No.

In the Supreme Court of the United States

CHARLES A. REHBERG,

Petitioner,

v.

JAMES P. PAULK, KENNETH B. HODGES, III, AND KELLY R. BURKE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), this Court held that law enforcement officials enjoy absolute immunity from civil liability under 42 U.S.C. § 1983 for perjured testimony that they provide at trial. But in *Malley* v. *Briggs*, 475 U.S. 335 (1986), this Court held that law enforcement officials are *not* entitled to absolute immunity when they act as "complaining witnesses" to initiate a criminal prosecution by submitting a legally invalid arrest warrant. The federal courts of appeals have since divided about how *Briscoe* and *Malley* apply when government officials act as "complaining witnesses" by testifying before a grand jury or at another judicial proceeding. The question presented in this case is:

Whether a government official who acts as a "complaining witness" by presenting perjured testimony against an innocent citizen is entitled to absolute immunity from a Section 1983 claim for civil damages.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles A. Rehberg respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-44a) issued on rehearing is reported at 611 F.3d 828. The panel's initial, withdrawn opinion (App., *infra*, 45a-80a), is reported at 598 F.3d 1268. The opinion of the District Court for the Middle District of Georgia (App., *infra*, 81a-108a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2010, upon consideration of petitioner's petition for a rehearing. On October 6, 2010, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including December 13, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT

The federal courts of appeals are deeply divided regarding whether government officials who initiate prosecutions by providing false testimony in judicial proceedings are absolutely immune from civil suit. This conflict stems from the lower courts' differing views on how to reconcile two precedents of this Court, *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), and *Malley* v. *Briggs*, 475 U.S. 335 (1986). In *Briscoe*, this Court held that a police officer who allegedly committed perjury during a criminal trial was absolutely immune from civil liability because "[42 U.S.C.]

§ 1983 did not abrogate the absolute immunity [for testimony] existing at common law." 460 U.S. at 334.[1] In *Malley*, this Court held that a police officer *could* be held liable for wrongfully causing an arrest warrant to issue by submitting a legally invalid affidavit. The Court reasoned that officers who initiate prosecution in this manner function as complaining witnesses, who, unlike ordinary witnesses, were "not absolutely immune at common law." 475 U.S. at 340.[2]

These two lines of authority—the *Briscoe* line establishing absolute immunity for testimony in judicial proceedings, and the *Malley* line creating an exception from absolute immunity for complaining witnesses—collide when a government official gives testimony *as a complaining witness*. The Eleventh

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[1] Although *Briscoe* declined to decide whether absolute witness immunity applied to pretrial proceedings, 460 U.S. at 328 n.5, the majority of the courts of appeals have concluded that the reasoning underlying *Briscoe* supports extending the same protections to pretrial testimony. See *Lyles* v. *Sparks*, 79 F.3d 372, 378 (4th Cir. 1996); *Frazier* v. *Bailey*, 957 F.2d 920, 931 n.12 (1st Cir. 1992); *Anthony* v. *Baker*, 955 F.2d 1395, 1400-1401 (10th Cir. 1992); *Strength* v. *Hubert*, 854 F.2d 421, 423-425 (11th Cir. 1988), overruled on other grounds by *Whiting* v. *Traylor*, 85 F.3d 581 (11th Cir. 1996); *Williams* v. *Hepting*, 844 F.2d 138, 141-143 (3d Cir. 1988); *Holt* v. *Castaneda*, 832 F.2d 123, 124-127 (9th Cir. 1987); *Macko* v. *Byron*, 760 F.2d 95, 97 (6th Cir. 1985); *San Filippo* v. *U.S. Trust Co.*, 737 F.2d 246, 254 (2d Cir. 1984); *Kincaid* v. *Eberle*, 712 F.2d 1023, 1023-1024 (7th Cir. 1983); *Briggs* v. *Goodwin*, 712 F.2d 1444, 1448-1449 (D.C. Cir. 1983). But see *Wheeler* v. *Cosden Oil & Chem. Co.*, 734 F.2d 254, 261 n.16 (5th Cir. 1984), modified on other grounds by *Castellano* v. *Fragozo*, 352 F.3d 939 (5th Cir. 2005).

[2] This Court has since defined a complaining witness as one who "set[s] the wheels of government in motion by instigating a legal action." *Wyatt* v. *Cole*, 504 U.S. 158, 164-165 (1992).

Circuit in this case, along with the Third and Fourth Circuits in prior rulings, rejected the complaining witness exception for judicial testimony, relying on this Court's holding in *Briscoe*. The Second, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits, however, have reached the opposite conclusion, holding that the complaining witness exception applies to various forms of judicial testimony based on this Court's holding in *Malley*.[3]

As a result, the civil recourse available to individuals wrongfully indicted because of a government official's knowingly false testimony turns on no more than the jurisdiction in which they file suit. This Court should grant review to clarify the appropriate immunity standard for the testimony of complaining witnesses and to restore uniform access to Section 1983 remedies for victims of perjurious testimony.

A. Factual Background[4]

Petitioner Charles A. Rehberg, a forensic accountant, discovered evidence of unethical billing practices at Phoebe Putney Memorial Hospital in Albany, Georgia. See generally Compl., *United States ex rel. Rehberg* v. *Phoebe Putney Health Sys., Inc.*, No. 1:04-CV-162(WLS) (D. Ga. Oct. 25, 2004). Petitioner publicized his findings by sending a series of

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[3] This petition uses the term "judicial testimony" and "judicial proceedings" to refer to testimony and proceedings relating to formal court actions before a judge or other factfinder such as a grand jury.

[4] The facts described herein are derived from the complaint, which the courts below accepted as true for purposes of resolving respondent's motion to dismiss. App., *infra*, 3a n.1 (citing *Jackson* v. *Okaloosa County*, *Fla.*, 21 F.3d 1531, 1534 (11th Cir. 1994)).

anonymous faxes to the hospital. App., *infra*, 3a. Respondent James P. Paulk was the Chief Investigator for the Office of the District Attorney of Dougherty County in Georgia; as a "favor" to the hospital, with whom he and the District Attorney had political connections, Paulk and the District Attorney launched a criminal investigation of petitioner. App., *infra*, 3a, 15a, 83a-85a.[5] The District Attorney's Office indicted petitioner on three separate occasions for allegedly harassing the recipients of his anonymous faxes and for assaulting a doctor, a crime that Paulk later acknowledged had never occurred. App., *infra*, 4a-6a. All three indictments were eventually dismissed as legally insufficient. App., *infra*, 5a-6a.

With respect to the first indictment, charging petitioner with aggravated assault, burglary, and making "harassing telephone calls," Paulk was the sole witness who testified, and he affirmed to the grand jury that his testimony consisted of "true and accurate facts." App., *infra*, 83a-84a. With respect to the second and third indictments against petitioner, for "simple assault" and "harassing phone calls," Paulk again testified before the grand jury, personally—though falsely—attesting to petitioner's conduct. App., *infra*, 84a-85a. Pursuant to the second and third indictments, petitioner was arrested and briefly detained. App., *infra*, 6a.

Paulk subsequently admitted that he made these accusations without any "knowledge or preparation."

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[5] The District Attorney of Dougherty County was Kenneth B. Hodges, III. After unfavorable press coverage about his relationship with the hospital, Hodges recused himself, and Kelly R. Burke was appointed as a special prosecutor in his stead. App., *infra*, 4a.

Compl. ¶ 17, *Rehberg* v. *Paulk*, No. 1:07-CV-22(WLS) (M.D. Ga. Jan. 23, 2007). As he disclosed in a deposition, Paulk had gathered no evidence whatsoever prior to his grand jury testimony to indicate that petitioner had committed an assault or burglary, nor had Paulk ever interviewed any of the individuals whom he attested had been harassed by petitioner's faxes. Compl. ¶ 17, *Rehberg* v. *Paulk*, No. 1:07-CV-22(WLS) (M.D. Ga. Jan. 23, 2007); App, *infra*, 83a-84a.

B. Proceedings Below

Following the dismissal of the indictments, petitioner filed a complaint in the United States District Court for the Middle District of Georgia against Paulk, alleging, in addition to various state law claims, three violations of 42 U.S.C. § 1983. App., *infra*, 6a-7a.[6] Petitioner accused Paulk of malicious prosecution in violation of the Fourth and Fourteenth Amendments, retaliatory investigation and prosecution in violation of petitioner's First Amendment free speech rights, and participation in evidence fabrication and conspiracy to violate petitioner's rights under the First, Fourth, and Fourteenth Amendments. App., *infra*, 6a-7a.

Respondent Paulk moved to dismiss the claims pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing, among other grounds, that he was entitled to absolute immunity for his testimony before the grand jury. According to respondent, "plaintiff cannot maintain *any* claim that would require consid-

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[6] Kenneth B. Hodges, III, Kelly R. Burke, and Dougherty County were also named as defendants in petitioner's suit. See App. 81a, 108a. This petition concerns only the claims alleged against Paulk.

eration of the contents of Paulk's grand jury testimony." Paulk and Dougherty County Mem. in Support of Mot. to Dismiss 9, *Rehberg* v. *Paulk*, No. 1:07-CV-22(WLS) (M.D. Ga. Apr. 10, 2007) (emphasis added).

The district court identified Paulk as a complaining witness before the grand jury, App., *infra*, 83a, but did not decide whether the complaining witness exception to absolute immunity applied to his testimony. Rather, the court denied Paulk's motion to dismiss on the ground that his other non-testimonial acts as a complaining witness were sufficient to defeat his claim of absolute immunity. App., *infra*, 98a-100a.[7]

The Eleventh Circuit acknowledged that Paulk was a "complaining witness against Rehberg," App., *infra*, 4a, but it "reject[ed] Rehberg's 'complaining witness' exception to absolute immunity for false grand jury testimony." App., *infra*, 14a. The court reversed the district court's denial of Paulk's motion, holding that, under *Briscoe*, "[e]ven if Hodges and Paulk knew Paulk's testimony was false, Paulk receives absolute immunity for the act of testifying to the grand jury." App., *infra*, 12a (citing *Briscoe*, 460 U.S. at 326). The court distinguished *Malley* on the ground that the criminal complaint at issue in that case did not implicate the secrecy concerns associated with the grand jury. App., *infra*, 14a n.9. Even though it explicitly recognized that "[t]wo circuits [have] carved out a complaining-witness exception" for false testimony, App., *infra*, 14a n.9, the Eleventh

[7] The district court rejected Paulk's qualified immunity claim because his alleged conduct violated petitioner's clearly established constitutional right. App., *infra*, 101a-102a.

Circuit dismissed the malicious prosecution claim against Paulk, thereby denying petitioner access to a remedy under Section 1983.[8]

REASONS FOR GRANTING THE PETITION

The federal courts of appeals are deeply divided about whether government officials who act as complaining witnesses are entitled to absolute immunity from civil liability for their false testimony before grand juries and in other judicial proceedings. Seven courts of appeals have concluded that complaining witnesses should not have such immunity, while three—including the Eleventh Circuit in this case—have concluded that even complaining witnesses should be absolutely immune for perjuriously initiating the false prosecution of innocent citizens.

The conflict among courts of appeals is the result of the lower courts' different approaches to reconciling this Court's decisions in *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), extending absolute immunity to government officials for their trial testimony, and *Malley* v. *Briggs*, 475 U.S. 335 (1986), denying absolute immunity to government officials for initiating false prosecutions.

The Eleventh Circuit here disregarded the crucial distinction that this Court drew in *Malley* between ordinary witnesses—who merely testify about facts—and complaining witnesses—who initiate

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[8] The Eleventh Circuit resolved petitioner's retaliatory prosecution claim by affirming the district court's denial of Paulk's motion to dismiss. App., *infra*, 34a. It resolved petitioner's conspiracy claim by reversing the district court's denial of Paulk motion to dismiss, and holding that the claim was barred by the intracorporate conspiracy doctrine. App., *infra*, 43a-44a.

prosecutions. At common law and under this Court's precedent, absolute immunity attaches to ordinary witnesses lest the threat of civil liability for defamatory statements deter them from testifying at all or from testifying truthfully. That absolute immunity does not extend to complaining witnesses, who by definition have actively and voluntarily come forward to initiate a criminal prosecution.

This Court should grant review to clarify—and restore uniformity to—the law governing immunity under Section 1983 for complaining witnesses who testify falsely.

A. The Courts Of Appeals Disagree Sharply About Whether Complaining Witnesses Are Entitled To Absolute Immunity For Giving Testimony In Judicial Proceedings.

The federal courts of appeals are deeply divided as to whether complaining witnesses are exempt from the absolute immunity otherwise enjoyed by witnesses in grand jury and other judicial proceedings.[9] Many federal appeals court decisions—

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[9] Seven circuits recognize the complaining witness exception for grand jury or other type of judicial testimony. See *Vakilian* v. *Shaw*, 335 F.3d 509, 516 (6th Cir. 2003); *Cervantes* v. *Jones*, 188 F.3d 805, 809-810 (7th Cir. 1999), overruled on other grounds by *Newsome* v. *McCabe*, 256 F.3d 747 (7th Cir. 2001); *Harris* v. *Roderick*, 126 F.3d 1189, 1198-1199 (9th Cir. 1997); *Anthony* v. *Baker*, 955 F.2d 1395, 1399-1401 (10th Cir. 1992); *Enlow* v. *Tishomingo County, Miss.*, 962 F.2d 501, 511-512 (5th Cir. 1992); *Edmond* v. *U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 422-423 (D.C. Cir. 1991); *White* v. *Frank*, 855 F.2d 956, 958-961 (2d Cir. 1988). Three circuits reject the complaining witness exception for judicial testimony. See, *e.g.*, *Jones* v. *Cannon*, 174 F.3d 1271, 1287 n.10 (11th Cir. 1999); *Lyles* v. *Sparks*,

including the decision below—explicitly acknowledge this conflict. See, *e.g.*, App., *infra*, 14a n.9 (contrasting its decision upholding absolute immunity with rulings by "[t]wo circuits [that] carved out a complaining-witness exception to absolute immunity for false grand jury testimony."); *Jones* v. *Cannon*, 174 F.3d 1271, 1287 n.10 (11th Cir. 1999) ("[A]lthough *Mastroianni* [v. *Bowers*, 173 F.3d 1363 (11th Cir. 1999)] cites circuits adopting an exception for complaining witnesses, we agree with the Third Circuit's rejection of that approach * * *."); *Harris* v. *Roderick*, 126 F.3d 1189, 1199 n.11 (9th Cir. 1997) ("There is also a minority view. The Third Circuit * * * expressly rejected the reasoning of [the Second and Tenth Circuits] * * * and refused to read the complaining witness exception in *Malley* as overriding the broad protection for law enforcement witnesses set forth in *Briscoe* * * *."); *Kulwicki* v. *Dawson*, 969 F.2d 1454, 1467 n.16 (3d Cir. 1992) (noting that the Second and Tenth Circuits "have pointed out the tension between the Supreme Court's sweeping protection of all witness testimony in *Briscoe*, and the common law distinction, noted in *Malley* * * *, between lay witnesses (absolutely protected) and complaining witnesses in malicious prosecution suits (not absolutely protected). * * * [T]his court has been criticized for failing to emphasize the distinction.").

The result of this conflict is that, for many victims of malicious prosecution, the availability of civil remedies depends solely on where the misconduct—and the resulting suit—happens to take place. That is exactly what happened in this case. Had petitioner suffered the same constitutional injury in one of the

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79 F.3d 372, 378 (4th Cir. 1996); *Kulwicki* v. *Dawson*, 969 F.2d 1454, 1467 n.16 (3d Cir. 1992).

seven circuits that recognize the complaining witness exception, rather than in one of the three that reject it, he would have had a remedy for Paulk's perjured testimony falsely accusing him of a crime.

1. Seven Circuits Recognize The Complaining Witness Exception For Judicial Testimony On The Basis Of Malley.

The Eleventh Circuit's holding conflicts with decisions of the Second, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits.

In *White* v. *Frank*, 855 F.2d 956 (2d Cir. 1988), the Second Circuit considered a Section 1983 suit against a police officer who had perjured himself before a grand jury in order to obtain a narcotics indictment. *Id.* at 957. Noting the "subtle but crucial" common law distinction between witnesses "whose role was limited to providing testimony" and witnesses "who played a role in initiating a prosecution—complaining witnesses," *id.* at 958-959, the court held that the officer's "role as a 'complaining witness' render[ed] him liable to the victim under Section 1983, just as it did at common law." *Id.* at 961. According to the Second Circuit, *Briscoe* was inapposite because it concerned absolute immunity against suits for defamation, whereas *Malley* governed suits for malicious prosecution. *Ibid.*

Likewise, the Fifth Circuit has concluded that *Briscoe* does not control in an action for malicious prosecution against a complaining witness: "In advocating the extension of *Briscoe* and other such cases to his grand jury testimony, [defendant police officer] obfuscates a crucial distinction. * * * [A]t common law, complaining witnesses were not absolutely immune." *Enlow* v. *Tishomingo County, Miss.*, 962 F.2d

501, 511 & n.29 (5th Cir. 1992); see also *Keko* v. *Hingle*, 318 F.3d 639, 643 (5th Cir. 2003) ("[W]hen either a police officer or a prosecutor becomes a 'complaining witness' in a probable cause hearing, neither official may claim absolute immunity.").

The Tenth Circuit, in adopting the complaining witness exception, also relied on this Court's holding in *Malley*. See *Anthony* v. *Baker*, 955 F.2d 1395, 1399-1401 (10th Cir. 1992). That case, like petitioner's, involved a claim that a law enforcement officer had procured an indictment against the plaintiff by presenting false evidence to the grand jury. Citing *Malley*, the court opined, "we are not convinced that the common law granted absolute immunity to a complaining witness who initiated—at least in part—a baseless prosecution by giving false testimony at a grand jury proceeding." *Id.* at 1399; see also *PJ ex rel. Jensen* v. *Wagner*, 603 F.3d 1182, 1195 (10th Cir. 2010) (noting that "the [appellants] correctly point out that a complaining witness is not entitled to absolute immunity").

The Ninth Circuit, too, denies absolute immunity to complaining witnesses before the grand jury. See *Kulas* v. *Flores*, 255 F.3d 780, 783 n.1 (9th Cir. 2001) ("Grand jury witnesses are generally immune from suit under § 1983 for their testimony. However, there is an exception to this immunity for law enforcement witnesses functioning as 'complaining witnesses.'") (internal citations omitted).

Indeed, the Ninth Circuit has gone beyond the holdings of the Second, Fifth, and Tenth Circuits to apply the complaining witness exception to *trial* as well as pretrial testimony. In *Harris* v. *Roderick*, 126 F.3d 1189 (9th Cir. 1997), the court denied immunity to two deputy United States marshals for their alleg-

edly false testimony before a grand jury *and* at the subsequent trial. It explained that *Briscoe* did not control because the marshals initiated and continued the prosecution through their own perjurious testimony: "We do not believe that the general policy that immunizes false official testimony requires that we preclude [plaintiff] from showing the full range of occasions on which [defendants'] falsehoods were uttered, simply because some of them occurred before a grand *or petit jury*." *Id*. at 1199 (emphasis added).

The Seventh Circuit also recognizes the complaining witness exception. See *Curtis* v. *Bembenek*, 48 F.3d 281, 285 n.5 (7th Cir. 1995) (noting that, at common law, "although an ordinary witness could not be sued at all, a 'complaining witness' (*i.e.*, the private party who actively instigated or encouraged the suit) could be sued for malicious prosecution"). The Seventh Circuit, like the Ninth, has stated that the complaining witness exception applies to *all* testimony, not just pretrial testimony. *Cervantes* v. *Jones*, 188 F.3d 805, 809 (7th Cir. 1999) ("An exception to this wall of immunity *for trial and pretrial testimony* exists for a 'complaining witness.'") (emphasis added), overruled on other grounds in *Newsome* v. *McCabe*, 256 F.3d 747, 751 (7th Cir. 2001).

Although the Sixth Circuit has not squarely ruled on this issue, it has applied the complaining witness exception to probable cause hearings, using language that suggests it would apply the exception to other *ex parte* pretrial proceedings such as grand jury proceedings. See *Vakilian* v. *Shaw*, 335 F.3d 509, 516 (6th Cir. 2003) ("Shaw testified at an *ex parte* proceeding where his actions were that of a 'complaining witness' rather than a 'testifying witness.' Because a complaining witness is not protected by absolute

immunity, neither is Shaw."). In contrast to the Ninth Circuit, however, the Sixth Circuit has explicitly held that the complaining witness exception "does not extend to testimony delivered at trial." *Moldowan* v. *City of Warren*, 578 F.3d 351, 390 (6th Cir. 2009), cert. denied, 130 S. Ct. 3504 (2010).

Likewise, the District of Columbia Circuit appears to recognize a complaining witness exception, which it calls "Perjurer's Liability" and defines as "assert[ing] that someone who causes an indictment and consequent arrest by perjuring himself or arranging for the submission of perjured testimony before the grand jury violates the Fourth Amendment." *Edmond* v. *U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 419 (D.C. Cir. 1991). In a case involving an allegedly racially-motivated prosecution initiated through false grand jury testimony, the court declared, "Perjurer's Liability is a valid constitutional tort theory * * *. The Supreme Court's reasoning in *Malley v. Briggs* would appear to settle that question." *Id.* at 423 (internal citation omitted); *cf. Gray* v. *Poole*, 275 F.3d 1113, 1119 (D.C. Cir. 2002) ("*Kalina* [v. *Fletcher*, 522 U.S. 118 (1997)] confirms that officials who serve as complaining witnesses receive qualified, not absolute, immunity.")

The majority of circuits that have considered this question thus interpret *Malley* as creating an exception to *Briscoe* applicable when a government official functions as a complaining witness before a grand jury or in other judicial proceedings.

2. Three Circuits Refuse To Recognize The Complaining Witness Exception For Judicial Testimony On The Basis Of Briscoe.

The Third, Fourth, and Eleventh Circuits have reached the opposite conclusion, holding that *Briscoe* controls in all cases of perjured testimony, even when a government official functions as a complaining witness.

In *Kulwicki* v. *Dawson*, 969 F.2d 1454 (3d Cir. 1992), the Third Circuit "decline[d] to interpret the language in *Malley* as overriding the broad witness protection announced in *Briscoe*." *Id*. at 1467 n.16. Although *Kulwicki* involved only trial, and not pretrial, testimony, the Third Circuit has also cited it for the proposition that complaining witnesses who testify before a grand jury are entitled to the same absolute immunity as trial witnesses. *Knight* v. *Poritz*, 157 Fed. App'x 481, 487 (3d Cir. 2005) (*per curiam*) (noting that "[i]n *Kulwicki*, we expressly rejected the argument that *Malley* carved out an exception to the general rule announced in *Briscoe v. LaHue* that government witnesses are afforded absolute immunity for statements made while testifying") (internal citation omitted).

The Eleventh Circuit declared in *Jones* v. *Cannon*, 174 F.3d 1271 (11th Cir. 1999), that it "expressly reject[s] carving out an exception to absolute immunity for grand jury testimony, even if false and even if [the detective] were construed to be a complaining witness." *Id.* at 1287 n.10. In that case, the plaintiff, who had been acquitted of two felony charges, alleged that the detective had purposely obtained a baseless indictment against him by lying to the grand jury. *Id.* at 1277-1279. Despite the detec-

tive's prominent role in initiating the prosecution, the Eleventh Circuit found that he was entitled to absolute immunity for his grand jury testimony. *Id.* at 1287. The court expressed concern that civil liability "would emasculate * * * the confidential nature of grand jury proceedings," concluding that the "remedy for false grand jury testimony is criminal prosecution for perjury." *Id*. at 1287 n.10.

