

1 as a Maricopa County Medical Examiner, State of
2 Arizona

3 Defendants.

4
5 COMES NOW, Defendants, by and through counsel undersigned, and hereby
6 moves this Court Dismiss the Complaint as it fails to state a claim and because the
7 Defendants are immune from suit pursuant to the doctrines of Absolute Immunity and
8 Qualified Immunity. This Motion is more fully supported by the accompanying
9 Memorandum of Points and Authorities.

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **FACTS:**

12 **A. ABSOLUTE IMMUNITY:**

13 Plaintiff has alleged violations of his civil rights pursuant to 42 U.S.C.A. § 1983
14 and also 42 U.S.C.A. § 1985 and 1986. He further seeks monetary damages. (Doc. # 1)¹

15 As against Susie Charbel, Deputy County Attorney, Maricopa County Attorney's
16 Office ("Charbel") he has alleged beginning at paragraph 65 of Doc. # 1, that Charbel
17 violated his rights in the way in which she (1) presented evidence at two grand juries, (2)
18 by refusing to prosecute one of his victims, (3) by recognizing the surviving kidnapping
19 victim as a victim under state law, (4) by preventing him from interviewing the
20 surviving kidnapping victim, (5) by not allowing Plaintiff to appear before the grand
21 jury, (6) by false reporting to police agencies, (7) by violating certain rules of evidence,

22 ¹ Defendants have not been provided with the exhibits listed in Plaintiff's Complaint.

1 (8) in the issuance of a search warrant, (9) by violating certain rules of Arizona criminal
2 procedure, (10) by ignoring certain witness statements, (11) by allegedly attempting to
3 coerce a witness into assisting her in the false charges, and (12) committing perjury in
4 statements to Judge Baca related to an IRS letter.

5 **LAW AND ANALYSIS:**

6 **Issue:**

7 Charbel is protected from suits for damages by the doctrine of Absolute
8 Immunity. Because Charbel was acting within the scope of her duties as a
9 prosecutor this lawsuit must be dismissed.

10 Based upon the allegations against Charbel it is patently clear that each and every
11 allegation is directed toward an action undertaken by Charbel in the course and scope of
12 her duties as a prosecutor. As such Charbel is protected from this lawsuit by the doctrine
13 of Absolute Immunity and the complaint against her must be dismissed.

14 The foremost case on absolute immunity afforded to prosecutors acting within the
15 scope of their duties in initiating and pursuing a criminal prosecution is *Imbler v.*
16 *Pachtman*.² In *Pachtman* the Supreme Court held that "a prosecutor who acts within the
17 scope of his duties in initiating and pursuing a criminal prosecution and in presenting the
18 state's case is absolutely immune from a civil suit for damages for alleged deprivations
19 of the defendant's constitutional rights under 42 U.S.C.A. § 1983."³

20 Subsequent cases have further defined the prosecutor's immunity from suit.
21 Absolute prosecutorial immunity applies when a prosecutor prepares to initiate a judicial

22 ² 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)

³ *Id.* at 431, 96 S.Ct. at 995, 47 L.Ed.2d 128

1 proceeding, or appears in court to present evidence in support of a search warrant
2 application.⁴ A prosecutor has absolute immunity from suits for actions in the drafting
3 and application for a search warrant.⁵ Further, a prosecutor's appearance in court in
4 support of an application for a search warrant and the presentation of evidence at that
5 hearing are protected from § 1983 actions by absolute immunity.⁶

6 The prosecutor enjoys absolute immunity from damages claims under 42
7 U.S.C.A. § 1983 for various conduct before or in connection with a grand jury.⁷ The
8 presentation of evidence to a grand jury is conduct comprised of the prosecutor's quasi-
9 judicial duties as a state prosecutor in initiating a prosecution and presenting the state's
10 case and thus the prosecutor is absolutely immune from claims for damages.⁸

