

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

09-11897-G

CHARLES A. REHBERG,

Plaintiff/Appellee,

v.

JAMES P. PAULK, et. al.

Defendants/Appellants.

**BRIEF OF APPELLANTS KENNETH B. HODGES, III AND
KELLY R. BURKE**

On Appeal from the United States District Court
For the Middle District of Georgia
Docket No.: 1:07-cv-00022-WLS

THURBERT E. BAKER 033887
Attorney General

KATHLEEN M. PACIOUS 558555
Deputy Attorney General

DEVON ORLAND 554301
Senior Assistant Attorney General

MICHELLE J. HIRSCH 357198
Assistant Attorney General

40 Capitol Square, S.W.
Atlanta, GA 30334-1300
PH: (404) 463-8850
FAX: (404) 651-5304

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

Pursuant to 11 Cir. R. 26.1-1, the following have an interest in the outcome of this case:

Baker, Thurbert, Attorney General, Attorney for Defendants/Appellants Hodges and

Burke;

Crongeyer, John W., Attorney for Rehberg/Appellee;

Burke, Kelly R., Defendant/Appellant;

Hirsch, Michelle J., Asst. Attorney General, Attorney for Defendants/Appellants

Hodges and Burke;

Hodges, Kenneth B., III, Defendant/Appellant;

Jones, John C., Attorney for Defendant/Appellant Paulk;

Orland, Devon, Senior Asst. Attorney General, Attorney for Defendants/Appellants

Hodges and Burke;

Pacious, Kathleen M., Deputy Attorney General, Attorney for Defendants/Appellants

Hodges and Burke;

Paulk, James P., Defendant/Appellant

Rehberg, Charles A., Rehberg/Appellee;

Sands, W. Louis, District Court Judge;

Vroon, Bryan A., Attorney for Rehberg/Appellee.

STATEMENT REGARDING ORAL ARGUMENT

Appellants Kenneth B. Hodges III (“Hodges”) and Kelly R. Burke (“Burke”) respectfully submit that oral argument would be helpful to the Court as this appeal relies upon recent Supreme Court cases that have not yet been interpreted in this Circuit, and raises issues of law currently being considered by the United States Supreme Court. FRAP 34(a)(2)(C).

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STATEMENT REGARDING ADOPTION OF OTHER BRIEFS

Appellants Hodges and Burke do not adopt the brief of any other party.

STATEMENT OF JURISDICTION

A. Basis for District Court's Jurisdiction

The Complaint was filed pursuant to 42 U.S.C. § 1983 and thus the district court had jurisdiction under 28 U.S.C. § 1331.

B. Basis for the Court of Appeals' Jurisdiction

Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291; Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985).

C. Filing Dates

On March 31, 2009 the order of the district court denying the individual Defendants' motions to dismiss on the grounds of absolute and qualified immunity was docketed. (R.34). Defendants filed a joint notice of interlocutory appeal on April 13, 2009. (R.36).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether argument before a grand jury is a prosecutorial function subject to absolute prosecutorial immunity?
2. Whether a prosecutor is entitled to absolute prosecutorial immunity for the presentment of evidence to a grand jury if he is also alleged to have fabricated evidence during the investigatory stage?
3. Whether it is the use of false evidence, rather than its procurement, that violates the Constitution?
4. Whether absolute prosecutorial immunity bars a claim that a prosecutor failed to train and supervise subordinates in how to testify before a grand jury?
5. Whether absolute prosecutorial immunity bars a claim for conspiracy when the alleged agreement pertains to acts that are cloaked by absolute immunity?
6. Whether it was clearly established that the “plus” portion of the “stigma plus” test could be met by conduct that is cloaked by absolute immunity?
7. Whether the well-pleaded factual allegations of the Complaint are sufficient to show that Hodges and/or Burke violated Rehberg’s clearly established constitutional rights?

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Plaintiff Charles A. Rehberg (“Rehberg”) filed his complaint on January 23, 2007. (R.1). On March 23, 2007, Defendants Hodges and Burke filed their motion to dismiss asserting the defenses of absolute prosecutorial immunity, qualified immunity, and failure to state a claim. (R.5). Defendant James Paulk (“Paulk”) filed his motion to dismiss on April 10, 2007. (R.6). Dougherty County filed its motion to dismiss on May 3, 2007. (R.20).

On March 30, 2009, the district court entered an order denying the individual Defendants’ motions to dismiss. (R.34). Dougherty County’s motion was granted and it was dismissed from the action. (R.34). The district court’s order was docketed on March 31, 2009. (R.34). A joint notice of interlocutory appeal was filed on April 13, 2009. (R.36).

II. STATEMENT OF FACTS¹

Between September 2003 and March 2004, Rehberg sent anonymous facsimiles which criticized and parodied the management and activities of Phoebe Putney Memorial Hospital (“Phoebe Putney”). (R.1, pp. 5, 10-11, ¶¶ 11, 31).

¹ These Defendants dispute the allegations in the Complaint but, as they must, accept the well-pleaded fact as true for the purposes of a motion to dismiss and this appeal. St. Joseph’s Hosp., Inc. v. Hosp. Corp. of America, 795 F.2d 948, 954 (11th Cir. 1986).

Rehberg claims that even though these actions did not violate Georgia law, Hodges, Burke, and Paulk initiated an investigation into the sending of these facsimiles as a “political favor” and to retaliate against him for exercising his First Amendment rights. (R.1, pp. 5, 10, 11, ¶¶ 14, 31, 32). At some unspecified point Hodges, then the Dougherty County District Attorney, recused himself because of a possible appearance of a conflict of interest, and District Attorney Burke was appointed special prosecutor by the Attorney General. (R.1, pp. 5, 16-17, 30, ¶¶ 12, 54, 133). Paulk was the Chief Investigator of the Dougherty County District Attorney’s Office. (R.1, p. 2, ¶ 3).

It is alleged that during the investigation, subpoenas on the letterhead of Kenneth B. Hodges, III were issued to telephone companies and an internet service provider seeking certain telephone and e-mail records relating to Rehberg. (R.1, p. 12, ¶¶ 36, 37). The subpoenas were allegedly prepared at the request of third parties and issued on October 22, 2003, December 1, 2003, January 20, 2004, February 5, 2004, and February 24, 2004. (R.1, p. 12, ¶¶ 37, 38). Rehberg claims that these third parties were given the documents after they paid the costs associated with obtaining them. (R.1, pp. 12, 13, 15, ¶¶ 36, 40, 49). On the dates the subpoenas were issued a Dougherty County Grand Jury was not impaneled to consider the case against Rehberg. (R.1, p. 13, ¶ 38).

On or around December 14, 2005, the Dougherty County Grand Jury met. (R.1, p. 6, ¶ 16). Paulk was the only witness to testify before the grand jury. (R.1, p. 6, ¶ 16). The grand jury indicted Rehberg on the charges of aggravated assault, burglary, and harassing telephone calls. (R.1, p. 4, ¶ 10). The charge for harassing telephone calls was premised on the facsimiles Rehberg sent regarding Phoebe Putney. (R.1, p. 5, ¶ 11). The aggravated assault and burglary charges were premised upon allegations that Rehberg entered the home of Dr. James Hotz and confronted him while suggesting that he (Rehberg) had a weapon, thereby placing Dr. Hotz in reasonable fear of bodily injury. (R.1, p. 4, ¶ 10).

Paulk was listed as the complainant on the indictment. (R.1, p. 6, ¶ 16). Rehberg claims that Paulk never interviewed any witnesses or gathered any evidence indicating that Rehberg had committed an assault and battery, that Paulk never interviewed any witness who claimed to have been harassed by Rehberg's facsimiles, and that there was no evidence that the crimes of burglary or assault ever occurred. (R.1, pp. 5, 6, ¶¶ 11, 19). In sum, Rehberg claims that there was no probable cause to indict him on any of the charges. (R.1, p. 7, ¶ 17).

