

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

KARIM KOUBRITI,

Plaintiff,

Case No. 2:07-cv-13678

v.

Hon. Marianne O. Battani

RICHARD CONVERTINO,
MICHAEL THOMAS and
HARRY RAYMOND SMITH,
Jointly and Severally
and in their Individual Capacities
Defendants.

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**DEFENDANT MICHAEL THOMAS' MOTION TO DISMISS
OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT**

Defendant Michael Thomas, by undersigned counsel, moves this Court under Federal Rule of Civil Procedure 12(b)(6) to dismiss Plaintiff's Complaint and action against him because he is immune to suit for actions that he took in good faith in his capacity as an FBI Agent. Alternatively, Defendant moves for summary judgment pursuant to Federal Rule of Civil Procedure 56(c) because there is no evidence that Defendant engaged in any misconduct which violated plaintiff's constitutional rights.

Background

1. Plaintiff Karim Koubriti alleges Defendant Thomas violated Plaintiff's constitutional rights in a criminal matter by manufacturing evidence and failing to turn over exculpatory evidence to Plaintiff's criminal defense counsel. Plaintiff has brought his claim pursuant to the Fifth Amendment to the Constitution of the United States and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1999).

2. Because Defendant Thomas is entitled to qualified immunity from suit, Plaintiff's Complaint must be dismissed for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

3. Alternatively, because Plaintiff cannot create a genuine issue of material fact about whether Defendant Thomas engaged in any misconduct which violated Plaintiff's constitutional rights, summary judgment must be granted to Defendant Thomas.

Defendant Michael Thomas therefore respectfully requests this Court to enter an order dismissing the Complaint and action in its entirety, or alternatively, granting summary judgment to Defendant.

Respectfully submitted,

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**BRIEF IN SUPPORT OF
DEFENDANT MICHAEL THOMAS'
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM OR,
ALTERNATIVELY, FOR SUMMARY JUDGEMENT**

STATEMENT OF QUESTIONS PRESENTED

I. Has Plaintiff stated a claim upon which relief can be granted?

Defendant's contention: No.

II. Is Defendant entitled to qualified immunity from the instant suit?

Defendant's contention: Yes.

III. Is Plaintiff's claim barred by the doctrine of collateral estoppel or issue preclusion?

Defendant's contention: Yes.

IV. Can Plaintiff create a genuine issue of material fact about whether Defendant engaged in any misconduct which violated Plaintiff's constitutional rights?

Defendant's contention: No.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

- I. Even if each of plaintiff's allegations is taken as true, no relief could be granted under any set of facts that could be proved consistent with the allegations.

Marks v. Newcourt Credit Corp., Inc., 342 F.3d 444 (6th Cir. 2003)

Hobbs v. Duggins, 318 Fed.Appx. 375 (6th Cir. 2009)

- II. Plaintiff has failed to meet the pleading standards articulated by the Supreme Court because his complaint contains only labels and conclusions.

Bell Atlantic Corp. V. Twombly, __ U.S. __, 127 S.Ct. 1955 (2007)

Association of Cleveland Fire Fighters v. City of Cleveland, Ohio, 502 F.3d 545 (6th Cir. 2007)

- III. Plaintiff can create no genuine issue of material fact which must be decided by a jury.

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)

Kunz v. United Food & Commercial Workers, 876 F.3d 1006 (6th Cir. 1993)

Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989)

- IV. Defendant Thomas is entitled to qualified immunity from the instant suit because his conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Wilson v. Layne, 526 U.S. 603 (1999).

Harlow v. Fitzgerald, 457 U.S. 800 (1982)

Mitchell v. Forsyth, 472 U.S. 511 (1985)

Pearson v. Callahan, __ U.S. __, 129 S.Ct 808 (2009)

Koubriti v. Convertino, 593 F.3d 459 (6th Cir. 2010)

Abel v. Sharp, 278 Fed.Appx. 642 (6th Cir. 2008)

- V. Plaintiff is barred from re-litigating the issue of Agent Thomas's qualified immunity by the doctrine of collateral estoppel.

Montana v. United States, 440 U.S. 147 (1979)

Hammer v. I.N.S., 195 F.3d 836 (6th Cir. 1999)

- VI. The allegations against Defendant Thomas do not amount to a violation of Plaintiff's constitutional rights.

Moore v. Illinois, 408 U.S. 786 (1972)

Koubriti v. Convertino, 593 F.3d 459 (6th Cir. 2010)

United States v. Bernard, 625 F.2d 854 (9th Cir. 1980)

STATEMENT OF FACTS

Plaintiff Karim Koubriti's instant Complaint purports to assert *Bivens* claims against Defendant Michael Thomas, alleging that Defendant Thomas violated Plaintiff's rights under the Fifth Amendment to the United States Constitution. However, Plaintiff has failed to state a claim for which relief can be granted because Defendant Thomas is entitled to qualified immunity from the instant suit. Furthermore, at no time did Defendant Thomas engage in any conduct which violated Plaintiff's constitutional rights.

