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TO  
ATTORNEY

IN THE SUPERIOR COURT OF CHEROKEE COUNTY  
STATE OF GEORGIA

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Kerry Walker	)	
	)	
Plaintiff,	)	
	)	Civil Action No.:
vs.	)	07-CV-3325
	)	
Garry Moss, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS MOSS AND JUDGE SUMNER'S SPECIAL APPEARANCE BRIEF IN  
SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT

COME NOW Defendants Garry Moss and Judge John Sumner, by special appearance without submitting themselves to the jurisdiction of the Court or waiving proper service of process in the above-styled action, by and through counsel, Thurbert E. Baker, Attorney General for the State of Georgia, and file this, their Motion to Dismiss, pursuant to O.C.G.A. § 9-11-12.

**I. PROCEDURAL HISTORY**

Plaintiff filed his Complaint November 20, 2007, seeking a "demand for injunctory relief of 20 million dollars" for alleged injuries arising from an arrest and subsequent prosecution. (See Complaint generally). Included in the named defendants were District Attorney Garry Moss and Judge John Sumner, who now move to dismiss the Complaint in its entirety. Plaintiff seeks recovery under common law tort of false arrest and malicious prosecution and § 1983 for alleged violations of his Fourth Amendment rights.

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Plaintiff's claims against Defendants Moss and Judge Sumner should be dismissed. First, the claims should be dismissed because Defendant Moss is entitled to absolute prosecutorial immunity and Judge Sumner is entitled to absolute judicial immunity. Second, Plaintiff has failed to comply with the mandatory requirements of the Georgia Tort Claims Act. Third, as the Complaint relates to Plaintiff's claims for damages under state law, Defendants as sued in their official capacities are protected by sovereign immunity. Finally, Plaintiff's allegations fail to state a claim under either state law or § 1983.

## **II. FACTS**

Plaintiff filed his Complaint on November 20, 2007, alleging that Defendants Moss and Sumner "covered up" the actions taken by Detective Preston Peavy in relation to Plaintiff's arrest and prosecution. (See Complaint generally). Specifically, Plaintiff implicates Defendant Moss in his Complaint by noting "[t]his provisional government has enslaved a natural State Citizen under Administrative Rules by false arrest and false indictment without the citizen being given fair treatment." (Complaint, ¶ 2a). Plaintiff also alleges that "overzealous District Attorneys and prosecutors" are rewarded for "malicious prosecution," and his "Order of Nolle Prosequi contained more erroneous information about [his] case." (Complaint, ¶¶ 8a, 11a).

Plaintiff alleges Judge Sumner failed to provide him with an evidentiary hearing and caused Plaintiff to expend time (3 years) and money (tens of thousands of dollars) because he failed to dismiss the charges brought against him. (Complaint, ¶¶ 4a, 10a).

### **III. ARGUMENT AND CITATION TO AUTHORITY**

#### **A. DEFENDANT MOSS AND JUDGE SUMNER ARE ABSOLUTELY IMMUNE FROM PLAINTIFF'S SUIT**

Defendants Moss and Judge Sumner are protected from Plaintiff's suit by absolute immunity.

##### **1. DEFENDANT MOSS IS IMMUNE FROM SUIT UNDER BOTH STATE AND FEDERAL LAW**

Defendant Moss is insulated from liability for any injury resulting to Plaintiff pursuant to the doctrine of prosecutorial immunity. First, Plaintiff's state law claims against Defendant Moss are barred by prosecutorial immunity under Art. VI, Sec. VIII, Par. I(e) of the Georgia Constitution, which provides that "District attorneys shall enjoy immunity from private suit for actions arising in the performance of their duties." This immunity is critical as prosecutors must "be free to make decisions properly within the purview of their official duties without being influenced by the shadow of liability." Holsey v. Hind, 189 Ga. App. 656, 657 (1988). Thus, "a district attorney is protected by the same immunity in civil cases that is applicable to judges, provided that his acts are within the

scope of his jurisdiction." Smith v. Hancock, 150 Ga. App. 80, 81 (1979).

