plaintiff went beyond the scope permitted by the Court and included for the first time an invasion of privacy claim.¹⁴

Defendants, presumably believing that Plaintiff's amendments were within the scope allowed by the Court, did not file an amended answer within the applicable time period. Rather, their first substantive response was the joint motion for summary judgment, in which they raised the statute of limitations defense as to both the defamation and invasion of privacy claims. When Defendants finally answered the Amended Complaint – in response to a Court order and after summary judgment had been filed – it also included the statute of limitations as an affirmative defense.

Because Plaintiff made a substantive change to his pleading, Defendants became entitled to file a new answer and to include affirmative defenses that they had neglected to append to the original. *See, e.g., Massey v. Helman*, 196 F.3d 727, 735 (7th Cir. 1999). Although Defendants did not file a new answer until ordered to do so by the Court, there is no waiver of the statute of limitations defense because any tardiness on Defendants' part was caused primarily by Defendants'

¹⁴ The original Complaint was filed in state court and was attached to Defendants' Notice of Removal; it did not contain an invasion of privacy count. (Docket Entry 1.)

reasonable belief that the Amended Complaint was substantively identical to the original.

Faced with a scenario in which Defendants' initial response to the Amended Complaint, the summary judgment motion, raised the statute of limitations defense and where Defendants' Amended Answer, the tardiness of which was caused in large part by Plaintiff's own conduct, also raised the defense, the Court declines to find a waiver. *See Robinson v. Johnson*, 313 F.3d 128, 134-37 (3d Cir. 2002).¹⁵ Under the circumstances, Defendants raised the statute of limitations defense at the "earliest practical moment" in the litigation. *Id.* at 137. Accordingly, Defendants' motion for summary judgment as to Plaintiff's invasion of privacy and defamation claims is granted.

5. *Intentional Infliction of Emotional Distress*

Defendant's cite *Taylor v. Albert Einstein Med. Ctr.*, 754 A.2d 650, 652 (Pa. 2000), for the proposition that Pennsylvania has never expressly recognized a cause of action for intentional infliction of emotional distress. While *Taylor* is not a paragon of judicial clarity, its holding ultimately recognizes the existence of the cause of action. *Id.*

To establish intentional infliction of emotional distress, a plaintiff must show: (1) conduct that is extreme and outrageous; (2) that the conduct was intentionally or recklessly engaged in; (3) that it caused emotional distress; and (4) that the distress was severe. *McHenry v. Cty. of Delaware*, Civ. A. No. 04-1011, 2005 WL 2789182, at *14 (E.D. Pa. Oct. 24, 2005). A plaintiff cannot rely exclusively on the opprobrious nature of the defendant's conduct to establish severe emotional

¹⁵ *Robinson* discussed the "Third Circuit Rule," which permits parties to raise the statute of limitations defense by a motion pursuant to Rule 12 where the complaint itself makes clear that the statute of limitations provides a bar. *Id.* at 135. While here Defendants responded to Plaintiff's Amended Complaint by way of a summary judgment motion rather than via a motion to dismiss, this distinction does not give the Court pause, at least where the facts and procedural posture of the case made a summary judgment motion procedurally appropriate.

injury. *Kazatsky v. King David Memorial Park, Inc.*, 527 A.2d 988, 995 (Pa. 1987). Competent medical evidence of the alleged distress must be provided. *Id.* In the instant case, Plaintiff has not provided any medical evidence supporting his emotional distress claim. Indeed, Plaintiff does no more than assert the existence of the intentional infliction of emotional distress tort. Where a plaintiff has not adduced evidence of a fact essential to his recovery, summary judgment in favor of the defense is proper. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