The Fourth Circuit has reached the same result, albeit without explicitly referencing the complaining witness exception. In *Lyles* v. *Sparks*, 79 F.3d 372 (4th Cir. 1996), the plaintiffs brought a claim of "Perjurer's Liability," alleging that they had been wrongfully indicted on the basis of perjurious grand jury testimony. The court found that, under *Briscoe*, the defendant was entitled to "absolute immunity from the Perjurer's Liability claim." *Id.* at 378. At least one district court within the Fourth Circuit has stated that it understands *Lyles* to extend absolute immunity to complaining witnesses who testify. See *Collis* v. *United States*, 498 F. Supp. 2d 764, 771 (D. Md. 2007) ("Although it does not refer to the 'complaining witness' doctrine by name, but instead refers to such claims as 'Perjurer's Liability,' the Fourth Circuit has held that *Briscoe* controls such situations.").

In sum, there plainly is a deep and persistent division among the courts of appeals concerning the status and scope of the complaining witness exception. This Court should grant the petition to resolve the stark disagreement among the lower courts.

B. This Case Presents A Frequently Recurring Issue Of Substantial Importance.

Whether government officials may be held accountable for initiating a prosecution through perjurious testimony is a question that arises with considerable frequency throughout the United States, as the large number of circuit and district court decisions addressing this issue demonstrates. We have identified over 50 cases raising the complaining witness exception, spread throughout ten circuits and the federal district courts of twenty states.[10]

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[10] See, *e.g.*, *Watson* v. *Grady*, No. 09-CV-3055 (KMK), 2010 WL 3835047, at *5-*7 (S.D.N.Y. Sept. 30, 2010); *Jarvis* v. *Eaton*, No. 08-14221-BC, 2010 WL 3565809, at *4-*5 (E.D. Mich. Sept. 13, 2010); *Kerns* v. *Board of Comm'rs of Bernalillo County*, 707 F. Supp. 2d 1190, 1278-1279 (D.N.M. 2010); *McGuire* v. *Warner*, No. 05-40185, 2009 WL 2423173, at *2-*3 (E.D. Mich. Aug 3, 2009); *Manganiello* v. *City of New York*, No. 07 Civ. 3644(HB), 2008 WL 2358922, at *7-*8 (S.D.N.Y. June 10, 2008); *Finwall* v. *City of Chicago*, 490 F. Supp. 2d 918, 926 (N.D. Ill. 2007); *Chicago United Industries, Ltd.* v. *City of Chicago*, No. 05 C 5011, 2007 WL 1100746, at *7 (N.D. Ill. Apr. 10, 2007); *Hornung* v. *Madarang*, No. C06-2340 TEH, 2006 WL 3190671, at *4-*5 (N.D. Cal. Nov. 2, 2006); *Ester* v. *Faflak*, Civil No. 05-0049 (PJS/JSM), 2006 WL 2700288, at *15 (D. Minn. Sept. 18, 2006); *Caudill* v. *Owen*, No. 1:02CV663, 2005 WL 2654228, at *7 (S.D. Ohio Oct. 17, 2005); *Norris* v. *City of Aurora*, No. Civ.A.03CV1334WDMBNB, 2005 WL 1768758, at *7-*8 (D. Colo. July 25, 2005); *Orange* v. *Burge*, No. 04 C 0168, 2005 WL 742641, at *12 (N.D. Ill. Mar. 30, 2005); *Scott* v. *Vasquez*, No. CV 02-05296 GAF(AJW), 2004 WL 746259, at *3 (C.D. Cal. Feb. 18, 2004); *Crawford* v. *Pennsylvania*, No. Civ.A. 1:CV-03-693, 2003 WL 22169372, at *6-*8 (M.D. Pa. Sept. 12, 2003); *Pace* v. *Platt*, No. 3:01-CV-471/LAC, 2002 WL 32098709, at *5 (N.D. Fla. Sept. 10, 2002); *Evans* v. *City of Chicago*, No. 00 C 7222, 2001 WL 1028401, at *9 n.12 (N.D. Ill. Sept. 6, 2001); *Cipolla* v. *County of Rensselaer*, 129 F. Supp. 2d 436, 450-451 (N.D.N.Y. 2001); *Pierce* v. *Pawelski*, No. 98 C 3337, 2000 WL 1847778, at

Of the courts of appeals that recognize the complaining witness exception, many have explicitly focused on false testimony presented before the grand jury—precisely the issue in this case. The complaining witness exception serves as an especially critical protection in this context because the grand jury system provides defendants with far fewer procedural protections than most other judicial proceedings.

Prosecutors generally have no obligation to present exculpatory evidence to grand juries, grand jurors may consider evidence that would not be inadmissible at trial, and defendants ordinarily have no right to testify, present evidence, or even to be present for any part of the grand jury proceedings. "Consequently, the grand jurors hear only the evidence the prosecutor wants them to hear—'the most inculpatory version of the facts possible, regardless of whether that version is based on evidence that will be considered at trial.'" Gregory T. Fouts, *Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 Ind. L.J. 323, 328 (2004) (internal citations omitted). See also Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 Geo. L.J. 1265, 1293 (2006) (noting that because grand juries are neither fully prosecutorial nor judicial in nature, "the contradictory result [is] that grand jury action is deemed 'judicial' in effect, yet

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*5 (N.D. Ill. Dec. 14, 2000); *Sciance* v. *Muskingum County*, No. C2-98-1075, 2000 WL 1460076, at *5 (S.D. Ohio Sept. 29, 2000); *Walker* v. *Mendoza*, No. 00-CV-93(JG), 2000 WL 915070, at *6 (E.D.N.Y. June 27, 2000); *Mejia* v. *City of New York*, 119 F. Supp. 2d 232, 272-273 (E.D.N.Y. 2000); *Steeves* v. *McGrath*, No. 99 C 4567, 2000 WL 198895, at *2 (N.D. Ill. Feb. 11, 2000).

carries none of the procedural rights that normally characterize judicial action").

Perjury in such proceedings by government officials acting as complaining witnesses, especially by law enforcement officers, can have devastating effects on individuals wrongfully indicted, even when no conviction results. This Court itself has recognized the "adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives." *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1043 (1991) (plurality opinion). "An innocent suspect may have the charges dismissed or may be acquitted, but the sequella of an indictment may leave the defendant's reputation, personal relationships, and ability to earn a living so badly damaged that he may never be able to return to the life he knew before being accused." Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 Nw. U. L. Rev. 1297, 1299 (2000). Ultimately, though, the impact extends far beyond those individuals who are wrongfully indicted, as misconduct by government officials "diminishes one of our most crucial 'social goods'—trust in government." Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. Colo. L. Rev. 1037, 1039 (1996).

Whether a victim of false testimony will be able to vindicate his claim often will depend on whether a jurisdiction applies the complaining witness exception. Because claims of absolute and qualified immunity must be raised and resolved early in litigation, recognition of the complaining witness exception typically determines whether a Section 1983 claim involving false testimony survives a motion to dismiss. See *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991)

(*per curiam*) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."); *Mireles* v. *Waco*, 502 U.S. 9, 11 (1991) (*per curiam*) ("Judicial immunity is an immunity from suit, not just from ultimate assessment of damages.").

Several examples are illustrative:

- In *Garrett* v. *Stanton*, No. 08-0175-WS-M, 2009 WL 4258135 (S.D. Ala. Nov. 19, 2009), the lack of a complaining witness exception meant there was no relief against a police officer whose misidentification led to the indictment of a "wheelchair-bound stroke victim" on multiple drug charges. *Id.* at *1. The court in *Garrett* criticized the Eleventh Circuit's categorical rule, which "creates the somewhat anomalous result that a law enforcement officer who seeks to obtain a warrant by falsely testifying before a grand jury is entitled to absolute immunity, while one who does so via false affidavit submitted to a judge is not." *Id.* at *8 n.23.
- In *Pace* v. *Platt*, No. 3:01-CV-471/LAC, 2002 WL 32098709 (N.D. Fla. Sept. 10, 2002), the absence of a complaining witness exception meant that an Ohio lawyer indicted on eighty-one counts of criminal activity and acquitted of seventy-eight of them had no recourse against an IRS agent who falsely testified before a grand jury about the results of his criminal investigation.
- In *Ester* v. *Faflak*, No. 05-0049(PJS/JSM), 2006 WL 2700288 (D. Minn. Sept. 18, 2006), the lack of a complaining witness exception

> meant no relief for a plaintiff who spent five months in prison after a Homeland Security agent, attempting to obtain information about an unrelated murder, falsely accused the plaintiff before a grand jury of purchasing a controlled narcotic.
>
> * * * * *

This case presents an ideal vehicle to resolve the deeply entrenched conflict over the complaining witness exception for judicial testimony. This is the quintessential complaining witness case: respondent Paulk allegedly instigated the indictments, personally attested to the veracity of evidence that he knew was false, and did so while testifying before a grand jury. The parties directly raised the complaining witness issue in their pleadings, the Eleventh Circuit ultimately resolved the issued by selecting between this Court's rulings in *Briscoe* and *Malley*, and in doing so the Eleventh Circuit explicitly acknowledged that its decision diverged from the views of other circuits.

C. The Decision Below Ignored The Common Law Complaining Witness Exception To Absolute Immunity And Incorrectly Applied This Court's Precedents.

Government officials sued in Section 1983 actions typically are entitled only to *qualified* immunity for acts performed in the course of their duties. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982) ("For executive officials in general, * * * qualified immunity represents the norm.").[11] Officials enjoy *absolute*

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[11] See also *Butz* v. *Economou*, 438 U.S. 478, 506 (1978) (noting that "federal officials who seek absolute exemption from per-

immunity only for certain acts "intimately associated with the judicial phase of the criminal process." *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976).[12]

This Court determines the nature of an official's immunity from Section 1983 liability based in large part on the common law immunities that existed in 1871, when the statute was enacted. See, *e.g.*, *Malley*, 475 U.S. at 339-340 ("Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common law counterpart to the privilege he asserts."); *Briscoe* v. *LaHue*, 460 U.S. at 330 ("It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum. . . . One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common law principles, including defenses * * * and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.").

As the Court has recognized, there was no absolute immunity at common law for government officials functioning as complaining witnesses. *Malley*, 475 U.S. at 340-341 ("[C]omplaining witnesses were not absolutely immune at common law. In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a

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sonal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.").

[12] See also *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855 (2009) (absolute prosecutorial immunity in a Section 1983 suit against a prosecutor for failure to disclose impeachment material); *Burns* v. *Reed*, 500 U.S. 478, 492-496 (1991) (absolute prosecutorial immunity for participating in probable cause hearing, but not for giving legal advice to police).

complaint could be held liable if the complaint was made maliciously and without probable cause.") (citing *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 402 (1852); *Randall* v. *Henry*, 5 Stew. & P. 367 (Ala. 1834); *Bell* v. *Keepers*, 14 P. 542 (Kan. 1887); *Finn* v. *Frink*, 24 A. 853 (Me. 1892); 4 William Wait, Actions and Defenses 352-356 (1878)).

The Court invoked the common law complaining witness exception to hold in *Malley* that a police officer functioning as a complaining witness did not enjoy absolute immunity from Section 1983 claims. *Malley*, 475 U.S. at 342 ("[S]ince [Section 1983] on its face does not provide for *any* immunities, we would be going far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871.") (emphasis in original).

Malley set forth a powerful justification for applying only qualified, rather than absolute, immunity to officers acting as complaining witnesses: "[A]n officer who knows that objectively unreasonable decisions will be actionable may be motivated to reflect, before submitting a request for a warrant, upon whether he has a reasonable basis for believing that his affidavit establishes probable cause. * * * [S]uch reflection is desirable, because it reduces the likelihood that the officer's request for a warrant will be premature." *Id.* at 343.

Because this case involves a complaining witness and not an ordinary witness, it is controlled by *Malley* and not *Briscoe*. *Briscoe* drew on the common law history of immunity for parties and witnesses testifying in judicial proceedings, which dates back as early as the sixteenth century. See *Briscoe*, 460 U.S. at 330-331 (citing English common law cases up to the nineteenth century). Such immunity was granted

based on the fear that damages liability might lead to self-censorship in which "witnesses might be reluctant to come forward to testify" in the first place or that "once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability." *Briscoe*, 460 U.S. at 333. Such concerns about self-censorship do not apply to complaining witnesses, who, by definition, have complained openly and voluntarily to instigate legal action.

The Court's decision in *Kalina* v. *Fletcher*, 522 U.S. 118 (1997), confirms that the complaining witness doctrine established in *Malley* reaches a broad range of cases. *Kalina* explained that officials could function as complaining witnesses in a variety of contexts, applying *Malley*'s complaining witness exception from absolute immunity to a prosecutor who executed a certificate of probable cause. See *Kalina*, 522 U.S. at 129-130 ("Although the law required that [certification of probable cause] to be sworn or certified under penalty of perjury, neither federal nor state law made it necessary for the prosecutor to make that certification. In doing so, petitioner performed an act that any competent witness might have performed.").

Kalina also specifically suggested that the complaining witness exception applies to testimony. *Id.* at 130-131 ("Testifying about facts is the function of the witness, not of the lawyer. * * * Even when the person who makes the constitutionally required 'Oath or affirmation' is a lawyer, the only function that she performs in giving sworn testimony is that of a witness.").

The justifications for applying the complaining witness exception to the submission of affidavits (in *Malley*) and certifications of probable cause (in *Ka-*

lina) apply with equal force when an official is functioning as a complaining witness by testifying in a grand jury or other judicial proceeding. Just as warrants should not issue on false pretenses, indictments should not result from false testimony such as that alleged in this case. See Eugene Scalia, Comment, *Police Witness Immunity Under § 1983*, 56 U. Chi. L. Rev. 1433, 1458 (1989) ("[S]ubjecting police officers to suit for statements made in judicial proceedings does not necessarily deter them from effectively performing their jobs. Potentially, it merely handles police liability with the same solicitude for public and private interests expressed by the early common-law courts, and evinced by the Supreme Court in *Briscoe*.").

This Court has placed no limitations on the complaining witness exception, and *Kalina*'s broad reading of the exception—to allow it to apply even to a prosecutor—suggests it should not exclude grand jury or other judicial testimony. Rather, the reasoning of *Malley* and *Kalina* should apply here to preclude respondent from invoking absolute immunity for his false testimony as a complaining witness before the grand jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2010

APPENDICES

APPENDIX A

Filed July 16, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-11897

D. C. Docket No. 07-00022-CV-WLS-1

CHARLES A. REHBERG,

Plaintiff-Appellee,

versus

JAMES P. PAULK,
in his individual capacity,
KENNETH B. HODGES, III,
in his individual capacity and
in his official capacity as District
Attorney of Dougherty County
KELLY R. BURKE, in his
individual capacity,

Defendants-Appellants,

DOUGHERTY COUNTY,

Defendant.

Appeal from the United States District Court
for the Middle District of Georgia

(July 16, 2010)

ON PETITION FOR PANEL REHEARING

Before CARNES, HULL and ANDERSON, Circuit Judges.

HULL, Circuit Judge:

Upon consideration of Plaintiff-Appellee's petition for rehearing and to the extent it seeks panel rehearing, we vacate the prior opinion in this case, issued on March 11, 2010 and published at 598 F.3d 1268 (11th Cir. 2010), and substitute the following opinion in its place. Plaintiff-Appellee's petition for panel rehearing is granted in part and denied in part.

In this § 1983 action, Plaintiff Charles Rehberg sued former District Attorney Kenneth Hodges, specially appointed prosecutor Kelly Burke, and Chief Investigator James Paulk, alleging federal claims for malicious prosecution, retaliatory investigation and prosecution, evidence fabrication, and conspiracy to violate Rehberg's constitutional rights. Defendants Hodges, Burke, and Paulk, in their individual capacities, appeal the district court's denial of absolute and qualified immunities. After review and oral argument, we affirm in part and reverse in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

We review Rehberg's version of the events as alleged in his complaint, accepting them as true.[1]

A. The Investigation

From September 2003 to March 2004, Plaintiff Rehberg sent anonymous faxes to the management of Phoebe Putney Memorial Hospital (the "hospital"). The faxes criticized and parodied the management and activities of the hospital.

Defendant Hodges, then the District Attorney of Dougherty County, Georgia, and Defendant Paulk, the Chief Investigator in the District Attorney's Office, investigated Rehberg's actions as a "favor" to the hospital, to which Hodges and Paulk are alleged to have political connections. Rehberg alleges Hodges and Paulk lacked probable cause to initiate a criminal investigation of him.

From October 2003 to February 2004, Defendants Hodges and Paulk prepared a series of subpoenas on Hodges's letterhead and issued the subpoenas to BellSouth and Alltel (later Sprint), requesting Rehberg's telephone records. "Mr. Paulk also prepared and issued a subpoena to Exact Advertising, the Internet service provider of one of Mr. Rehberg's email accounts, and obtained Mr. Rehberg's personal e-mails that were sent and received from his personal computer." Compl. ¶ 37, *Rehberg* v. *Paulk*, No. 1:07-CV-22(WLS) (M.D. Ga. Jan. 23,

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[1]In reviewing a Rule 12(b)(6) motion to dismiss, we accept as true the factual allegations in the complaint and all reasonable inferences therefrom. Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1534 (11th Cir. 1994).

2007). Although no grand jury was impaneled at the time, the subpoenas purported to require appearance before a Dougherty County grand jury. Rehberg's case was not presented to a grand jury until December 14, 2005.

Defendant Paulk gave the results of the subpoenas, consisting of Rehberg's personal emails and phone records, to private civilian investigators, who allegedly directed the substance of the subpoenas. These civilian investigators paid the District Attorney's Office for Rehberg's information, often making payments directly to BellSouth and the other subpoenaed parties, allegedly to pay debts of the District Attorney's Office.

After receiving unfavorable press coverage of his relationships with the hospital, Hodges recused himself from prosecuting Rehberg. Burke was appointed a special prosecutor in Hodges's place. Hodges continued to supervise Paulk and remained in communication with Burke throughout the investigation, but he "never served as the actual prosecutor of the charges against Mr. Rehberg before the Grand Jury."

B. First Indictment

On December 14, 2005, a grand jury indicted Rehberg on charges of aggravated assault, burglary, and six counts of "harassing phone calls." Burke was the prosecutor, and Paulk was the sole complaining witness against Rehberg before the grand jury. The first indictment alleged Rehberg assaulted Dr. James Hotz after unlawfully entering Dr. Hotz's home. In fact, Rehberg has never been to Dr. Hotz's home, and Dr. Hotz never reported an assault or burglary to law enforcement agencies. Paulk later admitted that he never interviewed any witnesses or gathered evi-

dence indicating Rehberg committed an aggravated assault or burglary. And the alleged "harassing" phone calls to Dr. Hotz all were related to the faxes Rehberg had already sent criticizing the hospital.

The City of Albany Police Department[2] did not participate in the investigation. Paulk stated that he and Hodges initiated and handled the investigation on their own because they lacked confidence in the police department's ability to handle the investigation.

Rehberg contested the legal sufficiency of the first indictment. On February 2, 2006, Defendant Burke dismissed and nol-prossed the first indictment.

C. Second Indictment

On February 15, 2006, Defendants Burke and Paulk initiated charges before a second grand jury. Paulk and Dr. Hotz appeared as witnesses. The grand jury issued a second indictment, charging Rehberg with simple assault against Dr. Hotz on August 22, 2004 and five counts of harassing phone calls.

Rehberg contested the sufficiency of the second indictment too. Rehberg alleged he was "nowhere near Dr. Hotz on August 22, 2004," and "[t]here was no evidence whatsoever that Mr. Rehberg committed an assault on anybody as he was charged." At a pretrial hearing on April 10, 2006, Defendant Burke announced the second indictment would be dismissed, but Burke did not dismiss it. On July 7, 2006, the state trial court ordered it dismissed.

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[2]The City of Albany, Georgia, is in Dougherty County.

D. Third Indictment

On March 1, 2006, Defendants Burke and Paulk appeared before a third grand jury and secured a third indictment against Rehberg, charging him with simple assault and harassing telephone calls. At some unspecified time, Rehberg was arrested and briefly detained pursuant to an arrest warrant issued as a result of the second and third indictments.

On May 1, 2006, the state trial court issued two orders dismissing all charges against Rehberg because the third indictment did not sufficiently charge Rehberg with a criminal offense.

The three indictments against Rehberg were widely reported in the local press. Defendant Burke conducted interviews with the press and issued statements saying: (1) "[I]t is never free speech to assault or harass someone, no matter who they are and no matter how much you don't like them," and (2) "It would be ludicrous to say that an individual has the right to go onto someone else's property and burn a cross under the guise of free speech, which is tantamount to what these defendants are claiming."

E. District Court Proceedings

Plaintiff Rehberg filed a verified complaint against Defendants Hodges, Burke, and Paulk, in their individual capacities. Rehberg's complaint alleges ten counts, including these four federal § 1983 claims at issue in this appeal:[3] (1) malicious prosecu-

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[3]Rehberg's complaint also alleges state-law claims for negligence (Counts 1 & 2) and invasion of privacy (Counts 3 & 4) against Paulk, which the district court refused to dismiss. At this juncture, Defendant Paulk has not appealed the district court's rulings on those state-law claims. At oral argument,

tion against Hodges and Paulk in violation of Rehberg's Fourth and Fourteenth Amendment rights (Count 6); (2) retaliatory investigation and prosecution against Hodges and Paulk, for their alleged retaliation against Rehberg because he exercised First Amendment free speech rights (Count 7); (3) participation in evidence fabrication, calling Paulk to give false testimony to the grand jury, and giving false statements to the media against Burke only (Count 8); and (4) conspiracy to violate Rehberg's constitutional rights under the First, Fourth, and Fourteenth Amendments, against Hodges, Burke, and Paulk (Count 10).[4]

Defendants Hodges, Burke, and Paulk moved to dismiss these counts pursuant to Federal Rule of Civil Procedure 12(b)(6). They claimed absolute immunity, and, alternatively, qualified immunity. The district court denied the Defendants' motions.

Defendants Hodges, Burke, and Paulk, in their individual capacities, appeal the district court's denials of immunity as to Rehberg's above four federal

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counsel for Defendant Paulk confirmed to the Court that the state-law claims in Counts 1, 2, 3, and 4 against Paulk were not on appeal.

[4]Plaintiff Rehberg also sued Dougherty County and Hodges, in his official capacity. Rehberg withdrew Count 5 against Dougherty County in response to its claim of sovereign immunity. Rehberg has not appealed the district court's dismissal of Count 9 against Dougherty County, which effectively dismissed Count 9 against Hodges because an official capacity claim against Hodges is another moniker for a claim against Dougherty County, Hodges's employer. See Brown v. Neumann, 188 F.3d 1289, 1290 (11th Cir. 1999). Thus only Counts 6, 7, 8, and 10 are involved in this appeal.

constitutional claims.[5] We discuss absolute and qualified immunity and then Rehberg's claims.