Determinative of what is within the scope of the prosecutor's jurisdiction is whether the act or omission is intimately associated with the judicial phase of the criminal process. Robbins v. Lanier, 198 Ga. App. 592, 593 (1991); Smith v. Hancock, 150 Ga. App. 80 (1979); Holsey v. Hind, 198 Ga. App. 656 (1988).

Plaintiff's claims against Defendant Moss should be dismissed as the alleged injuries arose from actions or omissions committed by Defendant Moss were during the judicial phase of Plaintiff's criminal charges. Moreover, the acts were within the scope of Defendant Moss's jurisdiction.

Plaintiff's allegations against Defendant Moss consist of malicious prosecution, presenting corrupted evidence to the grand jury, and misstating facts in a Motion for *Nolle Prosequi*. (Complaint, ¶¶ 8a, 11a). There is no question that the decision to prosecute, the act of presenting evidence to a grand jury, and making the decision to dismiss a case by Order of *Nolle Prosequi* are well within Defendant Moss's jurisdiction as a prosecutor, and are related to the commencement and/or dismissal of a criminal action. See O.C.G.A. § 15-18-6 (listing duties of district attorneys, including prosecuting all indictable offenses when requested by the grand jury and advising the grand

jury on matters of law). As such, Plaintiff's state law claims should be dismissed.

Second, Defendant Moss is absolutely immune from Plaintiff's claims of civil rights violations as the "ultimate fairness of the operation of the [legal] system itself could be weakened by subjecting prosecutors to § 1983 liability." Imbler v. Pachtman, 424 U.S. 409, 426 (1976). As such, prosecutors enjoy an absolute immunity to § 1983 suits, regardless of whether the alleged prosecutorial conduct was "malicious or dishonest." Id. at 427. Immunity extends to charging a defendant without probable cause and to the knowing proffer of perjured testimony and fabricated exhibits at trial. Rowe v. City of Ft. Lauderdale, 279 F.3d 1271, 1279-1281 (11th Cir. 2002). The prosecutorial function includes the "initiation and pursuit of criminal prosecution." Imbler v. Pachtman, 424 U.S. 409, 424, 96 S. Ct. 984, 992 (1976). Moreover, a prosecutor's absolute immunity applies to all appearances before the court, including examining witnesses and presenting evidence. See Burns v. Reed, 500 U.S. 478, 492, 111 S. Ct. 1934, 1942 (1991).

Defendant Moss has absolute immunity to Plaintiff's § 1983 claims. Plaintiff's allegations against Defendant Moss consist of malicious prosecution, presenting corrupted evidence to the grand jury, and misstating facts in a Motion for *Nolle Prosequi*. (Complaint, §§ 8a, 11a). As Defendant Moss is entitled to

absolute immunity for the initiation and pursuit of criminal prosecutions and presenting evidence, Plaintiff's allegations of must fail.

## **2. JUDGE SUMNER IS IMMUNE FROM SUIT BOTH UNDER STATE AND FEDERAL LAW**

In Georgia, "[j]udges are immune from liability in civil actions for acts performed within their judicial capacity." Maddox v. Prescott, 214 Ga. App. 810, 812 (1994). Such immunity allows judges "to exercise within their lawful jurisdiction untrammelled determination without apprehension of subsequent damage suits." Id. at 813. Thus, "a judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction." Chamberlain v. Thompson, 165 Ga. App. 807, 808 (1983).

Judicial immunity "is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." Robinson v. Becker, 265 Ga. App. 692, 694 (2004) (citing Mireles v. Waco, 502 U.S. 9, 11-12 (1991)).

"[W]hether an act by a judge is a 'judicial' one relates to the

nature of the act itself, i.e., whether it is a function normally performed by a judge in his judicial capacity." Mireles v. Waco, 502 U.S. at 12.

As noted in his Complaint, Defendant Sumner was presiding over Plaintiff's case when he committed the alleged acts of not holding an evidentiary hearing or dismissing the charges against Plaintiff. (Complaint, ¶¶ 4a, 10a). As the decisions of whether to hold evidentiary hearings and to dismiss charges are clearly within the normal judiciary functions performed by judges in their judicial capacity, Plaintiff's claims must fail.

