IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

09-11897-G

CHARLES A. REHBERG

Plaintiff/Appellee

V.

KENNETH B. HODGES III, KELLY R. BURKE,
AND JAMES P. PAULK

Defendants/Appellants

APPELLEE CHARLES A. REHBERG'S PETITION FOR REHEARING (OR HEARING) EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND ENTITIES

The following persons or entities have a financial interest in the outcome of this case:

1. Burke, Kelly
2. Hodges, Kenneth III
3. Paulk, James
4. Rehberg, Charles
5. State of Georgia
6. Vroon, Bryan and the Law Offices of Bryan A. Vroon LLC

The Honorable Louis Sands of the Middle District of Georgia denied the Motions to Dismiss at issue on appeal.

CERTIFICATION OF COUNSEL UNDER RULE 35-5

I believe, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: *Katz v. United States*, 389 U.S. 347 (1967); *Smith v. Maryland*, 442 U.S. 735 (1979); *United States v. U.S. District Court*, 407 U.S. 297, 313 (1972); *United States v. Jacobsen*, 466 U.S. 109, 114 (1984); *Boyd v. United States*, 116 U.S. 616, 621 (1886); *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993); *Kalina v. Fletcher*, 522 U.S. 118, 126 (1997); *Malley v. Briggs*, 475 U.S. 335 (1986); and *Burns v. Reed*, 500 U.S. 478, 492 (1991).

I further believe, based on a reasoned and studied professional judgment,

that this appeal involves four questions of exceptional importance:

1. Whether it is a clearly established Fourth Amendment violation for a prosecutor to issue fraudulent grand jury subpoenas to compel disclosure of the contents of private email communications?

2. Whether absolute immunity is unavailable to prosecutors who manipulate and contrive evidence during an investigation?

3. Whether absolute immunity is unavailable to a prosecutor who made defamatory comments to the media portraying an individual as a burglar and assailant when the prosecutor knew the individual was falsely implicated in those felony crimes?

4. Whether immunity under the intra-corporate conspiracy doctrine is unavailable to a government investigator who conspires with third parties to investigate and falsely implicate an individual in crimes in retaliation for his public criticisms of that third party?

/s/Bryan A. Vroon

Attorney of Record for Appellee Charles A. Rehberg

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STATEMENT OF THE ISSUES MERITING EN BANC CONSIDERATION

The Panel made four critical errors that warrant *en banc* rehearing.

First, the panel overlooked the long established rule that individuals possess a reasonable expectation of privacy in the contents of communications, and erroneously held that Rehberg had no Fourth Amendment rights in the contents of emails sent and received on his personal email account. Because no reasonable prosecutor could have believed that (1) preparing a series of sham subpoenas purporting to be from a grand jury even though no grand jury was investigating Rehberg, (2) using the subpoenas to obtain constitutionally- and statutorily-protected email content, and (3) turning those emails over to private parties did not violate the Fourth Amendment, the panel should not have held that Defendants enjoy qualified immunity for Count 6 of the Complaint.

Second, the panel should not have dismissed Rehberg's claims against Hodges and Paulk for manipulating and fabricating "evidence" of an assault and burglary during the investigation they instigated and conducted. (Complaint ¶¶ 109, 134-35, 158). The dismissal is contrary to Supreme Court precedent establishing that prosecutors are not entitled to absolute immunity when they function as investigators, especially before a grand jury is impaneled. *Buckley v. Fitzsimmons*, 509 U.S. 259, 277 (1993).

Third, the panel should not have found that qualified immunity applies to defendant Burke's defamatory statements to the media labeling Rehberg, a certified public accountant, as a criminal felon. The panel erroneously found that Burke's statements were not connected to Hodges's and Paulk's evidence

fabrication, despite the clear allegations that Burke himself conspired to knowingly and falsely implicate Rehberg in such crimes. Accordingly, the panel misapplied the stigma-plus test of *Paul v. Davis*, 424 U.S. 693, 712 (1976), as construed by this Court in *Riley v. City of Montgomery, Ala.*, 104 F. 3d 1247, 1253 (11th Cir. 1997).