II. IMMUNITY LAW

A. Absolute Immunity

Traditional common-law immunities for prosecutors apply to civil cases brought under § 1983. Imbler v. Pachtman, 424 U.S. 409, 427-28, 96 S. Ct. 984, 993-94 (1976). "[A]t common law, '[t]he general rule was, and is, that a prosecutor is absolutely immune from suit for malicious prosecution.'" Malley v. Briggs, 475 U.S. 335, 342, 106 S. Ct. 1092, 1097 (1986) (quoting Imbler, 424 U.S. at 437, 96 S. Ct. at 998). In § 1983 actions, prosecutors have absolute immunity for all activities that are "'intimately associated with the judicial phase of the criminal process.'" Van de Kamp v. Goldstein, __ U.S. __, 129 S.Ct. 855, 860 (2009) (quoting Imbler, 424 U.S. at 430, 96 S. Ct. at 995); accord Jones v. Cannon, 174 F.3d 1271, 1281 (11th Cir. 1999).

Absolute immunity does not depend entirely on a defendant's job title, but involves a functional approach granting immunity based on conduct. Jones, 174 F.3d at 1282. This functional approach looks to "the nature of the function performed, not the identity of the actor who performed it." Buckley v. Fitzsimmons, 509 U.S. 259, 269, 113 S. Ct. 2606, 2613

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[5]The denial of absolute or qualified immunity on a motion to dismiss is an appealable interlocutory order. See Jones v. Cannon, 174 F.3d 1271, 1280-81 (11th Cir. 1999); Maggio v. Sipple, 211 F.3d 1346, 1350 (11th Cir. 2000) (citing Mitchell v. Forsyth, 472 U.S. 511, 530 (1985)). We review de novo the district court's denial of a motion to dismiss on the basis of absolute or qualified immunity. Maggio, 211 F.3d at 1350; Scarbrough v. Myles, 245 F.3d 1299, 1302 (11th Cir. 2001).

(1993); accord Imbler, 424 U.S. at 431 n. 33, 96 S. Ct. at 955 n. 33.

Absolute immunity accordingly applies to the prosecutor's actions "in initiating a prosecution and in presenting the State's case." Imbler, 424 U.S. at 431, 96 S. Ct. at 955. Prosecutors are immune for appearances in judicial proceedings, including prosecutorial conduct before grand juries, statements made during trial, examination of witnesses, and presentation of evidence in support of a search warrant during a probable cause hearing. Burns v. Reed, 500 U.S. 478, 490-92, 111 S. Ct. 1934, 1942 (1991); Kalina v. Fletcher, 522 U.S. 118, 126, 118 S. Ct. 502, 507-08 (1997); see also Van de Kamp, 129 S.Ct. at 861. "A prosecutor enjoys absolute immunity from allegations stemming from the prosecutor's function as advocate." Jones, 174 F.3d at 1281. Such absolute immunity also "extends to a prosecutor's acts undertaken . . . in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State." Id. (quotation marks omitted); accord Rowe v. City of Fort Lauderdale, 279 F.3d 1271, 1279-80 (11th Cir. 2002) (holding prosecutor who proffered perjured testimony and fabricated exhibits at trial is entitled to absolute immunity, but a prosecutor who participated in the search of a suspect's apartment is entitled to only qualified immunity).

If a prosecutor functions in a capacity unrelated to his role as an advocate for the state, he is not protected by absolute immunity but enjoys only qualified immunity. Kalina, 522 U.S. at 121, 118 S. Ct. at 505 (concluding prosecutor was acting as a witness in personally attesting to truth of averments in a "Certification for Determination of Probable Cause"

for an arrest warrant and was not absolutely immune for that witness act, but that prosecutor was absolutely immune for preparing and filing an "information charging respondent with burglary and a motion for an arrest warrant"); Buckley, 509 U.S. at 275-77, 113 S. Ct. at 2616-18 (concluding prosecutor's pre-indictment fabrication of third-party expert testimony linking defendant's boot to bootprint at murder scene and post-indictment participation in a press conference were not protected by absolute immunity); Burns, 500 U.S. at 496, 111 S. Ct. at 1944-45 (stating prosecutors do not enjoy absolute immunity for giving pre-indictment legal advice to the police). A prosecutor is not entitled to absolute immunity when he "performs the investigative functions normally performed by a detective or police officer." Buckley, 509 U.S. at 273, 113 S. Ct. at 2616; accord Jones, 174 F.3d at 1281-82 ("Although absolutely immune for actions taken as an advocate, the prosecutor has only qualified immunity when performing a function that is not associated with his role as an advocate for the state"); see also Malley, 475 U.S. at 340-41, 106 S. Ct. at 1096 (concluding police officer was not absolutely immune for drafting "felony complaints" with malice and without probable cause and submitting them in support of an application for arrest warrants).

B. Qualified Immunity

Qualified immunity shields government officials who perform discretionary governmental functions from civil liability so long as their conduct does not violate any "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). A government

agent is entitled to immunity unless his act is "so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing." Lassiter v. Ala. A&M Univ., 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc).

To evaluate claims of qualified immunity, the Court considers whether (1) the plaintiff has alleged a violation of a constitutional right; and (2) whether the right was "clearly established" at the time of the defendant's misconduct. This two-pronged analysis may be done in whatever order is deemed most appropriate for the case. Pearson v. Callahan, 555 U.S. ___, 129 S.Ct. 808, 821 (2009).

With this immunity background, we turn to Rehberg's claims.

III. COUNT 6 – MALICIOUS PROSECUTION

Count 6 alleges Defendants Hodges and Paulk violated Rehberg's Fourth and Fourteenth Amendment rights through their "malicious prosecution" of him, resulting in his indictment and arrest.[6] Rehberg alleges that (1) Hodges and Paulk knew there was no probable cause to indict him, and therefore they got together with malice, fabricated evidence (i.e., Paulk's false testimony), and decided to present that fabricated evidence to the grand jury; (2) Paulk, at Hodges's direction, then testified falsely before the grand jury, resulting in Rehberg's indictment and ar-

[6]Rehberg alleges his arrest was an unreasonable seizure. The Fourth Amendment protection against "unreasonable" searches and seizures was made applicable to the States through the Fourteenth Amendment. Major League Baseball v. Crist, 331 F.3d 1177, 1179 n. 4 (11th Cir. 2003).

rest; and (3) Hodges and Paulk invaded Rehberg's privacy by illegally issuing subpoenas to BellSouth, Alltel, and Exact Advertising, without any pending indictment and as a discovery device for private civilians. We first discuss Paulk's false testimony before the grand jury and then the Defendants' pre-indictment conduct and subpoenas.

A. Paulk's Grand Jury Testimony

Even if Hodges and Paulk knew Paulk's testimony was false, Paulk receives absolute immunity for the act of testifying to the grand jury. Briscoe v. LaHue, 460 U.S. 325, 326, 103 S. Ct. 1108, 1111-12 (1983) (affirming that common-law immunities granted to witnesses in judicial proceedings required giving absolute immunity from § 1983 suit to police officer accused of giving false testimony at trial); Burns, 500 U.S. at 492, 111 S. Ct. at 1492 (holding prosecutor was absolutely immune for "appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing"); Jones, 174 F.3d at 1288 ("[P]rosecutors and witnesses have absolute immunity for claims of conspiracy to commit perjury based on a witness's allegedly false testimony at trial, before a grand jury, or at a post-conviction hearing."); Strength v. Hubert, 854 F.2d 421, 422-24 (11th Cir. 1988) (concluding investigator for state Attorney General's office received absolute immunity for false testimony to a grand jury, at which the defendant investigator was the sole witness);[7] Kelly v. Curtis, 21 F.3d 1544, 1553 (11th Cir. 1994) (holding detective immune for grand jury testimony).

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[7]Overruled on other grounds, Whiting v. Traylor, 85 F.3d 581 (11th Cir. 1996).

We recognize that Plaintiff Rehberg alleges Defendant Paulk was the sole "complaining witness" before the grand jury. However, in Jones, "we expressly reject[ed] carving out an exception to absolute immunity for grand jury testimony, even if false and even if [the detective] were construed to be a complaining witness." Jones, 174 F.3d at 1287 n. 10; see Rowe, 279 F.3d at 1285 (stating Jones "reject[ed] an exception for the testimony of 'complaining witnesses'"). In Jones, this Court aligned itself with the Third Circuit's decision in Kulwicki v. Dawson, 969 F.2d 1454, 1467 n. 16 (3d Cir. 1992), which rejected the "complaining witness" exception to absolute immunity for false grand jury testimony. Jones, 174 F.3d at 1287 n. 10. The Jones Court reasoned that allowing civil suits for false grand jury testimony would result in depositions, emasculate the confidential nature of grand jury testimony, and eviscerate the traditional absolute immunity for witness testimony in judicial proceedings:

> [T]his case vividly illustrates the serious problems with carving out such an exception and imposing civil liability for . . . false testimony deceiving the grand jury. To prove or to defend against such a claim would necessitate depositions from the prosecutor, the grand jury witnesses, and the grand jury members . . . [which], in effect, would emasculate both the absolute immunity for grand jury testimony and the confidential nature of grand jury proceedings. The remedy for false grand jury testimony is criminal prosecution for perjury and not expanded civil liability and damages.

Jones, 174 F.3d at 1287 n. 10.[8] And the Supreme Court "consistently ha[s] recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." United States v. Sells Eng'g, Inc., 463 U.S. 418, 424, 103 S. Ct. 3133, 3138 (1983) (quotation marks omitted). Based on Jones, we reject Rehberg's "complaining witness" exception to absolute immunity for false grand jury testimony.[9]

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[8]In Mastroianni v. Bowers, 173 F.3d 1363 (11th Cir. 1999), this Court declined to decide whether to adopt a "complaining witness" exception because there was no factual finding in that case that the defendant Georgia Bureau of Investigation officer was equivalent to a "complaining witness." Id. at 1367 n. 1. So Mastroianni did not answer the question presented here, but Jones did.

[9]Two circuits carved out a complaining-witness exception to absolute immunity for false grand jury testimony. See, e.g., Harris v. Roderick, 126 F.3d 1189, 1199 (9th Cir. 1997) (Deputy U.S. Marshals not absolutely immune for false testimony before a grand and petit jury); White v. Frank, 855 F.2d 956 (2d Cir. 1988) (police officer, as the "complaining witness," was not absolutely immune for false grand jury testimony). These decisions rely on Malley v. Briggs, 475 U.S. at 340, 106 S. Ct. at 1096, which concluded that a police officer did not receive absolute immunity for drawing up "felony complaints" with malice and without probable cause and submitting them in support of an application for arrest warrants. The Supreme Court held similarly in Kalina v. Fletcher, 522 U.S. at 120, 129-31, 118 S. Ct. at 505, 509-10, finding a prosecutor was not absolutely immune for acting as a witness in personally attesting to the truth of averments in a certification affidavit supporting an application for probable cause for an arrest warrant.

Acknowledging White v. Frank relies on Malley, the Jones Court noted that carving out an immunity exception for grand jury testimony would eviscerate the secrecy of grand jury proceedings, a concern not implicated by the "felony complaints"

B. Hodges and Paulk's Pre-Indictment Investigation

Distilled to its essence, Defendants' alleged pre-indictment conduct (excepting the subpoenas) is this: Hodges and Paulk, acting as investigators, got together as a favor to the hospital, with malice and without probable cause, and made up a story about Rehberg, and then Paulk (at Hodges's direction) told that fake story under oath to the grand jury, leading to Rehberg's indictment and arrest. We already determined supra that Paulk receives absolute immunity for the actual grand jury testimony itself. The question before us now is whether absolute immunity applies to the alleged conspiracy decision in the investigative stage to make up and present Paulk's false testimony to the grand jury. Our precedent answers this question too. See Mastroianni, 173 F.3d at 1367; Rowe, 279 F.3d at 1282; Jones, 174 F.3d at 1289.

In Mastroianni, the plaintiff alleged defendant Yeomans, a Georgia Bureau of Investigation agent, "engaged in a pretestimonial conspiracy to present false evidence, for which neither absolute nor qualified immunity is available." Mastroianni, 173 F.3d at 1367. This Court first stressed that "a witness has absolute immunity from civil liability based on his grand jury testimony. See Strength, 854 F.2d at 425, relying on Briscoe v. La Hue, 460 U.S. 325, 103 S. Ct. 1108 [ ] (1983)." Id. The Mastroianni Court then pointed out that while the plaintiff "contend[ed] that Yeomans committed numerous acts in furtherance of a conspiracy to present false testimony before the

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filed to support an arrest warrant in Malley and the personal certification for an arrest warrant in Kalina.

grand jury convened, the record itself support[ed] such an inference only if we consider as evidence Yeomans' testimony as it relates back to Yeomans' pretestimonial acts and statements." Mastroianni, 173 F.3d at 1367. In other words, because the only evidence to show a conspiracy in the pre-indictment phase was Yeomans's later false grand jury testimony, and because Yeomans was immune for that testimony, we concluded that Yeomans was absolutely immune for conspiracy to present or give grand jury testimony. Id. ("Because we may not consider such testimony as a factor upon which to base Yeomans' potential liability, we conclude that Yeomans is entitled to absolute immunity for his actions in this case").

This Court subsequently applied Mastroianni in Jones and Rowe, in each case concluding that absolute immunity applied equally both to the false testimony itself and to the alleged conspiracies to present false testimony. Jones, 174 F.3d at 1289 ("To allow a § 1983 claim based on subornation of perjured testimony where the allegedly perjured testimony itself is cloaked in absolute immunity would be to permit through the back door what is prohibited through the front"); Rowe, 279 F.3d at 1282 ("It would be cold comfort for a prosecutor to know that he is absolutely immune from direct liability for actions taken as prosecutor, if those same actions could be used to prove him liable on a conspiracy theory involving conduct for which he was not immune").

Since Paulk receives absolute immunity for his false testimony before the grand jury, Hodges and Paulk are similarly immune for their alleged conspiracy to fabricate and present false testimony to the grand jury. Rowe, 279 F.3d at 1282 ("[A] wit-

ness's absolute immunity from liability for testifying forecloses any use of that testimony as evidence of the witness's membership in a conspiracy prior to his taking the stand").

It is important to point out that Hodges and Paulk generally would not receive absolute immunity for fabricating evidence, because investigating and gathering evidence falls outside the prosecutor's role as an advocate. See Buckley, 509 U.S. at 262-64, 113 S. Ct. at 2610-11 (no immunity for prosecutor who fabricated expert testimony linking defendant's boot with bootprint at murder scene); Rowe, 279 F.3d at 1281 (no immunity for fabrication of jump rope); Jones, 174 F.3d at 1289-90 (no immunity for fabrication of bootprint); Riley v. City of Montgomery, Ala., 104 F.3d 1247, 1253 (11th Cir. 1997) (no immunity for police officer's planting of cocaine). All of these cases involved a particular discrete item of physical or expert evidence that was falsely created during the investigative stage to link the accused to a crime.

In contrast, there is no allegation of any physical or expert evidence that Hodges or Paulk fabricated or planted. There is no allegation of a pre-indictment document such as a false affidavit or false certification. Rather, Hodges and Paulk are accused of fabricating together only the testimony Paulk later gave to the grand jury. No evidence existed until Paulk actually testified to the grand jury. Stated differently, the only evidence Rehberg alleges was fabricated is Paulk's false grand jury testimony, for which Paulk receives absolute immunity.[10]

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[10]Rehberg does not allege, for instance, that Hodges and Paulk fabricated physical evidence linking him to Dr. Hotz's house or convinced another witness to testify falsely about Re-

For all these reasons, we conclude Hodges and Paulk are entitled to absolute immunity for the pre-indictment conduct of conspiring to make up and present Paulk's false testimony to the grand jury.

C. Subpoenas During Investigation

Rehberg's allegations regarding the subpoenas to his telephone and Internet providers all recount pre-indictment investigative conduct by Hodges and Paulk.[11] A prosecutor loses the cloak of absolute immunity by stepping out of his role as an advocate and performing "investigative" functions more commonly performed by law enforcement officers. Buckley, 509 U.S. at 273, 113 S. Ct. at 2616; Burns, 500 U.S. at 496; Rowe, 279 F.3d at 1280, 111 S. Ct. at 1944-45; Jones, 174 F.3d at 1285. Hodges and Paulk accordingly do not receive absolute immunity for preparing and filing subpoenas during the investigation of Rehberg.

Hodges and Paulk may, however, receive qualified immunity if Rehberg's subpoena allegations either do not state a constitutional violation or do not state a constitutional violation that was clearly established. Pearson, 129 S.Ct. at 815-16, 821-22. Rehberg claims the subpoenas violated his Fourth Amendment right to be free of unreasonable search and seizure.[12]

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hberg's involvement. The only evidence presented to the grand jury was Paulk's testimony and Dr. Hotz's testimony (which Rehberg does not allege was false).

[11]Rehberg's complaint does not allege Defendant Burke participated in the issuance of the subpoenas.

[12]The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects,

In order for Fourth Amendment protections to apply, the person invoking the protection must have an objectively reasonable expectation of privacy in the place searched or item seized. Minnesota v. Carter, 525 U.S. 83, 88, 119 S. Ct. 469, 473 (1998); Katz v. United States, 389 U.S. 347, 353, 88 S. Ct. 507, 512 (1967). To establish a reasonable expectation of privacy, the person must show (1) that he manifested "a subjective expectation of privacy" in the item searched or seized, and (2) a willingness by society "to recognize that expectation as legitimate." United States v. McKennon, 814 F.2d 1539, 1543 (11th Cir. 1987).

The Supreme Court "consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Smith v. Maryland, 442 U.S. 735, 743-44, 99 S. Ct. 2577, 2582 (1979). "[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." United States v. Miller, 425 U.S. 435, 443, 96 S. Ct. 1619, 1624 (1976).

More specifically, a person does not have a legitimate expectation of privacy in numerical information he conveys to a telephone company in the ordinary course of business. Smith, 442 U.S. at 743-44, 99 S. Ct. at 2582 ("[E]ven if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is

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against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

not one that society is prepared to recognize as reasonable") (quotation marks omitted); accord United States v. Thompson, 936 F.2d 1249, 1250 (11th Cir. 1991) ("The Supreme Court has held that the installation of a pen register does not constitute a search under the Fourth Amendment of the Constitution and does not warrant invocation of the exclusionary rule.").

Here, Rehberg lacked a legitimate expectation of privacy in the phone and fax numbers he dialed. Once he voluntarily provided that information to BellSouth and Alltel (later Sprint), Rehberg lacked any further valid expectation that those third parties would not turn the information over to law enforcement officers. Absent a valid right of privacy, Rehberg cannot state a constitutional violation regarding the subpoenas for his phone and fax information, and Paulk and Hodges accordingly are entitled to qualified immunity for issuing those subpoenas to BellSouth and Alltel.

This case presents a closer question over whether Paulk violated Rehberg's Fourth Amendment rights by issuing a subpoena to Rehberg's Internet Service Provider ("ISP") and obtaining "Mr. Rehberg's personal e-mails that were sent and received from his personal computer." Compl. ¶ 37, *Rehberg* v. *Paulk*, No. 1:07-CV-22(WLS) (M.D. Ga. Jan. 23, 2007). This is a question of first impression in this Circuit. Thus, we examine how other circuits have considered privacy rights in email material, such as email addresses, Internet subscriber information, and the contents of emails stored either on an ISP server or on a private computer/server, or both.

Several circuits have concluded that a person lacks legitimate privacy expectations in Internet

subscriber information and in to/from addresses in emails sent via ISPs. See, e.g., United States v. Perrine, 518 F.3d 1196, 1204-05 (10th Cir. 2008) ("Every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy expectation") (collecting cases from the Fourth, Sixth, and Ninth Circuits and district courts in West Virginia, Massachusetts, Connecticut, Maryland, New York, and Kansas); United States v. Forrester, 512 F.3d 500, 510 (9th Cir. 2008) ("[E]-mail and Internet users have no expectation of privacy in the to/from addresses of their messages or the IP addresses of the websites they visit because they should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing of information.").

To date only a few circuit decisions address the issue of Fourth Amendment protection of email content. Some circuit decisions suggest in dicta that a person loses a legitimate expectation of privacy in emails sent to and received by a third-party recipient. In Guest v. Leis, 255 F.3d 325, 333 (6th Cir. 2001), the Sixth Circuit noted that Internet bulletin board users lack a valid Fourth Amendment expectation of privacy in materials they voluntarily posted to a public Internet bulletin board. Id. The Sixth Circuit reasoned that a person would lose a legitimate expectation of privacy in a sent email that had already reached its recipient, analogizing an emailer to a letter-writer, whose "'expectation of privacy ordinarily terminates upon delivery'" of a letter. Id. (quoting United States v. King, 55 F.3d 1193, 1196 (6th Cir. 1995)). Ultimately, however, the Sixth Circuit did not resolve this constitutional question because it determined that the plaintiffs had not shown

a genuine issue of fact over whether the defendants actually searched their emails, and thus could not show a Fourth Amendment violation even assuming a privacy right had been violated. Id. at 335.[13]

In United States v. Lifshitz, 369 F.3d 173, 190 (2d Cir. 2004), the Second Circuit cited Guest and noted that the defendant, who challenged the constitutionality of a probation condition allowing monitoring of his computer, "may not [ ] enjoy [ ] an expectation of privacy in transmissions over the Internet or e-mail that have already arrived at the recipient." Id. However, the Second Circuit ultimately noted that as a probationer, the defendant would be subject to a reduced expectation of privacy. The Second Circuit thus did not issue a constitutional holding on the privacy rights of private citizens in email content. Id.

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[13]Plaintiff Rehberg points to Warshak v. United States, 490 F.3d 455 (6th Cir. 2007), reh'g en banc granted, opinion vacated (6th Cir. Oct. 9, 2007) (criminal investigation of plaintiff), in which a Sixth Circuit panel concluded "that individuals maintain a reasonable expectation of privacy in e-mails that are stored with, or sent or received through, a commercial ISP." Id. at 473. In reaching this conclusion, the Sixth Circuit panel distinguished its circuit precedent in Guest: "Although we stated that an e-mail sender would 'lose a legitimate expectation of privacy in an e-mail that had already reached its recipient,' analogizing such an e-mailer to 'a letter-writer,' this diminished privacy is only relevant with respect to the recipient, as the sender has assumed the risk of disclosure by or through the recipient. [Guest, 255 F.3d] at 333. Guest did not hold that the mere use of an intermediary such as an ISP to send and receive e-mails amounted to a waiver of a legitimate expectation of privacy." Id. at 472. The Sixth Circuit en banc subsequently vacated the Warshak opinion because the criminal investigation was over, there was no ongoing possibility of a Fourth Amendment violation, and thus the case was not ripe. Warshak v. United States, 532 F.3d 521 (6th Cir. 2008).

The Supreme Court has not yet addressed the question of privacy rights in email material. Plaintiff Rehberg thus relies on Supreme Court precedent on privacy rights accorded to the contents of telephone communications. In Katz, the Supreme Court first recognized a privacy expectation in the contents of a telephone conversation in a closed public phone booth. Katz, 389 U.S. at 353, 88 S. Ct. at 512. In Smith v. Maryland, the Supreme Court refined that privacy expectation, noting the distinction between the contents of a telephone call (for which a legitimate privacy expectation exists) and the actual phone numbers dialed (no privacy expectation). 442 U.S. at 743-44, 99 S. Ct. at 2582.