The Sixth Circuit Court of Appeals dismissed Plaintiff's claim against co-defendant prosecutor Richard Convertino, holding that Convertino is entitled to both absolute and qualified immunity from the instant suit. *Koubriti v. Convertino*, 593 F.3d 459 (6th Cir. 2010). As Plaintiff's case against Convertino involved the same set of facts as well as the identical legal issue of qualified immunity, Plaintiff should be barred from bringing this claim against Defendant Thomas by the doctrine of collateral estoppel, or issue preclusion.

ARGUMENT

I. Legal Standards

a. Motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)

Agent Thomas moves to dismiss the instant suit for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Even if each of plaintiff's allegations is taken as true, "no relief could be granted under any set of

facts that could be proved consistent with the allegations” because Agent Thomas is entitled to qualified immunity from the instant suit. *See Hobbs v. Duggins*, 318 Fed.Appx. 375, 376 (6th Cir. 2009), *quoting Marks v. Newcourt Credit Corp., Inc.*, 342 F.3d 444, 452-53 (6th Cir. 2003).

Furthermore, Defendant moves to dismiss Plaintiff’s complaint under Rule 12(b)(6) because Plaintiff has failed to meet the pleading standards articulated by the Supreme Court. Following the Supreme Court's precedent in *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955 (2007), the Sixth Circuit has quite recently stated the pleading requirements that a complaint must satisfy:

The Supreme Court has recently clarified the law with respect to what a plaintiff must plead in order to survive a Rule 12(b)(6) motion. *Bell Atl. Corp. v. Twombly*, [127 S.Ct. 1955 (2007)]. The Court stated that "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." *Id.* at 1964-65 (citations and quotation marks omitted). Additionally, the Court emphasized that even though a complaint need not contain "detailed" factual allegations, its "[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." *Id.* (internal citation and quotation marks omitted).

Association of Cleveland Fire Fighters v. City of Cleveland, Ohio, 502 F.3d 545, 548 (6th Cir. 2007).

In *Association of Cleveland Fire Fighters*, the Sixth Circuit highlighted that, on a Rule 12(b)(6) challenge, a complaint must not be indulged inferences that lack grounding in pleaded facts:

In so holding, the Court disavowed the oft-quoted Rule 12(b)(6) standard of *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed.2d 80 (1957) (recognizing "the accepted rule 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"), characterizing that rule as one "best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Twombly*, 127 S.Ct. at 1969.

Association of Cleveland Fire Fighters, 502 F.3d at 548.

b. Motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(c)

Under Federal Rule of Civil Procedure. 56(c), summary judgment is proper if there is no genuine issue as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The facts and all reasonable inferences to be drawn therefrom are viewed in a light most favorable to the non-moving party in determining if a genuine issue of material fact exists. *Kunz v. United Food & Commercial Workers*, 876, F.3d 1006, 1008-09 (6th Cir.1993). The standard is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir.1989), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

In this case, Plaintiff cannot produce sufficient evidence to create a genuine issue as to any material fact. As such, his complaint must be dismissed.

II. Agent Thomas is entitled to qualified immunity from suit.

Under the *Bivens* line of cases, the Supreme Court has recognized a cause of action

against federal officials for certain constitutional violations where there are no alternative processes to protect the interests of the Plaintiff and no special factors counseling against recognizing the cause of action. *Koubriti v. Convertino*, 593 F.3d 459, 466 (6th Cir. 2010), *citing Wilkie v. Robins*, 551 U.S. 537, 550, 127 S.Ct. 2588, 2596 (2007). On the other hand, government officials generally enjoy a presumption qualified immunity from civil lawsuits, such that they are “shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Koubriti*, 593 F.3d at 466, *quoting Wilson v. Layne*, 526 U.S. 603, 609, 119 S.Ct. 1692, 1696 (1999).

Under the doctrine of qualified immunity, “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Abel v. Sharp*, 278 Fed.Appx. 642, 649 (6th Cir. 2008), *quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity entails “*immunity from suit* rather than a mere defense to liability.” *Abel*, 278 Fed.Appx at 649., *quoting Mitchell v. Forsyth*, 472 U.S. 511, 526, (1985) (emphasis in original).