Finally, the panel erroneously applied the intra-corporate conspiracy doctrine because it misapprehended the alleged conspiracy as one solely between representatives of the District Attorney's Office when the Complaint clearly alleges that those representatives colluded with agents of Phoebe Putney Memorial Hospital.

If the Court treats this petition as one for panel rehearing and grants such rehearing, Appellee Rehberg requests the opportunity to file additional briefing to the panel on these issues to enable full exploration of the case law regarding the issues identified in this Petition.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

This action was filed on January 23, 2007, yet the case has not proceeded past the motion to dismiss stage. On March 31, 2009, the United States District Court for the Middle District of Georgia denied Hodges', Burke's, and Paulk's motions to dismiss the Section 1983 claims at issue on this appeal. On March 11, 2010, a panel of this Court reversed in part, granting immunity to the two prosecutors, Hodges and Burke, and leaving only a single 1983 claim pending against Paulk, the DA's chief investigator, for instigating a retaliatory prosecution

of Rehberg.[1]

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF THE ISSUES

This case arises from the gross misuse of investigatory powers of defendants: Dougherty County District Attorneys Ken Hodges and Kelley Burke, and the DA's chief investigator, James Paulk, in retaliation for Plaintiff's exercise of his free speech rights to criticize financial malfeasance and waste at Phoebe Putney Memorial Hospital.

The Complaint, supported by sworn deposition testimony from previous proceedings, alleges that Hodges, Burke and Paulk fabricated both crimes and evidence against Charles Rehberg and had him indicted three times as a political favor to hospital officials. During the course of the sham investigation, Hodges and Paulk illegally subpoenaed the *contents* of Rehberg's personal emails on behalf of a purported grand jury that did not exist. Hodges and Paulk then sold these personal emails to private investigators hired by the hospital. Hodges, Paulk, and Burke knowingly manipulated and twisted evidence gathered during their investigation to frame and indict Rehberg for a burglary and assault that never happened with full knowledge their evidence and the charges were false. Defendants' misconduct led to three indictments against Rehberg, all of which were dismissed. Burke continued the retaliation campaign against Rehberg by defaming him as a racist felon in his press releases and comments to the media.

Though Rehberg was eventually successful at dismissing all three

[1] A copy of the Panel's decision is attached as Exhibit 1.

indictments, he will be forever associated with the false accusations, has had to bear the significant expenses of his legal defense, and has sustained significant damages to his professional career as a certified public accountant.

ARGUMENT AND AUTHORITIES

I. Defendants Are Not Entitled to Qualified Immunity Since Users Have a Reasonable Expectation of Privacy in the Content of Their Communications and No One Could Have Believed That Issuing Sham Subpoenas in Order to Acquire Such Protected Information to Assist Private Parties in Retaliation for Plaintiff's Public Criticism Was Lawful.

Over forty years ago the Supreme Court established that individuals possess a reasonable expectation of privacy in the contents of communications. *See Katz v. United States*, 389 U.S. 347 (1967) (finding a Fourth Amendment expectation of privacy in telephone calls made from a closed phone booth). Here, Defendants Paulk and Hodges issued a subpoena to Exact Advertising, seeking the content of emails sent and received by Rehberg.[2] (Complaint ¶ 37). Exact Advertising complied with the subpoena. *Id*.

Two factual errors led the panel to erroneously conclude Defendants have qualified immunity for this subpoena. First, the panel overlooked that Rehberg's claims include the seizure of email *content* when concluding "[l]acking a valid expectation of privacy in that email information, Rehberg fails to state a Fourth Amendment violation for the subpoenas for his Internet *records*." Slip Op. at 22 (emphasis added). Second, the panel overlooked the fact that Defendants sought

[2] More specifically, this subpoena sought the "contents and header information" of Rehberg's email messages, in violation of the Stored Communications Act, 18 U.S.C. § 2703 (a) (requiring a warrant to obtain the content of these emails).

and obtained from third parties emails Rehberg *received*, instead focusing on the expectation of privacy of the senders of messages. These serious errors threaten to eliminate Fourth Amendment protections for the content of personal email, undermining the privacy of a key communications method for millions of people in this Circuit.[3]

A. Supreme Court Precedent Clearly Establishes an Expectation of Privacy in the Content of Communications.

Under the 1967 *Katz* case, email users have a reasonable expectation of privacy in the content of their communications. In *Katz*, the court recognized society's reliance on public telephones for private communication, noting, "[t]o read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." 389 U.S. at 352. The only difference here is that the method of content communication is email rather than public telephones, and today email serves that same, if not a more, vital role in private communication than public telephones did in 1967.