The Supreme Court's more-recent precedent shows a marked lack of clarity in what privacy expectations as to content of electronic communications are reasonable. In City of Ontario v. Quon, No. 08-1332, slip. op., 78 U.S.L.W. 4591 (U.S. June 17, 2010), the Supreme Court reversed the Ninth Circuit's decision that held a government employee had a reasonable expectation of privacy in text messages sent and received by a third party. The plaintiff police sergeant sued the City for violating his Fourth Amendment rights by obtaining and reviewing transcripts of personal text messages he sent and received from a pager that was owned by the City and issued to him for work use. Id. at 1, 5. The parties disputed whether the plaintiff, as a public employee, had an objectively reasonable expectation of privacy in those text messages. Id. at 9-10.

Even after the briefs of 2 parties and 10 amici curiae, the Supreme Court declined to decide whether the plaintiff's asserted privacy expectations were reasonable. Id. at 9, 11-12. The Supreme Court

acknowledged that the case "touches issues of far-reaching significance." Id. at 1. After remarking that it "must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer," the Supreme Court cautioned that "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." Id. at 10. The Supreme Court explained: "In Katz, the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth." Id. In contrast, the Supreme Court found "[i]t is not so clear that courts at present are on so sure a ground" as to electronic devices. Id. Therefore, the Supreme Court admonished that "[p]rudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations" in communications on electronic devices. Id. The Supreme Court specifically noted that ongoing "[r]apid changes in the dynamics of communication and information transmission" caused similar rapid change "in what society accepts as proper behavior." Id. at 11.

To underscore its disinclination to establish broad precedents as to privacy rights vis-a-vis electronic devices and emerging technologies, the Supreme Court explained the difficulty in determining what privacy expectations are reasonable, stating:

> [T]he Court would have difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable. Cell phone

> and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.

Id. at 11. The Supreme Court again eschewed "a broad holding," finding it "preferable to dispose of this case on narrower grounds" and "settled principles." Id. at 1, 11-12. It declined to answer the constitutional question of whether the plaintiff's privacy expectation was reasonable or even to set forth the governing principles to answer that question. Instead, the Supreme Court (1) assumed arguendo that plaintiff Quon had a reasonable expectation of privacy, (2) assumed that the government's review of a transcript of his text messages was a search under the Fourth Amendment, and even (3) assumed principles governing a search of a physical office applied to "the electronic sphere." Id. 12. It then concluded that the plaintiff's government employer did not violate the Fourth Amendment because its review of his personal text messages on a government-owned pager was reasonable and motivated by a legitimate work-related purpose. Id. at 12, 16-17 (citing

O'Connor v. Ortega, 480 U.S. 709, 725, 107 S. Ct. 1492, 1502 (1987)).

As these varied cases suggest, the questions of whether Fourth Amendment principles governing a search of Rehberg's home also should apply to subpoenas sent to a third-party ISP for electronic data stored on the third-party's server, and whether Rehberg had a reasonable privacy expectation in the contents of his personal emails sent voluntarily through that third-party ISP, are complex, difficult, and "far-reaching" legal issues that we should be cautious about resolving too broadly. As the Supreme Court advised us, "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." Id. at 10. Given the lack of precedent, we now question whether it would be prudent in this case and on this limited factual record to establish broad precedent as to the reasonable privacy expectation in email content. Moreover, because this is a qualified immunity case, we need not reach the underlying constitutional issue. Instead, we can resolve this case narrowly, cf. id. at 1, because at a minimum Rehberg has not shown his alleged constitutional right was clearly established.[14]

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[14]In his petition for panel rehearing, Rehberg also tangentially mentions the Stored Communications Act ("SCA"), 18 U.S.C. § 2703, et seq., which provides the government a mechanism to require the provider of a remote computing service to disclose the contents of wire or electronic communications upon issuance of a warrant or court order. Pet. for Reh'g at 4 n.2, 10. Rehberg seemingly argues that a violation of this Act implies a violation of his constitutional rights. However, Rehberg did not assert an SCA claim in the district court or in his appellate brief, so we decline to address it further. Tanner Adver. Group,

In determining whether a constitutional right was clearly established at the time of violation, "[t]he relevant, dispositive inquiry . . . is whether 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, 121 S. Ct. 2151, 2156 (2001); see also Hope v. Pelzer, 536 U.S. 730, 741, 122 S. Ct. 2508, 2516 (2002) ("the salient question . . . is whether the state of the law [at the time of violation] . . . gave [the defendants] fair warning that their alleged treatment of [the plaintiff] was unconstitutional").[15]

No Supreme Court decision and no precedential decision of this Circuit defines privacy rights in email content voluntarily transmitted over the global

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L.L.C. v. Fayette County, 451 F.3d 777, 785 (11th Cir. 2006) (""The law is by now well settled in this Circuit that a legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed."' (quoting Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1330 (11th Cir. 2004)) (brackets omitted)); see also Snow v. DirecTV, Inc., 450 F.3d 1314, 1321 (11th Cir. 2006) ("a valid civil complaint under the SCA must allege a violation of one of its provisions").

[15]This fair and clear notice requirement may be met in three ways: (1) the words of the pertinent federal statute or constitutional provision may be so specific as to clearly establish the law even in total absence of judicial decisions interpreting the law, Vinyard v. Wilson, 311 F.3d 1340, 1350 (11th Cir. 2002); (2) "some broad statements of principle in case law are not tied to particularized facts and can clearly establish law applicable in the future to different sets of detailed facts," id. at 1351; and (3) most commonly, when we lack explicit statutory or constitutional pronouncements and broad case holdings, we look to precedential cases that are tied to their particular facts. Id. at 1351-52. When caselaw is needed, we look to decisions of the U.S. Supreme Court, this Court, and, where applicable, the highest court of the pertinent state. Marsh v. Butler County, Ala., 268 F.3d 1014, 1032-33 n. 10 (11th Cir. 2001).

Internet and stored at a third-party ISP. See Quon, slip op. at 9-10. As a result, Paulk could not have known the scope of the privacy rights, if any, that Rehberg had in email content stored at his third-party ISP.[16] The Supreme Court's decisions in Katz and Smith clearly established an objectively reasonable privacy right in telephone conversation content, but, as the modern Internet did not exist at the time of those decisions, whether the analytical framework, much less the rationale, of those decisions transfers to privacy rights in Internet email is questionable and far from clearly established. Indeed, in Quon, the Supreme Court only assumed, without deciding, that the Fourth Amendment framework for analyzing physical searches applied to searches in the "electronic sphere." Id. at 12. In contrast, Rehberg has not identified any judicial decision holding a government agent liable for Fourth Amendment violations related to email content received by a third party and stored on a third party's server.

Because the federal law was not clearly established, the district court erred in denying qualified immunity to Paulk on Rehberg's email subpoena claim.[17]

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[16]There is no allegation, for instance, that the Defendants searched Rehberg's home computer or even his entire email account. The Complaint alleges only that Paulk subpoenaed and accessed email messages actually sent and received through Rehberg's ISP. An email draft never sent by Rehberg to his ISP would not have been within the scope of the subpoena.

[17]Rehberg's Section 1983 malicious prosecution claim in Count 6 requires proving both (1) the elements of the common-law tort of malicious prosecution; and (2) a violation of his Fourth Amendment right to be free from unreasonable seizures. Kingsland v. City of Miami, 382 F.3d 1220, 1234 (11th Cir.

IV. COUNT 7 – RETALIATORY PROSECUTION

In Count 7, Rehberg alleges Hodges and Paulk violated his First Amendment free speech rights by retaliating against him for his criticism of the hospital in his faxes. Rehberg alleges Hodges's and Paulk's decisions to investigate him, issue subpoenas, provide his information to paid civilians, and procure wrongful indictments were in retaliation for his faxes and criticism of the hospital and were all made without probable cause.[18]

We first review Hartman v. Moore, 547 U.S. 250, 126 S. Ct. 1695 (2006), which addresses retaliatory-prosecution claims.

A. Hartman v. Moore

2004); Wood v. Kesler, 323 F.3d 872, 881 (11th Cir. 2003). Rehberg alleges his arrest was an unlawful seizure, but he also appears to contend that the unlawful search of his phone records and emails also would support a malicious prosecution claim. We cannot locate any case where a search without a later arrest was sufficient to support a Section 1983 malicious prosecution claim. However, because Rehberg has not shown the search of his phone records and emails violated clearly established federal law, we need not address the viability of Rehberg's malicious prosecution claims as to the subpoenas. Alternatively, if Rehberg is attempting to assert only an independent Fourth Amendment claim (and not a malicious prosecution claim) as to the subpoenas, Rehberg also has not shown the violation of clearly established federal law.

[18]To the extent Rehberg relies on the Fourth Amendment, "there is no retaliation claim under the Fourth Amendment separate and distinct from [Rehberg's] malicious prosecution . . . claim[ ]." Wood, 323 F.3d at 883. "Instead, the only cause of action for retaliation that arguably applies here is retaliatory prosecution in violation of the First Amendment." Id.

In Hartman, plaintiff Moore brought a Bivens[19] action against postal inspectors and a federal prosecutor for retaliatory prosecution.[20] Because of Moore's criticism of and lobbying to the U.S. Postal Service, postal inspectors launched criminal investigations against Moore and pressured the United States Attorney's Office to indict him, "[n]otwithstanding very limited evidence." Id. at 253-54, 126 S. Ct. at 1699-1700. Although they did not testify, the postal inspectors drafted "witness statements" for other witnesses and provided them to the prosecutor, who presented them to the grand jury. Moore v. United States, 213 F.3d 705, 707 (D.C. Cir. 2000). The district court dismissed the criminal charges against Moore for a "complete lack of direct evidence." Hartman, 547 U.S. at 254, 126 S. Ct. at 1700.

In Moore's subsequent Bivens action for retaliatory prosecution, the district court granted absolute immunity to the prosecutor but denied qualified immunity to the postal inspectors. Id. at 255, 126 S. Ct. at 1701. As to the prosecutor, the D.C. Circuit affirmed absolute immunity for the retaliatory decision to prosecute Moore and the prosecutor's concealment of exculpatory evidence from the grand jury, manipulation of evidence before the grand jury, and failure to disclose exculpatory material before trial. Moore, 213 F.3d at 708. As to the postal inspectors, the D.C.

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[19]See Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999 (1971).

[20]Moore's company manufactured a multiline optical character reader useful in sorting mail. Hartman, 547 U.S. at 252, 126 S. Ct. at 1699. He lobbied the U.S. Postal Service to purchase multiline readers and criticized its reliance on single-line readers. Id. at 253, 126 S. Ct. at 1699.

Circuit affirmed the denial of qualified immunity and allowed Moore's retaliatory-prosecution claim to proceed against them, even though Moore had not shown an absence of probable cause for the criminal charges against him.

In reversing the D.C. Circuit's denial of qualified immunity to the postal inspectors, the Supreme Court in Hartman concluded that to bring a retaliatory-prosecution claim, the plaintiff must show an absence of probable cause for the prosecution. Hartman, 547 U.S. at 252, 126 S. Ct. at 1699. The Supreme Court first noted, "as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." Id. at 256, 126 S. Ct. at 1701 (citations and quotation marks omitted). The Supreme Court, however, explained that a retaliatory-prosecution suit cannot be brought against the prosecutor, but only against the "non-prosecuting official" who successfully induced the prosecutor to bring charges that would not otherwise have been brought, as follows:

> A Bivens (or § 1983) action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute. Instead, the defendant will be a nonprosecutor, an official, like an inspector here, who may have influenced the prosecutorial decision but did not himself make it, and the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory inducement to prosecute. The consequence is that a plaintiff like Moore must show that the nonprosecuting official acted in retalia-

> tion, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging.

Id. at 261-62, 126 S. Ct. at 1704-05 (emphasis added). To sue for retaliatory prosecution, a plaintiff must establish a "but-for" causal connection between the retaliatory animus of the non-prosecutor and the prosecutor's decision to prosecute. See id. at 256, 261, 126 S. Ct. at 1701, 1704 (discussing "but-for cause" and "but-for basis" for the prosecutor's decision to prosecute).[21]

And Hartman indicates that to establish a prima facie case of this but-for causal connection, a plaintiff must plead and prove both (1) a retaliatory motive on the part of the non-prosecutor official, and (2) the absence of probable cause supporting the prosecutor's decision. Id. at 265; see also Wood, 323 F.3d at 883 (First Amendment retaliatory-prosecution claim is defeated by the existence of probable cause). A retaliatory motive on the part of a "non-prosecuting official" combined with an absence of probable cause will create "a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to bring the charge." Hartman, 547 U.S. at 265, 126 S. Ct. at 1706. Importantly, the absence of probable cause "is not necessarily dispositive" of whether the unconstitutionally motivated inducement succeeded, but will create a prima facie inference that it did. Id. The burden then shifts to the

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[21]In a footnote, the Supreme Court noted that Moore's complaint charged the prosecutor with acting in both an investigatory and prosecutorial capacity, but that no appeal or claim against the prosecutor was before the Supreme Court. Hartman, 547 U.S. at 262 n.8, 126 S. Ct. at 1705 n.8.

defendant official to show "that the action would have been taken anyway, independently of any retaliatory animus." Id. at 261, 126 S. Ct. at 1704. In other words, the defendant official will not be liable if he can show the prosecutor would have taken the action complained of anyway. Id.

B. Rehberg's Retaliatory-Prosecution Claims

Hartman dictates the outcome of Rehberg's retaliatory-prosecution claim in Count 7. First, as to Hodges, Rehberg alleges Hodges was in communication with Burke about the decision to prosecute, even after Hodges recused. Hodges's alleged decision to prosecute Rehberg, even if made without probable cause and even if caused solely by Paulk's and his unconstitutional retaliatory animus, is protected by absolute immunity. Hartman, 547 U.S. at 261-62, 126 S. Ct. at 1704-05.

As to Paulk, Rehberg must show investigator Paulk's retaliation against Rehberg successfully induced the prosecution and was the "but-for" cause of the prosecution. Hartman, 547 U.S. at 265, 126 S. Ct. at 1701. Accordingly, Rehberg must show that prosecutor Burke (himself or with Hodges's influence) would not have prosecuted Rehberg but for Paulk's retaliatory motive and conduct.[22]

The very detailed allegations in Rehberg's complaint satisfy the two requirements for a prima facie case of retaliatory prosecution: non-prosecutor Paulk's retaliatory motive, and the absence of prob-

[22]Count 7 of Rehberg's complaint does not name Burke as a defendant, but Count 7 claims Paulk's retaliatory motive and actions "wrongfully influenced and instigated the prosecutorial decision to bring charges against Mr. Rehberg."

able cause for prosecutor Burke to bring charges. Hartman, 547 U.S. at 265, 126 S. Ct. at 1706. For example, Rehberg alleges "[t]here was no probable cause for the underlying criminal charges against Mr. Rehberg and such charges would not have been brought if there was no retaliatory motive." Rehberg supports this alleged lack of probable cause by alleging Paulk admitted that "he never interviewed any witnesses or gathered any evidence indicating that Mr. Rehberg committed any aggravated assault or burglary," and Paulk's false testimony was the only evidence Burke presented in support of the first indictment. Without Paulk's allegedly false testimony, Burke could not have procured the first indictment because there was no other evidence. Rehberg also alleges Hodges and Paulk acted in retaliation for Rehberg's criticisms of the activities and financial management of a public hospital to which they had close political connections and personal relationships and that chilling Rehberg's speech was a motivating factor in all of Hodges's and Paulk's conduct in investigating and prosecuting him.

In sum, Rehberg sufficiently has alleged the requisite retaliatory motive, absence of probable cause, and but-for causation (i.e., that Burke would not have prosecuted Rehberg but for Paulk's false testimony). Therefore, at this pleading juncture, the district court did not err in denying absolute and qualified immunity to Defendant Paulk on Rehberg's retaliatory-prosecution claim.

C. Retaliatory Investigation Claim

Rehberg's complaint also alleges a "retaliatory investigation" claim against Hodges and Paulk. For example, Rehberg's complaint alleges Hodges and Paulk together decided to investigate Rehberg and

took several steps during the investigation because each of them had retaliatory animus. These allegations of coordinated and joint actions are replete throughout the complaint. E.g., Compl. ¶¶ 99 ("Mr. Paulk and Mr. Hodges instituted an investigation . . ."), 124 ("Chilling his political speech was a substantial or motivating factor in the wrongful conduct of Mr. Paulk and Mr. Hodges in investigating Mr. Rehberg . . ."), 157-61 (conspiracy claim).

Hartman does not help us with this claim because the Supreme Court pointedly did not decide whether "simply conducting retaliatory investigation with a view to promote prosecution is a constitutional tort." Hartman, 547 U.S. at 262 n. 9, 126 S. Ct. at 1705 n. 9 ("Whether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation is not before us").[23]

As noted above, only qualified immunity, not absolute immunity, applies to conduct taken in an investigatory capacity as opposed to a prosecutorial capacity. As we explain above, it was not clearly established that the subpoenas to Rehberg's phone and email providers violated his Fourth Amendment rights. We also are inclined to agree with the government that Hodges and Paulk's retaliatory animus does not create a distinct constitutional tort.[24]

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[23]Rehberg does not allege he incurred any expenses in the investigation stage.

[24]The initiation of a criminal investigation in and of itself does not implicate a federal constitutional right. The Constitution does not require evidence of wrongdoing or reasonable suspicion of wrongdoing by a suspect before the government can begin investigating that suspect. See United States v. Aibejeris,

But even if we assume Rehberg has stated a constitutional violation by alleging that Hodges and Paulk initiated an investigation and issued subpoenas in retaliation for Rehberg's exercise of First Amendment rights, Hodges and Paulk still receive qualified immunity because Rehberg's right to be free from a retaliatory investigation is not clearly established. The Supreme Court has never defined retaliatory investigation, standing alone, as a constitutional tort, Hartman, 547 U.S. at 262 n. 9, and neither has this Court. Without this sort of precedent, Rehberg cannot show that the retaliatory investigation alleged here violated his First Amendment rights. See Oliver v. Fiorino, 586 F.3d 898, 907 (11th Cir. 2009) ("In order to determine whether a right is clearly established, we look to the precedent of the Supreme Court of the United States, this Court's precedent, and the pertinent state's supreme court precedent, interpreting and applying the law in similar circumstances"). Hodges and Paulk accordingly are entitled to qualified immunity for Rehberg's retaliatory investigation claims in Count 7.

V. COUNT 8 – FABRICATION OF EVIDENCE AND PRESS STATEMENTS AGAINST BURKE

Count 8 is against only Burke. Rehberg alleges Burke violated his "constitutional rights" by (1) "participat[ing] in fabricating evidence"; (2) presenting Paulk's perjured testimony to the grand jury; and (3)

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28 F.3d 97, 99 (11th Cir. 1994). No Section 1983 liability can attach merely because the government initiated a criminal investigation.

making defamatory statements to the media which "damaged Mr. Rehberg's reputation."[25]

As a special prosecutor appointed to stand in for Hodges, Burke receives the full scope of absolute prosecutorial immunity and is absolutely immune for Rehberg's claims of malicious prosecution and the presentation of perjured testimony to a grand jury. For the same reasons explained above, Burke also is absolutely immune for participating in the conspiracy to fabricate Paulk's grand jury testimony against Rehberg.

Burke's statements to the media, however, are not cloaked in absolute immunity because "[c]omments to the media have no functional tie to the judicial process just because they are made by a prosecutor," and they are not part of the prosecutor's role as an advocate of the State. See Buckley, 509 U.S. at 277-78, 113 S. Ct. at 2618 ("The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions"); Hart v. Hodges, 587 F.3d 1288, 1297 (11th Cir. 2009). Burke's immunity for the alleged press statements must arise, if at all, through qualified immunity.

A tort claim, such as Rehberg's defamation allegation in Count 8, does not give rise to a § 1983 due process claim unless there is an additional constitutional injury alleged. Cypress Ins. Co. v. Clark, 144 F.3d 1435, 1438 (11th Cir. 1998). "The Supreme Court . . . held that injury to reputation, by itself,

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[25]Burke is not alleged to have participated in subpoenaing Rehberg's telephone and Internet providers.

does not constitute the deprivation of a liberty or property interest protected under the Fourteenth Amendment." Behrens v. Regier, 422 F.3d 1255, 1259 (11th Cir. 2005) (citing Paul v. Davis, 424 U.S. 693, 701-02, 96 S. Ct. 1155, 1160-61 (1976)).[26] Damages to a plaintiff's reputation "are only recoverable in a section 1983 action if those damages were incurred as a result of government action significantly altering the plaintiff's constitutionally recognized legal rights." Cypress, 144 F.3d at 1438.

This doctrine is known as the "stigma-plus" test, Cannon v. City of W. Palm Beach, 250 F.3d 1299, 1302 (11th Cir. 2001), and requires the plaintiff to show both a valid defamation claim (the stigma) and "the violation of some more tangible interest" (the plus). Behrens, 422 F.3d at 1260 (quotation marks omitted). "To establish a liberty interest sufficient to implicate the fourteenth amendment safeguards, the individual must be not only stigmatized but also stigmatized in connection with . . . [a] government official's conduct [that] deprived the plaintiff of a previously recognized property or liberty interest in addition to damaging the plaintiff's reputation." Id. (citations and quotation marks omitted).[27] The "stigma-

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[26]Rehberg does not specifically identify what constitutional provision Burke's media statements violated. We assume Rehberg asserts a Fourteenth Amendment due process claim. See, e.g., Paul, 424 U.S. at 712, 96 S. Ct. at 1165-66; Cypress, 144 F.3d at 1436. Rehberg does not identify another constitutional theory that might support a Section 1983 action for false statements to the media.

[27]"While we have in a number of our prior cases pointed out the frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as

plus" test requires not only allegations stating a common-law defamation claim, but also an additional constitutional injury, tied to a previously recognized constitutional property or liberty interest, flowing from the defamation. Cypress, 144 F.3d at 1436-37.

Rehberg's complaint alleges damage to his reputation but does not allege the required deprivation of any previously recognized constitutional property or liberty interest. The only factual allegations Rehberg makes regarding Burke's media statements are these: "Mr. Rehberg . . . was subjected to extensive publicity in the media where he was identified as being charged with multiple felonies and misdemeanors, and publicly identified by the acting District Attorney as having committed an assault and burglary. The damage of three indictments on his public record will remain with him and his wife and children for the rest of their lives." He continues by alleging, "[t]hese wrongful indictments will always be associated with his name and have caused and will cause significant personal, professional and economic damages to Mr. Rehberg." Rehberg alleges Burke's media statements "wrongfully damaged [his] reputation."

In short, Rehberg's defamation allegations are too generalized to show a previously recognized con-

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employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." Paul, 424 U.S. at 701; see also Siegert v. Gilley, 500 U.S. 226, 234, 111 S. Ct. 1789, 1794 (1991) ("Most defamation plaintiffs attempt to show some sort of special damage and out-of-pocket loss which flows from the injury to their reputation. But so long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law but it is not recoverable in a Bivens action.").

stitutional deprivation flowing from Burke's alleged defamatory statements. Damage to reputation alone is insufficient to state a Fourteenth Amendment due process claim. Cypress, 144 F.3d at 1437-38 ("Indeed, [in Siegert v. Gilley, 500 U.S. 226, 111 S. Ct. 1789 (1991)] the [Supreme] Court specifically rejected the notion that defamation by a government actor that causes injury to professional reputation violates procedural due process").