11 Absolute immunity is afforded prosecutors when interviewing witnesses.⁹ In *Rose*
12 *v. Koch*, the court noted that "it is important that some investigative work be done by the
13 prosecutor if he was properly to fulfill his functions in the judicial process." The court
14 emphasized that "for a prosecutor to prepare and present his case adequately, it was
15 desirable that he interview the witnesses and discuss with them their testimony."¹⁰ A
16 prosecutor's evaluation of a witness is entitled to absolute immunity even if that
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18 ⁴ *Van De Kamp v. Goldstein*, 129 S.Ct. 855, 172 L.Ed.2d 706 (2009)

19 ⁵ *Maxfield v. Thomas*, 557 F.Supp. 1123 (D. Idaho 1983)

20 ⁶ *Ostrzenski v. Seigel*, 177 F.3d 245 (4th Cir. 1999); see also *KRL v. Moore*, 384 F.3d 1105 (9th Cir. 2004) aff'd in part rev'd in part *KRI v. Estate of Moore*, 512 F.3d 118 (9th Cir. 2008)

21 ⁷ *Rose v. Koch*, 465 F.Supp. 1157 (E.D.N.Y. 1979); *Cerbone v. County of Westchester*, 508 F.Supp. 780 (S.D.N.Y. 1981); *Slavin v. Curry*, 574 F.2d 1256 (C.A. 5 Tex. 1978), mod. on other grounds and reh. denied (583 F.2d 779 (C.A. 5 Tex.) and overruled on other grounds *Sparks v. Duval County Ranch Co.*, 604 F.2d 976 (C.A. 5 Tex.) aff'd 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185

22 ⁸ *Hampton v. Hanrahan*, 600 F.2d 600 (C.A. 7 Ill. 1979) rev'd, in part on other grounds 446 U.S. 754, 100 S.Ct. 1987 (1980)

⁹ *Rose v. Koch*, 465 F.Supp. 1157 (E.D.N.Y. 1979)

¹⁰ *Id.*

1 judgment is harsh, unfair or clouded by personal animus.¹¹ Furthermore, the alleged
2 intimidation, coercion and or restraint of a witness by a prosecutor post-indictment has
3 been found to be protected by absolute immunity.¹² A prosecutor is also entitled to
4 immunity in performing prosecutorial functions despite allegations of his knowing use
5 of perjured testimony and the deliberate withholding of exculpatory information.¹³

6 It has been held that a state prosecutor's alleged failure to investigate
7 circumstances impacting upon a criminal case was conduct well within the scope of
8 absolute prosecutorial immunity from damages.¹⁴ Furthermore, failure to investigate a
9 defendant's claimed version of what transpired during or regarding the crime the
10 defendant has been charged with is within the prosecutor's scope of duties as an
11 advocate and thus protected by absolute immunity.¹⁵ A prosecutor is absolutely immune
12 from liability for decisions to prosecute or not to prosecute.¹⁶

13 The office of public prosecutor is one which must be administered with
14 independence and courage. The prosecutor must be free to make decisions on
15 prosecution without the fear of threat, or actual defense, of civil law suits. A prosecutor
16 is duty bound to exercise her judgment both in deciding which cases to prosecute and in
17 conducting them in court. The public trust in the prosecutor's office would suffer if she

18 ¹¹ *Botello v. Gammick*, 413 F.3d 971 (9th Cir. 2005)

19 ¹² *Taylor v. Poehling*, 438 F.Supp. 914 (E.D. Mo. 1977)

¹³ *Newton v. City of New York*, 566 F.Supp.2d 256 (S.D.N.Y. 2008)

20 ¹⁴ See *Halpern v. New Haven* 489 F.Supp. 841 (D.C. Conn. 1980); *Henzel v. Gerstein*, 608 F.2d 654 (C.A. 5 Fla. 1979);

21 ¹⁵ *McDonald v. Illinois*, 557 F.2d 596 (CA7 Ill. 1977) cert denied 434 U.S. 966 98 S.Ct. 508, (1977); *Dick v. Watonwan County*, 551 F.Supp. 983 (D.C. Minn. 1982); *O'Connor v. Nevada*, 686 F.2d 749 (9th Cir. 1982), cert denied 495 U.S. 1071, 103 S.Ct. 491(1982)

