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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KARIM KOUBRITI,

Plaintiff,

v.

RICHARD CONVERTINO, MICHAEL THOMAS, and HARRY RAYMOND SMITH, jointly and severally, and in their individual capacities,

Defendants.

Case No. 2:07-cv-13678

HONORABLE MARIANNE O. BATTANI

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DEFENDANT RICHARD CONVERTINO'S
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

NOW COMES Defendant, Richard Convertino, by and through counsel, Robert S. Mullen, pursuant to Fed. R. Civ. P. 12(b)(6), and respectfully requests this Honorable Court to dismiss this matter due to Plaintiff's failure to state a claim upon which relief can be granted, based upon the following:

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1. Plaintiff Karim Koubriti has filed a three-count Complaint and Jury Demand pursuant to 42 U.S.C. § 1983, alleging claims arising under the Fourth, Fifth, and Fourteenth Amendments to the United State Constitution.

2. Mr. Koubriti is currently on pre-trial release status under the supervision of Pretrial Services, awaiting trial for Conspiracy to Commit Mail Fraud, 18 U.S.C. § 371 under a Fourth Superseding Indictment issued in the same prosecution that is the subject of this action.

3. Defendant Richard Convertino was the Assistant United States Attorney who obtained Mr. Koubriti's criminal conviction under the Third Superseding Indictment in that action.

4. The gist of the Complaint and Jury Demand is that Defendant Richard Convertino maliciously prosecuted Mr. Koubriti by conspiring with Defendant Michael Thomas and Defendant Harry Raymond Smith to manufacture evidence against him and that Defendant Convertino further manufactured evidence against Mr. Koubriti, withheld exculpatory evidence showing that Mr. Koubriti was not guilty of terrorist related charges, and failing to turn over exculpatory evidence and prosecuting him on terrorism related charges.

5. Plaintiff's Complaint and Jury Demand fails to state a claim upon which relief can be granted because Plaintiff's Fifth Amendment due process malicious prosecution claim requires that the alleged deprivation occur as a result of federal action, but liability under 42 U.S.C. § 1983 requires that the alleged deprivation occur as a result of state action.

6. Plaintiff's Complaint and Jury Demand fails to state a claim upon which relief can be granted because Plaintiff's Fourteenth Amendment due process malicious prosecution claim is not cognizable in a 42 U.S.C. § 1983 action.

7. Plaintiff's Complaint and Jury Demand fails to state a claim upon which relief can be granted because Plaintiff's Fourth Amendment due process malicious prosecution claim fails to allege that the purported deprivation of constitutional rights was the result of action taken under color of state law.

8. Plaintiff's Complaint and Jury Demand fails to state a claim upon which relief can be granted because Plaintiff's Fourth Amendment due process malicious prosecution claim fails to allege that Plaintiff was arrested or prosecuted in the absence of probable cause.

9. Plaintiff's Complaint and Jury Demand fails to state a claim upon which relief can be granted because Defendant Convertino enjoys absolute immunity from section 1983 liability for functions that he performed in his capacity as an Assistant United States Attorney General.

10. In support of this motion, Defendant Convertino relies upon the arguments contained in his accompanying Brief in Support, which is hereby incorporated in full by reference.

11. There was a conference between attorneys or unrepresented parties in which the movant explained the nature of the motion or request and its legal basis and requested but did not obtain concurrence in the relief sought.

WHEREFORE, Defendant Richard Convertino respectfully requests this Honorable Court to enter an Order dismissing this action for failure to state a claim upon which relief can be granted and granting other relief to which it may appear that he is entitled.

Respectfully submitted,

s/Robert S. Mullen

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Dated: December 7, 2007

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SOUTHERN DIVISION

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Plaintiff,

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RICHARD CONVERTINO, MICHAEL THOMAS, and HARRY RAYMOND SMITH, jointly and severally, and in their individual capacities,

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BRIEF IN SUPPORT OF
DEFENDANT RICHARD CONVERTINO'S
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

CONCISE STATEMENT OF ISSUES PRESENTED

I. Should this Court dismiss Plaintiff Karim Koubriti's Fifth Amendment due process malicious prosecution claim where such claims require that the alleged deprivation occur as a result of federal action, yet liability under 42 U.S.C. § 1983 requires that the alleged deprivation occur as a result of state action?

Defendant Convertino says: YES

II. Should this Court dismiss Plaintiff Karim Koubriti's Fourteenth Amendment due process malicious prosecution claim where no such claim is cognizable in a 42 U.S.C. § 1983 action?

Defendant Convertino says: YES

III. Should this Court dismiss Plaintiff Karim Koubriti's Fourth Amendment due process malicious prosecution claim where Plaintiff has failed to plead that the alleged deprivation of constitutional rights was the result of action taken under color of state law?

Defendant Convertino says: YES

IV. Should this Court dismiss Plaintiff Karim Koubriti's Fourth Amendment due process malicious prosecution claim where Plaintiff has failed to plead that he was prosecuted in the absence of probable cause?