Moreover, Plaintiff's mere invocation of alleged civil right violations does not penetrate Judges Sumner's shield of absolute immunity. In enacting 42 U.S.C. § 1983, Congress did not abrogate the doctrine of judicial immunity. Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978). Judicial immunity is an absolute immunity and it applies even where a judge acts maliciously. Id. at 356. Moreover, "judicial immunity is an immunity from suit, not just from ultimate assessment of damages." Mireles v. Waco, 502 U.S. 9, 11, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991).

In Stump, the Court established a two-part test for deciding when a judge is entitled to immunity from money damages under § 1983. Id. First, whether the judge dealt with the plaintiff/appellant in a judicial capacity. Id. at 362. Second,

if the judge's dealings were in his judicial capacity, whether the judge acted in the "clear absence of all jurisdiction." Id. at 357.

In Harper v. Merckle, 638 F.2d 848 (5th Cir. Unit B),<sup>1</sup> cert. denied, 454 U.S. 816, 102 S. Ct. 93, 70 L. Ed. 2d 85 (1981), the Court focused on four factors in determining whether a judge's conduct constituted a judicial act: (1) whether the precise act complained of . . . is a normal judicial function; (2) whether the events involved occurred in the judge's chambers; (3) whether the controversy centered around a case then pending before the judge; and (4) whether the confrontation arose directly and immediately out of a visit to the judge in his official capacity. Harper, 638 F.2d at 858.

Judge Sumner is entitled to absolute immunity for the purported civil rights violations as he was acting in his judicial capacity and within his jurisdiction when he committed the alleged violations. The "acts" of refusing to dismiss charges against Plaintiff and failing to have a "Chain of Custody" hearing in relation to Plaintiff's case are all acts performed within the "normal judicial function" of adjudicating criminal proceedings. All of the "events" that Plaintiff complains of occurred in Judge Sumner's courtroom; the

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<sup>1</sup> The Eleventh Circuit, in Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th 1983), adopted as precedent decisions of the former Fifth Circuit, Unit B, rendered after September 30, 1981.

"controversy" centers precisely on the case Judge Sumner was presiding over. Moreover, Plaintiff's confrontation - or dissatisfaction with the process and outcome of his criminal proceedings - stems directly and immediately from his encounter with Judge Sumner acting in his official capacity. Finally, Judge Sumner's judicial actions were well within the purview of his jurisdiction as O.C.G.A. § 15-6-8 vests superior courts with exclusive subject matter jurisdiction over all felony trials. Goodrum v. State, 259 Ga. App. 704, 578 S.E.2d 484 (2003).

**B. PLAINTIFF'S STATE LAW CLAIMS ARE BARRED UNDER THE GEORGIA TORT CLAIMS ACT**

The state law claims alleged in Plaintiff's Complaint should be dismissed in their entirety as Plaintiff has failed to comply with the mandatory terms and limitations of the Georgia Tort Claims Act ("GTCA"). O.C.G.A. § 50-21-20 *et seq.* Since Plaintiff's claims arose after January 1, 1991, his state law tort claims must be brought pursuant to the GTCA. Adams v. Coweta County, 228 Ga. App. 334 (1993). As such, all tort actions against the State based upon the acts of State employees acting within the scope of their employment must be brought pursuant to the GTCA. O.C.G.A. §§ 50-21-21, 50-21-25, 50-21-27.

In passing the Tort Claims Act, the Georgia General Assembly realized the "unfair and inequitable results which occur in the strict application of the traditional doctrine of

sovereign immunity." O.C.G.A. § 50-21-21(a). It also recognized that due to the unique nature of government, "the exposure of the State Treasury to the Tort Liability must... be limited." O.C.G.A. § 50-21-21(a).

The GTCA provides, in pertinent part, that the provisions of the GTCA constitute "the exclusive remedy for any tort committed by a State officer or employee." O.C.G.A. § 50-21-25(a). Since the GTCA is the exclusive remedy for any tort action brought against the State, Plaintiff is required to follow the mandatory terms and limitations of the Act.