22 ¹⁶ *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695 (2006); *Anderson v. Larson*, 327 F.3d 762 (8th Cir. 2003); *Botello v. Gammick*, 413 F.3d 971 (9th Cir. 2005); *U.S. v. Leon H.*, 365 F.3d 750 (9th Cir. 2004); *Milstein v. Cooley*, 257 F.3d 1004 (9th Cir. 2001)

1 were constrained in making every decision by the consequences of her potential liability
2 in a suit for damages.¹⁷ Hence the absolute immunity that is afforded prosecutors
3 engaged in the scope of their duties as quasi-judicial officers.

4 In conclusion, Plaintiff has alleged violations of his constitutional and civil rights
5 by Charbel that even if such allegations are true are alleged to have occurred while
6 Charbel was engaged in the scope of her duties as a quasi-judicial officer. Therefore, the
7 complaint against Charbel must be dismissed with prejudice in its entirety.

8 **FACTS:**

9 **B. QUALIFIED IMMUNITY:**

10 Plaintiff has alleged violations of his civil rights pursuant to 42 U.S.C.A. § 1983
11 and also 42 U.S.C.A. §§ 1985 and 1986. He further seeks monetary damages. (Doc. # 1)

12 As against Robert Lyon, D.O. M.E. ("Lyon") he has alleged beginning at
13 paragraph 121 of Doc. # 1 that Lyon investigated the case in such a way as to violate his
14 rights: (1) by not testing "the kidnapper's"¹⁸ hair, (2) by not testing the kidnapper for
15 steroids, (3) by not testing the kidnapper for other signs of "roid rage", (4) by not testing
16 the kidnapper's stomach/bladder content, and (5) by violating A.R.S. § 11-594.

17 **LAW AND ANALYSIS:**

18 **Issue:**

19 1. Lyon is protected from suits for damages under the doctrine of Qualified
20 Immunity.

21
22 ¹⁷ See *Imbler v. Pachtman*, *supra*.

¹⁸ This is the decedent for which plaintiff is charged with murder.

1 Generally executive officials are entitled to qualified immunity when his or her
2 conduct does not violate a clearly established constitutional or statutory right of which a
3 reasonable person would be aware.¹⁹ Here Plaintiff has failed to allege facts that
4 establish that a clearly established constitutional duty existed requiring Lyon to (1) test
5 the murder victim's hair, (2) test the murder victim for steroids, (3) test the murder
6 victim for other signs of "roid rage", and (4) to test the murder victim's stomach/bladder
7 content. Lyon had no clearly established constitutional duty to do any of the above
8 during his autopsy of the deceased.²⁰ Furthermore, a medical examiner has no
9 constitutional duty to continue to investigate the crime once he has established probable
10 cause for that crime.²¹

11 Because Lyon's conduct in performing the autopsy of the murder victim and
12 determining cause of death did not violate a clearly established constitutional or
13 statutory right the complaint must be dismissed against him in its entirety.

14 Plaintiff further alleges that Lyon violated A.R.S. § 11-594 and thus violated his
15 civil rights. Arizona Revised Statute section 11-594 is entitled "Powers and duties of
16 county medical examiner."²² Plaintiff, however, fails again to allege facts that support
17 his claim that an alleged violation of this statute violates his civil rights.

18 C. 42 U.S.C.A. § 1985

19 Plaintiff has alleged his rights were violated and asserts claims pursuant to 42
20 U.S.C.A. § 1985. From a reading of his complaint he appears to assert these claims

21 ¹⁹ See *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982)

22 ²⁰ See *Kompare v. Stein*, MD, 801 F.2d 883 (7th Cir. 1986)

²¹ *Id.*

²² A.R.S. § 11-594

1 under subsection 2: Obstructing justice; intimidating party, witness, or juror; which
2 states:

