EXHIBIT 2

CASE NO. 09-1016
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KARIM KOUBRITI,

Plaintiff-Appellee,

v.

RICHARD CONVERTINO and
MICHAEL THOMAS,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ORAL ARGUMENT REQUESTED

APPEAL BRIEF OF PLAINTIFF/APPELLEE

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Plaintiff-Appellee makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   NO

s/ Ben M. Gonek
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Dated: May 6, 2009

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Sixth Circuit Rule 34(a), Plaintiff-Appellee requests that this Court docket this appeal for oral argument. Plaintiff-Appellee believes that oral argument will afford his counsel the opportunity to address any questions which the Court may have concerning the lower court record and the specifics of the parties' respective positions on appeal. Oral argument will enable counsel to succinctly place their client's positions before the Court. It is Plaintiff-Appellee's belief that oral argument is necessary, will be beneficial for all involved and that the decisional process will be significantly aided by this Court's allowance of oral arguments.

JURISDICTIONAL STATEMENT

On December 3, 2008, the district court entered an Order denying Defendant's Motion to Dismiss. Defendants timely filed their Notice of Appeal on December 29, 2008.

This Court has jurisdiction pursuant to 28 USC 1291 to review the trial court's Order Denying Defendant's Motion to Dismiss for Failure to State a Claim denying Convertino absolute prosecutorial immunity because a district court's denial of a claim of immunity "is an appealable 'final decision' within the meaning of 28 USC 1291 notwithstanding the absence of final judgment."

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Has the Plaintiff stated a cognizable claim of action under Bivens v. Six Unknown named Agents of Federal Bureau of Narcotics by alleging that Defendant Convertino suppressed exculpatory evidence during the investigation of the case against the Plaintiff and continued to suppress this evidence during trial?

   Defendants answer: No.

   Plaintiff answers: YES.

2. Did Defendant Convertino act in an investigatory role that stripped him of the privileges of absolute prosecutorial immunity when he fabricated evidence and maliciously and intentionally withheld exculpatory evidence in association with the prosecution of Plaintiff?

   Defendants answer: No.

   Plaintiff answers: YES.

STATEMENT OF THE CASE

Plaintiff Karim Koubriti filed his Complaint and Jury Demand pursuant to 42 U.S.C. Sec. 1983 on August 30, 2007, which he subsequently amended with leave from the district court. In his First Amended Complaint, Koubriti alleged that Defendants Richard Convertino, a former Assistant United States Attorney, and Michael Thomas, a Special Agent with the Federal Bureau of Investigation, violated his Fifth Amendment Rights when they pursued a criminal prosecution of him for Conspiracy to Provide Material Support or Resources to Terrorists in violation of 18 U.S.C. Secs. 371 and 2339 (A). Koubriti was convicted of this charge, as well as Conspiracy to Engage in Fraud and Misuse of Visas, Permits and Other Documents in violation of 18 U.S.C. Secs. 371 and 1546(a) on June 3, 2003. However, the terrorism charge was later dismissed and a new trial was granted on the fraud charges. Eventually the Government filed a superceding indictment against Koubriti for mail fraud relating to an insurance claim made around the time of his arrest, abandoning the fraud charges.

Koubriti alleged that Convertino, while acting in an investigative capacity, willfully withheld exculpatory evidence and fabricated evidence which resulted in his wrongful prosecution and conviction. Koubriti alleged that Thomas also willfully withheld exculpatory evidence and fabricated evidence which resulted in

his wrongful prosecution and conviction. He alleged that the Defendants' conduct violated United States v. Brady, 373 U.S. 83 (1963). On May 10, 2008, Convertino filed a Motion to Dismiss the First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). On December 3, 2008, the District Court denied his Motion, holding that summary judgment was not appropriate because Koubriti may be entitled to relief pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) for the Defendant' alleged Brady violations. The Court further held that Convertino was not entitled to absolute prosecutorial immunity because he acted in an investigatory, rather than prosecutorial role when he engaged in some of the misconduct alleged in the complaint.

Convertino filed an appeal of right of the District Court's opinion on March 15, 2009.

STATEMENT OF FACTS

On September 17, 2001, a group of task force agents from the Detroit Joint Terrorism Task Force (JTTF) went to 2653 Norman Street in Detroit, allegedly to interview Nabil Al-Marabh, an individual they suspected of terrorism. (R 43, First Amended Complaint, p. 3, par. 10, and Exhibit A, p. 6) Instead of finding Al-Marabh, the agents found Plaintiff Karim Koubriti, Amed Hannan and Farouk Ali-Haimoud, the new residents living at that address. They searched the residence and found a day planner containing sketches, a videotape of American vacation destinations, and numerous arabic language audio tapes, as well as false identity documents.

