IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
APPEAL NO.: 22-0111

NORM LAUNI, II,

Plaintiff Below, Petitioner

v.

THE HAMPSHIRE COUNTY PROSECUTING ATTORNEY'S OFFICE, and COUNTY OF HAMPSHIRE, WEST VIRGINIA, et al.

Defendants Below, Respondents.

RESPONDENTS' BRIEF

From the Circuit Court of Mineral County, WV
Civil Action No.: 19-C-15

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2. The Circuit Court committed no error in holding that the Appellant had failed to state a claim for civil conspiracy.

II. STATEMENT OF THE CASE

The Honorable James W. Courrier dismissed the Appellant's underlying malicious prosecution, civil conspiracy, abuse of process and negligence claims filed in the Circuit Court of Mineral County against Respondents Dan James[1] and John Ours (the "Appellees") based upon the absolute and qualified immunities enjoyed by prosecutors in West Virginia. AR 252-269. Claims were also brought and dismissed against the Hampshire County Prosecuting Attorney's Office, Hampshire County, the Mineral County Prosecuting Attorney's Office, Mineral County, the Morgan County Prosecutor's Office and Morgan County which are not Respondents to this Appeal. AR 1-2. The Orders were entered on August 12, 2020. AR 252 & 263. The trial court correctly ruled that the Appellant's claims against the Appellee prosecuting attorneys Dan James and John Ours are barred by absolute prosecutorial immunity and qualified immunity. AR 258-259, 268. Petitioner now appeals the dismissal of his claims based upon legally flawed theories: (1) probable cause did not exist even though the criminal case was brought to trial before a jury; (2) that a lack of probable cause somehow eviscerates absolute prosecutorial immunity in the face of the law to the contrary; and, (3) that the Appellant was prejudiced by an alleged suppression of evidence of which the Appellant was in possession the entire time. The law is clear and firmly

1 One live claim of Intentional Infliction of Emotional Distress remains in the Circuit Court against Appellee James. AR 262.

established: prosecutors are entitled to immunity for their decision to prosecute domestic abusers such as the Appellant. Nothing is raised in the Appellant's Brief which would call for disturbing that settled conclusion. Accordingly, Judge Courrier's well-reasoned decisions dismissing these underlying claims pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure* should be affirmed.

Appellant Norman Launi filed his Complaint in the underlying case on October 29, 2018.[2] The claims in this case arise from the same set of factual allegations as those which he raised in *Launi v. Hampshire Cty. Prosecuting Attorney's Office, et al.*, 480 F. Supp. 3d 724 (N.D.W.Va. 2020), a companion federal case dismissed by the Hon. Gina M. Groh, Chief United States District Judge. The Appellant also appealed that dismissal, and Chief Judge Groh's Order was affirmed by the United States Court of Appeals for the Fourth Circuit without argument. See *Launi v. James*, No. 20-2010, 2021 U.S. App. LEXIS 33824, 2021 WL 5294933 (4th Cir. Nov. 15, 2021). That shared set of facts between the two cases stem from the Appellant's prosecution for Domestic Assault and Domestic Battery in the Magistrate Court of Mineral County, West Virginia, for actions taken against his former romantic partner, Penny Hartman. The Appellant alleged that this prosecution was undertaken without probable cause, and was the culmination of a vast and intricate conspiracy between Appellees James, Ours, and Nazelrod, for ulterior reasons rooted in personal animus against him.

The Appellant alleges that Appellee James' personal animus against him stems in part from a prank played on him in 2013, as well as demeaning comments about Appellee James which were

2 The Appellant filed his original Complaint in the Circuit Court of Morgan County, WV. AR 004-042. The case was subsequently transferred to the Circuit Court of Mineral County on March 22, 2019. AR 001. The Plaintiff moved to amend his Complaint on December 10, 2019. AR 002. The parties subsequently stipulated to the filing of the Amended Complaint on January 3, 2020. AR 002. However, the Appellant did not include the Amended Complaint in the Joint Appendix and the Appellees must refer to the record as provided to this Court.

uncovered during a later investigation. AR 005 at ¶¶ 4-10, 006 at ¶¶ 12-14. The investigation concerned the August 16, 2016 death of the Appellant's former professional partner, Captain John Eckerson of the Hampshire County Sheriff's Office, ostensibly while attempting to perform a field test on a substance believed to be heroin. AR 005 at ¶ 11. The Appellant claims that, in or about August and September of 2016, Appellee James encouraged the U.S. Attorney's Office, as well as the U.S. Drug Enforcement Agency, to investigate the circumstances of Captain Eckerson's death, but that both agencies declined. AR 006 at ¶¶ 16-17. The Appellant further claims, in the course of this investigation, Appellee James stated to members of the Hampshire County Sheriff's Department that the Appellant had some role in the death of Captain Eckerson. AR 006 at ¶ 15. The investigation of Captain Eckerson's death was eventually assigned to Corporal Scott Nazelrod of the West Virginia State Police. AR 007 at ¶¶ 18-19.

Subsequently, in or about December of 2016, the Appellant claims that Ms. Hartman began harassing him by telephone. AR 007 at ¶ 23. On January 25, 2017, Appellee James, the Hampshire County Prosecuting Attorney at that time, was contacted by Ms. Hartman who informed him she was physically abused by the Appellant and she was in possession of evidence of the abuse. AR 007-008 at ¶ 28. Appellee James then referred these allegations to Appellee Nazelrod. See *id.* Ms. Hartman was arrested for telephone harassment of the Appellant and his son on January 31, 2017, and her bond for a prior DUI charge was revoked later that day on a petition filed by Appellee James. AR 008 at ¶¶ 31-32. Regardless of the fact Ms. Hartman was arrested for another crime based upon charges pursued by the Appellant, the Appellant claims this petition to revoke Ms. Hartman's bond was filed in an effort to pressure Ms. Hartman to pursue charges against the Appellant. AR 008 at ¶ 29 & 33.