To determine whether a defendant is entitled to the shield of qualified immunity, the Sixth Circuit adopted a three-step inquiry: “(1) whether the facts taken in the light most favorable to plaintiff could establish a constitutional violation; (2) whether the right

was ‘a clearly established’ right of which any reasonable officer could have known; and (3) whether the official's actions were objectively unreasonable in light of that clearly established right.” *Abel*, 278 Fed.Appx at 649, quoting *Risbridger v. Connelly*, 275 F.3d 565, 569 (6th Cir. 2002). However, since the Supreme Court’s decision in *Pearson v. Callahan*, the Court is no longer required to address the constitutionality of the alleged conduct first and can resolve the issue by determining whether such a violation was clearly established. *Koubriti v. Convertino*, 593 F.3d 459, 471 (6th Cir. 2010), citing *Pearson v. Callahan*, ___ U.S. ___, 129 S.Ct. 808, 818 (2009).

- a. None of the actions or omissions Plaintiff has alleged against Agent Thomas were objectively unreasonable in light of a clearly established constitutional right.

In determining whether a right is clearly established, the Court “may rely on decisions of the Supreme Court, decisions of this court and courts within this circuit, and in limited circumstances, on decisions of other circuits.” *Koubriti*, 593 F.3d at 471 (internal citations omitted). In Plaintiff’s case against prosecutor Convertino, the Sixth Circuit could

find no case law to support the conclusion that a reasonable official would have understood the complained of action violated Koubriti’s rights. Although Convertino’s directive may be questioned, it cannot be said that its unlawfulness is apparent, particularly when reviewing the existing case law. While such behavior is in tension with the policy judgments underlying *Brady*[], it would indeed go well beyond the reasonable limits of the *Brady* non-disclosure doctrine to say that it also requires memorialization of interviews. Additionally, cases analyzing sets of facts more similar to the instant case than those in *Brady* have suggested it is not a constitutional violation. See *Moore v. Illinois*, 408 U.S. 786, 795, 92 S.Ct.

2562 (1972) (“We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case”); *United States v. Bernard*, 625 F.2d 854, 860 (9th Cir. 1980) (“Nor can we find a constitutional basis for compelling the creation of [written witness statements] under *Brady*.”). Thus, Convertino’s behavior, were it to be ruled as a constitutional violation, was not clearly established as a violation at the time Convertino acted. Convertino’s qualified immunity, then, would still be sufficient to shield Convertino from this claim, even when characterized in the way the district court and Koubriti suggest.

Id. at 471-72.

The Sixth Circuit’s analysis of Koubriti’s civil claim against prosecutor Convertino is directly applicable his claim against Agent Thomas. There is no case law to support an assertion that any of the actions of which Plaintiff complains violates a “clearly established” constitutional right. As such, Agent Thomas is entitled to qualified immunity from the instant suit.

- b. Plaintiff is barred from re-litigating the issue of Agent Thomas’s qualified immunity by the doctrine of collateral estoppel.

This issue has been litigated and decided by the Sixth Circuit in *Koubriti v. Convertino*, 593 F.3d 459 (6th Cir. 2010) . As such, under the doctrine of collateral estoppel, Plaintiff should not be permitted to re-litigate this settled issue simply by naming a different defendant. Under the doctrine of collateral estoppel, also referred to as issue preclusion, “once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” *Hammer v. I.N.S.*, 195

F.3d 836, 840 (6th Cir. 1999), *quoting Montana v. United States*, 440 U.S. 147, 153, (1979). The doctrine reflects the longstanding policy that one full opportunity to litigate an issue is sufficient. *Hammer*, 195 F.3d at 840, *citing Hickman v. Commissioner*, 183 F.3d 535, 537 (6th Cir.1999). The Sixth Circuit has articulated the requirements for collateral estoppel as follows:

(1) the issue in the subsequent litigation is identical to that resolved in the earlier litigation, (2) the issue was actually litigated and decided in the prior action, (3) the resolution of the issue was necessary and essential to a judgment on the merits in the prior litigation, (4) the party to be estopped was a party to the prior litigation (or in privity with such a party), and (5) the party to be estopped had a full and fair opportunity to litigate the issue.

Hammer, 195 F.3d at 840; *see also United States v. Real Property Known and Numbered as 415 E. Mitchell Ave.*, 149 F.3d 472, 476 (6th Cir.1998); *Bills v. Aseleine*, 52 F.3d 596, 604 (6th Cir.1995).

All requirements for collateral estoppel to apply are present in this case. *Koubriti v. Convertino* involved an essentially identical set of facts and accusations. The Sixth Circuit held that qualified immunity applied to prosecutor Convertino for the same conduct of which Plaintiff accuses Agent Thomas. This issue was actually litigated and decided by the Sixth Circuit, and Koubriti had a full and fair opportunity to litigate the issue of qualified immunity. *See Koubriti*, 593 F.3d at 470-72.

III. Notwithstanding his entitlement to qualified immunity from suit, there is no genuine issue of material fact Agent Thomas did not commit any acts or omissions which violated Plaintiff's constitutional rights.