Defendant Convertino says: YES

V. Should this Court dismiss Plaintiff Karim Koubriti's Fourth Amendment due process malicious prosecution claim against Defendant Convertino based upon the doctrine of absolute prosecutorial immunity for functions that Defendant Convertino performed in his capacity as an Assistant United States Attorney General?

Defendant Convertino says: YES

MOST APPROPRIATE AUTHORITY FOR RELIEF SOUGHT

I. Fifth Amendment due process claims require federal action and liability under 42 U.S.C. § 1983 requires state action

Bolling v. Sharp, 347 U.S. 497 (1954)

Flagg Bros. v. Brooks, 436 U.S. 149 (1978)

American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999)

Scott v. Clay County, Tenn., 205 F.3d 867 (6th Cir.),
cert. denied, 531 U.S. 874 (2000)

Erdman v. Granholm, 2007 WL 757894, *6 fn. 4 (W.D. Mich. 2007)

Thompson v. Michigan Parole Bd., 2006 WL 3804892, *3 (E.D. Mich. 2006)

II. Fourteenth Amendment due process malicious prosecution claims do not exist

Albright v. Oliver, 510 U.S. 266 (1994)

III. Plaintiff's Fourteenth Amendment due process malicious prosecution claim fails to allege action taken under color of state law

Ana Leon T. v. Federal Reserve Bank of Chicago, 823 F.2d 928 (6th Cir. 1987),
cert. denied, 484 U.S. 945 (1987)

Conner v. Greef, 99 Fed. Appx. 577, 2004 WL 898866 (6th Cir. 2004)

City of Milwaukee v. Saxbe, 546 F.2d 693 (7th Cir. 1976)

United States v. Faneca, 332 F.2d 872, 874 (5th Cir. 1964),
cert. denied, 380 U.S. 971 (1965).

IV. Plaintiff's Fourteenth Amendment due process malicious prosecution claim fails to allege that Plaintiff was prosecuted in the absence of probable cause

Hartman v. Moore, 547 U.S. 250 (2006)

Darrah v. City of Oak Park, 255 F.3d 301 (6th Cir. 2001)

Fox v. DeSoto, 489 F.3d 227 (6th Cir. 2007)

McKinley v. City of Mansfield, 404 F.3d 418 (6th Cir. 2005)

Voyticky v. Village of Timberlake, Ohio, 412 F.3d 669 (6th Cir. 2005)

V. Plaintiff's Fourteenth Amendment due process malicious prosecution claim is barred by absolute prosecutorial immunity

Burns v. Reed, 500 U.S. 478 (1991)

Forrester v. White, 484 U.S. 219 (1988)

Higgason v. Stephens, 288 F.3d 868 (6th Cir.2002)

Howlett By and Through Howlett v. Rose, 496 U.S. 356 (1990)

Imbler v. Pachtman, 424 U.S. 409 (1976)

Loggins v. Franklin County, Ohio, 218 Fed. Appx. 466 (6th Cir. 2007)

Martinez v. State of Cal., 444 U.S. 277 (1980),
reh'g denied, 445 U.S. 920 (1980)

McKinley v. City of Mansfield, 404 F.3d 418 (6th Cir. 2005),
cert. denied, 546 U.S. 1090 (2006)

Spurlock v. Thompson, 330 F.3d 791 (6th Cir. 2003)

Wrack v. City of Detroit, 2007 WL 2121995 (E.D. Mich. 2007)

Facts

This matter arises from the first terrorist prosecution in the country after the events of September 11, 2001. More particularly, this matter arises from Plaintiff Karim Koubriti's conviction in that prosecution for conspiracy to provide material support or resources to terrorists, contrary to 18 U.S.C. §§ 371 and 2339A, and for conspiracy to engage in fraud and misuse of visas, permits and other documents, contrary to 18 U.S.C. § 371. *See United States v Karim Koubriti*, E.D. Mich. Case No. 01-80778. Mr. Koubriti is currently on pre-trial release status under the supervision of Pretrial Services and is currently awaiting trial for conspiracy to commit mail fraud, contrary to 18 U.S.C. § 371, under a Fourth Superseding Indictment issued in the continuation of the same prosecution that is the subject of this action. Defendant Richard Convertino was the Assistant United States Attorney who obtained Mr. Koubriti's criminal conviction under the Third Superseding Indictment in that action.

Mr. Koubriti filed the present action, alleging violations of constitutional rights secured by the Fourth, Fifth, and Fourteenth Amendments. Although he currently faces prosecution in the same criminal proceeding which forms the basis of this action, Mr. Koubriti nevertheless maintains that he is entitled to $9 million dollars in damages as a result of the federal government's malicious prosecution of him. In support of his claims, Mr. Koubriti alleges that the Defendants maliciously prosecuted him by intentionally withholding "exculpatory evidence showing that [he] was not guilty of the terrorist related charges," "manufacturing evidence against [him], failing to turn over exculpatory evidence and prosecuting him on terrorism related charges . . . ." *Complaint and Jury Demand*, ¶¶ 16, 17, 23-24, 26-27, and 29-30. Mr. Koubriti's Complaint and Jury

Demand should be dismissed where he has failed to state a cause of action upon which relief can be granted as to Defendant Convertino.