Smith v. Maryland, 442 U.S. 735 (1979), reaffirmed and clarified that the Fourth Amendment protects communications contents. In *Smith*, the Court

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[3] At the time of the subpoena, more than 100 million Americans used email, and "more than nine in ten online Americans have sent or read email." Pew Research Center, *America's Online Pursuits*, http://www.pewinternet.org/Reports/2003/Americas-Online-Pursuits.aspx?r=1. By 2008, the majority of Internet users (56%) were using webmail, where the messages are stored with the service provider. Pew Research Center, *Use of Cloud Computing Applications and Services*, http://www.pewinternet.org/Reports/2008/Use-of-Cloud-Computing-Applications-and-Services.aspx?r=1.

distinguished the protected content of communications from numbers dialed, in which it found users had no expectation of privacy. *Id.* at 743-744. Justice Stewart, writing in dissent, specifically noted that communication content remains protected even if conversations are exposed to third-party service providers. *Id.* at 746-47 (J. Stewart, dissenting). This protection extends in part because spying on what people are saying is far more invasive than knowing what phone numbers they are dialing. *See id*; *see also United States v. U.S. District Court*, 407 U.S. 297, 313 (1972) ("the broad and unsuspected governmental incursions into *conversational privacy* which electronic surveillance entails necessitate the application of Fourth Amendment safeguards.") (emphasis added).

1. Email Content Receives the Same Protection as Phone Calls.

Courts have recognized a reasonable expectation of privacy in email content stored by an email service provider. *See, e.g.*, *United States v. Maxwell*, 45 M.J. 406, 418-19 (C.A.A.F. 1996); *United States v. Long*, 64 M.J. 57, 65 (C.A.A.F. 2006); *Wilson v. Moreau*, 440 F. Supp. 2d 81, 108 (D.R.I. 2006); *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F.Supp.2d 548, 563 (S.D.N.Y. 2008). In fact, two days before the panel decision issued in this case, a different panel of this Court correctly recognized that email content is protected by the Fourth Amendment. *United States v. Beckett*, 2010 WL 776049, at *4 (11th Cir. Mar. 9, 2010) (holding that the defendant had no reasonable expectation of privacy in internet and call records, but distinguishing content: "[t]he investigators did not recover any information related to content").

This Panel overlooked the critical fact that the *Beckett* panel and other courts have gotten right: email *content* is protected by the Fourth Amendment. In *Warshak v. United States*, 490 F.3d 455 (6th Cir. 2007), the Sixth Circuit held that "individuals maintain a reasonable expectation of privacy in emails that are stored with, or sent or received through, a commercial ISP." *Id.* at 473, *vacated en banc on ripeness grounds*, *Warshak v. United States*, 532 F.3d 521 (6th Cir. 2008).[4] As that Court noted, "[i]t goes without saying that like the telephone earlier in our history, email is an ever-increasing mode of private communication, and protecting shared communications through this medium is as important to Fourth Amendment principles today as protecting telephone conversations has been in the past." 490 F.3d at 473.

The Supreme Court's rulings in analogous factual situations further demonstrate the Fourth Amendment protects email content. For example, there is a reasonable expectation of privacy in traditional mail, even though, as with email, the message is ultimately in the hands of the recipient. *See United States v. Jacobsen*, 466 U.S. 109, 114 (1984); *see also Ex parte Jackson*, 96 U.S. 727, 733 (1877). The Fourth Amendment protections for a hotel or rented room are analogous: emails are like "virtual" papers in a "virtual" rented room (the email account) that is owned by and accessible to another (the email provider). *See Stoner v. California*, 376 U.S. 483, 489 (1964) (hotel room); *Chapman v. United*

[4] Though vacated, the *Warshak* reasoning is sound and has been followed by other courts. *See, e.g.*, *In re Applic. of U.S. for Orders Authorizing the Use of Pen Registers*, 515 F. Supp. 2d 325, 337-38 (E.D.N.Y. 2007); *United States v. D'Andrea*, 497 F. Supp. 2d 117, 121 (D. Mass. 2007).