None of the men acknowledged engaging in terrorist activities, and there was no direct evidence tying any of them to any known terrorist group or activity. (R. 43, First Amended Complaint, Exhibit A, p.6)

The government subsequently charged all three men with possession of a false identification and/or identity document. The case was assigned to Assistant United States Attorney Richard Convertino. Thereafter, he and Federal Bureau of Investigation Agent Michael Thomas began investigating the men for any alleged ties to a terrorist group or activity. (R. 43, First Amended Complaint, Exhibit A, p. 7)

A former roommate of the men, Youseff Hmimssa, agreed to cooperate and provide testimony against Koubriti, Hannan, Ali-Haimoud, and a fourth man, Abdel Ilah El Mardoudi, implicating them in terrorist activities. (R. 43, First Amended Complaint, Exhibit A, p. 7) Convertino developed a theory that the four men constituted the Detroit-based "cell" of an Islamic terrorist organization; he claimed that they were a "shadowy group" that "stayed in the weeds...planning, seeking direction, awaiting the call" that was "going to strike out against targets, against the United States and abroad." (R. 43, First Amended Complaint, Exhibit A, pp. 10-11)

On August 28, 2002, eleven months after originally taking the men into custody, the government filed a second superceding indictment charging Koubriti, Hannan, Hmimssa, Abdella Lnu, and Ali-Haimoud with conspiracy to provide material support or resources to terrorists, along with the original charges of document and identity fraud. On February 11, 2003, a third superceding indictment was filed, charging Koubriti, Hannan, Ali-Haimoud, and El-Mardoudi with the same charges as those set forth in the second superceding indictment. (R. 43, First Amended Complaint, Exhibit A, p.7)

All four men proceeded to trial on these charges. Throughout the trial, counsel for Koubriti repeatedly complained about the lack of discovery. The Court

repeatedly instructed the government to provide necessary discovery in a timely fashion, stating at one point: "I've asked you to provide them with the names of witnesses [that you are going to call the next day]. Don't hold it close to your vest, err on the side of caution and provide them with more rather than less." At another point during trial, AUSA Keith Corbett suggested that the government usually decides whether FBI interview memoranda contain Brady or Giglio material, the Court responded: "Not in this Court." (R. 43, First Amended Complaint, Exhibit A, pp. 13-14)

The Court then explained that virtually every Court in the District required the government to turn over 302s in advance unless there was good reason not to do so. Defendant Convertino responded by assuring the Court: "If I have a question, I always refer it to the Court to make the ultimate determination as to whether or not it constitutes discoverable impeachment material." Corbett concluded the discussion by stating: "Any 302 of any witness we call will be presented to the defendants, or in the event it is not, it will be presented to the Court to make the determination in order not to be turned over. The Court followed the same procedure regarding other potential Giglio material, including Convertino's notes of his Hmimssa debriefings. (R. 43, First Amended Complaint, Exhibit A, 14)

The government's theory that the defendants were an "intelligence collection cell" and an "operational or potentially an operational cell" depended upon three different types of evidence, characterized by the government as a "three-legged stool": (1) expert testimony that the day planner sketches and the videotape constituted "operational terrorist casing material"; (2) the testimony of Hmimssa that the defendants had terrorist leanings and intentions; and (3) corroborating evidence that the defendants did things that were consistent with terrorist activities, but also consistent with ordinary criminal, commercial or religious activities. The corroborating activities included alleged document and credit card fraud, attempts to obtain commercial truck driver licenses with hazardous material specifications, the possession of audio tapes of alleged Muslim Salafist speakers, and the use of international wire transfers. (R. 43, First Amended Complaint, Exhibit A, pp. 12-13)

On June 3, 2003, Koubriti was convicted of Count I (conspiracy to provide material support to terrorists) and Count II (conspiracy to engage in fraud and misuse of visas, permits and other documents). El-Mardoudi was convicted of the same counts as Koubriti. Hannan was convicted of Count II, but acquitted of Count I. Ali-Haimoud was acquitted of all charges. (R. 45, First Amended Complaint, Exhibit A, p. 1)

On October 15, 2003, Koubriti and his co-defendants filed their Motion for New Trial, in which they alleged that the government had suppressed material evidence contrary to Brady. On December 12, 2003, the trial court conducted a hearing, finding at the conclusion that two previously undisclosed documents constituted exculpatory and impeaching evidence that should have been disclosed to the defense. The Court then ordered the government to conduct a thorough review of every document in the case to determine whether there were other undisclosed documents that constituted Brady or Giglio material. (R 43, First Amended Complaint, Exhibit A, pp. 2-3) It characterized the post-trial proceedings as "a fine kettle of fish" and the most unpleasant task he had been forced to undertake in almost 14 years on the bench. (R. 43, First Amended Complaint, p. 6)

On June 29, 2004, the government disclosed additional exculpatory or impeaching documents. On August 30, 2004, the government disclosed copies of numerous witness interview memoranda, or FBI 302s, in redacted form. (R. 43, First Amended Complaint, Exhibit A, p. 3)

On August 31, 2004, the government filed its response to Koubriti's Motion for New Trial, concurring in his request and requesting dismissal of Count I. It wrote: "Unfortunately, numerous developments since trial, including the discovery

of significant materials not disclosed by the prosecution, have undermined each part of this three-legged stool." (R. 43, First Amended Complaint, Exhibit A, p. 13) It then offered its own detailed analysis of each leg of the three-legged stool, concluding that the government had failed to disclose relevant and discoverable material regarding each of the three "legs".