6. *Abuse of Process*

Abuse of process, although similar to malicious prosecution, is distinct in that it focuses on the proceedings themselves, not merely the issuance of process that commences those proceedings. *See generally Rosen v. Am. Bank of Rolla*, 627 A.2d 190, 192 (Pa. Super. 1993). “The gravamen of the misconduct . . . is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish.” *Id.* To show an abuse of process, a plaintiff must prove that the defendant: (1) used a legal process against him; (2) primarily for a purpose other than for which it was designed; and (3) that harm resulted. *Id.* In the typical case, abuse of process constitutes some form of extortion or blackmail. *Id.* No abuse of process claim lies where a defendant has done nothing more than carry out process to its authorized conclusion, even if done with bad intentions. *Marable v. West Pottsgrove Twp.*, Civ. A. No. 03-3738, 2005 WL 1625055, at *12 (E.D. Pa. July 8, 2005); *see generally Gen. Refractories Co. v. Fireman’s Fund Ins. Co.*, 337 F.3d 297, 304-308 (3d Cir. 2003) (providing thorough and expansive explication of the abuse of process doctrine).

Although this is not a “typical” case because Plaintiff does not allege that Defendants maintained a criminal prosecution to obtain a desired result *from him* the Court nevertheless

declines to grant Defendants summary judgment because a jury crediting Plaintiff's coverup theory could rationally conclude that Defendants used the criminal action primarily for the purpose of concealing their unconstitutional conduct, a plain perversion of the criminal process.

7. *Civil Conspiracy*

Disputes of material fact involving Plaintiff's arrest and the subsequent decision to charge him with various crimes prevent summary judgment on Plaintiff's civil conspiracy claim. *See Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 472 (Pa. 1979) (setting forth elements of civil conspiracy). Specifically, if a jury credits Plaintiff's account of his arrest and resulting prosecution it could find the requisite common purpose to do an unlawful act, overt act in furtherance of that purpose, and lack of legal justification. *See id.*

8. *Tort Claims Act*

Nor are Defendants entitled to summary judgment on Plaintiff's state law claims pursuant to the Pennsylvania Tort Claims Act, which limits an individual municipal employee's liability to instances where the conduct constituted a "crime, actual fraud, actual malice or willful misconduct." 42 PA. CONS. STAT. ANN. § 8541 (2007). Genuine disputes of material fact exist that, if resolved in Plaintiff's favor, would entitle a jury to find actual malice or willful misconduct.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is granted as to Plaintiff's claims for defamation, invasion of privacy, and intentional infliction of emotional distress. Defendants' motion is also granted as to Plaintiff's Fourteenth Amendment claim and as to the false arrest claim against Detective Clancy. In all other respects, Defendants' motion is denied. An

appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DANIEL ESTEVEZ,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, et al,	:	No. 06-3168
Defendants.	:	

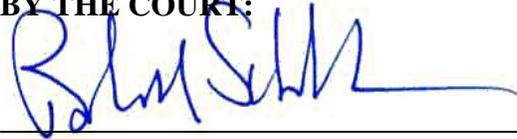
ORDER

AND NOW, this **2nd** day of **March, 2007**, upon consideration of Defendants' Motion for Summary Judgment, Plaintiff's response thereto, Defendants' Reply, and Plaintiff's Sur-Reply, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Defendants' motion (Document No. 14) is **GRANTED in part** and **DENIED in part** as follows:
 - a. Defendants' motion is **GRANTED** as to Plaintiff's claims for defamation, invasion of privacy, and intentional infliction of emotional distress. Accordingly, Counts **Five, Six, and Seven** are **DISMISSED**.
 - b. Defendants' motion is **GRANTED** as to Plaintiff's false arrest claim against **Defendant Clancy**. Defendant Clancy remains in the case, however, as he is a proper Defendant on other causes of action.
 - c. Defendants' motion is **GRANTED** as to Plaintiff's due process claims arising under the Fourteenth Amendment. Accordingly, that claim is **DISMISSED**.

- d. In all respects, Defendants' motion is **DENIED**.
2. Defendants' Motion for Leave to File a Reply (Document No. 20) is **GRANTED**.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "Berle M. Schiller", written over a horizontal line.

Berle M. Schiller, J.