APPENDIX

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13843
D.C. Docket No. 4:08-cv-00023-WTM-GRS

[Filed January 25, 2019]

DOUGLAS ECHOLS,	)
	)
Plaintiff-Appellant,	)
	)
versus	)
	)
SPENCER LAWTON,	)
in his individual capacity,	)
	)
Defendant-Appellee.	)
	)

Appeal from the United States District Court
for the Southern District of Georgia

(January 25, 2019)

Before TJOFLAT, WILLIAM PRYOR, and GILMAN,[*] Circuit Judges.

[*] Honorable Ronald L. Gilman, United States Circuit Judge for the Sixth Circuit, sitting by designation.

WILLIAM PRYOR, Circuit Judge:

This appeal requires us to decide whether a district attorney enjoys qualified immunity from a complaint that he defamed a former prisoner in retaliation for seeking legislative compensation for his wrongful convictions. After Douglas Echols served seven years of imprisonment for kidnapping and rape, a test revealed that his DNA did not match the semen recovered from the victim. Echols presented this evidence to Spencer Lawton, the local district attorney, who had a state crime lab confirm the test results. A Georgia trial court later vacated Echols's convictions. After Lawton declined to retry Echols, the trial court dismissed the indictment against him. A state legislator then introduced a bill to compensate Echols for his wrongful convictions. But Lawton wrote in opposition to the bill and allegedly falsely stated that Echols remained under indictment—a libel *per se*. *See Harcrow v. Struhar*, 511 S.E.2d 545, 546 (Ga. Ct. App. 1999). After the bill failed, Echols sued Lawton for violating his rights under the First and Fourteenth Amendments, 42 U.S.C. § 1983. The district court dismissed Echols's complaint based on qualified immunity. Although we conclude that Echols's complaint states a valid claim of retaliation under the First Amendment, we agree with the district court that Lawton enjoys qualified immunity because Echols's right was not clearly established when Lawton violated it. We affirm.

I. BACKGROUND

In 1986, three unknown assailants kidnapped and raped Donna Givens in Savannah, Georgia. Although Douglas Echols professed his innocence, a jury

convicted him of the kidnapping and rape of Givens. He was sentenced to 15 years of imprisonment.

After Echols served seven years of his sentence, a DNA test revealed that the semen recovered from Givens did not match Echols's DNA. Echols presented this evidence to Spencer Lawton, the district attorney for Chatham County, who also served in that role when Echols was convicted. Lawton ordered the state crime lab to conduct additional testing, which confirmed that the semen was not from Echols.

A Georgia trial court then vacated Echols's convictions and granted him a new trial. Instead of retrying Echols, the state entered a *nolle prosequi* on the charges of kidnapping and rape, and the trial court dismissed the indictment against him.

Four years later, after the Georgia Claims Advisory Board recommended compensation for Echols, a legislator in the Georgia General Assembly introduced a bill to compensate him with $1.6 million for his wrongful convictions. But before the General Assembly voted on the bill, Lawton sent a letter and memorandum to several legislators opposing Echols's compensation. Echols "was informed by the legislature that [the bill] would not pass specifically due to . . . Lawton's correspondence." Indeed, the legislators with whom Lawton corresponded blocked the bill from reaching the floor of the General Assembly, and the bill failed.

Echols then filed a complaint against Lawton, which he later amended. In his amended complaint, Echols alleged that Lawton violated his rights under the First

and Fourteenth Amendments, 42 U.S.C. § 1983, by providing "false information" and "intentionally misleading legal advice" to the legislators. Echols alleged that Lawton told the legislators that Echols's convictions "were proper and fitting, even though [his] conviction[s] had been vacated." Lawton also told the legislators not to presume Echols innocent of kidnapping and rape because the vacatur of his convictions did not establish his innocence. Lawton urged the legislators not to compensate Echols unless he proved his innocence. And Lawton told the legislators that Echols remained under indictment for kidnapping and rape even though the indictment had been dismissed four years earlier when the state entered a *nolle prosequi* on the charges. Echols complained that Lawton interfered with his freedom of speech and right to petition the government and retaliated against him for exercising those rights. And Echols complained that Lawton violated his right to due process of law by depriving him of a presumption of innocence.

The district court granted Lawton's motion to dismiss Echols's complaint. The district court ruled that Echols's complaint failed to state a claim under either the First or Fourteenth Amendments. It ruled that Lawton's letter did not amount to a threat, coercion, or intimidation, so Echols failed to state a claim of First Amendment retaliation. And it ruled that Echols failed to state a claim under the Due Process Clause of the Fourteenth Amendment because he failed to allege either a violation of a fundamental liberty or government conduct that shocks the conscience. The district court also ruled that Lawton enjoys qualified

immunity because Echols's complaint failed to allege the violation of a right that was clearly established when Lawton sent his letter.