3 If two or more persons in any State or Territory conspire to deter, by force,
4 intimidation, or threat, any party or witness in any court of the United
5 States from attending such court, or from testifying to any matter
6 pending therein, freely, fully, and truthfully, or to injure such party or
7 witness in his person or property on account of his having so attended or
8 testified, or to influence the verdict, presentment, or indictment of any
9 grand or petit juror in any such court, or to injure such juror in his person
10 or property on account of any verdict, presentment, or indictment lawfully
11 assented to by him, or of his being or having been such juror; or if two or
12 more persons conspire for the purpose of impeding, hindering, obstructing,
13 or defeating, in any manner, the due course of justice in any State or
14 Territory, with intent to deny to any citizen the equal protection of the
15 laws, or to injure him or his property for lawfully enforcing, or attempting
16 to enforce, the right of any person, or class of persons, to the equal
17 protection of the laws.

18 Plaintiff's conclusory and vague complaint fails to establish the required elements
19 of 42 U.S.C.A. § 1985(2) and are insufficient to state a claim.²³ Furthermore, any claim
20 against Charbel is defeated under the doctrine of absolute immunity.²⁴ No facts allege
21 would even implicate Lyon.

22 Plaintiff has failed to allege and cannot show any of the elements required under
§ 1985(2), therefore, this claim must be dismissed.

Plaintiff may assert that his claim is one of conspiracy in which case his claim
fails under an analysis of 42 U.S.C.A. § 1985(3).

19 D. 42 U.S.C.A. § 1985(3)

20 To state a claim under 42 U.S.C.A. § 1985(3) a plaintiff must allege the following
21

22 ²³ *Perry v. Gold & Laine, P.C.*, 371 F.Supp.2d 622 (D.N.J. 2005)

²⁴ *Snelling v. Westhoff*, 972 F.2d 199 (CA 8 Mo. 1992)

1 elements: (1) a conspiracy; (2) for purpose of depriving, either directly or indirectly, any
2 person or class of persons of equal protection of the laws, or of equal privileges and
3 immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a
4 person is either injured in his person or property or deprived of any right or privilege of
5 a citizen of the United States.²⁵ The second element requires a showing of “some racial,
6 or perhaps otherwise class-based, invidiously discriminatory animus behind the
7 conspirators’ action.”²⁶

8 Here, Plaintiff has failed to plead sufficient facts or to allege that there was any
9 race, gender, or any other class-based discrimination. Therefore, his Complaint fails to
10 state a claim under 42 U.S.C.A. § 1985(3) and this claim must be dismissed.

11 E. 42 U.S.C.A. § 1986

12 Because Plaintiff has failed to allege a violation of 42 U.S.C.A. § 1985 his claim
13 to relief under section 1986 also fails.²⁷ Thus, this claim must be dismissed.

14 F. RULE 12(b)6 FAILURE TO STATE A CLAIM

15 To state a claim under 42 U.S.C.A. § 1983, a plaintiff must allege facts
16 supporting (1) the conduct about which he complains was committed by a person acting
17 under color of state law and (2) the conduct deprived him of a federal constitutional
18 right.²⁸ In addition the plaintiff to state a viable constitutional claim under 42 U.S.C.A. §
19 1983 must show an affirmative link between the alleged injury and the conduct of the

20 ²⁵ *Carpenters Local 610 v. Scott*, 463 U.S. 825, 828-29 (1983)

21 ²⁶ *Id.* at 829

22 ²⁷ *Lindsey v. Thompson*, 550 F.Supp.2d 1285 (E.D. Okla. 2006); *Risley v. Hawk*, 918 F.Supp. 18 (D.D.C. 1996);
Mesa v. Rubin, 897 F.Supp. 883 (E.D. Pa. 1995); *Perkins v. Penagaricano Soler*, 610 F.Supp. 94 (D.C. Puerto Rico
1995)

²⁸ *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir. 1989)