Rehberg challenged the legal sufficiency of the indictment in the state criminal court and Burke dismissed the first indictment on February 2, 2006. (R.1, p. 7, ¶ 21). On or about February 15, 2006, Burke presented the matter to the grand jury a second time. (R.1, pp. 7-8, ¶ 22). Paulk and Dr. Hotz both testified

before the grand jury. (R.1, pp. 7-8, ¶ 22). A second indictment was issued on February 16, 2006 charging Rehberg with simple assault and harassing telephone calls. (R.1, pp. 7-8, ¶ 22). Rehberg claims that there was no probable cause to indict him on these charges either. (R.1, p. 8, ¶ 22). On March 1, 2006, Burke and Paulk allegedly appeared before the grand jury and a third indictment was issued charging Rehberg with simple assault and harassing telephone calls. (R.1, p. 9, ¶ 25). At some unspecified time, Rehberg was arrested pursuant to an arrest warrant issued as a result of the indictment(s). (R.1, p. 25, ¶¶ 104-05).

Rehberg filed motions attacking the legal sufficiency of the second and third indictments. (R.1, pp. 8-9, ¶¶ 24-25). At a pre-trial hearing held on April 10, 2006, Burke is alleged to have informed the state court judge that the second indictment would be dismissed. (R.1, pp. 8-9, ¶ 24). Burke, however, did not dismiss the second indictment. (R.1, p. 9, ¶ 24). On May 1, 2006, the third indictment was dismissed after the state court allegedly found that it did not sufficiently charge Rehberg with a crime. (R.1, p. 9, ¶ 26). Then, on July 7, 2006, the second indictment was dismissed by the state court. (R.1, pp. 9-10, ¶ 27). The dismissals of the indictments were not appealed. (R.1, p. 10, ¶ 28).

Rehberg's multi-count Complaint alleges various claims against various Defendants. (R.1). Count Six is a Section 1983 claim against Hodges in his individual capacity for malicious prosecution in violation of the Fourth

Amendment. (R.1, pp. 24-28, ¶¶ 96-120). Specifically, Rehberg alleges that Hodges, while acting as an investigator, “instituted an investigation of [Rehberg] and then instigated criminal indictments of [Rehberg] with malice and without probable cause.” (R.1, p. 25, ¶ 99). Rehberg alleges that the “criminal investigation, indictment and prosecution of [him] were induced by fabricated evidence and bad faith.” (R.1, p. 25, ¶ 101). The “fabricated evidence” consisted of Paulk’s alleged false testimony before the grand jury which resulted in the indictment(s) and issuance of an arrest warrant. (R.1, p. 25, ¶ 105). Rehberg claims that the criminal charges lacked probable cause and that the arrest warrant issued for his arrest was “void” because the grand jury testimony supporting it omitted facts showing that Paulk had no personal knowledge of the matters to which he testified. (R.1, pp. 25, 26, ¶¶ 98, 99, 105, 106, 107).

Rehberg also claims that Hodges actively instigated and encouraged the prosecution of Rehberg. (R.1, p. 27, ¶ 114). Specifically, Rehberg claims that Hodges “knew or should have known” that there was no probable cause to indict him on the charges of aggravated assault and burglary, but nonetheless directed Paulk to testify before the grand jury and attest to the truthfulness of the charges. (R.1, p. 27, ¶ 113).

Finally, Count Six alleges that Hodges is liable to him as Paulk’s supervisor because Hodges “knew or should have known” that Paulk was engaged in conduct

that posed an unreasonable risk of constitutional injury to Rehberg. (R.1, p. 28, ¶ 118). Specifically, Rehberg alleges that it was normal for district attorney investigators working under the supervision of the district attorney to testify without adequate knowledge, preparation or personal information of the facts being attested as true. (R.1, p. 6, ¶ 18).

Count Seven is a Section 1983 claim against Hodges in his individual capacity for allegedly instigating a prosecution against Rehberg in retaliation for exercising his alleged right to send anonymous facsimiles criticizing a public entity. (R.1, pp. 28-30, ¶¶ 122-131). Specifically, Rehberg alleges that the investigation, issuance of “illegal subpoenas,” providing documents to third parties, and instigating an indictment for which there was no probable cause was motivated by a desire to retaliate. (R.1, p. 29, ¶¶ 124, 128).

Count Eight is a Section 1983 claim against Burke in his individual capacity alleging that he, while acting in an investigatory capacity, “fabricated evidence” that Rehberg had committed an assault and battery. (R.1, p. 30, ¶ 134). The “fabricated evidence” consists of calling Paulk to testify before the grand jury as a complaining witness to attest to the truth of the charges that Rehberg had committed an assault and burglary, despite allegedly knowing that there was no evidence that Rehberg committed these crimes. (R.1, p. 31, ¶¶ 135, 136).

In addition Burke is alleged to have stated to the media, “it is never free speech to assault or harass someone, no matter how much you don’t like them,” and, “[i]t 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.” (R.1, pp. 31-32, ¶ 138).

Finally, Count Ten is a Section 1983 claim against Hodges and Burke in their individual capacities for conspiracy. (R.1, pp. 35-36, ¶¶ 157-161). After incorporating the allegations of the first sixty paragraphs, Rehberg alleges in a conclusory manner that all of the Defendants acted “in concert” and engaged in a conspiracy to violate Rehberg’s constitutional rights. (R.1, p. 35, ¶¶ 157, 160).

III. STANDARD OF REVIEW

An order granting or denying a motion to dismiss is reviewed *de novo*. Hoffman-Pugh v. Ramsey, 312 F.3d 1222, 1225 (11th Cir. 2002).

SUMMARY OF THE ARGUMENT

The district court improperly concluded that absolute immunity was not available to Hodges and Burke for their prosecutorial acts in initiating and presenting a case to the grand jury. Absolute prosecutorial immunity applies to Rehberg’s claims that Hodges and Burke induced a grand jury to indict him on criminal charges for which there was no probable cause and that they did so with perjured testimony. The law is well-established that bringing criminal charges,

presenting matters to the grand jury, and using perjured or fabricated evidence in a judicial proceeding are all acts for which absolute prosecutorial immunity applies. The district court recognized this body of law, but found that Hodges and Burke were not entitled to immunity because of Rehberg's conclusory allegations that they fabricated evidence during the investigatory stage of a proceeding. The district court's analysis is flawed in several respects.

First, it improperly conflates the procurement of allegedly fabricated evidence with the subsequent use of that evidence, thereby disregarding the functional approach that must be used to determine whether a prosecutor is entitled to absolute immunity for his acts. While only qualified immunity applies to conduct performed by a prosecutor acting in the role of an investigator, the Supreme Court has never retreated from the principle that acts undertaken by a prosecutor in his role as an advocate of the state are cloaked by absolute prosecutorial immunity. Under established law, even if Rehberg had sufficiently alleged that Hodges and Burke fabricated evidence during the investigatory stage, they are still entitled to absolute immunity for their prosecutorial acts.

Second, Rehberg does not identify any particular evidence presented to the grand jury that was fake or untruthful. The district court recognized as much, concluding that the wrongful conduct at issue was the alleged misrepresentation to the grand jury that truthful evidence supported a criminal charge of which Rehberg

was innocent. The effect of this conclusion is that absolute immunity was denied for a prosecutor's presentment of argument to the grand jury – a particularly distinctive act of advocacy.

Any acts not cloaked by absolute prosecutorial immunity must have occurred prior to the date that the grand jury was empaneled. While it is true that fabricating incriminating evidence can violate the constitution, Rehberg has not identified any specific evidence that was fabricated by Hodges or Burke. When the conclusory allegations are disregarded, the only alleged acts that occurred during the investigatory stage were the issuance of the subpoenas. But the issuance of the subpoenas did not violate any constitutional rights because Rehberg had no legitimate expectation of privacy in the information obtained through the subpoenas. What is more, even if Rehberg's conclusory allegations regarding "fabricated evidence" were properly considered, no constitutional violation occurred until the information was used before the grand jury. Then, in such a case, the use of the evidence would be cloaked by absolute prosecutorial immunity.