The Alleged Terrorist Casing Materials

With regard to the first leg, the alleged terrorist casing materials, the government wrote: "It was essential to the government's theory to establish that the day planner drawings and videotape seized from defendants' apartment were terrorist casing material." (R. 43, First Amended Complaint, Exhibit A, p. 14) In the absence of any direct testimony concerning the creation, purpose and intended use of the day planner sketches, the government offered the expert testimony of SSA George to establish that the drawings with Arabic words "American Airbase in Turkey under the Leadership of Defense Minister" and "Queen Alia Jordan" were casing sketches. (R. 43, First Amended Complaint, Exhibit A, p. 14)

SSA George explained that he evaluated the drawings and reached his opinions using a three step formula:

> First, he looks at the drawing to determine whether it could be a casing sketch–"Fundamentally, you're just looking at, does this depict something that could exist***that this may be something that could be casing." Next he questions whether the "casing sketch is consistent with a place in the real

> world"–a question he described as fundamental. The final question is whether or not the sketched location "is a possible [terrorist] target. Id. at 4539. He explained that he reached his opinion that the Turkey and Jordan drawings were operational terrorist casing sketches based entirely on this formula without reference to any other evidence 26 Tr. 4697. (R. 43, First Amended Complaint, Exhibit A, p. 15)

In its brief concurring with Koubriti's Motion for New Trial, the government noted: "[U]nder this formula, any drawing of the World Trade Center towers prior to 9-11 or any video of various Las Vegas hotels could be described as operational casing material even though the drawing might have been made by a school child and the video might have been purchased by a tourist from a hotel gift shop." (R. 43, First Amended Complaint, Exhibit A, p. 16)

The government acknowledged that the prosecution team failed to disclose the following with respect to the alleged casing materials:

- That it had taken photos of the Queen Alia Hospital in Jordan which would rebut the testimony that the site matched the sketch. Instead, SSA Thomas testified that he brought a camera to Jordan, but unfortunately did not take any pictures of the hospital or a dead tree which was prominently located near the hospital and was allegedly also present in the sketch. SSA Smith testified that he did not believe he could have obtained photographs and that "I would have to get higher approval as high as the Ambassador" before obtaining

photographs. In its brief concurring with Koubriti's request for a new trial, the government wrote: "The government had a duty to clarify the record and, at a minimum, submit the photos to the Court for an in-camera review under the Court's Brady/Giglio protocol." (R. 43, First Amended Complaint, Exhibit A, pp. 16-24)

- That agents visiting the hospital were unable to locate the alleged dead tree landmark, or that the tree had been removed. (R. 43, First Amended Complaint, Exhibit A, p. 20)
- That Convertino had traveled to Jordan with Smith and Thomas and accompanied them on the site visits. (R. 43, First Amended Complaint, Exhibit A, p. 18)
- That there was no consensus that one of the drawings represented the hospital. (R. 43, First Amended Complaint, Exhibit A, p. 21)
- That there was no consensus that the other drawing represented a hardened air shelter (HAS) at Incirlik Air Base in Turkey. In fact, agents from the CIA, FBI, as well as international intelligence agencies opined that the drawings were not of a HAS and in fact may have represented a map of the Middle East.(R. 43, First Amended Complaint, Exhibit A, pp. 25-39)

- That experts, including the Las Vegas FBI and others, believed that the videotape was not of casing material. (R. 43, First Amended Complaint, Exhibit A, pp. 39-42)

The Testimony of Youseff Hmimssa

In its brief, the government wrote: "Youseff Hmimssa was virtually the only fact witness who testified that the defendants were involved in terrorist activities." (R. 43, First Amended Complaint, Exhibit A, p. 42) Hmimssa testified that the defendants conducted surveillance of potential terrorist targets in Detroit, discussed various terrorist plots, and attempted to obtain false identifications, money and weapons to assist fellow terrorists abroad, among other terrorist activities. (R. 43, First Amended Complaint, Exhibit A, p. 43)

In its brief concurring with the defendants' Motion for New Trial, the government acknowledged that Convertino and the government failed to disclose the following to the defense at trial:

- A letter from inmate Milton "Butch" Jones to AUSA Joseph Allen regarding his jailhouse communications with Hmimssa in late 2002 and early 2003, in which Hmimssa "expressed hostility toward President Bush and Attorney General Ashcroft, bragged about fooling

the FBI and the Secret Service, expressed a desire to escape from prison, asserted that God would punish the United States for its actions in Afghanistan, indicated a desire to hurt the U.S. economy through fraud, boasted about his ability to create false IDs and suggested that he sold such IDs to the September 11 hijackers." (R. 43, First Amended Complaint, Exhibit A, pp. 44-45)

- Other documentation indicating that Hmimssa himself harbored anti-American views and was vehemently opposed to U.S. involvement in Afghanistan after the September 11 attacks. (R. 43, First Amended Complaint, Exhibit A, pp. 45-46)

The government continued, in its brief:

The failure to disclose th above impeachment material is compounded by AUSA Convertino's decision to limit the documentation of statements made by Hmimssa during debriefings after he began cooperating in mid-March 2002. **It appears that AUSA Convertino made a deliberate decision not to have the FBI take any notes or prepare any memoranda of these sessions in order to limit defense counsel's ability to cross-examine Hmimssa.** Rubio 302 at 1; Corbett 302 at 4. Instead, AUSA Convertino himself took handwritten notes of at least some of these interviews, which he then incorporated in a typewritten summary of Hmimssa's anticipated testimony. Convertino took the position that the Hmimssa interviews were all "witness preparation" and that his own notes were privileged and not discoverable. Likewise, Hmimssa was not called before the Grand Jury. As a result of these decisions, defendants were provided little discovery relating to Hmimssa's trial testimony. (R. 43, First Amended Complaint, Exhibit A, pp. 45-46)

The government also wrote that this practice caused "significant controversy within the Department of Justice" and that co-case agent Jim Brennan was "adamantly opposed" to the practice. AUSA Corbett said that he warned Convertino against the practice. (R. 43, First Amended Complaint, Exhibit A, p. 46) At trial, defense counsel repeatedly challenged the government's failure to prepare 302s. In response, some government witnesses went so far as to suggest that the note taking practices employed here followed normal government procedures. (R. 43, First Amended Complaint, Exhibit A, p. 47) The government noted: "AUSA Convertino's approach to documenting Hmimssa's cooperation prevented defendants from determining the extent to which, if any, his testimony changed over time." (R. 43, First Amended Complaint, Exhibit A, p. 48)

Corroborating Evidence

The third category of evidence in the three legged stool involved corroborating evidence that the defendants did things that were consistent with terrorist activities but also consistent with non-terrorist purposes. The government concluded that Convertino failed to disclose:

- Initial translations of approximately 105 Arabic language audio cassettes. The translations were performed by Marwan Farhat, a cooperating witness for the FBI who had a history of violence and

drug related criminal convictions and was involved with individuals known to associate Hezbollah, who was awaiting trial on federal cocaine charges. (R. 43, First Amended Complaint, Exhibit A, pp. 50-52)

- Notes concerning an alleged admission by Defendant Hannan that he knew that certain documents found in the Norman Street apartment were false. (R. 43, First Amended Complaint, Exhibit A, pp. 52-53)

The government also admitted, in its brief, that the prosecution had withheld evidence during the trial concerning one of the defendants' theories of the case; namely, that the day planner sketches were drawn by Ali Ahmed, a mentally unstable Yemeni man who had delusions about being a general in the Yemeni Army. (R. 43, First Amended Complaint, Exhibit A, pp. 53-56)

Based upon the government's Consolidated Response, on September 2, 2004, the criminal court granted the parties' joint request to dismiss the terrorist-related charge without prejudice and granted a new trial as to the document fraud charge. United States v. Koubriti, 336 F. Supp. 2d 676 (E.D. Mich. 2004).

On March 29, 2006, Convertino and Ray Smith were charged in a four-count Indictment for conspiracy to obstruct justice and make false declarations, making a materially false declaration before a court, and obstruction of justice. On October

31, 2007, the jury acquitted Convertino and Smith of all counts.

On August 30, 2007, Koubriti filed the present action, claiming that Convertino, SA Thomas, and Ray Smith had violated his constitutional rights during his criminal prosecution. (The claims against Defendant Smith have been dismissed.) Convertino filed a Motion to Dismiss Pursuant to F.R. Civ. P. 12(b)(6) for Failure to State a Claim Upon Which Relief Can be Granted.

The Court denied the Motion, holding that a jury could find that Convertino acted in an investigative, rather than prosecutorial, role when he gathered some of the evidence used in the prosecution and that he would not be entitled to prosecutorial immunity with regard to that evidence. The Court held further that a Bivens due process remedy may be available for a violation of Brady, and that summary judgment as to these claims was also inappropriate.