**1. DEFENDANTS MOSS AND JUDGE SUMNER CANNOT BE HELD INDIVIDUALLY LIABLE UNDER THE GEORGIA TORT CLAIMS ACT**

Plaintiff appears to have sued Defendants in their individual capacities for alleged violations of state law. However, the Tort Claims Act specifically provides immunity to state employees who are sued for actions within the scope of their employment. O.C.G.A §50-21-25(a) provides:

This article constitutes the exclusive remedy for any tort committed by a state officer or employee. A state officer or employee who commits a tort while acting within the scope of his or her official duties or employment is not subject to lawsuit or liability therefore.

The Tort Claims Act further states:

A person bringing an action against the state under the provisions of this article

must name as a party defendant only the state government entity for which the state officer or employee was acting and shall not name the state officer or employee individually.

O.C.G.A. § 50-21-25(b).

Where the underlying conduct is tortious, it falls within the scope of the Tort Claims Act, regardless of what characterization the plaintiff may give it. See Premo v. Georgia Ports Auth., 227 Ga. App. 27 (1997).

In the present case it is undisputed that any actions allegedly taken or not taken in relation to the incidents described in Plaintiff's Complaint were within the scope of Defendants' positions as District Attorney and Superior Court Judge.

Since the enactment of the Tort Claims Act, claims against state employees have consistently been dismissed. For example, in Datz, an inmate alleged that the negligence of correctional officers allowed other inmates to steal property from his locker. 208 Ga. App. at 455. The court cited O.C.G.A. §50-21-25 (a), finding that the immunity for individual employees contained therein was a complete defense to the cause of action. Id. at 455-56. Likewise, in Howard v. Miller, 222 Ga. App. 868 (1996), the Court of Appeals affirmed the dismissal of all

individually named defendants, and barred any claim against a state employee in his individual capacity. Id. at 870.<sup>2</sup>

These are a few in a long line of cases that have dismissed claims brought against state employees. See also Brooks v. Barry, 223 Ga. App. 648, 649 (1996) (suit against individual assistant warden properly dismissed); Mattox v. Bailey, 221 Ga. App. 546 (1996) (suit against individual correctional officer barred because his actions were within scope of official duties); Coultas v. Dunbar, 220 Ga. App. 54, 54-58 (1996) (suit against individual DHR employees barred).

Here, there is no allegation that Defendants acted other than within the scope of their official duties and employment with the State. Consequently, Defendants Moss and Judge Sumner cannot be sued individually, and all state tort claims against them should be dismissed.

**2. EVEN IF PLAINTIFF HAD NAMED THE PROPER DEFENDANTS, HIS CLAIMS ARE STILL BARRED BY THE GEORGIA TORT CLAIMS ACT.**

Defendants Moss and Judge Sumner respectfully submit that this Court is without jurisdiction as Plaintiff has failed to comply with the Georgia Tort Claims Act ("GTCA"). Since the GTCA is the exclusive remedy for any tort action brought against the State, Plaintiff is required to follow its requirements. Plaintiff has failed to do so.

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<sup>2</sup> The Court also held that the Tort Claims Act provided immunity for state

**a. PLAINTIFF FAILED TO GIVE PROPER NOTICE**

O.C.G.A. § 50-21-26 mandates that Plaintiff must give notice of his claim, in writing, to the Risk Management Division of the Department of Administrative Services ("DOAS") and to the appropriate government agency within twelve months of the date the cause of action arose. Without such pre-suit notice, the Court may not entertain jurisdiction. See O.C.G.A. § 50-21-26(a)(3) ("No action against the state under this article shall be commenced and courts shall have no jurisdiction thereof unless and until a written notice of claim has been timely presented to the state as provided in this subsection."); and see Howard v. State of Ga., 226 Ga. App. at 544 ("Failure to comply with this ante litem notice provision prevents any court from obtaining jurisdiction over the subject matter of the action.").