The district court also erred when it denied immunity as it relates to Rehberg's conspiracy claims. While the Complaint does not specifically describe the nature of the alleged conspiracy, the factual allegations relate only to the issuance of the subpoenas at a time when the grand jury was not empaneled and to the alleged use of perjured testimony at the grand jury proceeding. Any claim for

conspiracy premised on the former fails because the underlying conduct did not violate the Constitution; any conspiracy claim premised upon the latter is barred by immunity because such a claim cannot succeed without reference to conduct that is itself barred by absolute immunity.

Finally, Hodges is entitled to absolute prosecutorial immunity for allegations that he failed to train and supervise his staff. Recently, the Supreme Court extended prosecutorial immunity to the acts or omissions of prosecutors arising from general supervision and training if the tasks at issue are connected with trial advocacy. Presenting witness testimony at a judicial proceeding is such an issue.

The district court also improperly denied qualified immunity. No clearly established law put Hodges and Burke on notice that Rehberg's constitutional rights would be violated by misrepresenting to a grand jury the significance of truthful evidence. Similarly, since Rehberg has not identified any evidence that was "fabricated," he has not even alleged a constitutional violation. In addition, Hodges was entitled to rely on established law which holds that there is no legitimate expectation of privacy in the information obtained through the subpoenas. Next, Rehberg's conclusory allegations are insufficient to establish that Hodges was deliberately indifferent in failing to train and supervise his

subordinates or that Hodges and Burke participated in an unconstitutional conspiracy.

Finally, the district court improperly applied the “stigma-plus” test to Rehberg’s claims arising out of Burke’s alleged statements to the media. The alleged statements were not false and Rehberg makes only generalized statements of reputational damage. In finding that the allegations were sufficient to state a due process claim, the district court did not address the substance of the statements and held that the “plus” was met by Rehberg’s allegation that he was prosecuted on “false evidence/charges.” This analysis assumes that the Complaint sufficiently alleges the existence of any false evidence – an assumption expressly rejected by the district court. Moreover, it allows the “plus” to be met with conduct that is protected by absolute immunity. No controlling authority could have put Burke on notice that the “stigma-plus” test would be expanded in such a manner. As a result, he is entitled to qualified immunity.

IV. ARGUMENT AND CITATIONS OF AUTHORITY

A. THE ALLEGED ACTS OF HODGES AND BURKE WERE PROSECUTORIAL IN NATURE AND THEY ARE ENTITLED TO ABSOLUTE IMMUNITY

Prosecutors are entitled to absolute immunity from liability for Section 1983 damages claims which arise out of the performance of the traditional functions of their office. Imbler v. Pachtman, 424 U.S. 409, 427-28 (1976). Absolute immunity rests on the nature of the function performed by the official, not on the official's identity or status. Kalina v. Fletcher, 522 U.S. 118, 127 (1997). Prosecutors are absolutely immune from liability for damages for activities that are intimately associated with the judicial phase of the criminal process. Imbler, 424 U.S. at 430. A grand jury proceeding is a judicial phase of the criminal process. Strength v. Hubert, 854 F.2d 421, 424 (11th Cir. 1988).

A prosecutor's absolute immunity extends to all acts performed pursuant to his prosecutorial functions. Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993). The immunity applies to conduct associated with deciding which suits to bring and to conduct relating to prosecuting those suits. Imbler, 424 U.S. at 424. For example, speaking to witnesses, appearing before the court, examining witnesses, and presenting evidence are all acts that fall within a prosecutor's duties. Burns v. Reed, 500 U.S. 478, 490-92 (1991). Thus, claims that a defendant was charged with a crime for which there was no probable cause, or that a prosecutor proffered

fabricated evidence or used perjured testimony during a judicial proceeding all fall within the cloak of the immunity. Rowe v. City of Fort Lauderdale, 276 F.3d 1271, 1280-81 (11th Cir. 2002).

Acts involving the development and evaluation of a case prior to the formal initiation of a prosecution also fall within a prosecutor's duties and are covered by the immunity. Buckley, 509 U.S. at 273; Imbler, 424 U.S. at 431 n.33. “[A] prosecutor is entitled to absolute immunity for the factual investigation necessary to prepare a case, including interviewing witnesses before presenting them to the grand jury.” Mullinax v. McElhenney, 817 F.2d 711, 715 (11th Cir. 1987) (*citing* Cook v. Houston Post, 616 F.2d 791, 793 (5th Cir. 1980)). Such activities include preparing for the initiation of judicial proceedings, as well as out-of-court activities to control the presentation of a witness' testimony. Buckley, 509 U.S. at 272-73; Jones v. Cannon, 174 F. 3d 1271, 1281 (11th Cir. 1999).

Absolute immunity extends to conduct before a grand jury. Burns, 500 U.S. at 490 n.6. It bars claims arising out of the presentment of evidence to a grand jury. Mastroianni v. Bowers, 173 F.3d 1363, 1366 (11th Cir. 1999); Baxter v. Washington, 201 Fed. Appx. 656, 658 (11th Cir. 2006) (extending absolute immunity to a prosecutor's actions before a grand jury). In sum, so long as the acts are within the “scope or territorial jurisdiction of his office,” a prosecutor is

entitled to immunity. Elder v. Athens-Clarke County, Georgia, 54 F.3d 694, 695 (11th Cir. 1995).

1. Hodges and Burke are Entitled to Prosecutorial Immunity for Claims That They Improperly Induced the Grand Jury to Indict

The district court erred when it denied to Hodges and Burke absolute immunity for acts intimately associated with the initiation and presentment of a matter to the grand jury. Rehberg claims that Hodges and Burke are liable to him for malicious prosecution for “instigating” the grand jury to indict him on charges for which there was no probable cause, and used incomplete and perjured testimony to do so. These conclusory allegations are supported by the following factual allegations: 1) no crime prohibited the sending of anonymous facsimiles regarding Phoebe Putney, and 2) Paulk testified falsely to the grand jury regarding the incident at the home of Dr. Hotz and regarding the facsimiles. As illustrated by the above-cited authorities, all of these alleged acts (initiating criminal charges, seeking indictments, and presenting evidence to a grand jury) fall within a prosecutor’s advocacy function and are thus barred by immunity.

Malicious prosecution is defined as the wrongful institution of legal process. Wallace v. Kato, 549 U.S.384, 390 (2007). A prosecutor is absolutely immune from suit for malicious prosecution. Malley v. Briggs, 475 U.S. 335, 342-43 (1986). This Court has held that acts of charging a defendant with a crime for which there is no probable cause, using perjured testimony during a judicial

proceeding, and proffering fabricated evidence during a criminal proceeding are prosecutorial. Rowe, 276 F.3d at 1280-81. The alleged acts of Hodges and Burke of inducing the grand jury to indict Rehberg on criminal charges for which there was allegedly no probable cause through the procurement of allegedly perjured testimony are acts that have been repeatedly held to be prosecutorial in nature and thus barred by absolute immunity.

The district court interpreted the Complaint as alleging that Hodges and Burke presented to the grand jury truthful facts that did not constitute a crime, and believed that the wrongful conduct at issue was the alleged misrepresentation to the grand jury that the evidence supported criminal charges of which Rehberg was innocent.² (Doc. 34, p. 14). Although this finding was in relation to the qualified immunity analysis, the conclusion of the district court is, in effect, a finding that prosecutorial immunity does not apply to a prosecutor's argument to a grand jury. Such a finding is in error because argument in an attempt to persuade a grand jury to indict is conduct that is cut from the same cloth as presenting evidence to the grand jury.

² To the extent that Rehberg's claim arises from the conclusory and unsupported allegation that exculpatory information was not presented to the grand jury, (*i.e.*, that the grand jury was not informed that Paulk's testimony was false), such conduct does not establish a constitutional violation. *See United States v. Williams*, 504 U.S. 36, 54 (1992) (no constitutional duty to present exculpatory evidence to a grand jury).