Notwithstanding the fact that qualified immunity shields Agent Thomas from the

instant law suit, there is no genuine issue of material fact that Agent Thomas did not engage in any conduct that violated Plaintiff's constitutional rights. Plaintiff has based his constitutional claim against Agent Thomas on the allegation that Agent Thomas withheld exculpatory evidence from the prosecutor and defense counsel, and fabricated evidence. However, as the Sixth Circuit pointed out in *Koubriti v. Convertino*,

[a]lthough Plaintiff makes [the allegation that the defendants violated his Fifth Amendment Rights by maliciously and intentionally withholding exculpatory evidence and fabricating evidence], he does not identify the "fabricated evidence" alleged there or elsewhere. With respect to the interviews of Hmimssa, there is only the claim of preventing the creation of evidence for probable impeachment of that witness.

Koubriti, 593 F.3d at 469-70 n.13. As discussed *supra*, cases analyzing facts similar to these suggest that this does not amount to a constitutional violation. *See Moore v. Illinois*, 408 U.S. 786, 795 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case"); *United States v. Bernard*, 625 F.2d 854, 860 (9th Cir. 1980) ("Nor can we find a constitutional basis for compelling the creation of [written witness statements] under *Brady*."). Furthermore, Plaintiff can create no triable issue of fact that Agent Thomas engaged in any act or omission that violated his constitutional rights.

Plaintiff has alleged that Agent Thomas violated his constitutional rights in the following ways. First, Plaintiff alleges Agent Thomas failed to take photographs of the Queen Alia Hospital and failed to turn over photographs of the Queen Alia Hospital to the

prosecutor or defense counsel in Plaintiff's criminal case. Amended Proposed First Amended Complaint ("Am. Compl.") at 8. Plaintiff can make no argument that he had a constitutional right to Agent Thomas personally taking photographs of the Queen Alia Hospital. Furthermore, Agent Thomas requested that photographs be taken of the Queen Alia Hospital. When he received copies of those photographs, he furnished the copies to prosecutor Convertino. DX 1 (Thomas decl.) at ¶ 1-2.

Plaintiff also alleges that Agent Thomas violated his constitutional rights by failing to disclose emails that undermined witness testimony regarding sketches of the Queen Alia Hospital. Am. Compl. at 8-9. However, Agent Thomas did not withhold any information pertinent to the investigation of Plaintiff from prosecutor Convertino, including any emails concerning sketches of the area around the Queen Alia Hospital. DX 1 at ¶ 3. Agent Thomas similarly did not withhold any information regarding the possibility that Nassa Ahmad's mentally unstable brother may have been doodling in the day planner that was seized as evidence, because Ahmad never relayed any such information to Agent Thomas. *Id.* at ¶ 4. Agent Thomas also did not withhold any statement by Air Force OSI SA Goodnight or any other witnesses that the sketch of the Incirlik Air Base was inaccurate, because to the best of SA Thomas's knowledge, SA Goodnight made no such statement. *Id.* at ¶ 5-6. Prosecutor Convertino and Agent Thomas visited the Incirlik Air Base together, and both believed the sketch, which was very rough, was an accurate depiction of what they saw. *Id.* at ¶ 6.

Agent Thomas similarly did not engage in any conduct that violated Plaintiff's constitutional rights with respect to the interviews of Yousef Hmimssa. Agent Thomas did not record the contents of the interviews because it was prosecutor Convertino, not Agent Thomas, who was conducting the interviews, and Convertino instructed Agent Thomas not to take notes because the interviews were considered trial preparation. *Id.* at ¶ 7. Prosecutor Convertino was fully aware of any inconsistent statements Hmimssa may have made during his interviews because Convertino was present for and conducted the interviews. *Id.* at ¶ 9.

Finally, Agent Thomas did not withhold from prosecutor Convertino a 9/11/2007 email wherein Agent Thomas indicated that there were difficulties transcribing audio portions of the videotape due to Tuniusei or Algeria dialect speech. AUSA Convertino was aware of this problem. *Id.* at ¶ 8.

Plaintiff is unable to create a triable issue of material fact as to any of the allegations he has lodged against Agent Thomas, because the undisputed evidence establishes that Agent Thomas did not violate Plaintiff's "rights." Moreover, to the extent any alleged failure to disclose *Brady* information could plausibly have amounted to a denial of due process to Plaintiff, it was prosecutor Convertino who was responsible for providing discovery to Plaintiff, not Agent Thomas. As such, summary judgment must be granted to Defendant Thomas.

CONCLUSION

For all of the reasons set forth in this Motion and Brief, Plaintiff's Complaint and action should be dismissed.

Respectfully submitted,

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Date: January 28, 2011

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2011, I presented the foregoing **Defendant Michael Thomas' Motion to Dismiss for Failure to State a Claim or, Alternatively, for Summary Judgment** and this **Certificate of Service** to the Clerk of the Court for filing and uploading to the ECF system which will send notification of such filing to the following:

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Dated: January 24, 2008