Moreover, the burden is squarely on Plaintiff to demonstrate that he has met this requirement. O.C.G.A. § 50-21-26(a)(4) requires that a copy of the notice of the claim presented to DOAS be attached to the Complaint when it is filed. As the service aspect of the GTCA's ante litem notice provision is clear, it is ignored only at Plaintiff's peril:

[T]he State Tort Claims Act cannot be considered unclear or at all open-ended about the service aspect of its ante litem

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defendants sued in their official capacities. Howard, 222 Ga. App. at 870.

notice provision. In fact, it cannot get any more specific: ante litem notice must be served upon the Risk Management Division of the Department of Administrative Services and whichever state governmental entity the Plaintiff holds as liable for the alleged injury. . . . The explicit ante litem notice provision of the State Tort Claims Act is ignored only at peril to the plaintiff's cause of action. The specificity of the statute and the expressed public policy rationale therefore demand such a result.

Howard, 226 Ga. App. at 544-545.

Plaintiff's state law claims must be dismissed as he has failed to file the mandatory pre-suit notice. O.C.G.A. § 50-21-26. No document from Plaintiff was received by DOAS. Moreover, as no ante litem notice was served, the required components of the notice are also absent in this suit. See O.C.G.A. § 50-21-26(a)(5)(A) through (F) (enumerating components of ante litem notice, including the "amount of loss claimed"). Finally, the Georgia Supreme Court has been quite clear in holding that "all persons are presumed to know the law." See Harry v. Glynn County, 269 Ga. 503, 506 (1998), *citing* Puckett Paving Co. v. Carrier Leasing Corp., 236 Ga. 891, 892 (1976). Thus, any claimed ignorance of the GTCA's ante litem notice provision does not excuse Plaintiff from the requirement. Since Plaintiff has failed to meet any requirements of the GTCA, dismissal of this action is required.

The burden is squarely on Plaintiff to demonstrate that he has met these requirements. Plaintiff has not. He has never provided the notice required by the GTCA, and his state law tort claims must be dismissed on this basis.

**b. THE STATE HAS NOT WAIVED ITS IMMUNITY FOR  
PLAINTIFF'S STATE TORT CLAIMS**

Under the Georgia Tort Claims Act ("GTCA"), sovereign immunity is not waived for tortious acts that fall within one of the statutory exceptions to waiver. O.C.G.A. § 50-21-23(a). Two exceptions apply to this case. First, under O.C.G.A. § 50-21-24(4), the State has no liability for losses resulting from judicial, quasi-judicial, or prosecutorial action or inaction. Second, the alleged conduct falls within the exception barring liability for losses resulting from malicious prosecution. O.C.G.A. § 50-21-24(7).

These exceptions cannot be circumvented through allegations of negligent hiring, supervision, or discipline. Davis, 275 Ga. App. at 857. This is because the focus of the exception is not on the act or omission of the entity exercising oversight authority over the individual who committed the act, but rather is on the underlying conduct that produced the loss. Id. (quotations and citations omitted). Because the State has not waived immunity from the actions alleged in Plaintiff's Complaint, Plaintiff's tort claims are subject to dismissal.

**C. THE ALLEGATIONS OF THE COMPLAINT FAIL TO STATE A CLAIM AGAINST DEFENDANTS MOSS AND JUDGE SUMNER**

Plaintiff fails to identify with any specificity conduct committed by Defendants Moss or Judge Sumner which would support his claims of malicious prosecution or judicial misconduct. As a result, Plaintiff's Complaint fails to state a claim.

**1. PLAINTIFF FAILS TO STATE A CLAIM UNDER STATE LAW**

Plaintiff fails to state a claim for Malicious Prosecution. O.C.G.A. § 51-7-40 provides the State right of action for malicious prosecution, which is defined as "A criminal prosecution which is carried on maliciously and without any probable cause and which causes damage to the person." Id. To state a claim for malicious prosecution, Plaintiff must allege: (1) the prosecution for a criminal offense; (2) the prosecution instigated under a valid warrant, accusation or summons; (3) termination of the prosecution in favor of the plaintiff; (4) malice; (5) want of probable cause; and (6) damage to plaintiff. Medoc Corp. v. Keel, 166 Ga. App. 615 (1983).