II. STANDARD OF REVIEW

We review *de novo* a dismissal of a complaint for failure to state a claim. *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1303 (11th Cir. 2008). We accept the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Id.* "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). We also review *de novo* a grant of qualified immunity. *Courson v. McMillian*, 939 F.2d 1479, 1486 (11th Cir.1991).

III. DISCUSSION

We divide our discussion in two parts. First, we explain that Lawton enjoys qualified immunity from the claim that he retaliated against Echols for exercising his rights under the First Amendment. Second, we explain that Lawton also enjoys qualified immunity from the claim that he violated Echols's right to due process of law because the general rubric of substantive due process cannot be used to govern a claim that is otherwise covered by the specific text of the First Amendment.

A. Lawton Enjoys Qualified Immunity from Echols's Claim of Retaliation Under the First Amendment.

Lawton contends that he is entitled to qualified immunity from Echols's complaint of retaliation in violation of the First Amendment. "Qualified immunity shields public officials from liability for civil damages when their conduct does not violate a constitutional right that was clearly established at the time of the challenged action." *Bailey v. Wheeler*, 843 F.3d 473, 480 (11th Cir. 2016). To obtain a dismissal based on qualified immunity, "a government official must first establish that he was acting within the scope of his discretionary authority when the alleged wrongful act occurred." *Id.* If he was, the burden then shifts to the plaintiff to overcome the official's qualified immunity. *Mikko v. City of Atlanta*,857 F.3d 1136, 1144 (11th Cir. 2017). To overcome qualified immunity, a plaintiff must "plead[] facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

Echols argues that Lawton acted outside the scope of his discretionary authority when he sent the letter to the legislators, but we disagree. To be sure, "[a] prosecutor's most basic duty is to prosecute cases in his jurisdiction on behalf of the State." *Mikko*, 857 F.3d at 1144. But we have explained "[r]elated to that duty,"a prosecutor's discretionary authority also includes "communicat[ions] with other law enforcement agencies, officials, or employees about current or potential prosecutions." *Id.* Prosecutors must and do

regularly communicate with legislators about a variety of issues related to their offices and the criminal justice system. Those issues may involve administrative and financial matters, public safety and criminal justice policies, and past, pending, or future prosecutions. Lawton's letter addressed the public fisc and both a past prosecution and a potential future prosecution, so his communication with legislators was clearly "within, or reasonably related to the outer perimeter of [his] discretionary duties." *Id.*(emphasis omitted) (citation omitted). Because Lawton satisfied his initial burden to invoke qualified immunity, the burden shifted to Echols.

We agree with the district court that Lawton enjoys qualified immunity from Echols's complaint, but we do so for a different reason. In contrast with the district court, we conclude that Echols's complaint states a valid claim that Lawton violated a right protected by the First Amendment. But even so, that right was not clearly established when Lawton allegedly violated it.

1.Echols Stated a Claim of Retaliation in Violation of the First Amendment.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or . . . the right . . . to petition the government for a redress of grievances." U.S. Const. Amend. I. The Amendment protects "not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right." *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000). To state a claim for First Amendment retaliation, a plaintiff must allege that he engaged in protected

speech, that the official's conduct adversely affected the protected speech, and that a causal connection exists between the speech and the official's retaliatory conduct. *Bailey*, 843 F.3d at 480–81. Only the second element is at issue in this appeal.

When reviewing an official's retaliatory conduct for adverse effect, we consider whether his alleged conduct "would likely deter a person of ordinary firmness from the exercise of First Amendment rights," *id.* at 481, but we have acknowledged that special concerns arise when an official's "own First Amendment rights are implicated" in the commission of an alleged constitutional tort, *Dixon v. Burke Cty.*, 303 F.3d 1271, 1275 (11th Cir. 2002) (citing *Suarez Corp.*, 202 F.3d at 687). Because Lawton allegedly retaliated through his own speech to members of the General Assembly, the district court considered whether his speech amounted to "a threat, coercion, or intimidation intimating that punishment, sanctions, or adverse regulatory action will imminently follow," as several of our sister circuits have done in similar cases. *See, e.g.*, *Suarez Corp.*, 202F.3d at 687 (collecting cases); *see also Mirabella v. Villard*, 853 F.3d 641, 651 (3dCir. 2017); *Mulligan v. Nichols*, 835 F.3d 983, 990 (9th Cir. 2016); *Goldstein v.Galvin*, 719 F.3d 16, 30 (1st Cir. 2013); *Hutchins v. Clarke*, 661 F.3d 947, 956 (7thCir. 2011); *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 70 (2d Cir. 1999); *Colson v.Grohman*, 174 F.3d 498, 512 (5th Cir. 1999); *Penthouse Int'l, Ltd. v. Meese*, 939F.2d 1011, 1015 (D.C. Cir. 1991). Our sister circuits have required that an official's retaliatory speech amount to a threat, coercion, or intimidation to reconcile two competing rights: a plaintiff's right to be free from retaliation for

exercising his First Amendment rights and an official's right to engage in protected speech. *Suarez Corp.*, 202 F.3d at 687 n.13. But we need not resolve the difficult question whether that test strikes the right balance under the First Amendment in this appeal.