The district court averted this settled law by connecting Burke's media statements to "the alleged Fourteenth Amendment violation alleged by Plaintiff, i.e., violation of his right to be free from prosecution based upon false evidence/charges." This was error. The "stigma-plus" test requires the plaintiff to show deprivation of a previously recognized Fourteenth Amendment property or liberty interest "in connection with" the claimed defamation. Even liberally construed, Rehberg's complaint does not allege a procedural due process claim under the Fourteenth Amendment. See Albright v. Oliver, 510 U.S. 266, 272, 114 S. Ct. 807, 812 (1994). Rehberg does not allege Dougherty County or the individual defendants denied him the constitutionally required procedures necessary to challenge his indictments and arrest. Indeed, Rehberg's successful challenges to the three indictments show otherwise. And, under the Fourteenth Amendment, there is no substantive due process right to be free from malicious prosecution without probable cause. Id. at 274, 114 S. Ct. at 813. A malicious prosecution claim arises under the Fourth Amendment, not Fourteenth Amendment substantive due process.

Therefore, the only remaining "plus" Rehberg identifies is the right to be free from malicious prose-

cution and unreasonable detention under the Fourth Amendment. However, Rehberg's complaint does not allege that Burke's media statements caused Rehberg's indictments and arrest.[28] For example, there is no allegation that the grand jury relied on Burke's press statements in indicting Rehberg or that the Defendants relied on Burke's media statements as probable cause to arrest Rehberg. Paul's "stigma-plus" test is not satisfied by simply alleging a constitutional violation somewhere in the case. The constitutional violation must itself flow from the alleged defamation.[29]

In any event, Rehberg cannot use the prosecution itself (the indictment and arrest) as the basis for constitutional injury supporting a § 1983 defamation claim. The Seventh Circuit considered this precise situation, concluding the plaintiff must point to some constitutional wrong, other than the indictment and related events, in order to support a § 1983 constitutional claim based on defamation. "Identifying the arrest and imprisonment as the loss of liberty does not assist [the plaintiff], however, because [the prosecutor] has absolute immunity from damages for

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[28]The complaint does not clearly state whether Burke made his media statements before Rehberg was indicted or after, but the complaint also does not allege any fact showing that Burke's media statements caused Rehberg to be indicted.

[29]The district court cited Riley v. City of Montgomery, Ala., 104 F.3d at 1253, for the proposition that fabricating evidence violates an accused's constitutional rights, and thus since Rehberg alleges fabrication in this case, he satisfied Paul's "stigma-plus" test. Even assuming evidence was fabricated and that this fabrication was a constitutional violation, nothing in the complaint connects Hodges's and Paulk's alleged evidence fabrication to Burke's press statements.

these events." Buckley v. Fitzsimmons, 20 F.3d 789, 797 (7th Cir. 1994), cert. denied, 513 U.S. 1085, 115 S. Ct. 740 (1995) (rejecting plaintiff's arrest as a sufficient "plus" under the stigma-plus test). The Seventh Circuit explained that, "the Supreme Court [ ] adopt[ed] a strict separation between the prosecutor's role as advocate and the ancillary events (such as press conferences) surrounding the prosecution. It would be incongruous to treat the press conference and the prosecution as distinct for purposes of immunity but not for purposes of defining the actionable wrong." Id. at 797-98. The Seventh Circuit concluded that, "a plaintiff who uses a 'stigma plus' approach to avoid Paul and Siegert must identify a 'plus' other than the indictment, trial, and related events for which the defendants possess absolute prosecutorial immunity." Id. at 798.

Therefore Rehberg failed to satisfy Paul's "stigma-plus" test and fails to allege a constitutional claim based on the press statements. This lack of a constitutional claim means Burke receives qualified immunity for his press statements. The district court erred by not finding Burke immune for the allegations in Count 8.

VI. COUNT 10 – CONSPIRACY

Count 10 alleges Hodges, Burke, and Paulk engaged in a conspiracy to violate Rehberg's constitutional rights under the First, Fourth, and Fourteenth Amendments.

"A person may not be prosecuted for conspiring to commit an act that he may perform with impunity." Jones, 174 F.3d at 1289 (citations omitted). A prosecutor cannot be liable for "conspiracy" to violate a defendant's constitutional rights by prosecuting

him if the prosecutor also is immune from liability for actually prosecuting the defendant. Rowe, 279 F.3d at 1282. And a witness's absolute immunity for testifying prevents any use of that testimony as evidence of the witness's membership in an unconstitutional conspiracy prior to his testimony. Id.; Mastroianni, 173 F.3d at 1367.

Rehberg's conspiracy allegations do not enlarge what he alleged previously in his complaint. This opinion has already explained why Hodges, Burke, and Paulk receive absolute or qualified immunity for all of the conduct alleged in Counts 6 and 8 and why Hodges receives absolute immunity for the retaliatory prosecution in Count 7. Rehberg cannot state a valid conspiracy claim by alleging the Defendants conspired to do things they already are immune from doing directly.

The only portion of Count 7 that remains is Rehberg's retaliatory prosecution claim against Paulk alone. The intracorporate conspiracy doctrine bars conspiracy claims against corporate or government actors accused of conspiring together within an organization, preventing Rehberg's claim that Paulk "conspired" to initiate a retaliatory prosecution. Dickerson v. Alachua County Commission, 200 F.3d 761, 767 (11th Cir. 2000) ("[I]t is not possible for a single legal entity consisting of the corporation and its agents to conspire with itself, just as it is not possible for an individual person to conspire with himself"); Denney v. City of Albany, 247 F.3d 1172, 1190 (11th Cir. 2001) (applying intracorporate conspiracy doctrine to city, city fire chief, and city manager). Rehberg has not alleged that Paulk conspired with anyone outside of the District Attorney's office. See Denney, 247 F.3d at 1191 ("the only two conspirators

identified . . . are both City employees; no outsiders are alleged to be involved"). The "conspiracy" occurred only within a government entity, and thus the intracorporate conspiracy doctrine bars Count 10 against Paulk. The district court erred in not dismissing Count 10.

VII. CONCLUSION

For the reasons explained above, Hodges and Paulk receive absolute immunity for Paulk's grand jury testimony and for the related pre-indictment conspiracy conduct alleged in Count 6; Hodges and Paulk receive qualified immunity for the issuance of subpoenas alleged in Count 6; Hodges receives absolute immunity for initiating a retaliatory prosecution as alleged in Count 7; Hodges and Paulk both receive qualified immunity for the retaliatory investigation alleged in Count 7; Burke receives absolute immunity for the allegations in Count 8, except for the alleged media statements, for which he receives qualified immunity; and Count 10's conspiracy claim fails. The only surviving claim from this appeal is the retaliatory-prosecution claim in Count 7 against Paulk, for which the district court correctly denied absolute and qualified immunity. We reverse the district court's order in part and remand this case for the district court to grant the Defendants' motions to dismiss and to enter judgment in favor of all Defendants on Counts 6, 7, 8, and 10, except for the retaliatory-prosecution claim against Paulk in Count 7.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

Filed March 11, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-11897

D. C. Docket No. 07-00022-CV-WLS-1

CHARLES A. REHBERG,

Plaintiff-Appellee,

versus

JAMES P. PAULK,
in his individual capacity,
KENNETH B. HODGES, III,
in his individual capacity and
in his official capacity as District
Attorney of Dougherty County
KELLY R. BURKE, in his
individual capacity,

Defendants-Appellants,

DOUGHERTY COUNTY,

Defendant.

Appeal from the United States District Court
for the Middle District of Georgia

(March 11, 2010)

Before CARNES, HULL and ANDERSON, Circuit Judges.

HULL, Circuit Judge:

In this § 1983 action, Plaintiff Charles Rehberg sued former District Attorney Kenneth Hodges, specially appointed prosecutor Kelly Burke, and Chief Investigator James Paulk, alleging federal claims for malicious prosecution, retaliatory investigation and prosecution, evidence fabrication, and conspiracy to violate Rehberg's constitutional rights. Defendants Hodges, Burke, and Paulk, in their individual capacities, appeal the district court's denial of absolute and qualified immunities. After review and oral argument, we affirm in part and reverse in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

We review Rehberg's version of the events as alleged in his complaint, accepting them as true.[1]

A. The Investigation

[1]In reviewing a Rule 12(b)(6) motion to dismiss, we accept as true the factual allegations in the complaint and all reasonable inferences therefrom. Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1534 (11th Cir. 1994).

From September 2003 to March 2004, Plaintiff Rehberg sent anonymous faxes to the management of Phoebe Putney Memorial Hospital (the "hospital"). The faxes criticized and parodied the management and activities of the hospital.

Defendant Hodges, then the District Attorney of Dougherty County, Georgia, and Defendant Paulk, the Chief Investigator in the District Attorney's Office, investigated Rehberg's actions as a "favor" to the hospital, to which Hodges and Paulk are alleged to have political connections. Rehberg alleges Hodges and Paulk lacked probable cause to initiate a criminal investigation of him.

From October 2003 to February 2004, Defendants Hodges and Paulk prepared a series of subpoenas on Hodges's letterhead and issued the subpoenas to BellSouth and Alltel (later Sprint), requesting Rehberg's telephone records, and to Exact Advertising, an Internet service provider, requesting Rehberg's email records. Although no grand jury was impaneled at the time, the subpoenas purported to require appearance before a Dougherty County grand jury. Rehberg's case was not presented to a grand jury until December 14, 2005.

Defendant Paulk gave the results of the subpoenas, consisting of Rehberg's personal emails and phone records, to private civilian investigators, who had directed the substance of the subpoenas. These civilian investigators paid the District Attorney's Office for Rehberg's information, often making payments directly to BellSouth and the other subpoenaed parties, allegedly to pay debts of the District Attorney's Office.

After receiving unfavorable press coverage of his relationships with the hospital, Hodges recused himself from prosecuting Rehberg. Burke was appointed a special prosecutor in Hodges's place. Hodges continued to supervise Paulk and remained in communication with Burke throughout the investigation, but he "never served as the actual prosecutor of the charges against Mr. Rehberg before the Grand Jury."

B. First Indictment

On December 14, 2005, a grand jury indicted Rehberg on charges of aggravated assault, burglary, and six counts of "harassing phone calls." Burke was the prosecutor, and Paulk was the sole complaining witness against Rehberg before the grand jury. The first indictment alleged Rehberg assaulted Dr. James Hotz after unlawfully entering Dr. Hotz's home. In fact, Rehberg has never been to Dr. Hotz's home, and Dr. Hotz never reported an assault or burglary to law enforcement agencies. Paulk later admitted that he never interviewed any witnesses or gathered evidence indicating Rehberg committed an aggravated assault or burglary. And the alleged "harassing" phone calls to Dr. Hotz all were related to the faxes Rehberg had already sent criticizing the hospital.

The City of Albany Police Department[2] did not participate in the investigation. Paulk stated that he and Hodges initiated and handled the investigation because they lacked confidence in the police department's ability to handle the investigation on its own.

Rehberg contested the legal sufficiency of the first indictment. On February 2, 2006, Defendant

[2]The City of Albany, Georgia, is in Dougherty County.

Burke dismissed and nol-prossed the first indictment.

C. Second Indictment

On February 15, 2006, Defendants Burke and Paulk initiated charges before a second grand jury. Paulk and Dr. Hotz appeared as witnesses. The grand jury issued a second indictment, charging Rehberg with simple assault against Dr. Hotz on August 22, 2004 and five counts of harassing phone calls.

Rehberg contested the sufficiency of the second indictment too. Rehberg alleged he was "nowhere near Dr. Hotz on August 22, 2004," and "[t]here was no evidence whatsoever that Mr. Rehberg committed an assault on anybody as he was charged." At a pretrial hearing on April 10, 2006, Defendant Burke announced the second indictment would be dismissed, but Burke did not dismiss it. On July 7, 2006, the state trial court ordered it dismissed.

D. Third Indictment

On March 1, 2006, Defendants Burke and Paulk appeared before a third grand jury and secured a third indictment against Rehberg, charging him with simple assault and harassing telephone calls. At some unspecified time, Rehberg was arrested and briefly detained pursuant to an arrest warrant issued as a result of the second and third indictments.

On May 1, 2006, the state trial court issued two orders dismissing all charges against Rehberg because the third indictment did not sufficiently charge Rehberg with a criminal offense.

The three indictments against Rehberg were widely reported in the local press. Defendant Burke

conducted interviews with the press and issued statements saying: (1) "[I]t is never free speech to assault or harass someone, no matter who they are and no matter how much you don't like them," and (2) "It would be ludicrous to say that an individual has the right to go onto someone else's property and burn a cross under the guise of free speech, which is tantamount to what these defendants are claiming."

E. District Court Proceedings

Plaintiff Rehberg filed a verified complaint against Defendants Hodges, Burke, and Paulk, in their individual capacities. Rehberg's complaint alleges ten counts, including these four federal § 1983 claims at issue in this appeal:[3] (1) malicious prosecution against Hodges and Paulk, in violation of Rehberg's Fourth and Fourteenth Amendment rights (Count 6); (2) retaliatory investigation and prosecution against Hodges and Paulk, for their alleged retaliation against Rehberg because he exercised First Amendment free speech rights (Count 7); (3) participation in evidence fabrication, calling Paulk to give false testimony to the grand jury, and giving false statements to the media against Burke only (Count 8); and (4) conspiracy to violate Rehberg's constitutional rights under the First, Fourth, and Fourteenth

[3]Rehberg's complaint also alleges state law claims for negligence (Counts 1 & 2) and invasion of privacy (Counts 3 & 4) against Paulk, which the district court refused to dismiss. At this juncture, Defendant Paulk has not appealed the district court's rulings on those state law claims. At oral argument, counsel for Defendant Paulk confirmed to the Court that the state law claims in Counts 1, 2, 3, and 4 against Paulk were not on appeal.

Amendments, against Hodges, Burke, and Paulk (Count 10).[4]

Defendants Hodges, Burke, and Paulk moved to dismiss these counts pursuant to Federal Rule of Civil Procedure 12(b)(6). They claimed absolute immunity, and, alternatively, qualified immunity. The district court denied the Defendants' motions.

Defendants Hodges, Burke, and Paulk, in their individual capacities, appeal the district court's denials of immunity as to Rehberg's above four federal constitutional claims.[5] We discuss absolute and qualified immunity and then Rehberg's claims.

II. IMMUNITY LAW

A. Absolute Immunity

Traditional common-law immunities for prosecutors apply to civil cases brought under § 1983. Imbler

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[4]Plaintiff Rehberg also sued Dougherty County and Hodges, in his official capacity. Rehberg withdrew Count 5 against Dougherty County in response to its claim of sovereign immunity. Rehberg has not appealed the district court's dismissal of Count 9 against Dougherty County, which effectively dismissed Count 9 against Hodges because an official capacity claim against Hodges is another moniker for a claim against Dougherty County, Hodges's employer. See Brown v. Neumann, 188 F.3d 1289, 1290 (11th Cir. 1999). Thus only Counts 6, 7, 8, and 10 are involved in this appeal.

[5]The denial of absolute or qualified immunity on a motion to dismiss is an appealable interlocutory order. See Jones v. Cannon, 174 F.3d 1271, 1280-81 (11th Cir. 1999); Maggio v. Sipple, 211 F.3d 1346, 1350 (11th Cir. 2000) (citing Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S. Ct. 2806, 2817-18 (1985)). We review de novo the district court's denial of a motion to dismiss on the basis of immunity and for failure to state a constitutional violation. Maggio, 211 F.3d at 1350; Swann v. S. Health Partners, Inc., 388 F.3d 834, 836 (11th Cir. 2004).

v. Pachtman, 424 U.S. 409, 427-28, 96 S. Ct. 984, 993-94 (1976). "[A]t common law, '[t]he general rule was, and is, that a prosecutor is absolutely immune from suit for malicious prosecution.'" Malley v. Briggs, 475 U.S. 335, 342, 106 S. Ct. 1092, 1097 (1986) (quoting Imbler, 424 U.S. at 437, 96 S. Ct. at 996). In § 1983 actions, prosecutors have absolute immunity for all activities that are "'intimately associated with the judicial phase of the criminal process.'" Van de Kamp v. Goldstein, __ U.S. __, 129 S.Ct. 855, 860 (2009) (quoting Imbler, 424 U.S. at 430, 96 S. Ct. at 995); accord Jones, 174 F.3d at 1281.

Absolute immunity does not depend entirely on a defendant's job title, but involves a functional approach granting immunity based on conduct. Jones, 174 F.3d at 1282. This functional approach looks to "the nature of the function performed, not the identity of the actor who performed it." Buckley v. Fitzsimmons, 509 U.S. 259, 269, 113 S. Ct. 2606, 2613 (1993); accord Imbler, 424 U.S. at 431 n. 33, 96 S. Ct. at 995 n. 33.

Absolute immunity accordingly applies to the prosecutor's actions "in initiating a prosecution and in presenting the State's case." Imbler, 424 U.S. at 431, 96 S. Ct. at 995. Prosecutors are immune for appearances in judicial proceedings, including prosecutorial conduct before grand juries, statements made during trial, examination of witnesses, and presentation of evidence in support of a search warrant during a probable cause hearing. Burns v. Reed, 500 U.S. 478, 490-92, 111 S. Ct. 1934, 1942 (1991); Kalina v. Fletcher, 522 U.S. 118, 126, 118 S. Ct. 502, 507-08 (1997); see also Van de Kamp, 129 S.Ct. at 861. "A prosecutor enjoys absolute immunity from allegations stemming from the prosecutor's function as

advocate." Jones, 174 F.3d at 1281. Such absolute immunity also "extends to a prosecutor's acts undertaken . . . in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State." Id. (quotation marks omitted); accord Rowe v. City of Fort Lauderdale, 279 F.3d 1271, 1279-80 (11th Cir. 2002) (holding prosecutor who proffered perjured testimony and fabricated exhibits at trial is entitled to absolute immunity, but a prosecutor who participated in the search of a suspect's apartment is entitled to only qualified immunity).

If a prosecutor functions in a capacity unrelated to his role as an advocate for the state, he is not protected by absolute immunity but enjoys only qualified immunity. Kalina, 522 U.S. at 121, 118 S. Ct. at 505 (concluding prosecutor was acting as a witness in personally attesting to truth of averments in a "Certification for Determination of Probable Cause" for an arrest warrant and was not absolutely immune for that witness act, but that prosecutor was absolutely immune for preparing and filing an "information charging respondent with burglary and a motion for an arrest warrant"); Buckley, 509 U.S. at 275-77, 113 S. Ct. at 2616-18 (concluding prosecutor's pre-indictment fabrication of third-party expert testimony linking defendant's boot to bootprint at murder scene and post-indictment participation in a press conference were not protected by absolute immunity); Burns, 500 U.S. at 496, 111 S. Ct. at 1944-45 (stating prosecutors do not enjoy absolute immunity for giving pre-indictment legal advice to the police). A prosecutor is not entitled to absolute immunity when he "performs the investigative functions normally performed by a detective or police officer." Buckley, 509 U.S. at 273, 113 S. Ct. at 2616; accord

Jones, 174 F.3d at 1281-82 ("Although absolutely immune for actions taken as an advocate, the prosecutor has only qualified immunity when performing a function that is not associated with his role as an advocate for the state"); see also Malley, 475 U.S. at 340-41, 106 S. Ct. at 1096 (concluding police officer was not absolutely immune for drafting "felony complaints" with malice and without probable cause and submitting them in support of an application for arrest warrants).

B. Qualified Immunity

Qualified immunity shields government officials who perform discretionary governmental functions from civil liability so long as their conduct does not violate any "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). A government agent is entitled to immunity unless his act is "so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing." Lassiter v. Ala. A&M Univ., 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc).

To evaluate claims of qualified immunity, the Court considers whether (1) the plaintiff has alleged a violation of a constitutional right; and (2) whether the right was "clearly established" at the time of the defendant's misconduct. This two-pronged analysis may be done in whatever order is deemed most appropriate for the case. Pearson v. Callahan, 555 U.S. ___, 129 S.Ct. 808, 821 (2009).

With this immunity background, we turn to Rehberg's claims.

III. COUNT 6 – MALICIOUS PROSECUTION

Count 6 alleges Defendants Hodges and Paulk violated Rehberg's Fourth and Fourteenth Amendment rights through their "malicious prosecution" of him, resulting in his indictment and arrest.[6] Rehberg alleges that (1) Hodges and Paulk knew there was no probable cause to indict him, and therefore they got together with malice, fabricated evidence (i.e., Paulk's false testimony), and decided to present that fabricated evidence to the grand jury; (2) Paulk, at Hodges's direction, then testified falsely before the grand jury, resulting in Rehberg's indictment and arrest; and (3) Hodges and Paulk invaded Rehberg's privacy by illegally issuing subpoenas to BellSouth, Alltel, and Exact Advertising, without any pending indictment and as a discovery device for private civilians. We first discuss Paulk's false testimony before the grand jury and then the Defendants' pre-indictment conduct and subpoenas.

A. Paulk's Grand Jury Testimony

Even if Hodges and Paulk knew Paulk's testimony was false, Paulk receives absolute immunity for the act of testifying to the grand jury. Briscoe v. LaHue, 460 U.S. 325, 326, 103 S. Ct. 1108, 1111-12 (1983) (affirming that common-law immunities granted to witnesses in judicial proceedings required giving absolute immunity from § 1983 suit to police officer accused of giving false testimony at trial); Burns, 500 U.S. at 492, 111 S. Ct. at 1942 (holding

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[6]Rehberg alleges his arrest was an unreasonable seizure. The Fourth Amendment protection against "unreasonable" searches and seizures was made applicable to the States through the Fourteenth Amendment. Major League Baseball v. Crist, 331 F.3d 1177, 1179 n. 4 (11th Cir. 2003).

prosecutor was absolutely immune for "appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing"); Jones, 174 F.3d at 1288 ("[P]rosecutors and witnesses have absolute immunity for claims of conspiracy to commit perjury based on a witness's allegedly false testimony at trial, before a grand jury, or at a post-conviction hearing."); Strength v. Hubert, 854 F.2d 421, 422-24 (11th Cir. 1988) (concluding investigator for state Attorney General's office received absolute immunity for false testimony to a grand jury, at which the defendant investigator was the sole witness);[7] Kelly v. Curtis, 21 F.3d 1544, 1553 (11th Cir. 1994) (holding detective immune for grand jury testimony).

We recognize that Plaintiff Rehberg alleges Defendant Paulk was the sole "complaining witness" before the grand jury. However, in Jones, "we expressly reject[ed] carving out an exception to absolute immunity for grand jury testimony, even if false and even if [the detective] were construed to be a complaining witness." Jones, 174 F.3d at 1287 n. 10; see Rowe, 279 F.3d at 1285 (stating Jones "reject[ed] an exception for the testimony of 'complaining witnesses' "). In Jones, this Court aligned itself with the Third Circuit's decision in Kulwicki v. Dawson, 969 F.2d 1454, 1467 n.16 (3d Cir. 1992), which rejected the "complaining witness" exception to absolute immunity for false grand jury testimony. Jones, 174 F.3d at 1287 n.10. The Jones Court reasoned that allowing civil suits for false grand jury testimony would result in depositions, emasculate the confiden-

[7]Overruled on other grounds, Whiting v. Traylor, 85 F.3d 581 (11th Cir. 1996).

tial nature of grand jury testimony, and eviscerate the traditional absolute immunity for witness testimony in judicial proceedings:

> [T]his case vividly illustrates the serious problems with carving out such an exception and imposing civil liability for . . . false testimony deceiving the grand jury. To prove or to defend against such a claim would necessitate depositions from the prosecutor, the grand jury witnesses, and the grand jury members . . . [which], in effect, would emasculate both the absolute immunity for grand jury testimony and the confidential nature of grand jury proceedings. The remedy for false grand jury testimony is criminal prosecution for perjury and not expanded civil liability and damages.