Standard of Review

A motion to dismiss brought pursuant to Fed. R. Civ. P. 12(b)(6) challenges the legal sufficiency of the pleadings. "A complaint must contain either direct or inferential allegations with respect to all material elements necessary to sustain a recovery under some viable legal theory." *Weisbarth v. Geauga Park Dist*., 499 F.3d 538, 541 (6th Cir. 2007) (citation omitted). "In considering whether to grant a defendant's motion to dismiss pursuant to Rule 12(b)(6) a district court must accept as true all the allegations contained in the complaint and construe the complaint liberally in favor of the plaintiff." *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 1964-65 (2007) (citations and quotation marks omitted), *Association of Cleveland Fire Fighters v. City of Cleveland, Ohio*, 502 F.3d 545, 548 (6th Cir. 2007). The plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true."[1] *Twombly*, 127 S. Ct. at 1964-65 (internal citation and quotation marks omitted), *Association of Cleveland Fire Fighters*, 502 F.3d at 548.

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[1] In *Bell Atl. Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955 (2007), the Supreme Court recently disavowed the oft-quoted Rule 12(b)(6) standard of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), which held that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The *Twombly* Court characterized that rule as one "best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Twombly*, ___, U.S. at ___, 127 S. Ct. at 1969. *See also Association of Cleveland Fire Fighters v. City of Cleveland, Ohio*, 502 F.3d 545, 548 (6th Cir. 2007).

ARGUMENTS

I. PLAINTIFF'S MALICIOUS PROSECUTION CLAIM UNDER THE FIFTH AMENDMENT DUE PROCESS CLAUSE SHOULD BE DISMISSED WHERE SUCH CLAIMS REQUIRE THAT THE ALLEGED DEPRIVATION OCCUR AS A RESULT OF FEDERAL ACTION, YET LIABILITY UNDER 42 U.S.C. § 1983 REQUIRES THAT THE ALLEGED DEPRIVATION OCCUR AS A RESULT OF STATE ACTION.

Count II of Plaintiff's Complaint and Jury Demand asserts a claim for malicious prosecution under the Fifth Amendment. *See Complaint and Jury Demand*, p. 5, ¶¶25-27. This claim fails to state a claim insofar as Fifth Amendment due process claims require federal action, and section 1983 suits require state action.

The Fifth Amendment provides in pertinent part that "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Fourteenth Amendment analogue similarly provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. Amend. XIV, § 1. The relevant distinction between these seemingly redundant Amendments is that "[t]he Fourteenth Amendment's Due Process Clause restricts the activities of the states and their instrumentalities; whereas the Fifth Amendment's Due Process Clause circumscribes only the actions of the federal government." *Scott v. Clay County, Tenn.*, 205 F.3d 867, 873 fn. 8 (6th Cir.) (citations omitted), *cert. denied*, 531 U.S. 874 (2000). *See also Newsom v. Vanderbilt University*, 653 F.2d 1100, 1113 (6th Cir. 1981) ("The Fifth and Fourteenth Amendments apply to actions of the federal and state governments respectively.").

The paradox of Plaintiff's Fifth Amendment claim is that it alleges a Fifth Amendment due process violation, which requires that the deprivation be caused by

federal action, *Bolling v. Sharp*, 347 U.S. 497 (1954), in a 42 U.S.C. § 1983 action, which requires that the deprivation be caused by state action, *Flagg Bros. v. Brooks*, 436 U.S. 149, 155-56 (1978). The color-of-state-law requirement of section 1983 actions is tantamount to the state action required in order to establish a Fourteenth Amendment due process claim. *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49 & fn. 8 (1999). The naturally corollary is that federal action required in order to establish a Fifth Amendment due process claim cannot satisfy the state law requirement of a section 1983 action.

The Sixth Circuit Court of Appeals held as much in *Scott v. Clay County, Tenn.*, *supra*. In *Scott*, the plaintiff, like Mr. Koubriti, asserted claims under the Fourth, Fifth, and Fourteenth Amendments. The Sixth Circuit held that in a section 1983 action the plaintiff's "citation to the Fifth Amendment Due Process Clause was a nullity . . ." *Scott*, 205 F.3d at 873 fn. 8. *See also Myers v. Village of Alger, Ohio*, 102 Fed. Appx. 931, 933 (6th Cir. 2004) (affirming lower court's dismissal of Fifth Amendment claim in section 1983 action). Thus, when faced with section 1983 due process claims asserted under both the Fifth and Fourteenth Amendments, federal courts in this circuit dismiss the Fifth Amendment claims. *See, e.g., Erdman v. Granholm*, 2007 WL 757894, *6 fn. 4 (W.D. Mich. 2007), *Thompson v. Michigan Parole Bd.*, 2006 WL 3804892, *3 (E.D. Mich. 2006). Accordingly, Mr. Koubriti's Fifth Amendment due process claim should be dismissed due to his failure to state a claim upon which relief can be granted.