Appearing before a grand jury as a lawyer for the state and urging the grand jury to return an indictment against an accused is advocacy in its purest form. Absolute immunity attaches to such conduct, regardless of whether a prosecutor employs false legal reasoning in his efforts to persuade the grand jury. *See Burns*, 500 U.S. at 492 (appearances before the court fall within a prosecutor’s advocacy function); *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995) (“*Buckley II*”) (immunity applies even if prosecutors present to the grand jury “unreliable or wholly fictitious proofs”); *McClendon v. May*, 37 F. Supp. 2d 1371, 1379 (S.D. Ga. 1999) (immunity applies to a prosecutor’s alleged conduct of improperly interjecting himself into grand jury deliberations).

The district court acknowledged as much, but then denied absolute immunity because of the “multiple allegations that Defendants Hodges and Burke fabricated criminal charges against Rehberg before any Grand Jury was ever impaneled.”³ (R.34, p. 10). The district court found that the alleged pre-grand jury conduct of issuing subpoenas was “investigatory” in nature, thus vitiating absolute

³Throughout the opinion the district court uses the phrase “fabricated criminal charges” interchangeably with the phrase “fabricated evidence.” It is assumed that the district court intended to refer to Rehberg’s conclusory allegations of “fabricated evidence.” The phrase “fabricated criminal charges” does not appear in the Complaint. Moreover, the Complaint specifically alleges that criminal charges were not filed against Rehberg until after the grand jury voted to indict him. (R.1, p. 25, ¶¶ 104, 105, 110). Thus, not even Rehberg claims that criminal charges, fabricated or otherwise, were filed against him before the grand jury was impaneled.

prosecutorial immunity. (R.34, p. 10). In other words, absolute prosecutorial immunity was not available because Hodges and Burke were alleged to have fabricated evidence during the investigatory stage and then used it before the grand jury. A close review of the allegations, however, reveals that *no* evidence was “fabricated,” a fact noted by the district court itself.⁴

Assuming, *arguendo*, that Rehberg had identified some specific false evidence that was fabricated by Hodges and Burke during the investigatory stage which was then used at the grand jury proceeding, absolute immunity would not be lost for their prosecutorial acts. In finding otherwise, the district court improperly conflated the alleged pre-grand jury procurement of “fabricated evidence” with the subsequent use of that evidence.⁵ By doing so, the district court denied Hodges and Burke absolute immunity for acts clearly falling within their functions as prosecutors.

⁴ The district court stated, “the evidence obtained in and of itself was not fake or fabricated.” (R.34, p. 14).

⁵ The appropriateness of this conflation is being considered by the Supreme Court in McGhee v. Pottawattamie County, Iowa, 547 F.3d 922, 925 (8th Cir. 2008), *cert. granted*, 556 U.S. ___, 129 S. Ct. 2002 (April 20, 2009). As the certiorari briefs in McGhee indicate, there is a split in the Circuit Courts regarding this issue. *Compare* Buckley II, 20 F.3d at 795 and Michaels v. New Jersey, 222 F.3d 118 (3d Cir. 2000) with McGhee, 547 F.3d at 925 and Zahrey v. Coffey, 221 F.3d 342, 353-54 (2d Cir. 2000).

The district court’s analysis fails to appreciate the important distinction between a prosecutor’s investigatory role and his advocacy role, and ignores the “functional approach” that the Supreme Court has held is central to the prosecutorial immunity analysis. Buckley, 509 U.S. at 270; Burns, 500 U.S. at 486-87. To be sure, only qualified immunity is available for conduct that occurs when a prosecutor acts as an investigator, but the Supreme Court has never retreated from the principle that acts undertaken in preparation for the initiation of a judicial proceeding and occurring within a prosecutor’s role as an advocate of the state are entitled to absolute immunity. Id. at 273.

Even if Rehberg had alleged any facts to show that Hodges and Burke fabricated evidence during the investigatory stage, they are still entitled to absolute immunity for any later acts in connection with the grand jury proceedings. Allowing a claim for malicious prosecution to proceed in these circumstances would defeat the very purpose for absolute immunity by exposing prosecutors to potential liability for their prosecutorial decisions. The district court was incorrect when it held that absolute immunity for prosecutorial acts was vitiated by allegations of investigatory acts.

2. Hodges and Burke are Entitled to Absolute Immunity for Claims of Allegedly “Fabricating Evidence”

Hodges and Burke are also entitled to absolute immunity for Rehberg’s conclusory “fabricated evidence” claims. Generally, prosecutors are entitled only to qualified immunity when performing “the investigative functions normally performed by a detective or police officer.” Buckley, 509 U.S. at 273. Throughout the Complaint Rehberg alleges in a conclusory manner that the conduct of Hodges and Burke was “investigatory.” But merely labeling conduct as such is insufficient to defeat absolute immunity.

On two recent occasions the Supreme Court has reminded litigants that conclusory allegations are insufficient to defeat a motion to dismiss. Ashcroft v. Iqbal, 556 U.S. ___, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 884 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). While FED. R. CIV. P. 8 requires only a short and plain statement showing that the pleader is entitled to relief, it “does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” Ashcroft, 556 U.S. at ___, 129 S. Ct. at ___, 173 L. Ed. 2d at 884. Conclusions must be supported with facts. Id.

The Supreme Court has sanctioned a two-step approach for reviewing the sufficiency of a complaint. First, the conclusory allegations should be separated from the well-pleaded factual allegations. Id. at 884-85; Twombly, 550 U.S. at 565-66. Then, the court should look to whether the well-pled factual allegations

give rise to a “plausible” suggestion of unlawful conduct. Id. The plausibility standard requires “more than a sheer possibility that a defendant has acted unlawfully.” Id. If the well-pleaded allegations are consistent with lawful behavior, the complaint must be dismissed. Twombly, 550 U.S. at 570.

Here, Rehberg fails to separate pre-grand jury acts from post-grand jury acts, and instead sweeps all of the alleged conduct together under the “investigative” label. In the specific context of absolute prosecutorial immunity, this Circuit has held that conclusory allegations must be supported with facts to show that a prosecutor is acting outside his prosecutorial function. Fullman v. Graddick, 739 F.2d 553, 556-57 (11th Cir. 1984). Rehberg’s conclusory label of “investigative” conduct should be given no presumption of truthfulness. When the well-pleaded facts are considered, with the exception Burke’s statements to the media, all of the alleged acts that occurred after the grand jury was empaneled were in relation to activities occurring in a judicial proceeding and were prosecutorial in nature.

Such a finding is supported by the law in this Circuit. In Rowe, this Court held that a prosecutor was engaged in an investigative function when he attended the execution of a search warrant and was entitled to only qualified immunity for those acts. 279 F.3d at 1280. But, absolute prosecutorial immunity attached to claims arising from conduct occurring during the subsequent judicial phase. Id. at 1281. As a result, claims that the prosecutor filed charges without probable cause,

withheld exculpatory evidence, and proffered fabricated evidence were barred, despite the allegations of wrongful conduct that occurred during the investigatory stage. *Id.* See also Mastroianni, 173 F.3d at 1366 (“any potential liability that may attach to [prosecutors] must derive from actions that took place prior to the initiation of the grand jury proceeding.”).

Here, all of the alleged conduct that occurred after the grand jury was empaneled (i.e., presenting evidence and seeking an indictment) occurred during the course of a judicial proceeding and was prosecutorial in nature. Thus, to fall outside the protection of absolute prosecutorial immunity, any “investigative” act must have occurred before the grand jury was empaneled on December 15, 2005.

In this case, that conduct consists solely of issuing subpoenas at a time when a grand jury was not empaneled.⁶ The problem with this theory is that, for the reasons discussed below, Rehberg did not suffer a constitutional injury as a result of this conduct. Even if he did, no constitutional violation occurred until the evidence was used before the grand jury, and then the use of the evidence is cloaked with absolute prosecutorial immunity.