Thereafter, Cpl. Nazelrod interviewed Ms. Hartman and the Appellant regarding her allegations of domestic violence. AR 008 at ¶ 35. Cpl. Nazelrod then assisted Ms. Hartman in seeking a Domestic Violence Protective Order ("DVPO"), which described three (3) separate instances of domestic violence the Appellant inflicted on her. AR 009 at ¶¶ 40, 43-44. The Appellant denied committing any physical violence against Ms. Hartman in an interview with Appellee Nazelrod and provided alleged explanations for Ms. Hartman's allegations. AR 010 at ¶ 48. Ms. Hartman later requested that the DVPO be withdrawn; however, she informed Appellee Nazelrod she wanted to pursue charges against the Appellant for domestic abuse. AR 017 at ¶ 56. During the interim period between Ms. Hartman's allegations and the Appellant's indictment, Appellee James interviewed potential fact witnesses, including Jamie Carter and Donnie Smith, who provided no incriminating evidence. AR 016-017 at ¶¶ 51-53.

At some point during the investigation, it was determined that the alleged domestic batteries and assaults occurred in Mineral County. AR 015 at ¶ 49(g). Following this discovery, on April 7, 2017, Appellee Nazelrod filed a criminal complaint against the Appellant in Mineral County, West Virginia charging him with three (3) counts of domestic battery and one (1) domestic assault in Mineral County, West Virginia. AR 017 at ¶ 58. Appellee Nazelrod was the arresting officer, but the Appellant speculates that Appellee James was the actual author of the criminal complaint. AR 021 at ¶ 61. The Appellant expresses no basis for this allegation other than the criminal complaint was well-written. See *id.* Appellant further contends that Appellee Nazelrod's narrative attached to the criminal complaint lacked "many exculpatory statements, alibis, witnesses, and facts" that were relayed to him by Appellant. AR 021 at ¶ 60.

On April 12, 2017, the Mineral County Prosecuting Attorney recused himself from the case due to a perceived conflict. AR 022 at ¶ 68. On April 27, 2017, the West Virginia Prosecuting

Attorney's Institute appointed Appellee John Ours, the elected prosecutor of Grant County, West Virginia, as special prosecutor in the case. AR 022 at ¶ 69. During the summer of 2017, the criminal charges against the Appellant proceeded toward trial. AR 022 at ¶ 70. As the case progressed, Ms. Hartman, "repeatedly requested that the matter be dismissed." AR 022 at ¶ 71. The prosecution denied her requests and continued to prosecute Appellant for his crimes. AR 023 at ¶¶ 72-73.

The Appellant asserts that Appellee Ours committed prosecutorial misconduct in the course of prosecuting this matter. He claims that Appellee Ours prosecuted the Appellant in bad faith with an ulterior motive rooted in a conspiracy with Appellees James and Nazelrod. AR 033 at ¶¶ 143-144. He also claims that Appellee Ours took Ms. Hartman's deposition under false pretenses and continued to prosecute the Appellant in spite of Ms. Hartman's later-expressed desire that the case be dropped. AR 023 at ¶ 78 – AR 024 at ¶ 81. He further claims Appellee Ours suppressed and/or tampered with 36 minutes of allegedly exculpatory audio footage from Appellee Nazelrod's February 10, 2017 interview of the Appellant, which the Appellant actually had in his possession the entire time. AR 027 at ¶¶ 101-103. Regardless, he claims both Appellees Ours and Nazelrod knew about the missing portion of the interview and that this alleged suppression was done at the behest of Appellee James. AR 028 at ¶ 107. Nevertheless, the magistrate ordered the case to proceed to trial, but reprimanded Appellee Nazelrod as being 'negligent' in his duties. AR 026 at ¶ 106.

The Appellant's criminal trial went forward in October of 2017. The Appellant claims that during his trial, Ms. Hartman testified that he did not abuse her, but he also claims that "every single witness" except Appellee Nazelrod "indicated that Penny Hartman was not credible." AR 028 at ¶ 111. The Appellant moved the Magistrate for a judgment of acquittal after the presentation

of evidence, which was denied, and the matter was submitted to the jury. AR 265 at ¶ 9.[3] On October 27, 2017, after hearing all of the evidence presented against the Appellant, the jury returned a verdict of not guilty. AR 028 at ¶ 114.

The Appellant then brought two lawsuits against the Appellees arising from the same facts above: (1) in the Circuit Court of Mineral County, West Virginia, from which this appeal derives; and, (2) in the United States District Court for the Northern District of West Virginia, as discussed above. The Complaint below brought multiple claims against the Appellees, all but one of which were correctly dismissed by Circuit Court, including claims against Appellees James and Ours for Malicious Prosecution, Abuse of Process, Civil Conspiracy, and Intentional Infliction of Emotional Distress, as well as alternative counts for negligence. He also brought claims for negligent training and alternative counts for vicarious liability against the County and Prosecuting Attorney's Office Appellees.

After briefing by the Parties and oral argument, the Circuit Court entered orders on August 12, 2020 dismissing all claims except for a single Intentional Infliction of Emotional Distress claim against Appellee James. AR 283-337. In relevant part, the Court held that Appellees James and Ours were entitled to absolute prosecutorial immunity from each of Appellant's dismissed claims. AR 252-276. The Court also held that, in the alternative, they would also be entitled to qualified immunity, because probable cause existed for the prosecution, and no *Brady* violation occurred because the necessary element of prejudice could not be met based upon the Appellant's allegations. AR 252-276. The Appellant then noticed an appeal in September 2020: No. 20-0704. That appeal was dismissed by Order of this Court on January 28, 2021. This second appeal

3 In other words, the Court again found probable cause existed to submit the case to the jury following the presentation of the Appellant's case.

followed upon Appellant's opposed Motion for Rule 54(b) certification and Order granting the same.[4] AR 280-281.