Jones, 174 F.3d at 1287 n. 10.[8] And the Supreme Court "consistently ha[s] recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." United States v. Sells Eng'g, Inc., 463 U.S. 418, 424, 103 S. Ct. 3133, 3138 (1983) (quotation marks omitted). Based on Jones, we reject Rehberg's "complaining witness"

[8]In Mastroianni v. Bowers, 173 F.3d 1363 (11th Cir. 1999), this Court declined to decide whether to adopt a "complaining witness" exception because there was no factual finding in that case that the defendant Georgia Bureau of Investigation officer was equivalent to a "complaining witness." Id. at 1367 n. 1. So Mastroianni did not answer the question presented here, but Jones did.

exception to absolute immunity for false grand jury testimony.[9]

B. Hodges and Paulk's Pre-Indictment Investigation

Distilled to its essence, Defendants' alleged pre-indictment conduct (excepting the subpoenas) is this: Hodges and Paulk, acting as investigators, got together as a favor to the hospital, with malice and without probable cause, and made up a story about Rehberg, and then Paulk (at Hodges's direction) told that fake story under oath to the grand jury, leading to Rehberg's indictment and arrest. We already determined supra that Paulk receives absolute immu-

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[9]Two circuits carved out a complaining-witness exception to absolute immunity for false grand jury testimony. See, e.g., Harris v. Roderick, 126 F.3d 1189, 1199 (9th Cir. 1997) (Deputy U.S. Marshals not absolutely immune for false testimony before a grand and petit jury); White v. Frank, 855 F.2d 956 (2d Cir. 1988) (police officer, as the "complaining witness," was not absolutely immune for false grand jury testimony). These decisions rely on Malley v. Briggs, 475 U.S. at 340, 106 S. Ct. at 1096, which concluded that a police officer did not receive absolute immunity for drawing up "felony complaints" with malice and without probable cause and submitting them in support of an application for arrest warrants. The Supreme Court held similarly in Kalina v. Fletcher, 522 U.S. at 120, 129-31, 118 S. Ct. at 505, 509-10, finding a prosecutor was not absolutely immune for acting as a witness in personally attesting to the truth of averments in a certification affidavit supporting an application for probable cause for an arrest warrant.

Acknowledging White v. Frank relies on Malley, the Jones Court noted that carving out an immunity exception for grand jury testimony would eviscerate the secrecy of grand jury proceedings, a concern not implicated by the "felony complaints" filed to support an arrest warrant in Malley and the personal certification for an arrest warrant in Kalina.

nity for the actual grand jury testimony itself. The question before us now is whether absolute immunity applies to the alleged conspiracy decision in the investigative stage to make up and present Paulk's false testimony to the grand jury. Our precedent answers this question too. See Mastroianni, 173 F.3d at 1367; Rowe, 279 F.3d at 1282; Jones, 174 F.3d at 1289.

In Mastroianni, the plaintiff alleged defendant Yeomans, a Georgia Bureau of Investigation agent, "engaged in a pretestimonial conspiracy to present false evidence, for which neither absolute nor qualified immunity is available." Mastroianni, 173 F.3d at 1367. This Court first stressed that "a witness has absolute immunity from civil liability based on his grand jury testimony. See Strength, 854 F.2d at 425, relying on Briscoe v. La Hue, 460 U.S. 325, 103 S. Ct. 1108 [ ] (1983)." Id. The Mastroianni Court then pointed out that while the plaintiff "contend[ed] that Yeomans committed numerous acts in furtherance of a conspiracy to present false testimony before the grand jury convened, the record itself support[ed] such an inference only if we consider as evidence Yeomans' testimony as it relates back to Yeomans' pretestimonial acts and statements." Mastroianni, 173 F.3d at 1367. In other words, because the only evidence to show a conspiracy in the pre-indictment phase was Yeomans's later false grand jury testimony, and because Yeomans was immune for that testimony, we concluded that Yeomans was absolutely immune for conspiracy to present or give grand jury testimony. Id. ("Because we may not consider such testimony as a factor upon which to base Yeomans' potential liability, we conclude that Yeomans is entitled to absolute immunity for his actions in this case").

This Court subsequently applied Mastroianni in Jones and Rowe, in each case concluding that absolute immunity applied equally both to the false testimony itself and to the alleged conspiracies to present false testimony. Jones, 174 F.3d at 1289 ("To allow a § 1983 claim based on subornation of perjured testimony where the allegedly perjured testimony itself is cloaked in absolute immunity would be to permit through the back door what is prohibited through the front"); Rowe, 279 F.3d at 1282 ("It would be cold comfort for a prosecutor to know that he is absolutely immune from direct liability for actions taken as prosecutor, if those same actions could be used to prove him liable on a conspiracy theory involving conduct for which he was not immune").

Since Paulk receives absolute immunity for his false testimony before the grand jury, Hodges and Paulk are similarly immune for their alleged conspiracy to fabricate and present false testimony to the grand jury. Rowe, 279 F.3d at 1282 ("[A] witness's absolute immunity from liability for testifying forecloses any use of that testimony as evidence of the witness's membership in a conspiracy prior to his taking the stand").

It is important to point out that Hodges and Paulk generally would not receive absolute immunity for fabricating evidence, because investigating and gathering evidence falls outside the prosecutor's role as an advocate. See Buckley, 509 U.S. at 262-64, 113 S. Ct. at 2610-11 (no immunity for prosecutor who fabricated expert testimony linking defendant's boot with bootprint at murder scene); Rowe, 279 F.3d at 1281 (no immunity for fabrication of jump rope); Jones, 174 F.3d at 1289-90 (no immunity for fabrication of bootprint); Riley v. City of Montgomery, Ala.,

104 F.3d 1247, 1253 (11th Cir. 1997) (no immunity for police officer's planting of cocaine). All of these cases involved a particular discrete item of physical or expert evidence that was falsely created during the investigative stage to link the accused to a crime.

In contrast, there is no allegation of any physical or expert evidence that Hodges or Paulk fabricated or planted. There is no allegation of a pre-indictment document such as a false affidavit or false certification. Rather, Hodges and Paulk are accused of fabricating together only the testimony Paulk later gave to the grand jury. No evidence existed until Paulk actually testified to the grand jury. Stated differently, the only evidence Rehberg alleges was fabricated is Paulk's false grand jury testimony, for which Paulk receives absolute immunity.[10]

For all these reasons, we conclude Hodges and Paulk are entitled to absolute immunity for the pre-indictment conduct of conspiring to make up and present Paulk's false testimony to the grand jury.

C. Subpoenas During Investigation

Rehberg's allegations regarding the subpoenas to his telephone and Internet providers all recount pre-indictment investigative conduct by Hodges and Paulk. A prosecutor loses the cloak of absolute immunity by stepping out of his role as an advocate and performing "investigative" functions more commonly

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[10]Rehberg does not allege, for instance, that Hodges and Paulk fabricated physical evidence linking him to Dr. Hotz's house or convinced another witness to testify falsely about Rehberg's involvement. The only evidence presented to the grand jury was Paulk's testimony and Dr. Hotz's testimony (which Rehberg does not allege was false).

performed by law enforcement officers. Buckley, 509 U.S. at 273, 113 S. Ct. at 2616; Burns, 500 U.S. at 496, 111 S. Ct. at 1944-45; Rowe, 279 F.3d at 1280; Jones, 174 F.3d at 1285. Hodges and Paulk accordingly do not receive absolute immunity for preparing and filing subpoenas during the investigation of Rehberg.

Hodges and Paulk, however, do receive qualified immunity because Rehberg's subpoena allegations do not state a constitutional violation.[11] The subpoenas covered information Rehberg had provided voluntarily to third parties and for which Rehberg did not have a legitimate expectation of privacy. Thus, the subpoenas did not violate Rehberg's Fourth Amendment rights to be free of unreasonable search and seizure.[12]

In order for Fourth Amendment protections to apply, the person invoking the protection must have an objectively reasonable expectation of privacy in the place searched or item seized. Minnesota v. Carter, 525 U.S. 83, 88, 119 S. Ct. 469, 473 (1998); Katz v. United States, 389 U.S. 347, 88 S. Ct. 507 (1967). The Supreme Court "consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Smith v. Maryland, 442 U.S. 735, 743-44, 99 S. Ct. 2577, 2582 (1979). "[T]he Fourth Amendment does not prohibit the obtaining of information revealed to

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[11]Rehberg's complaint does not allege Defendant Burke participated in the issuance of the subpoenas.

[12]The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." United States v. Miller, 425 U.S. 435, 443, 96 S. Ct. 1619, 1624 (1976).

More specifically, a person does not have a legitimate expectation of privacy in the numerical information he conveys to a telephone company in the ordinary course of business. Smith, 442 U.S. at 743-44, 99 S. Ct. at 2582 ("[E]ven if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not one that society is prepared to recognize as reasonable") (quotation marks omitted); accord United States v. Thompson, 936 F.2d 1249, 1250 (11th Cir. 1991) ("The Supreme Court has held that the installation of a pen register does not constitute a search under the Fourth Amendment of the Constitution and does not warrant invocation of the exclusionary rule.").

Here, Rehberg lacks a reasonable expectation of privacy in the phone and fax numbers he dialed. Once he voluntarily provided that information to BellSouth and Alltel (later Sprint), Rehberg lacked any further valid expectation that those third parties would not turn the information over to law enforcement officers. Absent a valid right of privacy, Rehberg cannot state a constitutional violation regarding the subpoenas for his phone and fax information.

A person also loses a reasonable expectation of privacy in emails, at least after the email is sent to and received by a third party. See Guest v. Leis, 255 F.3d 325, 333 (6th Cir. 2001) (An individual sending an email loses "a legitimate expectation of privacy in

an e-mail that had already reached its recipient"); United States v. Lifshitz, 369 F.3d 173, 190 (2d Cir. 2004) (An individual may not "enjoy [ ] an expectation of privacy in transmissions over the Internet or e-mail that have already arrived at the recipient"); see also United States v. Perrine, 518 F.3d 1196, 1204-05 (10th Cir. 2008) ("Every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy expectation") (collecting cases).

Rehberg's voluntary delivery of emails to third parties constituted a voluntary relinquishment of the right to privacy in that information. Rehberg does not allege Hodges and Paulk illegally searched his home computer for emails, but alleges Hodges and Paulk subpoenaed the emails directly from the third-party Internet service provider to which Rehberg transmitted the messages. Lacking a valid expectation of privacy in that email information, Rehberg fails to state a Fourth Amendment violation for the subpoenas for his Internet records.

Because Rehberg's allegations related to the subpoenas do not state a violation of a constitutional right, the district court erred in denying qualified immunity to Hodges and Paulk on Rehberg's subpoena claims.

IV. COUNT 7 – RETALIATORY PROSECUTION

In Count 7, Rehberg alleges Hodges and Paulk violated his First Amendment free speech rights by retaliating against him for his criticism of the hospital in his faxes. Rehberg alleges Hodges's and Paulk's decisions to investigate him, issue subpoenas, provide his information to paid civilians, and

procure wrongful indictments were in retaliation for his faxes and criticism of the hospital and were all made without probable cause.[13]

We first review Hartman v. Moore, 547 U.S. 250, 126 S. Ct. 1695 (2006), which addresses retaliatory-prosecution claims.

A. Hartman v. Moore

In Hartman, plaintiff Moore brought a Bivens[14] action against postal inspectors and a federal prosecutor for retaliatory prosecution.[15] Because of Moore's criticism of and lobbying to the U.S. Postal Service, postal inspectors launched criminal investigations against Moore and pressured the United States Attorney's Office to indict him, "[n]otwithstanding very limited evidence." Id. at 253-54, 126 S. Ct. at 1699-1700. Although they did not testify, the postal inspectors drafted "witness statements" for other witnesses and provided them to the prosecutor, who presented them to the grand jury. Moore v. United States, 213 F.3d 705, 707 (D.C. Cir.

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[13]To the extent Rehberg relies on the Fourth Amendment, "there is no retaliation claim under the Fourth Amendment separate and distinct from [Rehberg's] malicious prosecution . . . claim[ ]." Wood v. Kesler, 323 F.3d 872, 883 (11th Cir. 2003). "Instead, the only cause of action for retaliation that arguably applies here is retaliatory prosecution in violation of the First Amendment." Id.

[14]See Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999 (1971).

[15]Moore's company manufactured a multiline optical character reader useful in sorting mail. Hartman, 547 U.S. at 252, 126 S. Ct. at 1699. He lobbied the U.S. Postal Service to purchase multiline readers and criticized its reliance on single-line readers. Id. at 253, 126 S. Ct. at 1699.

2000). The district court dismissed the criminal charges against Moore for a "complete lack of direct evidence." Hartman, 547 U.S. at 254, 126 S. Ct. at 1700.

In Moore's subsequent Bivens action for retaliatory prosecution, the district court granted absolute immunity to the prosecutor but denied qualified immunity to the postal inspectors. Id. at 255, 126 S. Ct. at 1701. As to the prosecutor, the D.C. Circuit affirmed absolute immunity for the retaliatory decision to prosecute Moore and the prosecutor's concealment of exculpatory evidence from the grand jury, manipulation of evidence before the grand jury, and failure to disclose exculpatory material before trial. Moore, 213 F.3d at 708. As to the postal inspectors, the D.C. Circuit affirmed the denial of qualified immunity and allowed Moore's retaliatory-prosecution claim to proceed against them, even though Moore had not shown an absence of probable cause for the criminal charges against him.

In reversing the D.C. Circuit's denial of qualified immunity to the postal inspectors, the Supreme Court in Hartman concluded that to bring a retaliatory-prosecution claim, the plaintiff must show an absence of probable cause for the prosecution. Hartman, 547 U.S. at 252, 126 S. Ct. at 1699. The Supreme Court first noted, "as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." Id. at 256, 126 S. Ct. at 1701 (citations and quotation marks omitted). The Supreme Court, however, explained that a retaliatory-prosecution suit cannot be brought against the prosecutor, but only against the "non-prosecuting official" who successfully induced

the prosecutor to bring charges that would not otherwise have been brought, as follows:

> A Bivens (or § 1983) action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute. Instead, the defendant will be a nonprosecutor, an official, like an inspector here, who may have influenced the prosecutorial decision but did not himself make it, and the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory inducement to prosecute. The consequence is that a plaintiff like Moore must show that the nonprosecuting official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging.

Id. at 261-62, 126 S. Ct. at 1704-05 (emphasis added). To sue for retaliatory prosecution, a plaintiff must establish a "but-for" causal connection between the retaliatory animus of the non-prosecutor and the prosecutor's decision to prosecute. See id. at 256, 261, 126 S. Ct. at 1701, 1704 (discussing "but-for cause" and "but-for basis" for the prosecutor's decision to prosecute).[16]

And Hartman indicates that to establish a prima facie case of this but-for causal connection, a plaintiff must plead and prove both (1) a retaliatory motive on

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[16]In a footnote, the Supreme Court noted that Moore's complaint charged the prosecutor with acting in both an investigatory and prosecutorial capacity, but that no appeal or claim against the prosecutor was before the Supreme Court. Hartman, 547 U.S. at 262 n.8, 126 S. Ct. at 1705 n.8.

the part of the non-prosecutor official, and (2) the absence of probable cause supporting the prosecutor's decision. Id. at 265, 126 S. Ct. at 1706; see also Wood, 323 F.3d at 883 (First Amendment retaliatory-prosecution claim is defeated by the existence of probable cause). A retaliatory motive on the part of a "non-prosecuting official" combined with an absence of probable cause will create "a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to bring the charge." Hartman, 547 U.S. at 265, 126 S. Ct. at 1706. Importantly, the absence of probable cause "is not necessarily dispositive" of whether the unconstitutionally motivated inducement succeeded, but will create a prima facie inference that it did. Id. The burden then shifts to the defendant official to show "that the action would have been taken anyway, independently of any retaliatory animus." Id. at 261, 126 S. Ct. at 1704. In other words, the defendant official will not be liable if he can show the prosecutor would have taken the action complained of anyway. Id.

B. Rehberg's Retaliatory-Prosecution Claims

Hartman dictates the outcome of Rehberg's retaliatory-prosecution claim in Count 7. First, as to Hodges, Rehberg alleges Hodges was in communication with Burke about the decision to prosecute, even after Hodges recused. Hodges's alleged decision to prosecute Rehberg, even if made without probable cause and even if caused solely by Paulk's and his unconstitutional retaliatory animus, is protected by absolute immunity. Hartman, 547 U.S. at 261-62, 126 S. Ct. at 1704-05.

As to Paulk, Rehberg must show investigator Paulk's retaliation against Rehberg successfully induced the prosecution and was the "but-for" cause of

the prosecution. Hartman, 547 U.S. at 265, 126 S. Ct. at 1701. Accordingly, Rehberg must show that prosecutor Burke (himself or with Hodges's influence) would not have prosecuted Rehberg but for Paulk's retaliatory motive and conduct.[17]

The very detailed allegations in Rehberg's complaint satisfy the two requirements for a prima facie case of retaliatory prosecution: non-prosecutor Paulk's retaliatory motive, and the absence of probable cause for prosecutor Burke to bring charges. Hartman, 547 U.S. at 265, 126 S. Ct. at 1706. For example, Rehberg alleges "[t]here was no probable cause for the underlying criminal charges against Mr. Rehberg and such charges would not have been brought if there was no retaliatory motive." Rehberg supports this alleged lack of probable cause by alleging Paulk admitted that "he never interviewed any witnesses or gathered any evidence indicating that Mr. Rehberg committed any aggravated assault or burglary," and Paulk's false testimony was the only evidence Burke presented in support of the first indictment. Without Paulk's allegedly false testimony, Burke could not have procured the first indictment because there was no other evidence. Rehberg also alleges Hodges and Paulk acted in retaliation for Rehberg's criticisms of the activities and financial management of a public hospital to which they had close political connections and personal relationships and that chilling Rehberg's speech was a motivating fac-

[17]Count 7 of Rehberg's complaint does not name Burke as a defendant, but Count 7 claims Paulk's retaliatory motive and actions "wrongfully influenced and instigated the prosecutorial decision to bring charges against Mr. Rehberg."

tor in all of Hodges's and Paulk's conduct in investigating and prosecuting him.

In sum, Rehberg sufficiently has alleged the requisite retaliatory motive, absence of probable cause, and but-for causation (i.e., that Burke would not have prosecuted Rehberg but for Paulk's false testimony). Therefore, at this pleading juncture, the district court did not err in denying absolute and qualified immunity to Defendant Paulk on Rehberg's retaliatory-prosecution claim.

C. Retaliatory Investigation Claim

Rehberg's complaint also alleges a "retaliatory investigation" claim against Hodges and Paulk. For example, Rehberg's complaint alleges Hodges and Paulk together decided to investigate Rehberg and took several steps during the investigation because each of them had retaliatory animus. These allegations of coordinated and joint actions are replete throughout the complaint. E.g., Compl. ¶¶ 99 ("Mr. Paulk and Mr. Hodges instituted an investigation . . ."), 124 ("Chilling his political speech was a substantial or motivating factor in the wrongful conduct of Mr. Paulk and Mr. Hodges in investigating Mr. Rehberg . . ."), 157-61 (conspiracy claim).

Hartman does not help us with this claim because the Supreme Court pointedly did not decide whether "simply conducting retaliatory investigation with a view to promote prosecution is a constitutional tort." Hartman, 547 U.S. at 262 n. 9, 126 S. Ct. at 1705 n. 9 ("Whether the expense or other adverse consequences of a retaliatory investigation would

ever justify recognizing such an investigation as a distinct constitutional violation is not before us").[18]

As noted above, only qualified immunity, not absolute immunity, applies to conduct taken in an investigatory capacity as opposed to a prosecutorial capacity. The only actual investigatory conduct alleged is the issuance of subpoenas, which, as we already stated above, did not violate Rehberg's Fourth Amendment rights. Because Hodges and Paulk's issuance of the subpoenas did not violate Rehberg's constitutional rights (Count 6), we are inclined to agree with the government that Hodges and Paulk's retaliatory animus (Count 7) does not create a distinct constitutional tort.[19]

But even if we assume Rehberg has stated a constitutional violation by alleging that Hodges and Paulk initiated an investigation and issued subpoenas in retaliation for Rehberg's exercise of First Amendment rights, Hodges and Paulk still receive qualified immunity because Rehberg's right to be free from a retaliatory investigation is not clearly established. The Supreme Court has never defined retaliatory investigation, standing alone, as a constitutional tort, Hartman, 547 U.S. at 262 n.9, 126 S. Ct. at 1705 n.9, and neither has this Court. Without this

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[18]Rehberg does not allege he incurred any expenses in the investigation stage.

[19]The initiation of a criminal investigation in and of itself does not implicate a federal constitutional right. The Constitution does not require evidence of wrongdoing or reasonable suspicion of wrongdoing by a suspect before the government can begin investigating that suspect. See United States v. Aibejeris, 28 F.3d 97, 99 (11th Cir. 1994). No Section 1983 liability can attach merely because the government initiated a criminal investigation.

sort of precedent, Rehberg cannot show that the retaliatory investigation alleged here violated his First Amendment rights. See Oliver v. Fiorino, 586 F.3d 898, 907 (11th Cir. 2009) ("In order to determine whether a right is clearly established, we look to the precedent of the Supreme Court of the United States, this Court's precedent, and the pertinent state's supreme court precedent, interpreting and applying the law in similar circumstances"). Hodges and Paulk accordingly are entitled to qualified immunity for Rehberg's retaliatory investigation claims in Count 7.

V. COUNT 8 – FABRICATION OF EVIDENCE AND PRESS STATEMENTS AGAINST BURKE

Count 8 is against only Burke. Rehberg alleges Burke violated his "constitutional rights" by (1) "participat[ing] in fabricating evidence"; (2) presenting Paulk's perjured testimony to the grand jury; and (3) making defamatory statements to the media which "damaged Mr. Rehberg's reputation."[20]

As a special prosecutor appointed to stand in for Hodges, Burke receives the full scope of absolute prosecutorial immunity and is absolutely immune for Rehberg's claims of malicious prosecution and the presentation of perjured testimony to a grand jury. For the same reasons explained above, Burke also is absolutely immune for participating in the conspiracy to fabricate Paulk's grand jury testimony against Rehberg.

Burke's statements to the media, however, are not cloaked in absolute immunity because

[20]Burke is not alleged to have participated in subpoenaing Rehberg's telephone and Internet providers.

"[c]omments to the media have no functional tie to the judicial process just because they are made by a prosecutor," and they are not part of the prosecutor's role as an advocate of the State. See Buckley, 509 U.S. at 277-78, 113 S. Ct. at 2618 ("The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions"); Hart v. Hodges, 587 F.3d 1288, 1297 (11th Cir. 2009). Burke's immunity for the alleged press statements must arise, if at all, through qualified immunity.

A tort claim, such as Rehberg's defamation allegation in Count 8, does not give rise to a § 1983 due process claim unless there is an additional constitutional injury alleged. Cypress Ins. Co. v. Clark, 144 F.3d 1435, 1438 (11th Cir. 1998). "The Supreme Court . . . held that injury to reputation, by itself, does not constitute the deprivation of a liberty or property interest protected under the Fourteenth Amendment." Behrens v. Regier, 422 F.3d 1255, 1259 (11th Cir. 2005) (citing Paul v. Davis, 424 U.S. 693, 701-02, 96 S. Ct. 1155, 1160-61 (1976)).[21] Damages to a plaintiff's reputation "are only recoverable in a section 1983 action if those damages were incurred as a result of government action significantly altering the plaintiff's constitutionally recognized legal rights." Cypress, 144 F.3d at 1438.