⁶ For purposes of this appeal, it is assumed, but not conceded, that the issuance of subpoenas before a grand jury was empaneled was investigative in nature.

a. The alleged acts occurring before the grand jury was empaneled did not violate the Constitution

Initially, it should be noted that the initiation of a criminal investigation, in and of itself, does not implicate a federal right. The Constitution does not require evidence of wrongdoing before an investigation is initiated. United States v. Albejeris, 28 F.3d 97, 99 (11th Cir. 1994) (*citing* United States v. Harvey, 991 F.2d 981, 990 (2d Cir. 1993) (“the Constitution does not require either a reasonable basis or reasonable suspicion of wrongdoing by a suspect before the government can begin an undercover investigation of that person.”)). *See also* Foy v. Holston, 94 F.3d 1528, 1536-37 (11th Cir. 1996) (no constitutional right to be free from child abuse investigation) (*quoting* Watterson v. Page, 987 F.2d 1, 8 (1st Cir. 1993)). Thus, no Section 1983 liability can attach merely because of allegations that an investigation was initiated.

With respect to the alleged investigative acts, both Rehberg and the district court construed the allegations as claims that Hodges and Burke “fabricated evidence.” Such an allegation is a mere conclusion and significantly, Rehberg has identified *no* evidence that was fake or fabricated. (R.34, p. 14). The only possible pre-grand jury investigatory act that can be gleaned from the facts alleged is the issuance of subpoenas before the grand jury was empaneled. In other words, Rehberg’s claim is premised on the mere fact that the subpoenas were issued. Burke is not alleged to have participated in this conduct, and Hodges cannot be

held liable for such conduct because the mere issuance of subpoenas to third parties for information voluntarily provided by Rehberg does not implicate any interest protected by the Fourth Amendment.⁷

Importantly, the relevant question is not whether the circumstances surrounding the issuance of the subpoenas violated state law. A search and seizure that violates state law is not necessarily unreasonable under the Fourth Amendment. United States v. Gilbert, 942 F.2d 1537, 1541-42 (11th Cir. 1991). *See also* Davis v. Scherer, 468 U.S. 183, 192-95 (1984) (a violation of state law does not, by itself, establish a constitutional violation); Foy, 94 F.3d at 1532 n.4 (same); Knight v. Jacobson, 300 F.3d 1272, 1276 (11th Cir. 2002) (same). Thus, any protections must be founded upon a violation of the Fourth Amendment itself.

The Fourth Amendment protects against unreasonable searches and seizures. Minnesota v. Carter, 525 U.S. 83, 88 (1998). Whether the protections of the Fourth Amendment apply depends on whether a person invoking the protection has a reasonable expectation of privacy and whether society recognizes the expectation as objectively reasonable. Katz v. United States, 389 U.S. 347, 361 (1969). The Supreme Court has repeatedly stated that a person has no legitimate expectation of

⁷ The last of the subpoenas was allegedly issued on February 24, 2004. Rehberg's Complaint was not filed until January 23, 2007, more than two (2) years later. While Defendants maintain that these claims are barred by the statute of limitations and disagree with the district court's contrary determination, they recognize that this particular decision is not yet ripe for review.

privacy in information he voluntarily turns over to third parties. Smith v. Maryland, 442 U.S. 735, 743-44 (1979). “The 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 (1976), *modified by statute*.

Relevant to this case, there is no reasonable expectation of privacy in the numbers a person dials on the telephone. Smith, 442 U.S. at 742. This is because telephone users:

. . . typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes. . . ., it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.

Id. at 743.

Similarly, there is no expectation of privacy in e-mail once it has been received by another person and the transmitter no longer controls its destination. United States v. Terrill, 149 Fed. Appx. 954, 959 (11th Cir. 2005) (*quoting United States v. Maxwell*, 45 M.J. 406, 418 (C.A.A.F. 1996)). *Accord United States v. Thompson*, 936 F.2d 1249, 1251 (11th Cir. 1991). *See also Guest v. Leis*, 255

F.3d 325, 335-36 (6th Cir. 2001) (subscriber information provided to internet service provider is not protected by Fourth Amendment because information voluntarily provided to third person); United States v. Perrine, 518 F.3d 1196, 1204-05 (10th Cir. 2008) (same) (collecting cases).

Here, Rehberg had no reasonable expectation of privacy in the records allegedly subpoenaed. Rehberg had no legitimate expectation that the numbers he dialed when he sent the facsimiles which were recorded by the telephone companies would be kept secret. Similarly, as soon as any e-mail sent by him was received by a third party, Rehberg no longer controlled its destiny and lost any legitimate expectation of privacy. As a result, even if the subpoenas were issued in violation of state law, which is not conceded, the Fourth Amendment was not violated. *See e.g.*, Davis, 468 U.S. at 192-95.

Rehberg also attempts to brand Paulk's alleged act of presenting perjured grand jury testimony as "investigatory." Rehberg's argument is that Hodges and Burke directed Paulk to provide false testimony to the grand jury. Rehberg's label notwithstanding, these alleged acts were not "investigatory." Even if Hodges and Burke knew that Paulk did not have personal knowledge about the Hotz incident and directed him to testify falsely before the grand jury, their conduct is still

prosecutorial in nature and cloaked with absolute immunity.⁸ Prosecutors are entitled to absolute immunity for interviewing witnesses before presenting them to the grand jury⁹, for prosecuting an individual “even if they suborned perjury to do so,”¹⁰ and for presenting fraudulent and illegal evidence to the grand jury.¹¹ Any claim premised upon Paulk’s testimony before the grand jury is nothing more than a claim that Hodges and Burke suborned perjury or otherwise presented false evidence in a grand jury proceeding – acts for which they have absolute immunity.

b. No constitutional violation occurred until the allegedly fabricated evidence was used in a judicial proceeding, at which time absolute prosecutorial immunity attached

It is not disputed that fabricating false incriminating evidence can violate the Constitution. Jones, 174 F.3d at 1290. The Complaint here, however, does not identify any evidence that was fabricated or false. But even if Rehberg had identified some specific false incriminating evidence that was fabricated, no constitutional violation occurred until such evidence was used at a judicial proceeding.

⁸ What is more, it is doubtful that such an allegation even raises a constitutional question, as grand jury witnesses may proffer hearsay testimony and may testify concerning matters not within their personal knowledge. State v. Bragg, 213 Ga. App. 795, 795-96 (1994).

⁹ Mullinax, 817 F.2d at 715.

¹⁰ Id.

¹¹ Slavin, 574 F.2d at 1264.

The mere procurement of false evidence, as opposed to its use, does not violate the Constitution. Buckley, 509 U.S. at 281 (Scalia, J., concurring). Buckley II, decided after remand, is instructive in this regard. There the plaintiff alleged that prosecutors coerced witnesses to give false statements that implicated him in a murder. Buckley II, 20 F.3d at 794. Considering the act of procuring false statements, the Seventh Circuit held that the plaintiff could not assert the constitutional rights of others, and thus he suffered no constitutional injury as a result of the coercive interrogations. Id. at 794-95. The court then held that no constitutional right was implicated by the mere procurement of the false statements. Id. The Seventh Circuit explained:

Let us suppose the prosecutors put [the witness] on the rack, tortured him until he named [the plaintiff] as his confederate, and then put the transcript in a drawer or framed it and hung it on the wall but took no other step, or began a prosecution. Could [the plaintiff] collect damages under the Constitution? Surely not; [the witness] himself would be the only victim.

Id.

The court next considered the use of the false confessions, and agreed that the plaintiff's constitutional rights could be violated if the confessions were admitted at a judicial proceeding. Id. Still, the plaintiff could not prevail on such a claim because the use of a false confession at trial or before the grand jury would be an action taken as an advocate for the state, thereby entitling the prosecutors to absolute immunity. Id. In sum, "*Obtaining* the confession is not covered by

immunity but does not violate any of [the plaintiff's] rights; *using* the confession could violate [the plaintiff's] rights but would be covered by absolute immunity.”

Id.