III. SUMMARY OF THE ARGUMENT

The instant appeal lacks merit for a number of compounding reasons, starting with the Circuit Court's correct application of absolute prosecutorial immunity. In West Virginia, as at federal common law, prosecutors are entitled to absolute immunity for acts they take within the scope of their role as an advocate of the state, even if done maliciously or with an otherwise improper motive. The relevant acts of which the Appellant accuses Appellees James and Ours as the basis for his claims of Malicious Prosecution and Abuse of Process are inarguably within that scope, and therefore protected by absolute immunity.

The acts include the decisions by both Appellees James and Ours to go forward with the prosecution at various points at which the Appellant alleges probable cause was lacking. Further, he alleges that the Appellees conspired with Appellee Nazelrod to perpetrate a *Brady* violation. He also alleges that Appellee James revoked Ms. Hartman's bond in order to leverage her into pressing charges against the Appellant, and that Appellee Ours took Ms. Hartman's deposition under false pretenses. The case law is clear that these are all tasks which are within the scope of a prosecutor's duties and the Circuit Court committed no error in so holding.

However, even if any of the aforementioned allegations against Appellees James and Ours were found to be outside the scope of absolute immunity, they would nonetheless be entitled to qualified immunity, because the Complaint below does not allege a violation of any clearly

4 The docket sheet provided by the Appellant reflects the filings as of the notice of appeal in No. 20-0704. The docket sheet reflecting the current status of the proceedings prior to this appeal was not included by the Appellant in the Joint Appendix.

established right. In relevant part, the Circuit Court committed no error in holding that the Appellant was charged and prosecuted upon probable cause. As discussed in greater depth in the forthcoming sections of this brief, the information which the Appellant alleges was omitted from the Criminal Complaint would not, if included, have defeated probable cause. This is further reinforced by the fact that the Magistrate denied a motion for judgment of acquittal and permitted the matter to go to the jury after the Appellant had the opportunity to present his defense, effectively ruling that even when all of the allegedly exculpatory information was included, probable cause still existed.

In addition, the Appellees are entitled to qualified immunity from the Appellant's claims of a *Brady* violation, because no such violation is alleged on the face of the Complaint. The necessary element of prejudice is not met under the Appellant's allegations, because the Appellant was acquitted in the underlying trial. The majority of federal circuit courts, including the Fourth Circuit, hold that an acquittal is fatal to a *Brady* claim, as the allegedly withheld evidence could not have caused a wrongful conviction.

Accordingly, the Circuit Court committed no error in dismissing the claims subject to this appeal. Its Orders should be affirmed in their entirety.

IV. STATEMTENT REGARDING ORAL ARGUMENT AND DECISION

In accordance with West Virginia Rule of Appellate Procedure 18(a), oral argument is not necessary on this appeal. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. In addition, this appeal is appropriate for disposition by memorandum decision under the criteria of West Virginia Rule of Appellate Procedure 21(c) because there was no prejudicial error committed below.

V. ARGUMENTS

A. Standard of Review.

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 1, *Albright v. White*, 202 W. Va. 292, 503 S.E.2d 860 (1998) (quoting Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995)).

"The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint 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." Syllabus, *John W. Lodge Distrib. Co. v. Texaco*, 161 W. Va. 603, 245 S.E.2d 157 (1978) (hereinafter "*John W. Lodge*"). In reviewing a motion under Rule 12, a Court should "read a pleading liberally and accept as true the well-pleaded allegations of the complaint and the inferences that reasonably may be drawn from the allegations." *Kopelman & Associates, L.C. v. Collins*, 196 W. Va. 489, 493, 473 S.E.2d 910, 914 (1996). "[A]lthough the plaintiff enjoys the benefit of all inferences that plausibly can be drawn from the pleadings, a party's legal conclusions, opinions, or unwarranted averments of fact will not be deemed admitted." *Id.*

This Court, and the federal courts covering this jurisdiction, have elaborated on this position with particular clarity as follows:

> In view of the liberal policy of the rules of pleading with regard to the construction of plaintiff's complaint, and in view of the policy of the rules favoring the determination of actions on the merits, the motion to dismiss for failure to state a claim should be viewed with disfavor and rarely granted. The standard which plaintiff must meet to overcome a Rule 12(b)(6) motion is a liberal standard, and few complaints fail to meet it. The plaintiff's burden in resisting a motion to dismiss is a relatively light one.

John W. Lodge at 606 (citing *Williams v. Wheeling Steel Corp.*, 266 F. Supp. 651, 654 (N.D. W.Va. 1967) (hereinafter "*Williams*"). "[A] complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. Pleadings are to be liberally construed. Mere vagueness or lack of detail is not ground for a motion to dismiss, but should be attacked by a motion for a more definite statement." See *Williams* at 654.

A. The Circuit Court committed no error in ruling that Appellees James and Ours are entitled to absolute prosecutorial immunity.

Each of the actions of which the Appellant accuses Appellees James and Ours fall within the protective ambit of absolute prosecutorial immunity, and the Circuit Court committed no error in so holding. West Virginia law acknowledges and adopts the well-established common-law immunity extended to prosecuting attorneys in their professional capacity. As summarized by Justice Cleckley in his authoritative *Litigation Handbook on West Virginia Rules of Civil Procedure*:

> Prosecutors enjoy absolute immunity from civil liability for prosecutorial functions such as, initiating and pursuing a criminal prosecution, presenting a case at trial, and other conduct that is intricately associated with the judicial process. . . . It has been said that absolute prosecutorial immunity cannot be defeated by showing that the prosecutor acted wrongfully or even maliciously, or because the criminal defendant ultimately prevailed on appeal or in a habeas corpus proceeding.
>
> The absolute immunity afforded to prosecutors attaches to the functions they perform, and not merely to the office. Therefore, it has been recognized that a prosecutor is entitled only to qualified immunity when performing actions in an investigatory or administrative capacity.