Plaintiff's complaint evidences no set of facts showing a lack of probable cause or that either Defendant Moss or Judge Sumner had the requisite element of malice required to state a claim for malicious prosecution. Moreover, Plaintiff's Complaint reflects that he was not even prosecuted in that his criminal charges were dismissed by Defendant Moss when the State *nolle*

prosecuted Plaintiff's criminal case. (Complaint, ¶ 3a). In addition, there is no state law tort available to Plaintiff for Judge Sumner's failure to hold an evidentiary hearing. As Plaintiff evidences no set of facts in his Complaint establishing the elements of malicious prosecution as defined by State law, Plaintiff's claims must be dismissed.

## **2. PLAINTIFF FAILS TO STATE A CLAIM UNDER FEDERAL LAW**

Malicious prosecution is a constitutional tort that is cognizable under § 1983. See Strength v. Hubert, 854 F.2d 421, 426 n.5 (11th Cir. 1988) ("Freedom from malicious prosecution is a federal right protected by § 1983 . . ."). Because the species of Fourth Amendment violation alleged by Plaintiff arises by analogy to the common law tort of malicious prosecution, common law serves as guidance as to the constituent elements of the claim. See Whiting v. Traylor, 85 F.3d 581, 584, 585 n. 7 (11th Cir. 1996) ("where the arrest is the basis of the Fourth Amendment section 1983 claim, we think the tort of malicious prosecution is the most analogous tort to the section 1983 claim."). And "in order to state a 'prima facie case for a section 1983 claim of malicious prosecution, the plaintiff must establish the elements of the common law tort as it has developed over time.'" Uboh v. Reno, 141 F.3d 1000, 1004 (11th Cir. 1998) (quoting Hilfirty v. Shipman, 91 f.3d 573, 579 (3rd Cir. 1996)). Thus, to assert a claim for malicious prosecution in

a § 1983 action, Plaintiff must prove a violation of his Fourth Amendment right to be free from unreasonable seizures, in addition to the elements of the common law tort of malicious prosecution. Wood v. Kesler, 323 F.3d 872, 881 (11th Cir. 2003).

Georgia law provides that a "criminal prosecution which is carried on maliciously and without any probable cause and which causes damage to the person prosecuted shall give him a cause of action." O.C.G.A. § 51-7-40. To state a claim for malicious prosecution, Plaintiff must allege: (1) the prosecution for a criminal offense; (2) the prosecution instigated under a valid warrant, accusation or summons; (3) termination of the prosecution in favor of the plaintiff; (4) malice; (5) want of probable cause; and (6) damage to plaintiff. Medoc Corp. v. Keel, 166 Ga. App. 615 (1983). Further, in order to state a cause of action for malicious prosecution, a plaintiff must allege and prove that the criminal proceeding that gives rise to the action has terminated in the favor of the accused. Heck v. Humphrey, 512 U.S. 477, 484, 114 S. Ct. 2364, 2371 (1994) ("One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in the favor of the accused."). Finally, a grant of *nolle prosequi* is sufficient to satisfy the requisite element of

favorable termination of a criminal action. Uboh v. Reno, 141 F.3d at 1005 (quoting Hilfirty, 91 F.3d at 584, 585).

Plaintiff has failed to state a claim for malicious prosecution under § 1983. Although Defendant Moss's entry of a *nolle prosequi* satisfies the favorable termination element, Plaintiff fails to allege that either Defendant Moss or Judge Sumner's actions lacked probable cause or carried the requisite malicious intent necessary to for Plaintiff to state a prima facie case. Rather, Plaintiff's sole claim is that they acted on misinformation and/or tainted evidence provided to them by a third Defendant, Detective Preston Peavy. Plaintiff makes no allegations that either Defendant Moss or Judge Sumner were aware of the misinformation or tainted evidence. As such, Plaintiff fails to state a claim for malicious prosecution and the claims against Defendants Moss and Sumner should be dismissed.