II. PLAINTIFF'S MALICIOUS PROSECUTION CLAIM UNDER THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE SHOULD BE DISMISSED WHERE NO SUCH CLAIM IS COGNIZABLE IN A 42 U.S.C. § 1983 ACTION.

Count III of Plaintiff's Complaint and Jury Demand asserts a claim for malicious prosecution under the Fourteenth Amendment. *See Complaint and Jury Demand*, p. 5, ¶¶25-27. This claim should be dismissed because no such claim exists.

Section 1983 has two basic requirements: (1) state action that (2) deprived an individual of federal statutory or constitutional rights. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-56 (1978), *Flint ex rel. Flint v. Kentucky Dept. of Corrections*, 270 F.3d 340, 351 (6th Cir. 2001). Section 1983 is not itself a source of substantive rights but, rather, merely provides "'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (citation omitted). Thus, "the first step in any such claim is to identify the specific constitutional right allegedly infringed." *Albright*, 510 U.S. at 271 (citations omitted),

In *Albright v. Oliver*, *supra*, a plurality of the Supreme Court specifically declined "to recognize a substantive right under the Due Process Clause of the Fourteen Amendment to be free from criminal prosecution except upon probable cause." *Albright*, 510 U.S. at 268. Upon rejecting substantive due process as a basis for section 1983 claims of malicious prosecution, the Court held that when a section 1983 claim implicates the Fourth Amendment prohibition against unlawful seizures, the claim must be brought under the Fourth Amendment. The Court explained that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process' must be the guide for analyzing these claims.'"

Albright, 510 U.S. at 273 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Consequently, a malicious prosecution claim brought under section 1983 must be brought as a violation of the Fourth Amendment, not as a violation of due process under the Fourteenth Amendment.[2]

Here, a particular constitutional amendment provides an explicit textual source of constitutional protection against Mr. Koubriti's malicious prosecution claim, namely the Fourth Amendment. In such circumstances, the Fourth Amendment, not the more thus, generalized notion of substantive due process, is the guide for analyzing these claims. Thus, Mr. Koubriti's Fourteenth Amendment malicious prosecution claim is not cognizable in a section 1983 action and, therefore, should be dismissed due for failure to state a claim upon which relief can be granted.

III. PLAINTIFF'S FOURTH AMENDMENT MALICIOUS PROSECUTION CLAIM SHOULD BE DISMISSED WHERE PLAINTIFF HAS FAILED TO PLEAD THAT THE ALLEGED DEPRIVATION OF CONSTITUTIONAL RIGHTS WAS THE RESULT OF ACTION TAKEN UNDER COLOR OF STATE LAW.

The last claim remaining is that asserted in Count I of Mr. Koubriti's Complaint and Jury Demand, which alleges malicious prosecution under the Fourth Amendment. *See Complaint and Jury Demand*, p. 5, ¶¶25-27. This claim should also be dismissed for failure to state a claim because Mr. Koubriti has failed to allege that this alleged constitutional deprivation was brought about by state action.

"Section 1983 creates a species of liability in favor of persons deprived of their federal civil rights *by those wielding state authority*." *Felder v. Casey*, 487 U.S. 131, 139

[2] Although *Albright v. Oliver*, 510 U.S. 266, 271 (1994) was a plurality opinion, the Sixth Circuit has subsequently adhered to its holding. *See, e.g., Thacker v. City of Columbus*, 328 F.3d 244, 258-59 (6th Cir. 2003) (discussing Sixth Circuit's interpretation of *Albright*).

(1988) (emphasis supplied). Thus, a valid section 1983 claim has two basic requirements: (1) state action that (2) deprived an individual of federal statutory or constitutional rights. *Flagg Bros., Inc*, 436 U.S. at 155-56, *Flint ex rel. Flint*, 270 F.3d at 351. Mr. Koubriti alleges in his Complaint and Jury Demand that Defendant Convertino at "all times relevant to this Complaint was employed as an Assistant United States Attorney by the United States Department of Justice." *Complaint and Jury Demand*, p. 2, ¶ 4. Mr. Koubriti further alleges that Defendant Convertino was acting under "color of law" at all times relevant to his Complaint. *Complaint and Jury Demand*, p. 2, ¶ 4. However, Mr. Koubriti has never alleged that Defendant Convertino acted under color of *state* law as required by section 1983 nor can he reasonably make such allegations.