States, 365 U.S. 610, 616-18 (1961) (rented house); *United States v. Johns*, 851 F.2d 1131, 1133-35 (9th Cir. 1988) (rented storage unit). More recently, the Ninth Circuit found a reasonable expectation of privacy against a government employer in employer-provided pager text messages stored by a third-party provider. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 906 (9th Cir. 2008), *cert. granted*, 130 S.Ct. 1011 (2009).

2. The Cases Cited by This Court and the Appellants Do Not Hold That Content Is Unprotected.

The panel opinion improperly relies on *Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001), asserting that senders no longer have "a legitimate expectation of privacy in an email that had already reached its recipient." *Id.* at 333. However, *Guest* concerned material posted on a public bulletin board frequented by an FBI agent, and did not reach the question of the expectation of privacy in the contents of email between private parties. *Id.* at 335. Moreover, as that same court later clarified in *Warshak*, *supra*, "*Guest* did not hold that the mere use of an intermediary such as an ISP to send and receive emails amounted to a waiver of a legitimate expectation of privacy." 490 F.3d at 472. Rather, *Guest*'s "diminished privacy is only relevant *with respect to the recipient*, as the sender has assumed the risk of disclosure by or through the recipient." *Id.* (emphasis added); *see also United States v. Charbonneau*, 979 F. Supp. 1177, 1184 (S.D. Ohio 1997) (citing *Maxwell*'s email privacy holding, 45 M.J. at 418, with approval, but finding no Fourth Amendment protection for messages sent to an AOL chat room). Likewise, *United States v. Lifshitz*, 369 F.3d 173 (2d Cir. 2004), also relied upon by the panel, was a

probation search case where the probationer's expectation of privacy was "reduced by the very fact that he remains subject to federal probation." *Id.* at 190. Finally, *United States v. Perrine*, 518 F.3d 1196, 1204-05 (10th Cir. 2008), is distinguishable because it considered "subscriber information provided to an internet provider" as opposed to content.

B. It Is a Clearly Established Fourth Amendment Violation for a Prosecutor to Issue Fraudulent Grand Jury Subpoenas to Compel Disclosure of the Content of Communications and Then Disclose Those Communications to Private Parties.

For well over one hundred years, the Supreme Court has recognized that the Fourth Amendment applies to the compulsory production of a party's private books and papers. *Boyd v. United States*, 116 U.S. 616, 621 (1886). For over fifty years, the law has established that a prosecutor may not compel the production of documents without the supervision of a grand jury or some other judicial authority. *See, e.g., Durbin v. United States*, 221 F.2d 520, 522 (D.C. Cir. 1954) ("'The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people' . . . do not recognize the use of a grand jury subpoena, a process of the District Court, as a compulsory administrative process of the United States Attorney's office." (citation omitted)); *United States v. Elliott*, 849 F.2d 554, 557-58 (11th Cir. 1988) (court subpoena cannot be used for administration's investigation). And for over forty years, the Supreme Court has recognized that the Fourth Amendment protects the contents of communications. *Sec. A, supra.*

Count 6 alleges that Defendants prepared a series of sham subpoenas purporting to be from the grand jury even though no grand jury was investigating

Plaintiff, used the subpoenas to obtain constitutionally-protected email content, and turned those emails over to private parties. No reasonable prosecutor could have believed that this course of conduct did not violate the Fourth Amendment. *See, e.g., Van Nice v. State*, 348 S.E.2d 515 (Ga. Ct. App. 1986) (citing a "clear and unmistakable aversion" where state prosecutors issued "sham subpoenas" for the production of documentary evidence "although there were no related hearings, cases or grand jury investigations pending before the issuing court"); *accord Duncan v. State*, 379 S.E.2d 507, 509 n.2 (Ga. 1989). Furthermore, the federal Stored Communications Act has long prohibited law enforcement from obtaining the content of email communications without valid legal process, 18 U.S.C. § 2703, a statute created, in part, to comply with the requirements of the Fourth Amendment. S. Rep. No. 99-541, at 1-2 (1986); *Lonegan v. Hasty*, 436 F. Supp. 2d 419 (E.D.N.Y. 2006) (denying immunity for illegal wiretap on similar basis); *see also Freedman v. America Online, Inc.*, 303 F. Supp. 2d 121 (D. Conn. 2004) (finding police officers knew or should have known invalid warrant violated Section 2703 of the SCA). In light of longstanding precedent, any reasonable member of a district attorney's office would know that issuing sham subpoenas for email content was a violation of clearly established rights.