1 defendant.²⁹ Plaintiff has failed to sufficiently allege or provide factual proof of an
2 injury he suffered. Plaintiff's Complaint from paragraph 21 to paragraph 34 contains
3 nothing more than unadorned and factually devoid labels and conclusions. Under
4 Federal Rules of Civil Procedure 8(a)(2), a pleading must contain a "short and plain
5 statement of the claim showing that the pleader is entitled to relief." As the United States
6 Supreme Court held in *Twombly*,³⁰ the pleading standard Rule 8 announces does not
7 require "detailed factual allegations," but it demands more than an unadorned, "the-
8 defendant-unlawfully-harmed-me" accusation.³¹ A pleading that offers "labels and
9 conclusions" or "a formulaic recitation of the elements of a cause of action will not
10 do."³² Nor does a complaint suffice if it tenders "naked assertions" devoid of "further
11 factual enhancement."³³

12 The naked assertions found at paragraphs 14 through 39 of Plaintiff's Complaint
13 are insufficient to pass the plausibility standard articulated in *Twombly* and *Ashcroft*.
14 Therefore, Plaintiff's section 1983 claims must be dismissed.

15 Plaintiff's has not alleged sufficient facts that support any of his claims that
16 Charbel or Lyon violated his constitutional and civil rights. Nothing in Plaintiff's
17 complaint establishes that the alleged violations by either Charbel at page 21 paragraphs
18 64 through 82 of Doc. # 1 or Lyon at page 35 paragraphs 120 through 125 of Doc. # 1
19 amount to a violation of his civil or constitutional rights. Moreover, the entire content of
20

21 ²⁹ *Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976)

³⁰ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)

³¹ *Ashcroft v. Iqbal*, *supra*, at 1949 (Internal citations omitted)

³² *Id.* (Internal citations omitted)

³³ *Id.* (Internal citations omitted)

1 the FACTUAL ALLEGATIONS at section III in Doc. # 1 merely recites the elements of
2 his causes of action or cites to case law.

3 Threadbare recitals of the elements of a cause of action, supported by mere
4 conclusory statements, do not suffice.³⁴ Plaintiff's complaint must contain enough
5 factual allegations, accepted as true, to state a claim to relief that is plausible on its
6 face.³⁵ The *Ashcroft* Court elaborated on the "plausibility standard."

7 A claim has facial plausibility when the plaintiff pleads factual content that
8 allows the court to draw a reasonable inference that the defendant is liable
9 for the misconduct alleged. The plausibility standard is not akin to a
10 "probability requirement," but it asks for more than a sheer possibility that
11 a defendant has acted unlawfully. Where a complaint pleads facts that are
12 "merely consistent with" a defendant's liability, it "stops short of the line
13 between possibility and plausibility of 'entitlement to relief'"³⁶

14 Plaintiff's threadbare recitals and naked assertions beginning at paragraph 14 and
15 continuing through paragraph 199 of Doc. # 1 fail to state a claim to relief.

16 Plaintiff attempts to cure this defect at the outset by acknowledging that if the
17 complaint is defective he moves this court to advise him of the defects in the pleadings
18 and procedures. If a Court determines that a pleading could be cured by the allegations
19 of other facts, a *pro se* litigant is entitled to an opportunity to amend the complaint
20 before dismissal of the action.³⁷ The Court should not, however, advise the litigant how
21 to cure the defects. This type of advice "would undermine the district judges' role as
22 impartial decision makers."³⁸ Determining whether a complaint states a plausible claim

³⁴ *Id.*

³⁵ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)

³⁶ *Ashcroft v. Iqbal*, *supra*. (Internal citations omitted)

³⁷ *See Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000)

³⁸ *Pfizer v. Ford*, 542 U.S. 225, 23, 124 S.Ct. 2446 (2004)

1 for relief is a "context specific task that requires the reviewing court to draw on its
2 judicial experience and common sense."³⁹

3 Plaintiff's complaint is already 199 paragraphs long yet he has failed to allege
4 factual content that state a claim to relief. Therefore this Court should dismiss the
5 complaint with prejudice in its entirety.