"The Department of Justice is an executive department of the United States at the seat of Government." 28 U.S.C. § 501. The President of the United States has the authority to appoint, by and with the advice and consent of the Senate, an Attorney General of the United States as head of the Department of Justice. 28 U.S.C. § 503. The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law,

> may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrate judges, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

28 U.S.C. § 515(a).

Defendant Convertino, as an Assistant United States Attorney for the United States Department of Justice, was at all times relevant to Mr. Koubriti's Complaint and Jury Demand an employee of the *federal* government acting according to *federal*, not

state, law. These are the facts as alleged by Mr. Koubriti, and no facts or evidence exists to the contrary. In short, a section 1983 claim does not lie against a defendant who acts under color of federal law. *See, e.g., Ana Leon T. v. Federal Reserve Bank of Chicago*, 823 F.2d 928, 931 (6th Cir. 1987), *cert. denied*, 484 U.S. 945 (1987), *Conner v. Greef*, 99 Fed. Appx. 577, 580, 2004 WL 898866, **2 (6th Cir. 2004). More specifically, a section 1983 claim does not lie against the United States Attorney General or his assistants. *City of Milwaukee v. Saxbe*, 546 F.2d 693, 703 (7th Cir. 1976), *United States v. Faneca*, 332 F.2d 872, 874 (5th Cir. 1964), *cert. denied*, 380 U.S. 971 (1965). The Complaint and Jury Demand fails to provide either direct or inferential allegations respecting this material element. *Tahfs*, 316 F.3d at 590. Accordingly, Mr. Koubriti's Fourth Amendment malicious prosecution claim should be dismissed for failure to state a claim upon which relief can be granted.

IV. PLAINTIFF'S FOURTH AMENDMENT MALICIOUS PROSECUTION CLAIM SHOULD BE DISMISSED WHERE PLAINTIFF HAS FAILED TO PLEAD THAT HE WAS PROSECUTED IN THE ABSENCE OF PROBABLE CAUSE.

In support of his Fourth Amendment Malicious Prosecution Claim, Mr. Koubriti alleges in his Complaint and Jury Demand that Defendant Convertino maliciously prosecuted him by conspiring "to manufacture evidence against [him] to be used at his trial," intentionally withholding "exculpatory evidence showing that [he] was not guilty of the terrorist related charges," and "manufacturing evidence against [him], failing to turn over exculpatory evidence and prosecuting him on terrorism related charges . . . ." *Complaint and Jury Demand*, ¶¶ 16, 17, 23-24, 26-27, and 29-30. According to the Complaint and Jury Demand, these actions by Defendant Convertino allegedly caused

Mr. Koubriti to be "wrongfully convicted of criminal charges and . . . illegally incarcerated for nearly three years." *Id.* Conspicuously absent from Mr. Koubriti's Complaint and Jury Demand is any mention that the prosecution was pursued despite an absence of probable cause.

"[The Sixth Circuit] has recognized a section 1983 claim for malicious prosecution arising under the Fourth Amendment, but the contours of such a claim remain uncertain." *Fox v. DeSoto*, 489 F.3d 227, 237 (6th Cir. 2007) (citations omitted). "What is certain, however, is that such a claim fails when there was probable cause to prosecute, or when the defendant did not make, influence, or participate in the decision to prosecute." *Id*. (citations omitted). *See also Voyticky v. Village of Timberlake, Ohio*, 412 F.3d 669, 675 (6th Cir. 2005) ("In order to prove malicious prosecution under federal law, a plaintiff must show, at a minimum, that there is no probable cause to justify an arrest or a prosecution."). Thus, where a plaintiff alleges that he was prosecuted in violation of his constitutional rights, an absence of probable cause must be both pleaded and proven. *Hartman v. Moore*, 547 U.S. 250, 265 (2006)

This pleading deficiency is particularly crucial in the instant case. To be sure, his Complaint and Jury Demand alleges that Mr. Koubriti was subject to a malicious prosecution because Defendant Convertino either fabricated false evidence against him or withheld evidence that had potentially exculpating value. However, Mr. Koubriti does not allege that his prosecution was pursued despite a lack of probable cause. This fact is crucial because if probable cause to prosecute existed, then Mr. Koubriti cannot make out a malicious prosecution claim under the Fourth Amendment, *regardless of any alleged false statements made by Defendant Convertino*. *Darrah v. City of Oak Park*, 255 F.3d

301, 312 (6th Cir. 2001). That is, allegations that false evidence was used to advance the prosecution of a criminal defendant, standing alone, are insufficient to state a Fourth Amendment malicious prosecution claim because probable cause can exist independent of allegedly false evidence. *Darrah*, 255 F.3d at 312. *See also McKinley v. City of Mansfield*, 404 F.3d 418, 444-445 (6th Cir. 2005).