II. The Panel's Grant of Absolute Immunity to Hodges and Paulk for Manufacturing Evidence Against Rehberg Is Contrary to Supreme Court Precedent.

The Panel's dismissal of Rehberg's claims for prosecutorial misconduct during this "investigation" is both contrary to Supreme Court precedent and premature on a motion to dismiss. Hodges and Paulk created false evidence of a

burglary and assault as part of their retaliatory investigation of Rehberg conducted as a political favor to a public hospital that Rehberg criticized. The Defendants knew that the alleged victim filed no police report nor complained of any crime and that Rehberg had never been to the alleged victim's home. (Complaint ¶¶ 11, 13, 17). Yet, without interviewing any witnesses, Hodges, Paulk, and Burke created, manipulated, and twisted information from the hospital's private investigators to implicate Rehberg in fictitious felonies that they created. (Complaint ¶¶ 10-29).

The Supreme Court has ruled that prosecutors are not entitled to absolute immunity when they act as investigators, as Defendants did (Complaint ¶¶ 99, 114, 124). *Buckley*, 509 U.S. at 273-274. Nor are they entitled to absolute immunity when they function as a complaining witness to establish probable cause, as Paulk did before the Grand Juries (Complaint ¶¶ 16, 22, 25). *Kalina v. Fletcher*, 522 U.S. 118, 126 (1997) (only qualified immunity for prosecutor personally attesting to the truth of facts necessary to obtain an arrest warrant). The Supreme Court precedent of *Buckley, Kalina*, *Malley v. Briggs*, 475 U.S. 335 (1986) (no immunity for arrest warrant without probable cause), and *Burns v. Reed*, 500 U.S. 478, 492 (1991) (no absolute immunity for the prosecutorial function of giving legal advice to the police) demonstrate that Rehberg is not required to prove that Hodges and Paulk fabricated physical evidence or expert evidence during the investigation. *See also Jones v. Cannon*, 174 F.3d 1271, 1281-1282 (11th Cir. 1999) (prosecutor has only qualified immunity when performing a function that is not associated with his role as an advocate for the state). This Circuit has held that it is well established

that "fabricating incriminating evidence violated constitutional rights." *Riley v. City of Montgomery, Ala.*, 104 F. 3d 1247, 1253 (11th Cir. 1997). This principle of law is not limited to physical evidence or expert evidence.

Furthermore, when a district attorney acts as an investigator before a grand jury is impaneled, he is not entitled to absolute immunity.[5] *Buckley* found no absolute immunity for the conduct of the prosecutors during the period before they convened a special grand jury because "[t]heir mission at that time was entirely investigative in character." *Buckley*, 509 U.S. at 274. "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* Just as in the *Buckley* case, Hodges' and Burke's unconstitutional misconduct predominantly occurred before a special grand jury was impaneled on December 14, 2005. (Complaint ¶ 38).

Nor may "[a] prosecutor . . . shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted and tried, that work may be retrospectively described as 'preparation' for a possible trial; every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial." *Buckley*, 509 U.S. at 276. "When the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same." *Id.*

When government prosecutors and their investigators handle an

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[5] For prosecutors performing an investigatory function, qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Burns v. Reed*, 500 U.S. at 494-95 (quoting *Malley v. Briggs*, 475 U.S. at 341).

investigation and deliberately manipulate, fabricate, twist, contrive, or invent "evidence," there is no absolute immunity under Supreme Court precedent. The panel's grant of absolute immunity is unsupported by either the rulings or the dicta of the Supreme Court. This case is far easier than *Buckley*, because the misconduct here began earlier in the investigation instigated by the prosecutor (without even a police report), and involved both fabricating a burglary and assault which never even happened and framing an innocent man (as opposed to shopping for an expert witness to address actual evidence in an actual crime). The Panel's ruling in the Defendants' favor eviscerates *Buckley*.