Applying this reasoning to the case at bar, even if Rehberg had sufficiently alleged that Hodges and Burke fabricated some identifiable piece of evidence and then used it at the grand jury proceeding, his claim would fail. This is because the procurement of the evidence did not violate the Constitution, and the subsequent use of the evidence at a grand jury proceeding falls within prosecutorial immunity.

The district court erred when it denied absolute prosecutorial immunity to Hodges and Burke.

3. Prosecutorial Immunity Bars Rehberg's Conspiracy Claims

The Supreme Court has recognized that entering into a conspiracy to violate constitutional rights can state a claim under Section 1983. Dennis v. Sparks, 449 U.S. 24, 29 (1980). When a prosecutor is acting within the scope of his authority, however, the mere allegation of a “conspiracy” does not dilute absolute immunity. Elder, 54 F.3d at 694. This is because “a person may not be prosecuted for conspiring to commit an act that he may perform with impunity.” Jones, 174 F.3d at 1289 (*quoting* House v. Belford, 956 F.2d 711, 720 (7th Cir. 1992)). For example, a prosecutor cannot be found liable for conspiring to violate a criminal defendant's rights by prosecuting him without probable cause because the

prosecutor is absolutely immune from liability for the prosecution itself. Rowe, 276 F.3d at 1282.

Moreover, while it is true that a prosecutor can be held liable for participating in a conspiracy that occurs sometime before a judicial proceeding begins, a prosecutor's conduct during the judicial proceeding may not be considered as evidence of participation in that conspiracy. Id. This is because:

It would be cold comfort for a prosecutor to know that he is absolutely immune from direct liability for actions taken as a prosecutor, if those same actions could be used to prove him liable on a conspiracy theory involving conduct for which he was not immune. "The vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system" would be unduly chilled. That is why acts for which a prosecutor enjoys absolute immunity may not be considered as evidence of the prosecutor's membership in a conspiracy for which the prosecutor does not have immunity.

Id. (internal citations omitted).

For example, in Mastroianni, the plaintiff alleged that a police officer entered into a pre-testimonial conspiracy to testify falsely before a grand jury and then testified pursuant to that agreement. 173 F.3d at 1367. While conceding that the officer was entitled to absolute immunity for the substance of his testimony, the plaintiff argued that no immunity attached to the pre-testimonial conspiracy. Id. This Court rejected the argument. In order to establish the existence of such a conspiracy, the substance of the grand jury testimony would have to be considered; but such consideration was not proper because the testimonial immunity is

absolute. Id. Therefore, the officer was also entitled to absolute immunity for the alleged pre-testimonial conspiracy. Id.

Here, Rehberg's conspiracy claims can overcome absolute immunity only if the subject of the alleged conspiracy falls outside a prosecutorial function. The Complaint does not identify the precise nature of the alleged agreement between the Defendants, and this deficiency was compounded by the district court when it simply referred to the "detailed allegations of wrongful conduct" alleged. (R.34, p. 13). When discounting the conclusory allegations of the Complaint¹², the only facts upon which a conspiracy claim could be based are: 1) the issuance of the subpoenas before the grand jury was empaneled, and 2) Paulk's allegedly perjured testimony to the grand jury. (R.1, pp. 5, 6, 12, 13, ¶¶ 11, 12, 37, 38). Rehberg can prevail on neither.

Rehberg's conspiracy claim cannot be premised upon allegations of improperly issued subpoenas because, for the reasons stated above in Section IV.A.2.a, Rehberg had no expectation of privacy in the information requested by the subpoenas, and thus no federal right was infringed.

¹² For example, that the subpoenas were "illegal," that "evidence" was "fabricated," and that Defendants "instigated criminal charges against [Rehberg] with malice and without probable cause," (R.1, pp. 25, 29, ¶¶ 99, 105, 124, 128), are mere conclusions that must be supported with facts. See Ashcroft, 556 U.S. at ___, 129 S. Ct. at ___, 173 L. Ed. 2d at 884-85.

Nor can a conspiracy claim be premised upon Paulk's grand jury testimony. Presenting evidence to the grand jury falls within the prosecutorial function. Consequently, the contents of Paulk's testimony cannot be considered in relation to any conspiracy claim. Without reference to the substance of Paulk's testimony, Rehberg cannot establish that the testimony was false, and therefore any conspiracy claim based on pre-testimonial conduct is also barred by absolute immunity. The district court erred when it concluded that Hodges and Burke are not entitled to absolute immunity for Rehberg's conspiracy claim.

4. Hodges is Entitled to Absolute Immunity For Claims of Negligent Supervision

Rehberg also seeks to impose supervisory liability on Hodges for Paulk's alleged perjured testimony.¹³ The district court found that the Complaint was sufficient to allege a wide-spread and common practice of district attorney investigators testifying "without adequate knowledge or preparation or personal

¹³There appears to be some overlap between this claim and Rehberg's claim against Dougherty County and Hodges in his official capacity. The district court dismissed Dougherty County from this proceeding. (R.34, pp. 21-23). Of course, any claim against Hodges in his official capacity is barred by the Eleventh Amendment. Claims against public officials in their official capacities are merely another way of pleading an action against the entity of which an officer is an agent and is a suit against the State itself. *Will v. Michigan Dep't. of State Police*, 491 U.S. 58, 70-71 (1989). The Eleventh Amendment bars suit against a State, its agencies, and employees, absent a waiver by the State or a valid congressional override. *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 100-01 (1984). The State of Georgia has not waived its immunity. O.C.G.A. § 50-21-23(b); Ga. Const. Art. I, Sec. II, Para. IX (f).

knowledge of the facts being attested to as true.”¹⁴ (R.34, pp. 11-12). Even if such conclusory allegations were sufficient to establish a constitutional violation, which is disputed, Hodges is entitled to absolute prosecutorial immunity under recent Supreme Court precedent.

In some circumstances, prosecutors are entitled to absolute immunity for conduct arising out of administrative duties. Acts or omissions involving the general methods of supervision and training by a prosecutor fall within a prosecutor’s absolute immunity if the tasks at issue are connected with trial advocacy. Van de Kamp v. Goldstein, 555 U.S. ___, ___, 129 S. Ct. 855, 862-63 (2009). In Van de Kamp, the Supreme Court held that the district attorney was entitled to absolute immunity for allegedly failing to adequately train and supervise deputy district attorneys regarding their constitutional obligation to provide a criminal defendant with impeachment related information. Id. at ___, 129 S. Ct. at 861-62.

The holding in Van de Kamp applies with equal force here. The task at issue is testifying before a grand jury. Such a task is connected with trial advocacy. *See* Burns, 500 U.S. at 490-92. Consequently, acts or omissions

¹⁴ Again, it is not improper for grand jury witnesses to testify to matters not within their personal knowledge. *See* footnote 8.

involving the general methods and training by a prosecutor of his subordinates in how to testify before a grand jury fall within absolute prosecutorial immunity.

B. THE FACTS ALLEGED DO NOT SHOW A VIOLATION OF A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT AND HODGES AND BURKE ARE ENTITLED TO QUALIFIED IMMUNITY

Should this Court determine that absolute immunity is not available for Hodges and Burke's alleged conduct then, at a minimum, they are entitled to qualified immunity. Qualified immunity protects governmental defendants sued in their individual capacities so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Vinyard v. Wilson, 311 F.3d 1340, 1346 (11th Cir. 2002) (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). To avail of the immunity, a defendant must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. Vinyard, 311 F.3d at 1346. Once this showing is made, the burden shifts to the plaintiff to show that the law was clearly established. Id.

A plaintiff can meet this burden only by pointing to constitutional provisions, federal statutes, and judicial decisions of the United States Supreme Court, the Eleventh Circuit, and the Georgia Supreme Court clearly establishing the law. Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1200 n.6 (11th Cir. 2007); Marsh v. Butler County, 268 F.3d 1014, 1033 n.10 (11th Cir. 2001) (*en banc*).