Taking all of the allegations in the Complaint and Jury Demand as true and assuming that Defendant Convertino manufactured inculpating evidence and withheld exculpating evidence, Mr. Koubriti has nonetheless failed to state a valid Fourth Amendment malicious prosecution claim because he failed to allege that Defendant Convertino pursued the prosecution in the absence of probable cause. The Complaint and Jury Demand fails to provide either direct or inferential allegations with respect to this material element. *Tahfs*, 316 F.3d at 590. Accordingly, it should be dismissed for failure to state a claim upon which relief can be granted.

V. PLAINTIFF'S MALICIOUS PROSECUTION CLAIM UNDER THE FOURTH AMENDMENT SHOULD BE DISMISSED WHERE PLAINTIFF IS ABSOLUTELY IMMUNE FROM SUIT FOR FUNCTIONS PERFORMED IN HIS CAPACITY AS AN ASSISTANT UNITED STATES ATTORNEY GENERAL.

Even assuming, *arguendo*, that Mr. Koubriti had pleaded valid section 1983 Fourth Amendment malicious prosecution claim – which he has not – Mr. Koubriti's allegations still fail to state a claim upon which relief can be granted because Defendant Convertino is clearly entitled to absolute prosecutorial immunity. In an effort to circumvent this inescapable conclusion, Mr. Koubriti alleges that Defendants are not entitled to the defense of "governmental immunity" because (1) they "were not acting in the furtherance of any legitimate governmental function," *Complaint and Jury Demand*,

p. 2, ¶ 7; (2) their "illegal and unconstitutional actions were intentional torts," *id*.; and (3) they "were violating Plaintiffs constitutional rights and their actions were clearly unreasonable," *Complaint and Jury Demand*, p. 2, ¶ 8. Mr. Koubriti further alleges that Defendant Convertino "was acting in an investigative role and not the role of a prosecutor." *Complaint and Jury Demand*, p. 4, ¶ 19. All of these arguments are insufficient to divest Defendant Convertino of his absolute immunity from section 1983 liability.

A. <u>Not in Furtherance of Any Legitimate Governmental Function</u>

Mr. Koubriti first argues that Defendant Convertino is not entitled to immunity because he was "not acting in the furtherance of any legitimate governmental function . . . ." *Complaint and Jury Demand*, p. 2, ¶ 7. This argument is an apparent reference to Michigan's governmental immunity, which provides that officers and employees of governmental agencies are immune from tort liability while in the course of employment if, *inter alia*, they were acting or reasonably believed that they were acting within the scope of their authority and "[t]he governmental agency is engaged in the exercise or discharge of a governmental function." M.C.L. 691.1407(2) (a). However, defenses to section 1983 actions are questions of federal law, *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 376-77 (1990), and as such, the availability of immunity in a section 1983 suit is also a question of federal law. *Id*. *See also Martinez v. State of Cal*., 444 U.S. 277, 284 & fn. 8 (1980), *reh'g denied*, 445 U.S. 920 (1980), *Loggins v. Franklin County, Ohio*, 218 Fed. Appx. 466, 476 (6th Cir. 2007). Thus, Mr. Koubriti's reliance on Michigan's governmental immunity is misplaced and fails to divest Defendant Convertino of his absolute immunity under federal law from section 1983 liability.

B. <u>Intentional Torts</u>

Similarly, Mr. Koubriti further argues that Defendant Convertino is not entitled to immunity because his "illegal and unconstitutional actions were intentional torts." *Complaint and Jury Demand*, p. 2, ¶ 7. Under Michigan law, governmental immunity is unavailable as a defense against allegations of intentional torts in certain circumstances because intentional torts are not considered to be the within exercise or discharge of a legitimate governmental function. *Bauss v. Plymouth Tp*., 408 F. Supp. 2d 363, 369 (E.D. Mich. 2005). Again, however, this is a federal section 1983 action governed by federal law, not state tort concepts, and Michigan's corpus of governmental immunity law has no applicability whatsoever in this action. *Rose*, 496 U.S. at 376-77, *Martinez*, 444 U.S. at 284 & fn. 8, and *Loggins*, 218 Fed. Appx. at 476. As Judge Cleland recently noted:

> Immunity under [Michigan] state law is remarkably different, as it applies a subjective standard of review to the official's actions. *Unlike federal qualified immunity, officers facing claims of intentional torts "are not shielded by [Michigan's] governmental immunity statute*." Unlike the immunity applicable to section 1983 claims, immunity from state torts under Michigan law depends upon an officer's subjective intent at the time of the alleged assault.

Wrack v. City of Detroit, 2007 WL 2121995 *4 (E.D. Mich. 2007) (citation omitted; emphasis added).

Again, Mr. Koubriti's attempt to divest Defendant Convertino of his absolute immunity from section 1983 liability based upon Michigan's governmental immunity fails.