SUMMARY OF THE ARGUMENT

The District Court properly denied Defendant's Motion to Dismiss because Convertino acted in an investigatory, rather than prosecutorial, capacity when he issued instructions that agents were not to record their interviews of Hmimssa. He again acted as an investigator when he traveled to Jordan to collect evidence against Koubriti and his co-defendants some 15 months before the criminal trial began.

As to Koubriti's due process claims, this Court has never held that no Bivens-type remedy is available for alleged Brady violations. Moreover, the alternate processes which Convertino has asserted are available to protect Koubriti's interests do not succeed in remedying his damages.

STANDARD OF REVIEW

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), the plaintiff must show that his complaint alleges facts which, if proven, would entitle him to relief. First Am. Title Co. V. DeVaugh, 480 F.3d 438, 445 (6th Cir. 2007) "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." Weiner v Klais & Co., 108 F.3d 86, 88 (6th Cir. 1997) When reviewing a motion to dismiss, the Court "must construe the complaint in the light

most favorable to the plaintiff, accept all factual allegations as true, and determine whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombley, 550 U.S. 544 (2007). However, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Id.

ARGUMENT

I. THE CLAIMS ADVANCED AGAINST CONVERTINO ARE NOT BARRED BY ABSOLUTE IMMUNITY BECAUSE CONVERTINO ACTED IN AN INVESTIGATORY, RATHER THAN PROSECUTORIAL, ROLE WHEN HE DIRECTED THAT AGENTS NOT RECORD THEIR INTERVIEWS OF HMIMSSA AND WHEN HE FAILED TO DISCLOSE THAT HE TRAVELED TO JORDAN 15 MONTHS PRIOR TO TRIAL IN ORDER TO AMASS EVIDENCE AGAINST KOUBRITI WHICH WOULD SUPPORT A TERRORISM CHARGE.

The District Court held that Convertino acted as an investigator, and not a prosecutor, when he: 1) failed to disclose, during Koubriti's criminal trial, the fact that the government could not establish which site or sites the day planner sketches represented (if either) during their trips to Jordan; and 2) ordered or directed Defendant Thomas not to memorialize any of the ten to twenty interviews of Youseff Hmimssa prior to the Second Superceding Indictment being issued. The

Court appropriately found that these two courses of conduct fell "outside the bounds of trial preparation" and thus were not entitled to the protection of complete prosecutorial immunity

The Supreme Court has 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 at trial." Burns v. Reed, 500 U.S. 478, 484 (1991). When determining whether particular actions of government officials fit within a common law tradition of absolute immunity, courts apply a functional test. Id. at 486. Those functions more "intimately associated with the judicial phase of the criminal process" are more likely to merit careful consideration for absolute immunity. Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1995). Those functions which are more "investigative" in nature–searching for "clues and corroboration" are more removed from the judicial process and merit only qualified immunity. Id. at 273. Courts look 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).

"The line between a prosecutor's advocacy and investigating roles might sometimes be difficult to draw." Zahrey v. Coffey, 221 F.3d 342, 347 (2d Cir. 2000). The Court in Buckley suggested that a prosecutor's conduct prior to the

establishment of probable cause should be considered investigative, noting: "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." Buckley, 509 U.S. at 274. Accord Zahrey, 221 F.3d at 347 n. 2; see also Hill v. City of New York, 45 F.3d 653, 661 (2d Cir. 1995) (observing that "[b]efore any formal legal proceeding has begun and before there is probable cause to arrest, it follows that a prosecutor receives only qualified immunity for his acts.")

Courts have held that prosecutorial conduct that occurs as part of an administrative or investigative function includes: "giving legal advice to police," Spurlock v. Thompson, 330 F.3d 791, 798 (6th Cir. 2003) (citing Burns, 500 U.S. 478, 496); "authorizing warrantless wiretaps in the interest of national security", Mitchell v. Forsyth, 472 U.S. 511, 520 (1985); making statements "in an affidavit supporting an application for an arrest warrant", Fletcher v. Kalina, 522 U.S. 118, 139 (1997); and making "out-of-court statements" at a press conference, (Buckley, 509 U.S. 259, 277-78).