The law establishing the right must be in effect at the time of the alleged violation. Id. In addition, a heightened pleading standard applies in civil rights cases involving the defense of qualified immunity and facts must be alleged with specificity. Dalyrmples v. Reno, 334 F.3d 991, 996-97. (11th Cir. 2003).

Under prior qualified immunity precedent, after showing that the defendants were acting within their discretionary authority, courts were required to first decide whether the facts alleged show that the official's conduct violated a constitutional right and only then decide whether the right was clearly established. *See generally* Saucier v. Katz, 533 U.S. 194 (2001). This rigid "order of battle" was recently abandoned by the Supreme Court and courts must now exercise discretion in deciding which of the two prongs should be addressed first. Pearson v. Callahan, 555 U.S. ___, ___, 129 S. Ct. 808, 821 (2009); Reams v. Irvin, 561 F.3d 1258, 1262 n.6 (11th Cir. 2009).

1. Hodges and Burke Were Acting Within Their Discretionary Authority

When determining whether a defendant was engaged in a discretionary act the question that must be answered is whether he was pursuing a legitimate job-related goal through means that were within his power to utilize. Holloman v. Harland, 370 F.3d 1252, 1266 (11th Cir. 2004). The inquiry does not focus on whether it was within a defendant's authority to commit the allegedly illegal act. Harbert Int'l, Inc. v. James, 157 F.3d 1271, 1282 (11th Cir. 1998). Rather, the

question is “whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official’s discretionary duties.” *Id.* (quoting *In re Allen*, 106 F.3d 582, 594 (4th Cir. 1997)). Courts look to the “general nature of the defendant’s action, putting aside the fact that it may have been committed for an unconstitutional purpose, in an unconstitutional manner, to an unconstitutional extent, or under constitutionally inappropriate circumstances.” *Holloman*, 370 F.3d at 1266.

Here, the focus of the inquiry is on the conduct of deciding whether criminal charges should be sought, processing and evaluating evidence, presenting evidence to a grand jury, asking a grand jury to return an indictment, supervising subordinates, and reporting on judicial proceedings. These acts clearly fall within the discretionary duties of prosecutors such as Hodges and Burke. *See* Ga. Const. Art. VI., Sec. VII, Para. I.; O.C.G.A. §§ 15-18-6 and 15-18-7. Since Hodges and Burke were acting within their discretionary authority as district attorneys, the burden shifts to Rehberg to show a violation of a clearly established constitutional right.

2. Hodges and Burke Did Not Deprive Rehberg of Any Clearly Established Constitutional Right

To defeat qualified immunity based on a claimed violation of a clearly established constitutional right, a plaintiff must plead sufficient facts to show that a constitutional violation occurred. *Ashcroft*, 556 U.S. at ___, 129 S. Ct. at ___, 173

L. Ed. 2d at 883. The facts necessary to make such a showing will depend on the constitutional provision at issue and must be made on facts, not conclusions. Id. at 883-84. For example, allegations that a defendant “knew of, condoned, and willfully and maliciously agreed” to commit an unconstitutional act is a mere conclusion entitled to no presumption of truth, as are allegations that a defendant was a “principal architect” of an unconstitutional policy, or that a defendant was “instrumental” in executing an unconstitutional policy. Id. at 885-86. *See also Twombly*, 550 U.S. at 555 (allegation that a defendants entered into “an unlawful agreement” is a legal conclusion).

It is clear that the district court improperly credited Rehberg’s conclusory allegations when evaluating the qualified immunity defenses. The district court summarily denied qualified immunity, stating:

. . . , 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.

(R.34, p. 14).

Allegations that a defendant “fabricated incriminating evidence,” or “improperly instigated criminal charges,” or made a “fake representation” are all conclusions that are entitled to no presumption of truth. When Rehberg’s conclusory allegations are disregarded, it is clear that his factual allegations do not show a violation of a clearly established constitutional right on the part of Hodges and/or Burke.

a. “Fake representation” to the grand jury

The district court was incorrect when it found that a clearly established constitutional right was violated when a prosecutor misrepresents to the grand jury the significance of truthful evidence. Initially, it is noted that Rehberg does not identify the how the representation to the grand jury was fake. But even if he had, there is no case which holds that presenting otherwise truthful evidence to a grand jury while allegedly misrepresenting the significance of that evidence violates a clearly established constitutional right. Simply put, even if a prosecutor could be found to have violated a constitutional right because of his argument to a grand jury, no controlling authority put Hodges and Burke on notice that they could be subjected to liability for damages under Section 1983 for such conduct and they are entitled to qualified immunity.

b. “Fabricated evidence” during investigatory stage

Rehberg has identified no evidence that was “fabricated” against him during the investigatory stage of the investigation. Hodges and Burke are entitled to qualified immunity on this claim because when the conclusory allegation is disregarded, Rehberg has not alleged a constitutional violation with respect to this claim.

c. Issuance of the third-party subpoenas

Hodges is also entitled to qualified immunity on any claim premised upon the issuance of the subpoenas. The district court improperly credited Rehberg’s conclusory allegations that the issuance of the subpoenas was “fraudulent” and “illegal.” As set forth by the case law cited above in Section IV.A.2.a, the issuance of the subpoenas did not run afoul of the Fourth Amendment. As a result, Rehberg has failed to allege the existence of a constitutional violation. *See Miller*, 425 U.S. at 742 (no reasonable expectation of privacy in the numbers a person dials on the telephone); *Terrill*, 149 Fed. Appx. at 959 (no expectation of privacy in e-mail once it has received by another person). Hodges was entitled to rely on this established case law showing that Rehberg had no legitimate expectation of privacy in the documents subpoenaed. Without citation to case law to the contrary, reasonable prosecutors could have believed that such acts did not violate the

constitution. Issuing subpoenas for this information did not violate any clearly established constitutional right and Hodges is entitled to qualified immunity.

d. Failure to train and supervise subordinates

The district court concluded that Hodges could be held liable under Section 1983 for negligent supervision of his employees. Supervisory liability may not be imposed on mere negligence. West v. Tillman, 496 F.3d 1321, 1328-29 (11th Cir. 2007). In addition, in a Section 1983 suit liability cannot be imposed based on *respondeat superior*; rather, a government official “is only liable for his or her own misconduct.” Ashcroft, 556 U.S. at ___, 129 S. Ct. at ___, 173 L. Ed. 2d at 883. “Purpose rather than knowledge” is required to overcome qualified immunity and impose liability on a supervisor for alleged violations arising from his superintendent responsibilities. Id.

In this respect, Rehberg alleges that Hodges “knew or should have known” that Paulk was engaged in conduct that posed an unreasonable risk of constitutional injury to him and that it was “normal” for district attorney investigators working under the supervision of the district attorney to testify “without adequate knowledge, preparation or personal information of the facts being attested as true.” (R.1, p. 6, 28, ¶¶ 18, 118). As explained in Twombly and Ashcroft, these are nothing more than conclusory allegations that must be

supported with factual allegations. Rehberg has not alleged sufficient facts to show the existence of a constitutional violation based on a failure to train.

Finally, while the allegations could be construed as “consistent with” liability, they are also consistent with lawful behavior on the part of Hodges. Consequently, the allegations stop “short of the line between possibility and plausibility” are insufficient to state a claim or defeat qualified immunity. *See Ashcroft*, 556 U.S. at ____, 129 S. Ct. at ____, 173 L. Ed. 2d at 884-85 (*quoting Twombly*, 550 U.S. at 557). The district court improperly denied qualified immunity to Hodges on Rehberg’s failure supervisory liability claim.

e. Conspiracy to deprive Rehberg of constitutional rights

Claims of conspiracy under Section 1983 must meet the well-established pleading requirements:

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

Fullman, 739 F.2d at 556-7.

A constitutional claim for conspiracy exists only when the defendants have reached an understanding to violate the Rehberg’s constitutional rights. Strength,

854 F.2d at 425. The conspiratorial acts must infringe upon a federal right and the plaintiff must prove an actionable wrong to support the conspiracy. NAACP v. Hunt, 891 F.2d 1555, 1563 (11th Cir. 1990). *See also* Bailey v. Bd. of County Comm'rs of Alachua County, Fla., 956 F.2d 1112, 1122 (11th Cir. 1992). Consequently, the conduct must be more than “wrongful;” the conspiratorial acts must deprive a plaintiff of a *federal right*.