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[21]Rehberg does not specifically identify what constitutional provision Burke's media statements violated. We assume Rehberg asserts a Fourteenth Amendment due process claim. See, e.g., Paul, 424 U.S. at 712, 96 S. Ct. at 1165-66; Cypress, 144 F.3d at 1436. Rehberg does not identify another constitutional theory that might support a Section 1983 action for false statements to the media.

This doctrine is known as the "stigma-plus" test, Cannon v. City of W. Palm Beach, 250 F.3d 1299, 1302 (11th Cir. 2001), and requires the plaintiff to show both a valid defamation claim (the stigma) and "the violation of some more tangible interest" (the plus). Behrens, 422 F.3d at 1260 (quotation marks omitted). "To establish a liberty interest sufficient to implicate the fourteenth amendment safeguards, the individual must be not only stigmatized but also stigmatized in connection with . . . [a] government official's conduct [that] deprived the plaintiff of a previously recognized property or liberty interest in addition to damaging the plaintiff's reputation." Id. (citations and quotation marks omitted).[22] The "stigma-plus" test requires not only allegations stating a common law defamation claim, but also an additional constitutional injury, tied to a previously recognized constitutional property or liberty interest, flowing from the defamation. Cypress, 144 F.3d at 1436-37.

Rehberg's complaint alleges damage to his reputation but does not allege the required deprivation of

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[22]"While we have in a number of our prior cases pointed out the frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." Paul, 424 U.S. at 701, 96 S. Ct. at 1160-61; see also Siegert v. Gilley, 500 U.S. 226, 234, 111 S. Ct. 1789, 1794 (1991) ("Most defamation plaintiffs attempt to show some sort of special damage and out-of-pocket loss which flows from the injury to their reputation. But so long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law but it is not recoverable in a Bivens action.").

any previously recognized constitutional property or liberty interest. The only factual allegations Rehberg makes regarding Burke's media statements are these: "Mr. Rehberg . . . was subjected to extensive publicity in the media where he was identified as being charged with multiple felonies and misdemeanors, and publicly identified by the acting District Attorney as having committed an assault and burglary. The damage of three indictments on his public record will remain with him and his wife and children for the rest of their lives." He continues by alleging, "[t]hese wrongful indictments will always be associated with his name and have caused and will cause significant personal, professional and economic damages to Mr. Rehberg." Rehberg alleges Burke's media statements "wrongfully damaged [his] reputation."

In short, Rehberg's defamation allegations are too generalized to show a previously recognized constitutional deprivation flowing from Burke's alleged defamatory statements. Damage to reputation alone is insufficient to state a Fourteenth Amendment due process claim. Cypress, 144 F.3d at 1437-38 ("Indeed, [in Siegert v. Gilley, 500 U.S. 226, 111 S. Ct. 1789 (1991)] the [Supreme] Court specifically rejected the notion that defamation by a government actor that causes injury to professional reputation violates procedural due process").

The district court averted this settled law by connecting Burke's media statements to "the alleged Fourteenth Amendment violation alleged by Plaintiff, i.e., violation of his right to be free from prosecution based upon false evidence/charges." This was error. The "stigma-plus" test requires the plaintiff to show deprivation of a previously recognized Fourteenth Amendment property or liberty interest "in

connection with" the claimed defamation. Even liberally construed, Rehberg's complaint does not allege a procedural due process claim under the Fourteenth Amendment. See Albright v. Oliver, 510 U.S. 266, 272, 114 S. Ct. 807, 812 (1994). Rehberg does not allege Dougherty County or the individual defendants denied him the constitutionally required procedures necessary to challenge his indictments and arrest. Indeed, Rehberg's successful challenges to the three indictments show otherwise. And, under the Fourteenth Amendment, there is no substantive due process right to be free from malicious prosecution without probable cause. Id. at 274, 114 S. Ct. at 813. A malicious prosecution claim arises under the Fourth Amendment, not Fourteenth Amendment substantive due process.

Therefore, the only remaining "plus" Rehberg identifies is the right to be free from malicious prosecution and unreasonable detention under the Fourth Amendment. However, Rehberg's complaint does not allege that Burke's media statements caused Rehberg's indictments and arrest.[23] For example, there is no allegation that the grand jury relied on Burke's press statements in indicting Rehberg or that the Defendants relied on Burke's media statements as probable cause to arrest Rehberg. Paul's "stigma-plus" test is not satisfied by simply alleging a constitutional violation somewhere in the case. The consti-

[23]The complaint does not clearly state whether Burke made his media statements before Rehberg was indicted or after, but the complaint also does not allege any fact showing that Burke's media statements caused Rehberg to be indicted.

tutional violation must itself flow from the alleged defamation.[24]

In any event, Rehberg cannot use the prosecution itself (the indictment and arrest) as the basis for constitutional injury supporting a § 1983 defamation claim. The Seventh Circuit considered this precise situation, concluding the plaintiff must point to some constitutional wrong, other than the indictment and related events, in order to support a § 1983 constitutional claim based on defamation. "Identifying the arrest and imprisonment as the loss of liberty does not assist [the plaintiff], however, because [the prosecutor] has absolute immunity from damages for these events." Buckley v. Fitzsimmons, 20 F.3d 789, 797 (7th Cir. 1994), cert. denied, 513 U.S. 1085, 115 S. Ct. 740 (1995) (rejecting plaintiff's arrest as a sufficient "plus" under the stigma-plus test). The Seventh Circuit explained that, "the Supreme Court [ ] adopt[ed] a strict separation between the prosecutor's role as advocate and the ancillary events (such as press conferences) surrounding the prosecution. It would be incongruous to treat the press conference and the prosecution as distinct for purposes of immunity but not for purposes of defining the actionable wrong." Id. at 797-98. The Seventh Circuit concluded that, "a plaintiff who uses a 'stigma plus' approach to avoid Paul and Siegert must identify a

[24]The district court cited Riley v. City of Montgomery, Ala., 104 F.3d at 1253, for the proposition that fabricating evidence violates an accused's constitutional rights, and thus since Rehberg alleges fabrication in this case, he satisfied Paul's "stigma-plus" test. Even assuming evidence was fabricated and that this fabrication was a constitutional violation, nothing in the complaint connects Hodges's and Paulk's alleged evidence fabrication to Burke's press statements.

'plus' other than the indictment, trial, and related events for which the defendants possess absolute prosecutorial immunity." Id. at 798.

Therefore Rehberg failed to satisfy Paul's "stigma-plus" test and fails to allege a constitutional claim based on the press statements. This lack of a constitutional claim means Burke receives qualified immunity for his press statements. The district court erred by not finding Burke immune for the allegations in Count 8.

VI. COUNT 10 – CONSPIRACY

Count 10 alleges Hodges, Burke, and Paulk engaged in a conspiracy to violate Rehberg's constitutional rights under the First, Fourth, and Fourteenth Amendments.

"A person may not be prosecuted for conspiring to commit an act that he may perform with impunity." Jones, 174 F.3d at 1289 (citations omitted). A prosecutor cannot be liable for "conspiracy" to violate a defendant's constitutional rights by prosecuting him if the prosecutor also is immune from liability for actually prosecuting the defendant. Rowe, 279 F.3d at 1282. And a witness's absolute immunity for testifying prevents any use of that testimony as evidence of the witness's membership in an unconstitutional conspiracy prior to his testimony. Id.; Mastroianni, 173 F.3d at 1367.

Rehberg's conspiracy allegations do not enlarge what he alleged previously in his complaint. This opinion has already explained why Hodges, Burke, and Paulk receive absolute or qualified immunity for all of the conduct alleged in Counts 6 and 8 and why Hodges receives absolute immunity for the retaliatory prosecution in Count 7. Rehberg cannot state a

valid conspiracy claim by alleging the Defendants conspired to do things they already are immune from doing directly.

The only portion of Count 7 that remains is Rehberg's retaliatory prosecution claim against Paulk alone. The intracorporate conspiracy doctrine bars conspiracy claims against corporate or government actors accused of conspiring together within an organization, preventing Rehberg's claim that Paulk "conspired" to initiate a retaliatory prosecution. Dickerson v. Alachua County Commission, 200 F.3d 761, 767 (11th Cir. 2000) ("[I]t is not possible for a single legal entity consisting of the corporation and its agents to conspire with itself, just as it is not possible for an individual person to conspire with himself"); Denney v. City of Albany, 247 F.3d 1172, 1190 (11th Cir. 2001) (applying intracorporate conspiracy doctrine to city, city fire chief, and city manager). Rehberg has not alleged that Paulk conspired with anyone outside of the District Attorney's office. See Denney, 247 F.3d at 1191 ("the only two conspirators identified . . . are both City employees; no outsiders are alleged to be involved"). The "conspiracy" occurred only within a government entity, and thus the intracorporate conspiracy doctrine bars Count 10 against Paulk. The district court erred in not dismissing Count 10.

VII. CONCLUSION

For the reasons explained above, Hodges and Paulk receive absolute immunity for Paulk's grand jury testimony and for the related pre-indictment conspiracy conduct alleged in Count 6; Hodges and Paulk receive qualified immunity for the issuance of subpoenas alleged in Count 6; Hodges receives absolute immunity for initiating a retaliatory prosecution

as alleged in Count 7; Hodges and Paulk both receive qualified immunity for the retaliatory investigation alleged in Count 7; Burke receives absolute immunity for the allegations in Count 8, except for the alleged media statements, for which he receives qualified immunity; and Count 10's conspiracy claim fails. The only surviving claim from this appeal is the retaliatory-prosecution claim in Count 7 against Paulk, for which the district court correctly denied absolute and qualified immunity. We reverse the district court's order in part and remand this case for the district court to grant the Defendants' motions to dismiss and to enter judgment in favor of all Defendants on Counts 6, 7, 8, and 10, except for the retaliatory-prosecution claim against Paulk in Count 7.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

CHARLES A. REHBERG,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	1:07-CV-22(WLS)
	:	
JAMES P. PAULK, in his individual capacity, *et al.*,	:	
	:	
Defendants.	:	
	:	

ORDER

Presently pending before the Court are Defendants Burke and Hodges's Motion to Dismiss, Defendants Paulk and Dougherty County's Motion to Dismiss, and Defendant Dougherty County's Second Supplemental Motion to Dismiss. (Docs. 5, 6, 20).

For the reasons below, Defendants Burke and Hodges's Motion to Dismiss (Doc. 5) is **DENIED**; Defendants Paulk and Dougherty County's Motion to Dismiss (Doc. 6) is **GRANTED-IN-PART, DENIED-IN-PART**; and Defendant Dougherty County's Second Supplemental Motion to Dismiss (Doc. 20) is **DENIED as MOOT**.

BACKGROUND

Based upon the facts alleged in the Complaint (Doc. 1), as set forth in relevant part below, Plaintiff filed this suit against Defendants for violations of 42 U.S.C. § 1983 and Georgia state law.

FACTS[1]

On October 22, 2003, a subpoena was issued under the letterhead of Kenneth B. Hodges, III, District Attorney to Bell South requiring the production of certain telephone records. On December 1, 2003, another subpoena was issued, under the letterhead of Defendant Hodges, District Attorney, to Bell South for certain telephone records. On January 20, 2004 another subpoena was issued, also on Defendant Hodges's letterhead, to Bell South for certain telephone number records. On February 5, 2004, a subpoena for production of evidence was issued to Bell South Subpoena Compliance Center relating to Plaintiff's unlisted residential number. On February 24, 2004, a subpoena was issued to Alltel requiring production of information of records concerning certain telephone numbers. Sprint long distance responded on January 27, 2004 to Defendant Paulk in response to a Subpoena (date unknown) for certain prepaid long distance calls originated by Plaintiff. Defendant Paulk also prepared and issued a subpoena to Exact Advertising, the Internet service provider of one of Plaintiff's email accounts, and obtained Plaintiff's personal e-mails (sent and received from his personal computer).

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[1] The facts set forth below are gleaned from Plaintiff's Complaint (Doc. 1), because in consideration of a motion to dismiss, the Court must accept all of Plaintiff's well pleaded allegations as true. *See infra* pp. 5-6.

On the dates set forth in the numerous subpoenas for appearance, the Dougherty County Grand Jury was not meeting to consider the case of the State vs. Charles Rehberg, John Bagnato, and Jim Bowman. The case against Plaintiff was not presented to the Dougherty County Grand Jury until December 14, 2005. Defendant Paulk has now admitted that at the time he prepared and issued the subpoenas, "[t]here was not [a Grand Jury] impaneled." Upon receipt of the subpoenaed records, Defendant Paulk provided the records, including Plaintiff's personal e-mails, to private civilians, who in turn paid for the information. The subpoenas were never intended to require an appearance before the Grand Jury on any matter pending before a Grand Jury, but were intended to obtain confidential and private records for private civilians.

On December 14, 2005, Charles Rehberg was indicted on charges of aggravated assault, burglary and "harassing telephone calls" in Dougherty County. The allegations in the indictment arose from Plaintiff's alleged interactions with a Dr. James Hotz (the victim). However, the charges against Mr. Rehberg were false. Plaintiff has never been to the home of Dr. Hotz. There is no evidence that Plaintiff committed a burglary or aggravated assault on anybody as he was charged. Neither the Albany Police Department nor any other police agencies were ever involved in any investigation of this alleged assault or burglary. Defendant Paulk, the Chief Investigator to the District Attorney in the case, testified that he and Mr. Hodges initiated and handled the investigation of Plaintiff supposedly because "of lack of confidence in the City police department to handle it." Defendant Paulk testified before the grand jury as the complaining witness and verified to the grand jury

that his testimony consisted of "true and accurate facts based upon the indictment." Yet, Defendant Paulk has now admitted that he never interviewed any witnesses or gathered any evidence indicating that Plaintiff committed any aggravated assault or burglary.

Based on the investigation conducted by Defendants Paulk, Hodges, and Burke, there was no probable cause to indict Plaintiff on charges of burglary, aggravated assault or "harassing" phone calls. The three indictments of Plaintiff were widely covered in the local and state press, including the Albany Herald, WALB-TV, WFXL-TV, and the Atlanta Journal. Defendant Burke conducted interviews with the press and also issued press statements in which he addressed challenges by Plaintiff's counsel and stated, "[I]t is never free speech to assault or harass someone, no matter who they are and no matter how much you don't like them." Defendant Burke represented to the public and the press that Plaintiff had committed an assault. Defendant Burke also publicly stated, "It would be ludicrous to say that an individual has the right to go onto someone else's property and burn a cross under the guise of free speech, which is tantamount to what these defendants are claiming."

Plaintiff's counsel filed pleadings attacking the legal sufficiency of the first indictment and a hearing was scheduled by the presiding judge. On February 2, 2006, Assistant District Attorney Kelly Burke dismissed and *nol-prossed* the entire indictment prior to the scheduled hearing, thus terminating the First Indictment. Defendants Burke and Paulk appeared before a second Grand Jury on or about February 15, 2006, and another indictment was issued

February 16, 2006. The second Indictment included charges of "simple assault" and five counts of "harassing telephone calls." Defendant Paulk again appeared as a state witness along with Dr. Hotz. At that time, Plaintiff still had never been to Dr. Hotz's home. There was still no evidence that Plaintiff committed an assault on anybody as he was charged. Plaintiff's counsel filed a motion attacking the legal sufficiency of the Second Indictment and the presiding judge scheduled a hearing. At a pretrial hearing held on April 10, 2006, Defendant Burke announced in open court that the Second Indictment was, or would immediately be dismissed. However, Defendant Burke failed to dismiss the Indictment. As a result, on July 7, 2006, as requested by Plaintiff's counsel, the Court dismissed the Second Indictment by Order of the Court, pursuant to the Defendant Burke's announcement made on April 10, 2006, thus terminating the Second Indictment.

Defendants Burke and Paulk appeared before a third Grand Jury on March 1, 2006 and secured a Third Indictment; again charging Plaintiff with "simple assault" and "harassing telephone calls." Plaintiff's counsel once again filed pleadings attacking the legal sufficiency of the pleadings and the presiding judge scheduled a hearing. On May 1,2006, Judge Harry Altman issued two orders dismissing all charges against Plaintiff.

DISCUSSION

Each Defendant, through the three motions to dismiss pending before the Court, moves to dismiss Plaintiff's Complaint as to all counts. Defendants rely on Federal Rule of Civil Procedure 12, which provides in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (6) failure to state a claim upon which relief can be granted . . . .

Fed. R. Civ. P. 12(b)(6). A motion to dismiss a plaintiff's complaint, or a portion thereof, under Federal Rule of Civil Procedure 12(b)(6) should not be granted unless Plaintiff fails to plead enough facts to state a claim to relief that is plausible[, and not merely just conceivable,] on its face. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (Citation omitted). *Id.* at 1964-65 (citing Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994)). Accordingly, "[a]t the motion to dismiss stage, all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1274 n.l (11th Cir. 1999). Finally, the "threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is . . . exceedingly low." Ancata v. Prison Health Servs. Inc., 769 F.2d 700, 703 (11th Cir. 1985) (quotation and citation omitted). The Court will address each motion to dismiss in turn.

I. DEFENDANTS HODGES AND BURKE'S MOTION TO DISMISS (Doc. 5)

Counts six, seven, eight, nine, and ten of Plaintiff's Complaint allege wrongful conduct by Defendants Hodges and/or Burke. Count VI alleges a Section 1983 claim against Defendant Hodges in his individual capacity, along with Defendant Paulk, for violating Plaintiff's rights under the Fourth and Fourteenth Amendments. Count VII alleges a Section 1983 claim against Defendant Hodges in his individual capacity, along with Defendant Paulk, for instigating a retaliatory prosecution. Count VIII alleges a Section 1983 claim against Defendant Burke in his individual capacity. Count IX alleges a Section 1983 claim against Defendant Hodges in his official capacity and Defendant Dougherty County. Finally, Count X alleges a conspiracy to violate Section 1983 and the constitutional rights of Plaintiff by Defendants Burke, Hodges, and Paulk in their individual capacities.

Defendants Hodges and Burke move to dismiss Plaintiff's Complaint on six separate grounds. First, Defendants argue that Plaintiff's § 1983 claims are barred by the two year statute of limitations. Second, Defendants contend that they are entitled to absolute immunity from Plaintiff's claims. Third, Defendant Burke contends that damage to one's reputation is not actionable under Section 1983. Fourth, Defendant Hodges argues that Plaintiff cannot support his claim of negligent supervision under a theory of respondeat superior alone. Fifth, Defendants contend that Plaintiff has not alleged a valid claim for conspiracy. Finally, Defendants argue that where all else fails, they are entitled to qualified immunity.

A. Statute of Limitations

> Pursuant to O.C.G.A. § 9-3-33:
>
> > Actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year after the right of action accrues, and except for actions for injuries to the person involving loss of consortium, which shall be brought within four years after the right of action accrues.

Although Georgia law provides the applicable statute of limitations for Plaintiff's claims, Mullinax v. McElhennev, 817 F.2d 711 (11th Cir. 1987) (citing Wilson v. Garcia, 471 U.S. 261, 269 (1985)), federal law determines when the same began to accrue. *Id.* "In Section 1983 cases, the statute of limitations does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Id.* (citing Calhoun v. Ala. Alcoholic Beverage Control Bd., 705 F.2d 422,425 (11th Cir. 1983)). Stated more simply, the statute of limitations for a Section 1983 action does not begin to accrue until (1) a plaintiff knows or has reason to know that he has been injured and (2) is aware or should have been aware of who injured him. *Id.* A cause of action for malicious prosecution does not arise until the criminal proceeding that gives rise to such a claim is terminated in favor of the accused. Heck v. Humphrey, 512 U.S. 477, 484 (1994).

Defendants argue that Plaintiff's allegations are barred by the two year statute of limitations because the allegedly unlawful subpoenas were issued from approximately October 22, 2003 to February, 24, 2004–with February 2004 being more than two years

prior to the January 2007 filing of Plaintiff's Complaint. Defendants also argue, confusingly, that any claims for action(s) which occurred before January 23, 2005 are barred by the statute of limitations. Finally, Defendants contend, incorrectly, that the first indictment in this case was "terminated in the Plaintiff's favor" more than two years before the filing of his Complaint.

Despite Defendants' arguments to the contrary, Plaintiff's claims against them are not barred by the statute of limitations specified in O.C.G.A. § 9-3-33. First, the initial indictment against Plaintiff was issued on December 14, 2005. The Court finds, as argued by Plaintiff, that merely because subpoenas were issued as early October 2003, it does not necessarily follow that Plaintiff would have immediately become aware of the illegality of the same. At a minimum on December 14, 2005, Plaintiff, proceeding as an indicted Defendant, had the ability to use the criminal discovery process to discover certain information surrounding the issuance of the allegedly unlawful subpoenas. Therefore, the statute of limitations for Plaintiff's causes of action relating to actions involving the investigation and instigation of the prosecutions against him did not begin to accrue until after the first indictment was issued against Plaintiff. At this time Plaintiff should have known the investigation, including the issuance of the subpoenas, was allegedly unlawful. Additionally, the first indictment was terminated in Plaintiff's favor on February 2, 20062, officially making any cause of

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[2] As noted by Plaintiff, it is quite unclear why Defendants argue "the first indictment was terminated in the Plaintiff's favor more than two years prior to the filing of this complaint."

action for malicious prosecution ripe for review anytime thereafter. Because the statute of limitation on Plaintiff's causes of action began to accrue on December 15, 2005 and February 2, 2006, Plaintiff's Complaint was timely filed on January 23, 2007.

B. Absolute Immunity

Prosecutors are immune from suit for damages under Section 1983 for "initiating a prosecution and in presenting the State's case." Imbler v. Pachtman, 424 U.S.409, 431 (1976). A prosecutor's duties "in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom, and are nonetheless entitled to absolute immunity." Buckley v. Fitzsimmons, 509 U.S. 259, 273-74 (1993) (citing Imbler, 424 U.S. at 431). However, any such actions by a prosecutor must include legal evaluation "of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Id.* Significantly, "[t]here is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" *Id.* (citing Hampton v. Chicago, 484 F.2d 602, 608 (7th Cir. 1973), cert. denied, 415 U.S. 917, (1974)). Therefore, if a prosecutor assumes the investigative roll, usually reserved for police officers, the prosecutor "has no

greater claim to complete immunity than activities of police officers allegedly acting under his direction." *Id.*

Defendants argue that the actions complained of in Plaintiff's Complaint "directly related to seeking indictments, the presentation of evidence to the grand-jury, the choice of witnesses to present the grand-jury, and decisions as to whether to dismiss indictments." Defendants contend that since these actions are prosecutorial in nature, they are entitled to absolute immunity under Imbler.

The Court rejects Defendants' conclusion. It is true, as conceded by Plaintiff, that some of the actions listed above by Defendants are included within the Complaint. Therefore, consistent with Imbler and Buckley Defendants would be immune from a Section 1983 damages suit for the same. However, Plaintiff's Complaint includes multiple allegations that Defendants Hodges and Burke fabricated criminal charges against Plaintiff before any Grand Jury was ever impaneled. Plaintiff's allegation is essentially that all Defendants in concerted action assumed the investigatory role of police officers. Accordingly, absolute immunity to suit cannot apply where Plaintiff's Complaint alleges actions by Defendants that fall outside the role of State's advocate. *See* Buckley, 509 U.S. at 276-78 (holding that prosecutor was not acting as an advocate when he held a press conference or allegedly fabricated evidence).