Franklin D. Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 8(c), at 213 (3d ed. 2008); see also *Mooney v. Frazier*, 225 W. Va. 358, 370 n.12, 693 S.E.2d 333, 345 (2010);*Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L. Ed. 2d 128 (1976) (extending absolute immunity to prosecutors from civil rights claims). "We have determined that the

immunity should be absolute, in order to extend the same degree of immunity that is provided under W. Va. Code § 29-21-20 for attorneys appointed by our circuit courts and this Court." *Mooney*, 225 W. Va. at 370 n.12, 693 S.E.2d at 345 n.12.[5] The extent of West Virginia common law on this matter is limited. As such, the federal courts provide further guidance on the application and degree of a prosecutor's absolute immunity.

Prosecutors have absolute immunity for activities performed as "an officer of the court" if the conduct at issue is closely associated with the judicial phase of the criminal process. *Van de Kamp v. Goldstein*, 555 U.S. 335, 341 - 343, 129 S.Ct. 855, 172 L.Ed.2d 706 (2009). In determining whether a prosecutor is entitled to absolute immunity, the Court must apply the "functional approach" examining the nature of the function performed. *Id.* at 342. It is well established that prosecutors are absolutely immune "for their conduct in initiating a prosecution and in presenting the State's case, insofar as that conduct is 'intimately associated with the judicial phase of the criminal process.'" *Burns v. Reed*, 500 U.S. 478, 486, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430-431, 96 S.Ct. at 995, 47 L. Ed. 2d 128 (1976)).

However, prosecutorial immunity is not limited to actions taken during court proceedings, and includes "actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Buckley v. Fitzsimmons*, 509 U.S. 259, 272, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993) (Internal citations and quotations omitted). "A prosecutor is acting within their role as an 'officer

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5 W. Va. Code § 29-21-20 states: Any attorney who provides legal representation under the provisions of this article under appointment by a circuit court, family court or by the Supreme Court of Appeals, and whose only compensation therefor is paid under the provisions of this article, shall be immune from liability arising from that representation in the same manner and to the same extent that prosecuting attorneys are immune from liability.

of the court' when performing tasks, such as (1) initiating a judicial proceeding, (2) presenting evidence in support of a search warrant application, (3) conducting a criminal trial, bond hearing, grand jury proceeding or pre-trial hearing, (4) engaging in 'an out-of-court effort to control the presentation of [a] witness' testimony,' and (5) making a 'professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before the grand jury after a decision to seek an indictment has been made.'" *Launi v. Hampshire Cty. Prosecuting Attorney's Office, et al.*, 480 F. Supp. 3d 724, 729-730 (N.D.W.Va. 2020), *aff'd Launi v. James*, No. 20-2010, 2021 U.S. App. LEXIS 33824, 2021 WL 5294933 (4th Cir., Nov. 15, 2021) (internal citations omitted); see also *Buckley* at 272; *Van de Kamp* at 344; *Dababnah v. Keller-Burnside*, 208 F.3d 467, 471 - 472 (4th Cir. 2000)).

A prosecutor's immunity extends even to situations in which they "acted with an improper state of mind or improper motive." *Shmueli v. City of New York*, 424 F.3d 231, 237 (2nd Cir. 2005); also see *Smith v. McCarthy*, 349 Fed.Appx. 851, 859 (4th Cir. 2009), *cert. denied*,562 U.S. 829, 131 S.Ct. 81, 178 L.Ed.2d 26 (2010); *Brown v. Daniel*, 230 F.3d 1351 (4th Cir. 2000) ("[T]o the extent [plaintiff] alleges that the prosecutors engaged in misconduct during the prosecution of this case . . ., the prosecutors are absolutely immune."). Thus, prosecutors are entitled to absolute immunity for withholding materially exculpatory evidence, and knowingly presenting perjured testimony or false or misleading evidence to the Court, or to a grand jury. See *Burns* at 490-92 ("A state prosecuting attorney is absolutely immune from liability for damages under § 1983 for participating in a probable-cause hearing . . .."); *Imbler* at 422 (finding prosecutor entitled to absolute immunity for allegations that he "maliciously and without probable cause procured plaintiff's grand jury indictment by the willful introduction of false and misleading evidence."); also see *Brown v. Daniel*, 230 F.3d at 1352; *Lyles v. Sparks*, 79 F.3d 372, 377 (4th Cir. 1996);

Carter v. Burch, 34 F.3d 257, 263 (4th Cir. 1994), *cert. denied*, 513 U.S. 1150, 115 S. Ct. 1101, 130 L. Ed. 2d 1068 (1995).

1. Appellee James is entitled to absolute prosecutorial immunity from Appellant's claims.

The Appellant contends on appeal that Appellee James acted outside the scope of his prosecutorial role by directing law enforcement resources toward the investigation of Ms. Hartman's report of domestic abuse, and referring the same to Corporal Nazelrod for investigation, which underpins the Appellant's Malicious Prosecution claim. He also alleges that Appellee James revoked Ms. Hartman's bond for a prior DUI charge upon being charged with telephone harassment, purportedly in order to leverage her into pressing charges against the Appellant, which he offers in support of his Abuse of Process claim. Finally, he argues that Appellee James involved himself in a conspiracy with Appellees Ours and Nazelrod in an unspecified capacity to suppress approximately thirty-six minutes of allegedly exculpatory content from a recording of an interview of the Appellant conducted by Appellee Nazelrod, which he claims also supports his Malicious Prosecution claim.