Rehberg alleges generally that Hodges and Burke conspired to violate his constitutional rights. What he does not allege, however, is particular facts to establish the existence of an unconstitutional conspiracy. Rehberg has not pled the particulars related to the alleged agreement among the Defendants, nor has he sufficiently alleged the subject matter of the conspiracy. Without these particularized facts, it is not possible to determine whether the alleged conspiracy even touches upon a constitutional violation. Hence, Rehberg failed to allege a violation of a clearly established constitutional right. Moreover, to the extent that the “agreement” related to the issuance of the subpoenas or the subornation of perjury, for the reasons stated above, these rights were not clearly established. The district court improperly held that Hodges and Burke were not entitled to qualified immunity on Rehberg’s conspiracy claim.

f. Statements to the media

Finally, Rehberg claims that Burke told the media, “it 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 “[i]t 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.” (R.1, pp, 31-32, ¶138). Burke is entitled to qualified immunity for claims arising out of these statements because Rehberg has failed to sufficiently allege a constitutional violation, and because even if the facts alleged establish a constitutional violation, the law was not clearly established.

Rehberg’s allegations fail to establish a constitutional violation for two reasons. First, the allegations do not show that Burke made a false claim about Rehberg. Acts constituting assault or harassment are not free speech. United States v. Eckhardt, 466 F.3d 938, 944-45 (11th Cir. 2006). Nor is the act of burning a cross in a yard. Virginia v. Black, 538 U.S. 343, 362-63 (2003). It is not “free speech to assault or harass someone,” and no one has “the right to go onto someone else’s property and burn a cross under the guise of free speech.” Burke’s general statements were truthful.

Second, Rehberg’s claim of generalized damage to his reputation is not an actionable claim under Section 1983. Defamation, by itself, is not a constitutional

deprivation, even when the stigmatizing statements “would undoubtedly damage the reputation of one in his position, and impair his future employment prospects.”

Siebert v. Gilley, 500 U.S. 226, 233 (1981). The Court explained:

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.

Id. at 234.

Under the applicable “stigma plus” test, to establish a claim, a plaintiff must show a deprivation of a previously recognized property or liberty interest in addition to damage to reputation. Paul v. Davis, 424 U.S. 693, 701-02 (1976).

Damage to reputation is actionable only if incurred as the result of government action that significantly alters a plaintiff’s constitutionally recognized legal rights.

Cypress Ins. Co. v. Clark, 144 F.3d 1435, 1438 (11th Cir. 1998).

Rehberg alleges that the “indictments will always be associated with his name and have caused and will cause significant personal, professional and economic damages to [him]”, and that, defendants have interfered with his ability to work and to continue his career. (Doc.1, p. 10, ¶ 29). This is nothing more than a generalized claim that Burke’s comments to the press “damaged his reputation.” Rehberg does not allege that he has been foreclosed from obtaining employment opportunities or that any other liberty or property interest has been impacted by

Burke's alleged statements. Thus, Rehberg has failed to meet the "stigma-plus" test, and has not established a constitutional violation premised upon Burke's alleged statements to the press.

The district court concluded that the "plus" portion of the "stigma-plus" test was met by the "Fourteenth Amendment violation alleged by Plaintiff, i.e., violation of his right to be free from prosecution based upon false evidence/charges." (R.34, p. 11). The district court relied on Riley v. City of Montgomery, Ala., 104 F.3d 1247, 1253 (11th Cir. 1997) for its conclusion. Riley does not stand for this proposition.

In Riley, the plaintiff alleged that a police officer had planted cocaine in his vehicle during a traffic stop. Id. at 1250, 1253. In deciding that the officer was not entitled to qualified immunity on the plaintiff's malicious prosecution claim, the Court made the unremarkable statement that the planting of false evidence by a police officer could constitute a violation of the Constitution. Id. at 1253. The plaintiff there did not raise a due process claim, and Paul's "stigma-plus" test was not at issue or even discussed. Riley does not support the district court's decision on this issue.

In addition, the district court's analysis assumes a finding that the district court itself rejected – that the Complaint alleged that there was any evidence that was fabricated. (R.34, p. 14). As noted above, despite his conclusory allegations,

Rehberg points to *no* evidence that was fabricated. Thus, we are again faced with a situation where Rehberg attempts to impose liability for conduct that either does not violate the Constitution (the issuance of the subpoenas) or conduct for which there is absolute prosecutorial immunity (the grand jury proceeding). First, conduct that is not unconstitutional cannot meet “plus” requirement. Cypress Ins. Co., 144 F.3d at 1438. Second, no Supreme Court, Eleventh Circuit, or Georgia Supreme Court case has held that the “plus” could be met by relying on conduct that is protected by absolute immunity.

The Seventh Circuit has made a compelling argument for why the “plus” cannot be met in such a manner. In Buckley II, the plaintiff made a slander claim premised on the prosecutor’s press conference announcing the indictment and attempted to meet the “plus” requirement by pointing to his arrest and imprisonment pending trial. 20 F.3d at 797. The court acknowledged that imprisonment implicated the loss of liberty, but stated:

Identifying the arrest and imprisonment as the loss of liberty does not assist Buckley, however, because Fitzsimmons has absolute immunity from damages for these events. We anticipate the response that this separation between the defamation and the loss is artificial; if one causes the other, why should it not be actionable? The answer is that Buckley himself persuaded the Supreme Court to adopt 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. To put this slightly differently, a Rehberg who uses a “stigma plus” approach to avoid *Paul* and *Siebert*

must identify a “plus” other than the indictment, trial, and related events for which defendants possess absolute prosecutorial immunity.”

Id. at 797-98.

As the plaintiff was in Buckley II, Rehberg here is attempting to meet the “plus” requirement by pointing to conduct that is cloaked with absolute prosecutorial immunity. He has not cited to any case that could have put Burke on notice that the “stigma plus” test could be met with conduct that is protected by absolute immunity. The district court’s citation to Riley is similarly unpersuasive because “stigma plus” was not even at issue there. This Court should adopt Buckley II’s reasoning and find that the “plus” requirement cannot be met in such a manner. At a minimum, no qualifying case put Burke on notice that such conduct could impose constitutional liability, and he is entitled to qualified immunity.

CONCLUSION

For all of the foregoing reasons, Defendants Hodges and Burke request that the decision of the district court be reversed and that Rehberg’s Complaint be dismissed based on absolute and qualified immunity.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

KATHLEEN M. PACIOUS 558555
Deputy Attorney General

DEVON ORLAND 554301
Senior Assistant Attorney General

MICHELLE J. HIRSCH
Assistant Attorney General

Michelle J. Hirsch
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
PH: (404) 463-8850
FAX: (404) 651-5304

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I certify that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because this brief contains 12,892 words according to the word processing system utilized by the Office of the Attorney General.

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared Times New Roman 14-point font.

Michelle J. Hirsch
Assistant Attorney General

CERTIFICATE OF SERVICE

This is to certify that I have this filed and electronically uploaded with the Eleventh Circuit Court of Appeals the foregoing Brief of Appellants Kenneth B. Hodges III and Kelly R. Burke, and served a true and correct copy of said document upon the following attorneys of record by placing same in the U.S. Mail, with sufficient first class postage to assure delivery and addressed as follows:

Bryan A. Vroon
Vroon & Crongeyer
1718 Peachtree Street, Suite 1088
Atlanta, GA 30309

John C. Jones
248 Roswell Street
Marietta, GA 30060

This 15th day of June, 2009.

Michelle J. Hirsch
Assistant Attorney General
Georgia Bar No. 357198

40 Capitol Square, S.W.
Atlanta, GA 30334-1300
PH: (404) 463-8850
FAX: (404) 651-5304