The District Court held:

> The instruction by Convertino not to record witness interviews, falls outside the bounds of trial preparation. See McCray v. City of New York, Nos. 03 Civ. 9685, 03 Civ. 9974, 03 Civ. 10080, 2007 U.S. Dist. LEXIS 90875, at *59 (S.D.N.Y. Dec. 11, 2007)("[I]f a prosecutor acts in an investigative capacity, for example; or gives police legal advice on the propriety of investigative techniques and on whether or not probable cause exists to make

an arrest...then absolute immunity cannot be invoked.") (citing Buckley, 509 U.S. at 270-71); Thompson v. Gentz, No. 06-CV-1743, 2007 U.S. Dist. LEXIS 29753, AT *4-*5 (E.D.N.Y. Apr. 23, 2007) (vacating prior order granting absolute immunity to prosecutor in part because "prosecutor [was] not entitled to absolute immunity when supervising and interacting with law enforcement agencies in acquiring evidence that might be used in a prosecution") (citing Barbera v. Smith, 836 F.2d 96, 100 (2d Cir. 1987)); Amaker v. Coombe, No. 96 Civ. 1622, 1988 U.S. Dist. LEXIS 14523 at *21 (S.D.N.Y. Sept. 16, 1998) (denying absolute immunity to prosecutor who "provide[d] legal advice to the police" during investigation); see also Mink v. Suthers, 482 F.3d 1244, 1260 (10th Cir. 2007) (holding that "[a]dvising police on interrogation methods or the existence of probable cause does not qualify" prosecutors for absolute immunity) (citation and quotation marks omitted); Genzler v. Longanbach, 410 F.3d 630, 641 (9th Cir. 2005), cert. denied, 2005 U.S. LEXIS 8597 (Nov. 28, 2005) (denying absolute immunity to prosecutors who were "actively directing police-type investigative actions," including witness interviews). Accord McGhee v. Pottawattamie County, 514 F.3d 739 (8th Cir. 2008) (affirming the denial of qualified immunity to a county attorney who "obtain[ed], manufactur[ed], coerc[ed], and fabricat[ed] evidence before filing formal charges.") (R. 54, Order, pp. 8-9)

In McGhee v. Pottawattamie County, the Supreme Court has recently granted certiorari and its holding in this case will likely have an impact on this Court's holding in the instant case.

Convertino's arguments that his conduct was justifiable and prosecutorial in nature are unconvincing. In his brief, he wrote the following with respect to his directive that Hmimssa's interviews not be recorded: "Convertino's order was not an advisory opinion; it was a directive from the prosecutorial official in charge of the case that was intended to limit documentation of well over a dozen interviews

and thereby minimize the chances that inconsistencies would inadvertently creep into a multitude of documentation resulting from the interviews." (Defendant's Brief, pp. 43-44)

Plaintiffs agree that Convertino was, in fact, attempting to "minimize the chances that inconsistencies would inadvertently creep into a multitude of documentation resulting from the interviews." However, attempting to minimize these inconsistencies, before terrorism charges were filed, is not a legitimate prosecutorial function. Instead, it reveals what Convertino's actual goal was: shaping Hmimssa's testimony in a manner that would support the terrorism charges against Koubriti and his co-defendants.

Convertino's argument that he is entitled to absolute immunity with respect to his fact-finding mission to Jordan 15 months prior to the start of trial is also unconvincing. He wrote: "In a scrupulous attempt not to convict innocent men, Convertino traveled to a distant land in order to be positively certain that the suspected terrorist casing sketches constituted actual evidence of criminal activity as opposed to the mere doodling of a pensive daydreamer."

The use of the word "scrupulous" with respect to Convertino's trip to Jordan and his subsequent prosecution of Koubriti would be laughable had it not resulted in such grave consequences for all four defendants in the ill-conceived terrorism

prosecution. In their Response Concurring in the Defendants' Motions for New Trial, the government acknowledged that Convertino failed to disclose that he had traveled to Jordan. More importantly, he failed to disclose that, while he was there, he collected only evidence that was consistent with his theory that the sketches constituted terrorist casing materials, while he simultaneously rejected opinions proffered by officials from the FBI and other intelligence agencies which cast doubt on this theory.

This conduct clearly extended beyond his role as a prosecutor. He went on a fact-finding mission to Jordan some 15 months prior to the trial, investigated Koubriti and his co-defendants, and picked and chose from the evidence he amassed in order to maximize his chances of success at the terrorism trial, without regard to what the evidence actually revealed: that Koubriti was not guilty of the terrorism related charges. Rather than allow the chips to fall where they may, he became involved in the investigation of the case to make sure that no evidence that did not support his theory of the case was documented and discoverable by the criminal defendants. In this way, he acted as an investigator, not a prosecutor, and as such, he forfeited his right to absolute prosecutorial immunity.

Prosecutorial immunity does not bar Plaintiff's claims against Convertino. Because Plaintiff has alleged facts against Convertino that could support his

claims, the trial Court properly denied his Motion to Dismiss, and this matter should proceed to a trial by jury.

II. PLAINTIFF STATED A VALID CLAIM FOR RELIEF UNDER BIVENS FOR CONVERTINO'S ALLEGED VIOLATIONS OF BRADY, AND THERE ARE NO ADEQUATE ALTERNATIVE PROCESSES AVAILABLE TO PROTECT HIS INTERESTS.