First, referring a report of criminal conduct to a law enforcement officer with jurisdiction to investigate it is clearly a prosecutorial function, as is advising that officer that there is sufficient evidence to charge. In the case of *Springmen v. Williams*, 122 F.3d 211 (4th Cir. 1997), a former criminal defendant sought to bring suit against a prosecutor who had reviewed evidence in a case and advised the investigating officer that there was sufficient evidence to charge. See *Springmen* at 212. The plaintiff therein claimed that this was a police investigative function, rather than a prosecutorial function, and the prosecutor was therefore entitled only to qualified immunity, rather than absolute. The Court rejected that argument, holding that this direction fell under the umbrella

of deciding whether or not to pursue a prosecution, which "falls squarely under [*Imbler v. Pachtman*, 424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976)]," the seminal case from whence absolute prosecutorial immunity sprung.

What the Appellant has claimed by making this allegation is that Appellee James, confronted with a report of criminal activity, allegedly referred the case to the West Virginia State Police, a law enforcement agency with jurisdiction to investigate it. As such, the basis of the Appellant's claim is an instance of the exercise of prosecutorial discretion, from which a prosecuting attorney is absolutely insulated from liability. The fact that the domestic incident giving rise to the prosecution was ultimately discovered to have occurred outside Hampshire County does not change this analysis. The Appellant has identified no exception in law to a prosecutor's absolute immunity for referring a report of criminal activity to law enforcement for investigation where that investigation ultimately shows the crime was committed outside their jurisdiction. The scope of prosecutorial immunity is a functional approach based on tasks, and not on geography.

The Amended Complaint alleges that Appellee James, as the Hampshire County Prosecutor, received a complaint from Penny Hartman alleging that the Appellant assaulted her. It goes on to allege that Appellee James referred this claim to Appellee Nazelrod with the West Virginia State Police. It seems nonsensical to argue that he had a duty to ignore a claim of domestic abuse just because it may have occurred in a neighboring county. Under the Appellant's theory, law enforcement would not have the ability to report criminal activity across county lines or assist neighboring agencies without forfeiting the immunities provided to them in carrying out their duties. This task is a proper one for a prosecutor who has received a claim of criminal activity, to which absolute immunity attaches. Thus, the Appellant has articulated no reason why absolute

immunity should not apply to Appellee James' decision to refer the Appellant's criminal conduct to the police.

Appellant's Abuse of Process claim, premised upon allegations that Appellee James moved to revoke Ms. Hartman's bond based upon an improper motivation, is equally subject to absolute immunity. He claims that, upon receiving reports that Ms. Hartman was the subject of allegations of telephone harassment, allegations in fact made by the Appellant himself, Mr. James revoked Ms. Hartman's bond in an effort to pressure her to pursue domestic violence charges against the Appellant.

"[W]hether to 'initiat[e] a prosecution,' of course, is in the heartland of the prosecutorial discretion covered by absolute immunity." *Savage v. State*, 896 F.3d 260, 270 (4th Cir. 2018) (citing *Burns v. Reed*, 500 U.S. 478, 486, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991). There is no way to interpret Appellee James' decision to revoke Ms. Hartman's bond other than as an exercise of prosecutorial discretion. A bond revocation is a criminal proceeding, for which a prosecutor's duty is to weigh the evidence and make a decision as to whether to pursue the same. Accordingly, this action, even if it had indeed been taken with an improper motive, it is nonetheless protected by absolute immunity.

Finally, the Appellant contends that the Circuit Court erred in holding that Appellee James' alleged participation in the supposed conspiracy to delete the purported exculpatory thirty-six (36) minute interview with Cpl. Nazelrod was within the scope of absolute prosecutorial immunity. The U.S. Supreme Court's landmark ruling in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), stands for the principle that exculpatory evidence in the possession of a prosecutor must be turned over to a criminal defendant in time for its effective use at trial. However, the evaluation and decision-making process of whether an item of evidence is

disclosable under *Brady* is indisputably a prosecutorial function which is afforded absolute immunity, and the Courts are express and uniform in that holding. See, e.g., *Carter v. Burch*, 34 F.3d 257, 263 (4th Cir. 1994) (holding that prosecutors have absolute civil immunity for alleged *Brady* violations, because "[t]he decision whether to turn this evidence over to defense counsel would have occurred after [defendant]'s arrest, but before his conviction, and is clearly part of the presentation of the State's case."). Thus, even if the Appellant's claim that Appellee James wrongfully suppressed evidence during the course of that prosecution is accurate, Appellee James is nonetheless insulated from civil liability for that purported act.

Furthermore, the Appellant's reliance on the extra-jurisdictional case of *Wearry v. Foster*, 33 F.4th 260, 2022 U.S. App. LEXIS 11969 (5th Cir. 2022) in an attempt to differentiate his claims from those in which evidence is allegedly withheld, which are indisputably subject to absolute immunity, is misplaced. See Appellant's Brief at pgs. 17-19. He argues that because his claim is that the recording in the possession of the State was allegedly partially deleted rather than simply withheld, that this places the purported act outside the scope of absolute immunity. See *id.* This is a misapplication of *Wearry* to the present case, even if it were binding precedent. The *Wearry* plaintiff claimed that prosecutors knowingly coerced a child witness into fabricating false testimony out of whole cloth. See *Wearry* at *2-*3. The Fifth Circuit held in its non-binding opinion that an allegation that the prosecutor had *caused evidence to be created*, which is a police investigative, evidence-gathering function, rather than a prosecutorial one. See *id.* This opinion is easily distinguishable. First, rather than gathering or fabricating evidence, the Appellant claims that Appellee James participated in efforts to cause certain audio footage to be omitted from the state's copy. Second, this alleged omission did not affect the evidentiary record of the case. As the Appellant himself argues, the missing portion of the interview recording was in the Appellant's

actual possession from the moment it was generated until the proceeding's conclusion, and was available for his use at trial. *Wearry* is therefore inapplicable, and, even if the Court were to adopt its holdings, it would not bring the Appellee James' conduct outside the scope of absolute immunity.

2. Appellee Ours is entitled to absolute prosecutorial immunity from Appellant's claims.

The argument for absolute immunity for Appellee Ours is even less controvertible. Appellee Ours is not alleged to have been involved in the prosecution at all until he was appointed as special prosecutor after the charges were filed and probable cause had already been determined by a magistrate, meaning that he was not even present for any "investigatory" stages of the case.