**D. DEFENDANTS GARRY MOSS AND JUDGE SUMNER ARE PROTECTED AGAINST PLAINTIFF'S FEDERAL CLAIMS BY QUALIFIED IMMUNITY**

Qualified immunity protects governmental defendants sued in their individual capacities so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Vinyard v. Wilson, 311 F.3d 1340, 1346 (11th Cir. 2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). "The purpose of this

immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law.” Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002). Qualified immunity is decided as a matter of law and is effectively lost if a case is erroneously permitted to go to trial. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Thus, Rule 12(b)(6) and qualified immunity defenses are intertwined. Wooten v. Campbell, 49 F.3d 696, 699 (11th Cir. 1995).

The Supreme Court has clarified the analytical structure under which a claim of qualified immunity should be addressed. First, the Court must determine “whether the plaintiff’s allegations, if true, establish a constitutional violation.” Hope v. Pelzer, 536 U.S. 730, 736 (2002) (citing Saucier v. Katz, 533 U.S. 194 (2001)). If the Court determines that a state actor may have violated Plaintiff’s constitutional rights, the Court must then determine if the Defendants violated clearly established law. Hope at 739. Thus, if the court determines that Plaintiff’s constitutional rights or statutory rights may have been violated, the Court must still examine the status of the law at the time and determine if Defendants violated clearly established law. Id. This standard, however, does not change the fact that liability only attaches if “the contours of the

right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." United States v. Lanier, 520 U.S. 259, 270 (1997). While factual identity with a previously decided case is not required, the conduct must have been clearly unlawful in light of pre-existing law. McClish v. Nugent, 483 F.3d 1231, 1248 (11th Cir. 2007). As the Court noted, "a very high degree of prior factual particularity may be necessary . . . when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue." Hope, 536 U.S. at 741.

Defendants acknowledge that the Court in Holloman noted that "Hope emphasized that 'general statements of the law are not inherently incapable of giving fair and clear warning . . . [as a] constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question even though the very action in question has [not] previous been held unlawful." Holloman, 370 F.3d at 1278. The Court in Holloman, however, also noted that Hope provides that "the salient question . . . is whether the state of the law [at the time of the events in question] gave [defendants] fair warning that their alleged treatment of [plaintiff] was unconstitutional." Id.

✓ In the qualified immunity analysis, the relevant question to be answered is the "objective (albeit fact specific) question," of whether a "reasonable officer" would have believed the defendant's action to be lawful in light of clearly established law and the information possessed by the defendant. Anderson v. Creighton, 483 U.S. 635, 641 (1987). Procedurally, the Eleventh Circuit has established a three-prong test analysis for answering this question. First, the public official must prove that he was acting within his discretionary authority when the allegedly wrongful acts occurred. Vinyard v. Wilson, 311 F.3d 1340, 1346-1347 (11th Cir. 2002). Once a defendant shows he was acting within his discretionary authority, the burden shifts to the plaintiff to show that immunity is not appropriate. Id. The Court must determine whether the allegations, if true, establish a constitutional violation. Hope v. Pelzer, 536 U.S. 730, 736 (2002).

If a constitutional right would have been violated under the plaintiff's versions of the facts, the Court must then evaluate if the right was clearly established. Id. at 739. Stated another way, the "salient question" is whether the state of law at the time of the incident gave the defendant "fair and clear warning" that his conduct with respect to plaintiff was unconstitutional. Id. at 746. Liability only attaches if "the contours of the right [violated are] sufficiently clear that a

reasonable officer would understand that what he is doing violates that right. U.S. v. Lanier, 520 U.S. 259, 270 (1997).

**1. DEFENDANTS MOSS AND JUDGE SUMNER WERE ACTING WITHIN THEIR DISCRETIONARY AUTHORITY.**

Defendants Moss and Judge Sumner admit they were acting within the scope of their discretionary authority as district attorney and superior court judge at the time of alleged incidents. Thus, the burden shifts to Plaintiff to establish a violation of a clearly established constitutional right.

**2. PLAINTIFF'S ALLEGATIONS DO NOT STATE A CONSTITUTIONAL VIOLATION**

In determining qualified immunity, the Court must decide whether Plaintiff's allegations, even if accepted as true, state a claim for violation of any rights secured under federal law or the United States Constitution. Siegert v. Gilley, 500 U.S. 226, 232 (1991). Negligent acts causing unintentional injury to life, liberty or property do not implicate due process rights under § 1983. Daniels v. Williams, 474 U.S. 327, 330-331 (1986).