Plaintiff has alleged that Convertino violated his Fifth Amendment due process rights, and that his claims are cognizable under Supreme Court precedent. Plaintiff further alleged, and the trial Court found, that no alternate processes exist which protect his interests.

In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court recognized a cause of action against individual federal officers for violations of the Fourth Amendment protection against unreasonable searches and seizures. The Court noted that "no special factors counsel[ed] hesitation in the absence of affirmative action by Congress" and there was no "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." The Supreme Court has extended Bivens to apply to a claim for employment discrimination in violation of the Due Process clause, Davis v. Passman, 442 U.S. 228 (1979), and for a claim for

violations of the Eighth Amendment by prison officials. Carlson v. Green, 446 U.S. 14 (1980). See also Bishop v. Trice, 622 F.2d 349 (8th Cir. 1980) (reinstating a complaint alleging federal employees deprived the plaintiff of liberty without due process of law).

Bivens concerned only a Fourth Amendment claim and therefore did not discuss what other personal interests were similarly protected by provisions of the Constitution. Butz v. Economou, 438 U.S. 478, 486 fn. 8 (1978). Whether or not a Bivens-type remedy exists for a particular claim is determined on a case by case basis. FDIC v. Meyer, 510 U.S. 471, 484 n 9 (1994).

Defendant has accurately noted that the Court has been reluctant to extend Bivens in recent years. However, it has not overturned Bivens, and it has not addressed the issue of applying Bivens to an alleged violation of United States v. Brady, 373 U.S. 83 (1963), which established the principle that the government is required under the Fifth Amendment to disclose exculpatory evidence to the accused in connection with trial proceedings, and the failure to do so when the evidence is material to either guilt or punishment violates due process. Id. At 87.

More recently, the Supreme Court recognized a Bivens damage remedy for a First Amendment violation when federal officials were accused of instituting retaliatory criminal prosecutions. Hartman v. Moore, 547 U.S. 250 (2006).

A close analog to the instant case is found in Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000). There, the plaintiff sued New York police officers and county prosecutors for conspiring to manufacture false evidence against him. The court found that plaintiff was entitled to constitutional due process protection from a wrongful deprivation of liberty, holding "there is a constitutional right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigatory capacity, at least where the officer foresees that he himself will use the evidence with a resulting deprivation of liberty." Id. at 344.

As previously discussed, Convertino acted as an investigator, and not as a prosecutor, when he directed that interviews with Hmimssa not be recorded in order to shape Hmimssa's testimony in a manner that would support charges against Koubriti and to leave no record of having done so. He also acted as an investigator when he traveled to Jordan to collect evidence against Koubriti and his co-defendants, fabricated evidence that was consistent with his theory of the case and concealed evidence that was in conflict with his theory. By acting in this gate keeping capacity in the months leading up to the filing of terrorism charges against Koubriti, Convertino acted in an investigatory capacity. Moreover, while acting as an investigator Convertino clearly foresaw and hoped that he would use the evidence himself with a resulting deprivation of liberty for Koubriti and his co-

defendants.

Convertino has cited Wilkie v. Robbins, 551 U.S. ___; 127 S. Ct. 2588 (2007) in support of his argument that a remedy under Bivens is unavailable to Koubriti. In Wilkie, officials from the United States Bureau of Land Management ("BLM") engaged in a variety of harassing and intimidating behavior in an attempt to force the plaintiff to regrant an easement that his predecessor in interest had granted to the BLM but which the government had forgotten to record. The Supreme Court held that the BLM's tactics, including bringing charges against the plaintiff, impounding his cattle, and videotaping the landowner's ranch guests, inter alia, were insufficient to establish Bivens liability because imposing limits on government agents when engaging in necessary and legitimate "hard bargaining" for a legitimate interest weighed against creating a Bivens remedy. Id. at 2601-02.

In the instant case, the trial court noted that unlike the BLM in Wilkie, Convertino was not pursuing a legitimate interest. He was instead attempting to mold and shape evidence in a manner that would support a terrorism conviction, while concealing and disregarding evidence which would undermine such a conviction. In his brief, he wrote:

> The lower court distinguished Wilkie on the grounds that Convertino, unlike the government actors in Wilkie, "was not pursuing a legitimate interest." (R 54, Order, p. 9) It is most difficult, however, to envision a more legitimate interest than protecting the nation from terrorism. (Defendant's brief, p. 24,

fn. 24)

This contention may be true, but has nothing to do with the instant case. The government itself repeatedly cast doubt on the grandiose claim that Convertino was "protecting the nation from terrorism". Instead, the government's voluntary dismissal of the terrorism charge reveals clearly that it does not believe that Koubriti ever engaged in any terrorist activities. Far from "protecting the nation from terrorism", Convertino engaged in a systematic effort to mold, shape and conceal evidence in order to wrongfully obtain a terrorism conviction. This is not a legitimate government interest. The evidence strongly suggests, on the contrary, that the interest Convertino was pursuing was the advancement of his own career by heading, in his words, "the first terrorist-related prosecution tried in the aftermath of the September 11th tragedy". (Defendant's Brief, p.7, fn. 9) This set of circumstances was clearly not present in Wilkie, as the government actors in that case stood to gain nothing personally from the regranting of the easement.