The Appellant's claims against Appellee Ours are that he allegedly prosecuted the Appellant for domestic battery maliciously and for an improper purpose. He further alleges that Appellee Ours acted in concert with Appellees James and Nezelrod to affect the purported *Brady* violation alleged in the foregoing section. Finally, he claims that Appellee Ours took Ms. Hartman's deposition under false pretenses.

As discussed in the foregoing sections of this Brief, the decision to pursue a prosecution is at the heart of qualified immunity, and Appellee Ours' decision to move forward with the prosecution is therefore absolutely insulated irrespective of alleged motive. Further, the taking of a deposition is indisputably the role of an attorney, and furthermore is 'an out-of-court effort to control the presentation of [a] witness' testimony,' which is repeatedly held to be protected by absolute immunity. *Broadnax v. Pugh*, No. 5:15-03736, 2017 U.S. Dist. LEXIS 191655, *9-13 (S.D.W.Va., Oct. 24, 2017) (Aboulhosn, M.J.), *adopted*, 5:15-cv-03736, 2017 U.S. Dist. LEXIS 191266, 2017 WL 5585630 (S.D.W.Va., Nov. 20, 2017) (Berger, J) (citing *Buckley* at 272; *Van*

de Kamp at 344; *Dababnah v. Keller-Burnside*, 208 F.3d 467, 471 - 472 (4th Cir. 2000)). Finally, as with the Appellant's similar claims regarding Appellee James, prosecutors are immune from civil liability for alleged *Brady* violations, and thus neither can the claim regarding suppression of exculpatory evidence stand.

Accordingly, like Appellee James, each of the allegations the Appellant has levied against Appellee Ours falls directly under the umbrella of absolute prosecutorial immunity. The Circuit Court committed no error in so holding, and its ruling should be affirmed.

B. The Circuit Court committed no error in ruling that, in the alternative, Appellees James and Ours would be entitled to qualified immunity.

In the alternative, for any of Appellant's claims for which Appellees James and Ours would not be entitled to absolute prosecutorial immunity, they would nonetheless be entitled to qualified immunity, because under the Appellant's allegations, no constitutional violation occurred. The Circuit Court held, correctly, that probable cause existed for the Appellant's prosecution, and that would be the case even if the allegedly exculpatory information the Plaintiff complains of were included in the Criminal Complaint. Further, it committed no error in holding that the Appellant failed to state a claim for a *Brady* violation,6 because under the allegations in the Complaint, the necessary element of prejudice is unmet.

West Virginia law acknowledges and adopts the well-established common-law immunity extended to prosecuting attorneys in their professional capacity. As summarized by Justice Cleckley in his authoritative *Litigation Handbook on West Virginia Rules of Civil Procedure*:

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6 The Appellant now contends that, contrary to the Circuit Court's analysis and his own arguments in briefs before the Circuit Court, he is not pursuing a claim based on a *Brady* violation. This begs the question of under what theory the Appellant is pursuing his claim based on the alleged failure to turn over a portion of the recording of Appellee Nazelrod's interview of the Appellant. The answer to this question is not facially apparent, and *Brady* appears to be the only applicable legal framework.

> The absolute immunity afforded to prosecutors attaches to the functions they perform, and not merely to the office. Therefore, it has been recognized that a prosecutor is entitled only to qualified immunity when performing actions in an investigatory or administrative capacity.

Under the doctrine of qualified immunity, public officials and employees are immune for acts or omissions arising out of the exercise of discretion in carrying out their duties, so long as they are not violating any known law, rule, regulation or standard or acting maliciously, fraudulently or oppressively. *See Parkulo v. WV Bd. of Probation and Parole,* 199 W.Va. 161, 483 S.E.2d 507 (1996). The common law doctrine of qualified immunity is designed to protect public officials from the threat of litigation resulting from difficult decisions which must be made in the course of public employment. *See e.g., Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995). The United States Supreme Court held that qualified immunity is an entitlement not to stand trial and should be made as early in the proceedings as possible so that the costs and expenses of trial are avoided where the defense is dispositive. *See Saucier v. Katz, et al.,* 533 U.S. 194, 150 L.Ed.2d 272, 121 S.Ct. 2151 (2001). In order to sustain a viable claim against employees or public officials acting within the scope of their authority sufficient to overcome this immunity, it must be established that the employee or official knowingly violated a clearly established law or acted maliciously, fraudulently or oppressively. *Parkulo, supra*; *Clark, supra* (citing *State v. Chase Securities, Inc.,* 188 W.Va. 356, 424 S.E.2d 591 (1992)).

The Supreme Court of Appeals has clarified the analysis necessary in order to determine whether qualified immunity applies. First, a court must determine whether the acts or omissions constitute legislative, judicial, executive or administrative policy-making acts *or* whether the acts or omissions involve discretionary governmental functions. See Syl. Pt. 10, *West Virginia Regional Jail and Correctional Facility Authority v. A.B.*, 766 S.E.2d 751 (W.Va. 2014). If the act or omission is a legislative, judicial, executive or administrative policy-making act, the State

and the official involved are absolutely immune. *Id.* If, on the other hand, the act or omission falls within the category of discretionary functions:

> [A] reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known <u>or</u> are otherwise fraudulent, malicious or oppressive . . . . In the absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability.

Id. at Syl. Pt. 11.

It is apparent that qualified immunity applies to the discretionary decisions of Appellees James and Ours in this matter to pursue charges against the Appellant because probable cause existed for his charge and prosecution for domestic abuse charges. This is the case even if the allegedly exculpatory evidence which the Appellant claims was omitted from the Criminal Complaint is considered.