C. Damage to Reputation

The protections of the Due Process Clause, guaranteeing, *inter alia*, the right to procedural due process, only apply where interests within the Fourteenth Amendment's protection of liberty and prop-

erty apply. Behrens v. Regier, 422 F.3d 1255, 1259 (11th Cir. 2005) (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569 (1972)). Injury to one's reputation alone does not constitute deprivation of a liberty or property interest protected by the Fourteenth Amendment. McCray v. Howard, 285 Fed.Appx. 689, **4 (11th Cir. 2008) (citing Paul v. Davis, 424 U.S. 693, 701-02, 712 (1976)). Therefore, a plaintiff alleging injury to his or her reputation must "establish more than a mere defamation claim." *Id.* This requirement is the "Stigma-plus" test from Paul. *Id.*; *see* Paul, 424 U.S. at 701-702, 712. Specifically, a plaintiff must show damage to an interest protected by the Fourteenth Amendment in addition to the related injury to one's reputation. *Id.*

Defendant Burke argues simply that the allegations included in Count VIII of Plaintiff's Complaint, alleging injury to Plaintiff's reputation caused by Defendant Burke's statements to the media, are insufficient to establish a claim under Section 1983.

As noted by Plaintiff, Counts VII and X allege that Defendant Burke "participated in fabricating evidence" and that Defendant Burke along with Defendants Hodges and Paulk conspired, among other things, to do the same. It is well established in the Eleventh Circuit that "fabricating incriminating evidence violate[s] constitutional, rights." Riley v. City of Montgomery, Ala., 104 F.3d 1247, 1253 (11th Cir. 1997) (citing Schneider v. Estelle, 552 F.2d 593, 595 (5th Cir. 1977)). Plaintiff alleges that Defendant Burke made the following statements: (1) "it is never free speech to assault or harass someone, no matter how much you don't like them[;]" and (2) "It would be ludicrous to say an individual has the right to go to someone else's property and burn a cross under the

guise of free speech, which is tantamount to what these defendants are claiming." These statements, if made, clearly relate to the alleged Fourteenth Amendment violation alleged by Plaintiff, i.e., violation of his right to be free from prosecution based upon false evidence/charges. Therefore, Plaintiff's allegations are sufficient to satisfy the Paul "Stigma-plus" standard.

D. Negligent Supervision

A Section 1983 claim cannot be maintained based upon a theory of respondeat superior. *See, e.g.*, Amnesty Intern. v. Battle, --- F.3d ----, 2009 WL 425050, *6 (11th Cir. 2009).

Defendant Hodges argues that a claim under Section 1983 cannot be maintained on the basis that a defendant is responsible under a theory of respondeat superior for the actions of another person. Defendant contends that Plaintiff must show that "the named defendant actually participated in the alleged constitutional violation, or exercised control or direction over the alleged violation." Additionally, Defendant argues that Plaintiff has not put forth sufficient allegations to show that constitutional violations were widespread.

Consistent with the legal standard espoused by Defendant Hodges, Plaintiff's Complaint, taken as true, is replete with allegations that Defendant personally participated in the alleged violations of Plaintiff's constitutional rights and/or exercised control or direction over Defendants Paulk and Burke to achieve said violations. Plaintiff also argues that the allegations included within his Complaint establish a claim of deliberate indifference in violation of Section 1983. Finally, contrary to Defendant Hodges's char-

acterization that the alleged constutional violations were not widespread, Plaintiff alleges that "Mr. Paulk has testified that it is 'unfortunately' ***normal and common*** for him and other investigators employed by Dougherty County and working under the supervision of the District Attorney to testify without adequate knowledge or preparation or personal knowledge of the facts being attested to as true." (Doc. 1, ¶ 18) (emphasis added). Therefore, Plaintiff's claims against Defendant Hodges are not merely based upon a theory of respondeat superior.

E. Conspiracy

In the Eleventh Circuit, a heightened pleading standard is required for Section 1983 claims against defendants for whom qualified immunity is available as a defense. Swann v. Southern Health Partners, 388 F.3d 834, 838 (11th Cir. 2004); *but see* Shows v. Morgan, 40 F. Supp. 2d 1345, 1357-58 (M.D. Ala. 1999) ("[I]t is unclear whether the Eleventh Circuit § 1983 pleading standard is still constitutional"). A plaintiff making such a claim must "allege with some specificity facts which make out its claim." GJR Investments, Inc. v. County of Escambia, 132 F.3d 1359, 1367 (11th Cir. 1998). In Fullman v. Graddick, the Eleventh Circuit held:

> In civil rights and conspiracy actions, courts have recognized that more than mere conclusory notice pleading is required. In civil rights actions, it has been held that a complaint will be dismissed as insufficient where the allegations it contains are vague and conclusory. In conspiracy cases, a defendant must be informed of the nature of the conspiracy which is alleged. It is not enough to simply aver in the complaint that a conspir-

> acy existed. A complaint may justifiably be dismissed because of the conclusory, vague and general nature of the allegations of conspiracy.

739 F.2d 553, 556-57 (11th Cir. 1984).

Defendants first reiterate their claim that they are entitled to absolute immunity because they were acting within the scope of their authority as prosecutors; therefore, a claim of conspiracy will not dilute their immunity. Next, Defendants argue that Plaintiff's conspiracy claim is vague and conclusory.

Contrary to Defendants' contention, Plaintiff's conspiracy count (Count X) is well pleaded and satisfies the heightened pleading requirement of the Eleventh Circuit. Count X of Plaintiff's Complaint "repeats and incorporates the allegations of paragraphs 1 through 60" of Plaintiff's Complaint. Paragraphs 1 through 60 set forth detailed allegations of the wrongful conduct Plaintiff alleges and Count X of Plaintiff's Complaint explicitly alleges that the facts described in paragraphs 1 through 60 establish that Defendants Paulk, Burke, and Hodges acted in "concert" and "engag[ed] in a conspiracy." Defendant appears to contend that Plaintiff must use the word "agreement" specifically in his Complaint to proceed with a conspiracy claim. This is not so. As noted by Defendants, "[i]n conspiracy cases, a defendant must be informed of the nature of the conspiracy which is alleged." Fullman, 739 F.2d at 556-57. Plaintiff's detailed allegations and conspiracy count (Count X) more than satisfy this requirement.

F. Qualified Immunity

"The doctrine of qualified immunity protects government officials 'from liability for civil damages in-

sofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " Amnesty Int'l, USA, 2009 WL 425030 (citing Pearson v. Callahan, 129 S.Ct. 808, 815 (2009)). The Supreme Court has developed a two step analysis for use by courts to determine whether a defendant is entitled to qualified immunity. Saucier v. Katz, 533 U.S. 194, 201 (2001). First, the Court determines whether the Complaint, with Plaintiff's well-pleaded allegations accepted as true, alleges a violation of a constitutional right. Amnesty Int'l, USA, 2009 WL 425030. Second, if the Court finds that a constitutional right was violated, the Court must determine if these rights were "clearly established." *Id.* Although this two-step inquiry is no longer mandatory, the Court thinks it remains appropriate in this case. *See id.*

Defendant argues quite loosely that any purported violations of constitutional rights caused by their actions was not clearly established and a reasonable official in their position would not have had a "fair and clear" warning. To support this proposition Defendants argue that prosecutors are traditionally given "great latitude;" therefore, reasonable prosecutors would not have expected the actions alleged in this case to run afoul of the Constitution.

As noted above, Plaintiff's Complaint is replete with allegations of fabrication of evidence and improper instigation of criminal charges, e.g., issuance of fraudulent and illegal subpoenas. "[F]abricating incriminating evidence violate[s] constitutional rights." Riley, 104 F.3d at 1253. Furthermore, "[i]t was well established [as far back as] 1989 that fabricating incriminating evidence violated constitutional rights," *id.*–thus it was certainly well established

that the same was constitutionally impermissible during the time frame of Plaintiff's allegations. The evidence obtained in and of itself was not fake or fabricated. It was the fake representation to the Grand Jury that the evidence supported the charges which themselves were not true as to Plaintiff. Defendants' Motion to Dismiss based on qualified immunity is **DENIED**.

Based on the above analysis, *see supra* Parts I.A.-F., Defendants' Motion to Dismiss (Doc. 5) is **DENIED**.

II. DEFENDANTS PAULK AND DOUGHERTY COUNTY'S MOTION TO DISMISS (Doc. 6)

Counts one, two, three, four, six, seven and ten allege wrongful conduct by Defendant Paulk, while Counts five and nine allege wrongful conduct by Defendant Dougherty County. Count I claims negligence on the part of Defendant Paulk. Count II claims negligence *per se* on the part of Defendant Paulk. Count III alleges that Defendant Paulk committed the tort of invasion of privacy by casting Plaintiff in a false light. Count IV alleges that Defendant Paulk committed the tort of invasion of privacy by intruding into Plaintiff's private affairs. Count V alleges a respondeat superior claim against Defendant Dougherty County for the negligence and torts committed by its employee, Defendant Paulk. Count VI alleges a Section 1983 claim against Defendant Paulk for malicious prosecution. Count VII alleges a Section 1983 claim against Defendant Paulk for instigating a retaliatory prosecution. Count IX alleges a Monell policy claim against Defendant Dougherty County pursuant to Section 1983. Finally, Count X alleges a conspiracy to violate Section 1983 and the constitutional rights of Plaintiff by Defen-

dants Burke, Hodges, and Paulk in their individual capacities.

Defendants Paulk and Dougherty County proffer seven grounds for dismissal of Plaintiff's claims against them. First, Defendants argue that Plaintiff's claims are barred by the applicable two year statute of limitations. Second, Defendant Paulk contends that he is entitled to absolute immunity for any claims arising from his testimony before the grand jury. Third, Defendant Paulk argues that Plaintiff's conspiracy claim must fail because the "Intracoporate Conspiracy Doctrine" applies in this case and, notwithstanding the same, Plaintiff fails to state a claim for conspiracy. Fourth, Defendant Paulk argues that he is entitled to qualified immunity. Fifth, Defendant Paulk contends that he is entitled to official immunity as to Plaintiff's state law claims. Sixth, Defendant Dougherty County argues that Plaintiff's Monell policy claim must fail because it had no authority over Defendant Paulk. And finally, Defendant Dougherty County argues that it is entitled to Sovereign Immunity from Plaintiff's state law claims.

A. Statute of Limitations

Defendants Paulk and Dougherty County proffer the same argues concerning the applicable statute of limitations as Defendants Burke and Hodges. *Compare* (Doc. 5, Part III.B.) *with* (Doc. 6, Part III.B.). Therefore, Defendants Paulk and Dougherty County's arguments concerning the applicable statute of limitations fail for the same reasons that Defendants Burke and Hodges's arguments failed. *See supra* Part LA.

B. Absolute Immunity

Government officials enjoy absolute immunity from Section 1983 suits for Grand jury testimony, even if the same was false. Jones v. Cannon, 174 F.3d 1271, 1286 (11th Cir. 1999). However, government officials may be liable for action taken prior to testifying before the grand jury in limited circumstances. *See* Mastroianni v. Bowers, 173 F.3d 1363, 1366-67 (11th Cir. 1999). The Eleventh Circuit has not resolved whether an exception to absolute immunity applies where the government official testifying before the grand jury is the complaining witness. Mastroianni, 173 F.3d at 1366 or 67 n. 1 (refusing to address whether an exception to absolute immunity would exist where the government official is the "complaining witness"); *but see* Jones, 174 F.3d at 1288 n. 10 (expressly rejecting an exception to the doctrine of absolute immunity even if the government official is the complaining witness).3

Defendant Paulk argues that under Mastroianni he cannot be held liable for his grand jury testimony, even if false. Defendant also contends that he cannot be held liable for any action leading up to the grand jury testimony because the doctrine of absolute immunity extends to all claims arising out of his grand jury testimony.

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[3] Whether a possible exception to the doctrine of absolute immunity exist has not been decided by the Eleventh Circuit, despite the language from the Jones opinion, because the holding by the Jones Court was dicta at best. In Jones it is not clear whether Detective Powers was in fact the complaining witness when he testified before the grand jury. The Jones Court only discussed the possibility that Powers could be construed as such. Therefore, the issue was not squarely before the Court.

Defendant's reliance on Mastroianni is slightly misplaced. In that case the government official, Yeoman, testified before the grand jury, an action for which Plaintiff Mastroianni conceded Yeoman was entitled to absolute immunity. However, Mastroianni argued that Yeoman was still liable for numerous acts allegedly committed in furtherance of a conspiracy to present false testimony before the grand jury convened. The Mastroianni Court held that Yeoman was not liable for any alleged pre-testimony conspiracy because the only evidence in the record to support such an inference was the substance of Yeoman's grand jury testimony. 173 F.3d at 1367. As the court explained, "we are prohibited from using Yeoman's grand jury testimony as a basis to impose civil liability."

The case at bar is distinguishable from Mastroianni in that this Court need not rely on the substance of Defendant Paulk's grand jury testimony to determine liability under Section 1983. Here, Plaintiff has alleged that Defendant Paulk fabricated evidence to instigate a criminal prosecution in addition to unlawfully exchanging subpoenaed documents for payment. In support of the same Plaintiff cites deposition testimony from Defendant Paulk, Barry McKinley, and others. This showing is sufficient to allow Plaintiff to survive Defendant Paulk's Motion to Dismiss (Doc. 6) on this claim.

C. Conspiracy

See supra Part I.E. for the law on conspiracy and the heightened pleading requirement in the Eleventh Circuit.

Initially, Defendant Paulk goes out on a limb and argues that Plaintiff's conspiracy claim (Count X) is

precluded by the Intracorporate Conspiracy Doctrine. As Defendant explains, under the Intracorporate Conspiracy Doctrine, the employees of a corporation, acting as agents of the corporation, are incapable of conspiring amongst themselves. Dickerson v. Alachua County Commission, 200 f.3d 761, 767 (11th Cir. 2000). However, Defendant cites no authority to support the proposition that the Intracorporate Conspiracy Doctrine applies in noncoporate contexts, specifically in a District Attorney's Office. Therefore, the Court refuses to apply the Intracorporate Conspiracy Doctrine in this case and join Defendant out on the edge of the judicial tree branch in that Defendant essentially seeks to expand the definition of "intracorporate" beyond that clearly supported by the existing laws.

The remainder of Defendant's challenges against Plaintiff's conspiracy claim mimic the arguments made by Defendants Burke and Hodges. *Compare* (Doc. 5, Part III.E.) *with* (Doc. 6, Part III.C.2.). Therefore, Defendant Paulk's arguments concerning Plaintiff's conspiracy claim fail for the same reasons that Defendants Burke and Hodges's arguments failed. *See supra* Part I.E.

D. Qualified Immunity

See supra Part I.F. for the law on qualified immunity.

Defendant Paulk argues he is entitled to qualified immunity because "no case law has been discovered that would put Paulk on notice that his conduct was legally actionable." Contrarily, as noted above, "[i]t was well established [as early as] 1989 that fabricating incriminating evidence violated constitutional rights." Riley, 104 F.3d at 1253. Therefore, De-

fendant Paulk is not entitled to the protections of qualified immunity for any of Plaintiff's claims.

E. Official Immunity

Under Georgia law, public officers may be personally liable only for negligently performed ministerial acts or discretionary acts performed with malice or intent to injure. Dollar v. Grammens, 294 Ga. App. 888, 890 (2008). The doctrine of official immunity protects public officers from liability where they perform discretionary acts within the scope of their official authority and without wilfulness, malice, or corruption. *Id.* "The rationale for this immunity is to preserve the public employee's independence of action without fear of lawsuits and to prevent a review of his or her judgment in hindsight." *Id.* (citing Murphy v. Bajjani, 282 Ga. 197, 198 (2007)).

A "ministerial act" is one that is commonly "simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty." *Id.* On the other hand, a discretionary act is typically one that "calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed. *Id.* The specific facts of an individual case determine whether an official's acts are ministerial or discretionary. *Id.* Additionally, "[t]he question whether a duty is ministerial or discretionary turns on the character of the specific act, not the general nature of the official's position." *Id.* Finally, "[w]hether an individual is entitled to official immunity is a question of law." *Id.*

Here, Defendant Paulk contends that all of the acts complained of my Plaintiff were discretionary

acts, and the same were performed without malice and/or intent to injure Plaintiff.

Plaintiff contends first that Defendant Paulk's actions were ministerial in nature. In the alternative, Plaintiff contends that if Defendant's actions were discretionary acts, the same were committed with malice and/or intent to injure Plaintiff.

The actions Plaintiff complains of are Defendant Paulk's preparation and issuance of faulty subpoenas and Defendant's improper investigation. It is unclear from Georgia caselaw whether the preparation and issuance of subpoenas is a ministerial or discretionary duty for a district attorney's investigator. The most likely scenario is that the district attorney, or assistant district attorney, would either prepare the subpoena to be issued and provide it to the investigator or direct the investigator to the target of the desired subpoena, leaving the investigator to prepare and issue the same. It is unclear from Georgia caselaw or statutory law whether an investigator may *sua sponte* determine the target of an investigation and proceed accordingly. Contrarily, it is clear that where the target of an investigation is identified for an investigator, the investigator would likely use his/her discretion to determine the best approach to achieve the goals of the investigation.

The Court finds that Defendant Paulk is not entitled to official immunity for his allegedly wrongful acts. Despite the Court's inability to determine whether the preparation and issuance of subpoenas is a ministerial or discretionary duty for a district attorney's investigator, the Court finds that Plaintiff has sufficiently pleaded facts to support a claim that Defendant Paulk's allegedly wrongful acts were committed with malice and/or intent to injury Plain-

tiff. Concerning "malice" the Eleventh Circuit provided in Peterson v. Baker, 504 F.3d 1331, 1339 (11th Cir. 2007):

> [A]ctual malice requires a deliberate intention to do wrong and denotes express malice or malice in fact. That actual malice requires more than harboring bad feelings about another is well established. While ill will may be an element of actual malice in many factual situations, its presence alone cannot pierce official immunity; rather, ill will must also be combined with the intent to do something wrongful or illegal. As we understand it, malice in this context means badness, a true desire to do something wrong. In addition, actual intent to cause injury means an actual intent to cause harm to the plaintiff, not merely an intent to do the act purportedly resulting in the claimed injury.

(Internal quotation marks and citations omitted). As provided in the Complaint, and admitted by Defendant during his deposition, the investigation was done as a "favor" for Phoebe. (Doc. 1, ¶ 35). Providing subpoenaed material solely for the use of a private party without regard to use of the same for official investigative purposes militates against Defendant. Therefore, Plaintiff has adequately alleged that Defendant Paulk acted with intent to cause harm as opposed to the proper reason for initiating a criminal investigation or issuing subpoenas.

F. Monell Policy Claim

In establishing the viability of a "Monell policy claim" the Supreme Court held in Monell that:

Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels. As Mr. Justice Harlan, writing for the Court, said in Adickes v. S. H. Kress & Co., 398 U.S. 144, 167-168, 90 S.Ct. 1598, 1613, 26 L.Ed.2d 142 (1970): Congress included customs and usages in § 1983 because of the persistent and widespread discriminatory practices of state officials. Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law.

Even though local governing bodies can be sued directly under Section 1983, they cannot be held liable for the acts of officials they do not have authority to control. Turquitt v. Jefferson County, Ala., 137 F.3d 1285, 1292 (11th Cir. 1998). "A local government must have power in an area in order to be held liable for an official's acts in that area." *Id.* (quoting McMillian v. Johnson, 88 F.3d 1573 (11th Cir. 1996)). To determine if a local government has authority to control a government official, a court should look to the laws of the state in question to determine whom is charged with direct control of how the government official fulfills his duties. *See id.* (citing McMillian v. Monroe County, Ala., 520 U.S. 781, 789 (1997).

Defendant Dougherty County contends that it has no authority to control Defendant Paulk. Defendant cites O.C.G.A. § 15-18-14.1 to support it's argument.

In response, Plaintiff contends that O.C.G.A. § 15-18-14.1 does not define Defendant Paulk's employer as a matter of law, and the same "merely authorizes a district attorney to appoint investigators." Additionally, Plaintiff notes that there is no evidence in the record as to who "appointed Mr. Paulk, who paid his salary, who paid his secretary, who paid for his office, office supplies, and clerical support." Plaintiff also notes that his Complaint alleges that all of these things were done by Defendant Dougherty County.

Unfortunately for Plaintiff, the question the Court must answer under Monell and Turquitt is not "who legally employed the government official?". Instead the Court must determine who had authority to exercise supervisory and/or administrative control over the official. *See* Turquitt, 137 F.3d at 1292.

Here, O.C.G.A. § 15-18-14.1 is clear in that the district attorney has the authority to "appoint one investigator to assist the district attonrey in the performance of his or her official duties." O.C.G.A. § 15-18-14.1(a). Furthermore, any individual appointed under O.C.G.A. § 15-18-14.1(a) serves at the pleasure of the district attorney. O.C.G.A. § 15-18-14.1(b). And although there is an enumerated list of duties to be performed by an appointed investigator, O.C.G.A. § 15-18-14.1(c)(6) also provides that the investigator shall "[p]erform such other duties as are required by the district attorney." Based on the applicable Georgia statute, it is clear that the only person who had authority to control Defendant Paulk as an investigator was Defendant Hodges, as District Attorney. Therefore, Defendant Dougherty County had no authority to control Defendant Paulk. Accordingly, Defendants' Motion to Dismiss is **GRANTED** as to Count IX against Defendant Dougherty County.

G. Defendant Dougherty County's Sovereign Immunity

In response to Defendant Dougherty County's claims of sovereign immunity as to Plaintiff's state law claims, Plaintiff has withdrawn Count V ("Against Dougherty County----Respondeat Superior for the Negligence and Torts Committed By Its Employee James Paulk") of its Complaint. Due to Plaintiff's withdrawal of Count V, it is unnecessary for the Court to consider Defendant's arguments addressing the same. Additionally, Defendant Dougherty County's Second Supplemental Motion to Dismiss (Doc. 20), challenging Plaintiff's state law claim due to an alleged failure to provide the necessary *ad litem* notice pursuant to O.C.G.A. § 36-11-1, is **DENIED as MOOT**.

Based on the above analysis, *see supra* Parts II.A.-G., Defendants' Motion to Dismiss (Doc. 6) is **GRANTED-IN-PART**, as it relates to Count IX of Plaintiff's Complaint against Defendant Dougherty County, and **DENIED-IN-PART**, as it relates to all other arguments against Plaintiff's Complaint..

CONCLUSION

For the aforementioned reasons, Defendants Burke and Hodges's Motion to Dismiss (Doc. 5) is **DENIED**; Defendants Paulk and Dougherty County's Motion to Dismiss (Doc. 6) is **GRANTED-IN-PART**, **DENIED-IN-PART**; and Defendant Dougherty County's Second Supplemental Motion to Dismiss (Doc. 20) is **DENIED as MOOT**.

Only Counts V and IX of Plaintiff's Complaint alleged wrongful action on the part of Defendant Dougherty County. Because Count V was withdrawn by Plaintiff and Count IX was dismissed by the Court, **Defendant Dougherty County** is hereby **ORDERED TERMINATED** from this action.

SO ORDERED, this 30th day of March, 2009.

/s/W. Louis Sands

THE HONORABLE W. LOUIS SANDS,
UNITED STATES DISTRICT JUDGE