6 G. STATE TORT CLAIMS

7 Prior to filing a lawsuit alleging state tort claims against a public entity or public
8 employee a plaintiff must first serve that public entity or public employee with a Notice
9 of Claim.⁴⁰ A public employee being sued is entitled to a separate notice of claim.⁴¹
10 Plaintiff must have given notice of claim to Charbel and Lyon within 180 days after the
11 cause of action accrued.⁴² A cause of action accrues when the damaged party realizes he
12 or she has been damaged and knows or reasonably should know the cause, source, act,
13 event, instrumentality or condition which caused or contributed to the damage.⁴³

14 Plaintiff reasonably should have known as of July 11, 2008 (Doc. # 1) the cause,
15 source, act, event, instrumentality or condition which caused or contributed to his
16 damages. Therefore, he had until 180 days after July 11, 2008 to serve notice of his
17 claim against Charbel and Lyon upon them. He has failed to timely give notice of his
18 claim against them. Failure to give timely notice of claim and failure to comply with
19
20

21 ³⁹ *Ashcraft, supra*, at 1950

⁴⁰ A.R.S. § 12-821.01(A)

⁴¹ *Crum v. Superior Court In and For County of Maricopa*, 186 Ariz.351, 352, 922 P.2d 316, 317 (App.1996)

⁴² A.R.S. § 12-821.01(A)

⁴³ A.R.S. § 12-821.01(B)

1 notice-of-claim statute bars the plaintiff from recovery on the underlying cause of
2 action.⁴⁴

3 Plaintiff has never served either Lyon or Charbel with a notice of claim.

4 Therefore, any state tort claims alleged as to them must be dismissed with prejudice.

5 **CONCLUSION:**

6 Plaintiff's complaint fails to state a claim to relief, Charbel is absolutely immune
7 from civil suit, Lyon has qualified immunity from civil suit, and Plaintiff failed to
8 comply with the Notice of Claim statute for state tort claims. Therefore, his complaint
9 must be dismissed with prejudice in its entirety.

10 WHEREFORE, Defendants respectfully request this court dismiss the complaint.

11 RESPECTFULLY SUBMITTED this 3rd day of February 2010.

12 MARICOPA COUNTY
13 OFFICE OF SPECIAL LITIGATION SERVICES

14 BY: /s/ S. Lee White>
15 S. LEE WHITE
16 GERALD L. PICCIRILLI
17 Attorneys for Defendants

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22 ⁴⁴ *Barth v. Cochise County, Arizona*, 213 Ariz. 59, 138 P.3d 1186 (App.2006); *Salerno v. Espinoza*, 210 Ariz. 586,
115 P.3d 626 (App.2005); *Crum v. Superior Court, supra*.

1 CERTIFICATE OF SERVICE

2 I hereby certify that on February 3, 2010, I caused the foregoing document to be
3 electronically transmitted to the Clerk's Office using the CM/ECF System for filing and
4 transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

5 COPIES electronically sent and/or
6 mailed this 3rd day of February 2010 to:

7 Honorable Roslyn O. Silver
8 United States District Court
9 Sandra Day O'Connor U.S. Courthouse
10 401 West Washington Street, Suite 624, SPC 59
11 Phoenix, Arizona 85003

12 John Stuart
13 10407 West Trumbull Road
14 Tolleson, Arizona 85353
15 Plaintiff *Pro per*

16 /s/ Lea Wink
17 _____

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Motions

2:10-cv-00044-ROS Stuart v. McMurdie et al
STD

**U.S. District Court
DISTRICT OF ARIZONA**

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Case Name: Stuart v. McMurdie et al
Case Number: 2:10-cv-00044-ROS
Filer: Susie Charbel
Robert E Lyon

Document Number: 12

Docket Text:

MOTION to Dismiss Case by Susie Charbel, Robert E Lyon. (White, S)

2:10-cv-00044-ROS Notice has been electronically mailed to:

S Lee White whites002@mail.maricopa.gov, fitzpatrickl@mail.maricopa.gov,
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a6c0b638cd9e3586f39b73387ddcf24f642cc6a1f17060a8958185e05e0]]