As noted in part C (2), supra, Plaintiff has not stated a valid constitutional claim as he has referenced no set of facts indicating that either Defendant Moss or Judge Sumner lacked probable cause for their actions. Moreover, to defeat Defendants Moss and Sumner's qualified immunity defense, Plaintiff must

show that they did not have probable cause to take the actions against Plaintiff as it relates to his judicial proceedings.

To receive qualified immunity protection, "an officer need not have actual probable cause but only 'arguable probable cause.'" Montoute v. Carr, 114 F.3d 181, 184 (11th Cir. 1997). Because only arguable probable cause is needed, "the inquiry is not whether probable cause actually existed, but instead whether an officer reasonable could have believed that probable cause existed, in light of the information the officer possessed." Id. "Even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity." Hunter v. Bryant, 502 U.S. 224, 227, 112 S. Ct. 534 (1991).

Plaintiff's allegations in his complaint reflect that Defendants Moss and Judge Sumner were acting within the scope of their discretionary authority as district attorney and superior court judge, respectively. (Complaint). Thus, Plaintiff has the burden of alleging a constitutional violation. Kingsland v. City of Miami, 382 F.3d 1220, 1232 (11th Cir. 2004). This he cannot do. To the extent he is attempting to assert a claim of malicious prosecution, he must allege that the prosecution terminated in his favor and that Defendants Moss and Judge Sumner lacked probable cause and took actions with the requisite element of malice. Plaintiff's complaint, however, evidences no

set of facts that shows that Defendants Moss and Sumner were aware of Plaintiff's arrest or of any alleged evidence mishandling by local law enforcement authorities, or had the requisite element of malice required for a claim of malicious prosecution. Additionally, Plaintiff fails to state any facts to support the contention that Defendants Moss and Sumner acted without probable cause. Rather, Plaintiff's Complaint reflects allegations that Defendants acted on information supplied by local law enforcement - information in which a reasonable officer would assume was untainted. (See Complaint generally).

Moreover, Plaintiff admits that the criminal charges against him were dismissed by Defendant Moss, in the form of a *nolle prosequi*. (Complaint, ¶ 5a). Plaintiff alleges no set of facts indicating that either Defendant Moss or Judge Sumner's actions led to his arrest, to the alleged tainted evidence, or to any unlawful conduct regarding his arrest or subsequent judicial proceedings. As such, Defendants are entitled to qualified immunity on all claims.

### **3. NO CLEARLY ESTABLISHED LAW WAS VIOLATED**

*Assuming arguendo* that Plaintiff can establish a constitutional injury, Defendants Moss and Judge Sumner are still entitled to qualified immunity because they did not violate clearly established law. For the reasons stated above, Plaintiff's federal constitutional rights have not been violated

as Defendants Moss and Judge Sumner's conduct, in relation to Plaintiff's alleged injuries, does not violate the federal Constitution.

Even if Plaintiff could allege constitutional violations, he cannot show that Defendants Moss and Judge Sumner had notice that their alleged conduct - which consists solely of dealing with Plaintiff in judicial proceedings - would somehow violate Plaintiffs constitutional rights. Rather, as evidenced in the body of this brief, the relevant law on the issues is abundantly contrary. Because no clearly established law put Defendants Moss and Judge Sumner on notice that their conduct violated the Plaintiff's constitutional rights, they are entitled to qualified immunity.

#### **IV. CONCLUSION**

Based on the foregoing, Defendants request that this Court dismiss Plaintiff's Complaint in its entirety.

Respectfully submitted this 2nd day of January, 2007.

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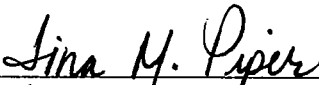
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing DEFENDANTS' MOTION TO DISMISS upon:

Kerry Walker  
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This 2nd day of January, 2007.

  
Assistant Attorney General  
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