The alleged pursuit of the prosecution in spite of a purported lack of probable cause forms the basis of the Appellant's Malicious Prosecution claim. "In an action for malicious prosecution, plaintiff must show: (1) that the prosecution was set on foot and conducted to its termination, resulting in plaintiff's discharge; (2) that it was caused or procured by defendant; (3) that it was without probable cause; and (4) that it was malicious. If plaintiff fails to prove any of these, he can not recover." *Goodwin v. City of Shepherdstown*, 241 W. Va. 416, 825 S.E.2d 363 (2019); see also Syl. Pt. 2, *Norfolk S. Ry. Co. v. Higginbotham*, 228 W. Va. 522, 721 S.E.2d 541 (2011). Accordingly, West Virginia's law against malicious prosecutions is necessarily not violated where a prosecution is supported by probable cause. "Probable cause for instituting a prosecution is such a state of facts and circumstances known to the prosecutor personally or by information from others as would in the judgment of the court lead a man of ordinary caution, acting conscientiously, in

the light of such facts and circumstances, to believe that the person charged is guilty." Syl. Pt. 3, *Morton v. Chesapeake & O. Ry.*, 184 W. Va. 64, 399 S.E.2d 464 (1990).

The Appellant takes a dramatic quantity-over-quality approach to enumerating the "facts" allegedly omitted from the Criminal Complaint. However, a review of these allegedly omitted facts will make apparent that they are largely immaterial to the question of whether a reasonable prosecutor could believe in good faith that the offenses at issue – domestic assault and domestic battery – occurred. The Circuit Court's decision reflects that it reviewed the allegedly omitted facts, and found that they failed to overcome the probable cause to prosecute the Appellant for domestic assault and battery. AR 274 at ¶ 13.

The Plaintiff begins with an allegation that Ms. Hartman testified in deposition that a picture she had shown to Appellee Nazelrod showing her injuries was from "years ago," and that she did not recall making a statement about a ham sandwich being shoved into her face. See Appellant's Brief at Pg. 21; AR 021 at ¶ 83(f) – 22 ¶ 83(g). Second, he claims that Appellee Nazelrod "was aware" of an alternate explanation of events, and that the Appellant provided him with the identities of witnesses for this alternate version with whom Appellee Nazelrod did not follow up. See Appellant's Brief at Pg. 21. Third, he claims Ms. Hartman admitted to lying about sending pictures to the Sheriff. See *id.* Finally, he claims the "metallic clicking sound" in the video footage of the domestic incident which Appellee Nazelrod took to be a gun being dry-fired is not actually audible. See *id.* The Circuit Court considered this information and more which the Appellant raised before that Court, and, in holding that probable cause would still exist even if every one of the Appellant's enumerated facts had been included, noted that "[t]he criminal complaint does not have to include all evidence favorable or exculpatory to the accused, and it is

very common for the accused, especially in domestic violence cases, to have a different version of what happened from the alleged victim." AR 258 at ¶ 14.

In fact, in this case the question of whether probable cause would still have been found if all of the allegedly omitted facts had been included in the Criminal Complaint need not remain a hypothetical. As noted by the Circuit Court, an effective second probable cause finding occurred when the Magistrate denied a motion or judgment of acquittal after the Appellant had an opportunity to present all of this allegedly exculpatory evidence at trial. So therefore, even with all of the information allegedly omitted from the Criminal Complaint available to him, the Magistrate still found probable cause and permitted the jury to make its decision. This alone is fatal to a Malicious Prosecution claim premised on a purported lack of probable cause.

The Appellees submit that a *de novo* review of the allegations contained in the Appellant's Complaint can only lead to the same result as that reached by the Circuit Court. Probable cause existed for the issuance of a Criminal Complaint against the Appellant for domestic battery. As the Fourth Circuit noted when ruling that probable cause existed based on the same set of facts at issue here:

> Nazelrod's criminal complaint relied on the victim's own statements, as corroborated by video and photographic evidence, that Launi had battered and assaulted her. None of this negates probable cause for Launi's arrest and prosecution, much less shows that Nazelrod acted with the requisite reckless disregard or intent to mislead.

Launi v James, 2021 U.S. App. LEXIS 33824 at *6-*7. As a result, Appellees James and Ours are entitled to qualified immunity as they did not violate a clearly establish right of the Appellant and the decision of the Circuit Court on this issue should be affirmed.

Additionally, even if it were outside the scope of absolute immunity, these Appellees are entitled to qualified immunity with regard to the Appellant's claims regarding allegedly suppressed

evidence, because no violation of law occurred. The Circuit Court's Orders correctly set forth the elements of a *Brady* violation as follows: "(1) the evidence at issue was favorable to him; (2) the evidence at issue was suppressed by the defendants; and (3) the evidence was material, meaning that prejudice to the plaintiff ensued. *Fullwood v. Lee*, 290 F.3d 663, 685 (4th Cir. 2002)." *Mead v. Shaw*, 2016 WL 316870, at *7 (W.D. N.C. 2016). AR 273 at ¶ 10. The *Mead* court carefully analyzed the third prong, the prejudice element, and determined that it "is only established if the Defendant can show that the verdict in his case is not entitled to reasonable confidence. It follows that where, as here, the jury acquits, that element of a *Brady* claim is not met." *Id.* The *Mead* court went on to state that it had not identified any Court of Appeals decision that held to the contrary, citing cases from the Sixth, Eighth, Tenth, and Eleventh Circuits that were consistent with its ultimate holding, adopted by the Circuit Court of Mineral County below.