As noted by the United States Supreme Court in Berger v. United States, 295 U.S. 78 (1935), "[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice

shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

Even at this late stage of the game, Convertino does not seem able to understand that the interest of the United States government is not in winning cases or convictions. In Brady, the Supreme Court stated: "An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." Brady, 373 U.S. at 87-88.

Convertino's failure to abide by this governing principle clearly demonstrates that he was not engaged in a legitimate government process, and thus distinguishes this case from the government agents' conduct in Wilkie. One could characterize the government actors' conduct, both in Wilkie and the instant case, as deplorable, but in Wilkie there was a legitimate government interest involved; in the instant case there was not.

Moreover, Convertino's claim that alternate remedies existed which

remedied Koubriti's damages was unconvincing. He devoted a significant portion of his brief to his argument that Koubriti sought, and was granted, a new trial pursuant to F. R. Crim. P. 33, and that this remedy foreclosed any other potential remedy under Bivens. However, the lower Court held:

> Nor does the Court find the Federal Rules of Criminal Procedure constitute a sufficient "alternative process." If that were the case, Bivens would have been decided differently because the injured party could have used the criminal procedural rules, which allow a criminal defendant to file a motion to suppress evidence in the event of wrongful search and seizure. (R. 54, Order, p. 14)

Convertino's other proposed "alternative processes" were also unpersuasive. The Court correctly noted that filing a grievance with the Michigan State Bar Association could result in punishment of Convertino, but not an avenue of relief to Koubriti. Likewise, a statutory malicious prosecution action or a state claim for a violation of the Michigan Constitution ignores the fact that Convertino has immunity for his actions as a prosecutor. Convertino's argument that Koubriti could have sought relief under 28 U.S.C. 2513, which provides an action for unjust conviction and imprisonment, requires that the person suing must have had his conviction reversed or set aside on the ground that he is not guilty of the offense or on a new trial where he was found not guilty. That is not what happened in the instant case; there was no new trial, and the terrorism charge was dismissed based upon the government's acknowledgment that Convertino inappropriately withheld

Brady and Giglio material.

One of the most audacious portions of Convertino's appellate brief comes in his objection to the trial court's finding that the possibility of filing a motion for reimbursement for damages pursuant to Section 617 of the Hyde Amendment was not an alternative remedy "[b]ecause recovery of attorney fees is such a minimal part of the damages resulting from the criminal prosecution that occurred here, the Court finds it does not constitute an alternative process mandating restraint." (R. 54, Order, p. 28) Convertino responded:

> [T]here is absolutely nothing of record–neither allegations nor evidence–to support the lower court's speculation that attorney fees comprise a minimal part of the damages resulting from Koubriti's criminal prosecution...How the lower court reached this conclusion is beyond the record. (Defendant's Brief, pp. 28-29)

This argument completely ignores the obvious damages which occurred as a result of Koubriti's being wrongfully deprived of his freedom for three years. Convertino's failure to consider this as the most obvious portion of his damages further illustrates how callously and capriciously he acted when he decided to pursue an investigation, and later a prosecution, against Koubriti and his co-defendants despite the volume of evidence which undermined his theory of the case. In any event, the lower court correctly concluded that attorney fees is a minimal part of the damages; it does not offer any remedy for the years that

Koubriti wrongfully spent in jail.

None of the "alternate remedies" proposed by Convertino provide any actual remedy for the wrongful investigation and prosecution of Koubriti. Because Koubriti has alleged facts sufficient to support a Bivens action against Convertino, the trial court's holding should be affirmed and this matter should proceed to a trial by jury.

CONCLUSION

Plaintiff Karim Koubriti respectfully requests this Honorable Court to affirm the holding of the District Court denying Defendant's Motion to Dismiss and allow this matter to proceed to a trial by jury.

Respectfully submitted,

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Dated: May 6, 2009

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)C), the undersigned certifies that the attached Brief for Plaintiff-Appellee contains no more than 6915 words.

s/ Ben M. Gonek
BEN M. GONEK (P43716)

CERTIFICATE OF SERVICE

BEN M. GONEK hereby states that on the 6th day of May 2009, he caused the foregoing Appeal Brief of Plaintiff-Appellee to be filed electronically with the United States Court of Appeals for the Sixth Circuit and that copies of said brief were forwarded to all counsel of record using the ecf system.

s/ Ben M. Gonek
BEN M. GONEK (P43716)