III. Rehberg Has Stated Valid Claims Arising in Part from Burke's Statements to the Press.

The Complaint also asserts claims against Burke arising from his press releases and media statements after Rehberg was indicted on false evidence. "Despite the clear constitutional violations of Mr. Rehberg's civil rights . . . Mr. Burke publicly indicated that Mr. Rehberg had committed an assault and had trespassed or committed a burglary." (Complaint ¶ 139). The Panel found that "nothing in the complaint connects Hodges's and Paulk's alleged evidence fabrication to Burke's press statements." Slip Op. at 36, n.24. This ruling was error. Burke's media statements to the public portrayed Rehberg as a felon assailant and burglar—the very same "evidence" that was twisted, manipulated, and contrived to implicate Rehberg in an assault and burglary during the investigation conducted by Paulk and Hodges. The Complaint alleges that Burke knew the evidence of a burglary and assault had been fabricated or contrived

against Rehberg. (Complaint ¶ 19). The Complaint alleges that Burke participated in the conspiracy to investigate and frame Rehberg in retaliation for his criticisms of a local hospital. (Complaint ¶¶ 32, 157-160). Not content with the damage of three false felony indictments to Rehberg, Burke went outside the role of a prosecutor to defame him in the press. (Complaint ¶ 58). The stigma-plus test of *Paul v. Davis*, 424 U.S. 693, 712 (1976), has been met.

"Comments to the media have no functional tie to the judicial process just because they are made by a prosecutor." *Buckley*, 509 U.S. at 277. "The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the State's case in court, or actions preparatory for these functions." *Id.* at 278. Since the allegations in the Complaint must be accepted as true, Appellant has adequately stated a claim for which Burke is not entitled to demand qualified immunity.

IV. This Court Dismissed the Conspiracy Count Against Paulk Based on an Erroneous Assumption That the Conspiracy Did Not Include Agents from the Public Hospital.

As to Count 10 claiming Conspiracy, the Panel erroneously concluded that "Rehberg has not alleged that Paulk conspired with anyone outside of the District Attorney's office." Slip Op. at 39. This finding overlooks repeated allegations in the Complaint that Paulk conducted the investigation as a political favor for private parties, acted in conspiracy with private civilians to illegally obtain Rehberg's private emails for the benefit and in exchange for payment from private civilians, and instigated a retaliatory prosecution as a political favor in retaliation for Mr.

Rehberg's comments which criticized the executives who managed the local hospital. (Complaint ¶¶ 121-131). The Complaint even contains quotes from Mr. Paulk's sworn testimony in which he told other witnesses that the investigation of Mr. Rehberg was a "favor" to Phoebe Putney Memorial Hospital. (Complaint ¶ 35 (citing Paulk Dep. pp. 75-76, 115)). Paulk testified, "I made the comment, 'Well, you know, Phoebe owes me. I'm doing Phoebe a favor.'" *Id.*

This Court overlooked the Complaint's allegations and erroneously concluded that "[t]he 'conspiracy' occurred only within a government entity, and thus the intracorporate conspiracy doctrine bars Count 10 against Paulk." Slip Op. at 39. As repeatedly alleged in the Complaint (e.g., Complaint ¶¶ 7, 40-47, 71, 86, 107), the conspiracy included third parties outside the government entity.

CONCLUSION

Appellee Charles Rehberg respectfully requests *en banc* review and reversal of the Eleventh Circuit's Opinion as to the 1983 claims that were dismissed. In the alternative, Appellee asks for rehearing before the original panel, and an opportunity for further briefing of these issues.

This 31st day of March 2010.

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CERTIFICATE OF SERVICE

I certify that I have this day filed the foregoing APPELLEE CHARLES REHBERG'S PETITION FOR REHEARING (OR HEARING) EN BANC and served all counsel of record as listed below by email and United States Mail:

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