However, even if the standard urged by the Appellant – that a conviction is not necessary to establish prejudice, merely that some inconvenience such as having to endure a trial – were to be adopted, he would still fail to establish prejudice. Even if his contention that the Appellees conspired to suppress the thirty-six allegedly exculpatory minutes of the recorded interview with Appellee Nazelrod were true, it cannot have prejudiced him. If his position is that the matter would not have proceeded to trial if the missing recording section had been made available to him, this cannot be true, because it was available to him from the moment the conversation occurred, as his recording came from his own device. On the face of his Complaint, he alleges that the purportedly missing portion of the recording was actually in his possession, and therefore available for his use at trial. AR 027 at ¶ 103. Further, as previously noted, the fact that the Magistrate denied a motion for judgment of acquittal after the missing recording section was presented at trial should be fatal

to any argument that it would have somehow defeated probable cause if included in the record at an earlier juncture. AR 257 at ¶ 12.

This debate about prejudice, however, may be a moot point entirely, as the Appellant fails to address the fact that this recording section is not even *Brady* material at all. *Brady* "does not compel the disclosure of evidence available to the defendant from other sources, including diligent investigation by the defense." *Stockton v. Murray*, 41 F.3d 920, 927 (4th Cir. 1994); see also *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990) ("Where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine."). "[N]ondisclosure . . . does not denote that no exculpatory evidence exists, but that the government possesses no exculpatory evidence that would be unavailable to a reasonably diligent defendant." *Barnes v. Thompson*, 58 F.3d 971, 975 n.4 (4th Cir. 1995). Accordingly, the fact that the recording section was not only available to the Appellant but actually in his possession is fatal to any claim premised upon *Brady*. The Circuit Court committed no error in dismissing the Appellant's malicious prosecution claims premised upon a purported *Brady* violation, and should be affirmed.

C. The Circuit Court committed no error in dismissing the Appellant's Civil Conspiracy claims.

Because the Plaintiff has only alleged acts on the part of these Appellants from which they enjoy absolute immunity were the subject of a civil conspiracy, they are also immune from allegations that they committed those acts in furtherance of a conspiracy. As has been previously summarized:

> It would be cold comfort for a prosecutor to know that he is absolutely immune from direct liability for actions taken as prosecutor, if those same actions could be used to prove him liable on a conspiracy theory involving conduct for which he was not immune. "[T]he vigorous and fearless performance of the prosecutor's duty that

> is essential to the proper functioning of the criminal justice system" would be unduly chilled. *Imbler v. Pachtman*, 424 U.S. 409, 427-28, 96 S.Ct. 984, 993-94, 47 L.Ed.2d 128 (1976). That is why acts for which a prosecutor enjoys absolute immunity may not be considered as evidence of the prosecutor's membership in a conspiracy for which the prosecutor does not have immunity. *Rowe v. City of Fort Lauderdale*, 279 F.3d 1271, 1282 (11th Cir. 2002); see also *Rehberg v. Paulk*, 611 F.3d 828, 842 (11th Cir. 2010) (noting prosecutor entitled to absolute immunity for the pre-indictment conduct of conspiring to make up and present false testimony to the grand jury, when the evidence of the prosecutor's involvement in the alleged conspiracy was the testimony before the grand jury, which is itself entitled to absolute immunity); *Reasonover v. St. Louis Cnty., Mo.*, 447 F.3d 569, 579-80 (8th Cir. 2006) (finding prosecutor is absolutely immune from a civil conspiracy charge when his alleged participation in the conspiracy consists of otherwise immune acts).

Elmore v. City of Greenwood, No. 3:13-cv-01755-TLW-KDW, 2014 U.S. Dist. LEXIS 120416, *18-*19 (D.S.C., June 27, 2014); see also *Washington v. Wilmore*, CIVIL ACTION NO. 3:02-CV-00106, 2006 U.S. Dist. LEXIS 59979, *23-*24 (W.D.Va., Aug. 23, 2006).

As discussed in the previous sections, Appellee James is immune from civil liability for his decision to revoke Ms. Hartman's bond. The count of the Plaintiff's complaint alleging civil conspiracy contains no more allegations as it pertains to Appellee James. AR 030 at ¶¶ 127-129. Thus, he cannot be held liable for an alleged civil conspiracy based on that act, warranting dismissal of this claim. Appellee Ours is likewise immune from civil liability for alleged *Brady* violations, from claims of witness tampering, from alleged deposition misconduct, and from liability regarding his decision to prosecute a case. The Plaintiff's Complaint contains no more allegations of civil conspiracy participation as it pertains to Appellee Ours. AR 032 at ¶¶ 137-138.

While the Appellant asserts in his Brief that there are "other allegations of civil conspiracy which are not dependent on a finding by this Court as to the sufficiency of Petitioner's malicious prosecution and abuse of process claims," this is contrary to the text of his Complaint. See Appellant's Brief at Pgs. 25-26. The enumerated counts for civil conspiracy list the acts upon

which they are premised, and they are limited to those which form the basis of his malicious prosecution and abuse of process claims. Thus, a ruling which is fatal to those claims is also fatal to his civil conspiracy claims, and the Circuit Court committed no error by so holding.

VI. CONCLUSIONS

WHEREFORE, based on the foregoing, Appellees Daniel M. James and John G. Ours respectfully pray this Honorable Court AFFIRM the decisions of the Circuit Court of Mineral County, West Virginia appealed herein, and grant them such other relief as the Court deems just and proper.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
APPEAL NO.: 22-0111

NORM LAUNI, II,

Plaintiff Below, Petitioner

v.

THE HAMPSHIRE COUNTY PROSECUTING ATTORNEY'S OFFICE, and COUNTY OF HAMPSHIRE, WEST VIRGINIA, et al.

Defendants Below, Respondents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing **Respondents' Brief** was served upon the following parties by U.S. Mail on this 30th day of June, 2022:

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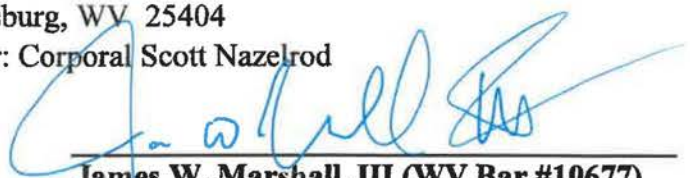

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