C. Violation of Constitutional Rights / Clearly Unreasonable Actions

Mr. Koubriti next argues that Defendant Convertino is not entitled to immunity because his actions "violat[ed] Plaintiffs constitutional rights and . . . were clearly unreasonable." *Complaint and Jury Demand*, p. 2, ¶ 8. This again appears to be a reference to Michigan governmental immunity, which subjects state or governmental entities to liability under Michigan law "[w]here it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action." *Smith v. Department of Public Health*, 410 N.W.2d 749, 751 (Mich. 1987), *affirmed sub nom., Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). There is no analogous counterpart under federal law which subjects actors, otherwise entitled to immunity from section 1983 liability for their constitutional torts, to liability merely because their conduct violates the constitution. Indeed, if this were the current state of federal immunity law, the entire body of law pertaining to absolute and qualified immunities in section 1983 actions would be rendered a nullity as such claims typically entail a violation of the federal constitution. In short, Mr. Koubriti's misplaced reliance upon Michigan's governmental immunity law again fails to subject to Defendant Convertino to section 1983 liability.[3]

D. Acting in Administrative Capacity

Lastly, Mr. Koubriti argues that Defendant Convertino "was acting in an investigative role and not the role of a prosecutor." *Complaint and Jury Demand*, p. 4, ¶ 19. Although this exception to absolute prosecutorial immunity is recognized under federal law, it is wholly inapplicable in this instance.

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[3] Parenthetically, neither federal nor state law rescinds a government employee's entitlement to immunity based on the grounds that his or her conduct was "clearly unreasonable."

Section 1983 is to be read “in harmony with general principles of tort immunities and defenses rather than in derogation of them.” *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). When determining whether particular actions of government officials fit within a common-law tradition of absolute immunity, courts apply a “functional approach,” *Burns v. Reed*, 500 U.S. 478, 486 (1991), which looks to “the nature of the function performed, not the identity of the actor who performed it.” *Forrester v. White*, 484 U.S. 219, 229 (1988), *Higgason v. Stephens*, 288 F.3d 868, 877 (6th Cir.2002). Functions that form an “integral part of the judicial process” or are otherwise “intimately associated with the judicial phase of the criminal process” are absolutely immunity from suit. *Imbler*, 424 U.S. at 430. As described by the *Imbler* Court:

> A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. *These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence.*

Imbler, 424 U.S. at 431 fn. 33 (emphasis added).

Because the following conduct occurs in a prosecutor’s role as an advocate, it is absolutely immune from section 1983 liability: malicious prosecution, *Spurlock v. Thompson*, 330 F.3d 791, 797 (6th Cir. 2003) (citing *Burns*, 500 U.S. 478, 485 n. 4); appearances at probable cause and grand jury hearings, *Spurlock*, 330 F.3d at 797 (citing *Burns*, 500 U.S. 478, 487, n. 8); professional evaluation of the evidence assembled by the police, and appropriate presentation of that evidence at trial or before the grand jury, *Spurlock*, 330 F.3d at 797 (citing *Buckley*, 509 U.S. 259, 273); preparation of witnesses for trial, *Spurlock*, 330 F.3d at 797 (citing *Higgason v. Stephens*, 288 F.3d 868, 878 (6th

Cir.2002)); and knowing presentation of false testimony at trial, *Spurlock*, 330 F.3d at 797 (citing *Imbler*, 424 U.S. at 413, 430, *Buckley*, 509 U.S. at 267 n. 3).

If, however, a prosecutor's actions are considered "investigatory or administrative" in nature, then he or she is entitled only to qualified immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993). "The analytical key to prosecutorial immunity, therefore, is advocacy – whether the actions in question are those of an advocate." *Holloway*, 220 F.3d at 775. Thus, the "critical inquiry is how closely related is the prosecutor's challenged activity to his role as an advocate intimately associated with the judicial phase of the criminal process." *Id*.

This Court need look no further that the seminal *Imbler* decision in order to dispose of Mr. Koubriti's claims. In *Imbler*, the plaintiff, like Mr. Koubriti, brought a section 1983 action, alleging "that the prosecution had knowingly used false testimony and suppressed material evidence at Imbler's trial." *Imbler*, 424 U.S. at 413. Notwithstanding the allegations, the Supreme Court held that prosecutorial officials are absolutely immune from "*suits for malicious prosecution and for defamation, **and that this immunity extend[s] to the knowing use of false testimony before the grand jury and at trial***."[4] *Burns v. Reed*, 500 U.S. 478, 484 (1991) (citing *Imbler*, 424 U.S. at 421-424, 426, and n. 23) (emphasis added). The *Imbler* Court minced no words regarding the consequences of its decision: "To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." *Imbler*, 424 U.S. at 413. Sixth Circuit

[4] Mr. Koubriti's claim that Defendant Convertino manufactured evidence is redundant vis-à-vis his claim that Defendant Convertino suppressed favorable evidence because, for purposes of prosecutorial immunity, there is no difference between the willful use of perjured testimony (*i.e*., manufactured evidence) and the willful suppression of exculpatory information. *Imbler v. Pachtman*, 424 U.S. 409, 431 fn. 34 (1976). Both acts are immune. *Id*.

precedent likewise adheres to the same principle and protects prosecuting officials with absolute prosecutorial immunity "even when it is alleged that a prosecutor knowingly presented false evidence against the plaintiff at trial." *McKinley v. City of Mansfield*, 404 F.3d 418, 438 (6th Cir. 2005), *cert. denied*, 546 U.S. 1090 (2006). *See also Spurlock*, 330 F.3d. at 797, 798 ("[E]ven the knowing presentation of false testimony at trial is protected by absolute immunity."), *Ireland v. Tunis*, 113 F.3d 1435, 1445 (6th Cir. 1997) ("A prosecutor was therefore absolutely immune from suit for soliciting false testimony from witnesses . . . ."), *cert. denied* 522 U.S. 996 (1997).

Even assuming, *arguendo*, that Defendant Convertino was acting in an investigative role and not the role of a prosecutor – which he was not – the facts pleaded in the Complaint and Jury Demand still fail to state a claim as they do not articulate any *facts* in support of this conclusion. On one hand, Mr. Koubriti alleges that Defendant Convertino was acting in an investigative role and not in the role of a prosecutor, yet on the other hand, the only allegations that support this claim are Mr. Koubriti's bald conclusions that Defendant Convertino manufactured evidence, intentionally withholding exculpatory evidence, and failed to turn over exculpatory evidence. "It is plain that, although liberal, the [Rule 12(b)(6) pleading] standard does require that a plaintiff plead more than bare legal conclusions."[5] *Lillard v. Shelby County Bd. of Educ*., 76 F.3d 716,

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[5] *See, e.g., Center for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 832 (6th Cir. 2007) ("[C]onspiracy claims must be pled with some degree of specificity and . . . vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim"), *Tahfs v. Proctor*, 316 F.3d 584, 590 (6th Cir. 2003) ("[T]he complaint must contain 'either direct or inferential allegations respecting all the material elements' and the allegations must constitute 'more than bare assertions of legal conclusions.'"), *Lillard v. Shelby County Bd. of Educ*., 76 F.3d 716, 726 (6th Cir. 1996) ("This court has held, in the context of a civil rights claim, that conclusory allegations of unconstitutional conduct without specific factual allegations fail to state a claim under section 1983.") (citation omitted), *Gutierrez v. Lynch*, 826 F.2d 1534, 1538-1539 (6th Cir. 1987) ("It is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under section 1983."), *Ana Leon T. v. Federal Reserve Bank*, 823 F.2d

726 (6th Cir. 1996). Notwithstanding Mr. Koubriti's conclusory statements, which are at ironic odds with the few facts that are well-pleaded, there simply are no *facts* in the Complaint and Jury Demand from which this Court can infer that Defendant Convertino acted in an investigative or administrative capacity during the times alleged in the Complaint and Jury Demand. When ruling upon a 12(b)(6) motion, a court need not accept as true legal conclusions or unwarranted factual inferences, *Kottmyer*, 436 F.3d at 688, conclusory allegations of unspecified conduct, *Lillard*, 76 F.3d at 726, or vague assertions. *Id.* Accordingly, Mr. Koubriti's Fourth Amendment malicious prosecution claim should be dismissed because Defendant Convertino enjoys absolutely prosecutorial immunity for the conduct alleged in the Complaint and Jury Demand undertaken by Defendant Convertino in his capacity as a federal Assistant United States Attorney.

928, 930 (6th Cir.) ("[T]he allegations must be more than mere conclusions, or they will not be sufficient to state a civil rights claim."), *cert. denied*, 484 U.S. 945 (1987), *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986) ("It is not enough for a complaint . . . to contain mere conclusory allegations of unconstitutional conduct by persons acting under color of state law. Some factual basis for such claims must be set forth in the pleadings."), *Smith v. Rose*, 760 F.2d 102, 106 (6th Cir. 1985) ("The conclusory statement in the complaint that plaintiff 'feels' that his property was disposed of through spite and conspiracy is not supported by factual statements and is not sufficient to state a claim for relief under 42 U.S.C. § 1983."), *Jaco v. Bloechle*, 739 F.2d 239, 245 (6th Cir. 1984) (conspiracy claim properly dismissed where "complaint merely alleged broad conclusory negligence language void of the factual allegations necessary to support a conspiracy theory").

RELIEF

WHEREFORE, Defendant Richard Convertino respectfully requests this Honorable Court to enter an Order dismissing this action for failure to state a claim upon which relief can be granted and granting other relief to which it may appear that he is entitled.

Respectfully submitted,

s/Robert S. Mullen

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Dated: December 7, 2007

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2007, I electronically filed the foregoing Defendant Richard Convertino's Motion to Dismiss for Failure to State a Claim, Brief in Support of Defendant Richard Convertino's Motion to Dismiss for Failure to State a Claim, and this Certificate of Service with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants:

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Respectfully submitted,

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