Echols argues that Lawton's speech presents an easier case because it amounted to defamation. Defamation is among the "historic and traditional categories of expression long familiar to the bar" that fall outside the protection of the First Amendment. *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion) (alteration adopted) (citation and internal quotation marks omitted). Echols maintains that Lawton's defamation of him raises no concerns about competing First Amendment rights.

Echols's argument that Lawton defamed him raises two questions. First, does Lawton's alleged speech qualify as defamation? Second, if so, does the First Amendment protect it?

To state a claim for defamation under Georgia law, a plaintiff must allege "(1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault by the defendant amounting at least to negligence; and (4) special harm or the actionability of the statement irrespective of special harm." *Mathis v. Cannon*, 573 S.E.2d 376, 380 (Ga. 2002) (quoting Restatement (Second) of Torts § 558 (Am. Law Inst. 1977)). A statement is not actionable as defamation when it conveys a pure opinion, *Gast v. Brittain*, 589S.E.2d 63, 64 (Ga. 2003), or a true statement of fact, O.C.G.A. § 51-5-6. When we consider whether a statement is

defamatory, we "read and construe the publication as a whole, and in the sense in which the readers to whom it is addressed would understand it." *Hoffman-Pugh v. Ramsey*, 312 F.3d 1222, 1225 (11th Cir. 2002)(citing *Mead v. True Citizen, Inc.*, 417 S.E.2d 16, 17 (Ga. Ct. App. 1992)).

Libel consists of the publication of defamatory statements in writing, O.C.G.A. § 51-5-1, and some written statements are libel *per se*. Libel *per se* is actionable without proof of special harm. *Cottrell v. Smith*, 788 S.E.2d 772, 780–81 (Ga. 2016).

Libel *per se* includes "falsely stat[ing] . . . that a person has a criminal case pending against him." *Harcrow*, 511 S.E.2d at 546; *Witham v. Atlanta Journal*, 53 S.E. 105, 107 (Ga. 1906) (explaining that a statement that "in effect charges that there are criminal cases pending against [the plaintiff]" is libel *per se* (internal quotation marks omitted)); *see also Cottrell*, 788 S.E.2d at 780–81 (explaining that a false statement imputing a crime to the plaintiff is libel *per se*). To establish libel *per se*, the statement "must charge the commission of a specific crime punishable by law" by "giv[ing] the impression that the crime is actually being charged against the individual." *Cottrell*, 788 S.E.2d at 781.

Echols's complaint alleges facts that would constitute libel *per se*. It alleges that Lawton falsely stated in writing that Echols remained under indictment for kidnapping and rape. To be sure, some of Lawton's written statements convey either his opinion or true statements of fact, but the legislators to whom Lawton addressed his alleged writing would

have understood it to state as a fact that Echols stood charged of kidnapping and rape. That alleged statement was false because a Georgia court had dismissed the indictment against Echols four years earlier. By falsely stating that Echols "ha[d] a criminal case pending against him," Lawton allegedly committed libel *per se*. *Harcrow*, 511 S.E.2d at 546. And libel *per se* is actionable irrespective of special harm. *Cottrell*, 788 S.E.2d at 780–81.

Because Echols's complaint alleges that Lawton committed libel *per se*, we next consider whether the alleged defamation is nevertheless protected by the First Amendment. Defamation is unprotected when the speaker committed the tort with actual malice. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)(holding that a public official or public figure can recover damages for defamation on a matter of public concern only if he proves that the speaker acted with actual malice); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348–49 (1974) (holding that, although a private figure can recover damages for defamation if he proves the speaker acted negligently, he must prove actual malice to recover presumed or punitive damages if the statement was on a matter of public concern). Actual malice exists when the speaker has knowledge that the statement is false or when he speaks with reckless disregard for whether it is false. *Sullivan*, 376 U.S. at 280.

Even if we were to assume that Echols was a public figure or that Lawton spoke about a matter of public concern, Echols's complaint alleges that Lawton defamed him with actual malice. The complaint alleges

that Lawton knew his statement that Echols remained under indictment was false because Lawton's office had dismissed the charges against him after he presented DNA evidence to Lawton and the state crime lab confirmed the results of the DNA test. Indeed, after Lawton declined to retry Echols, a Georgia court dismissed the indictment against him. Because the complaint alleges that Lawton knew that Echols no longer remained under indictment for kidnapping and rape, Lawton's alleged defamatory statement was made with actual malice.

The First Amendment affords no protection to Lawton's alleged libel of Echols, so no "balance must be struck" here between the First Amendment rights of a plaintiff alleging retaliation for his speech and an official who allegedly retaliated through his own speech. *Suarez Corp.*, 202 F.3d at 687 n.13. We must instead determine only whether Lawton's alleged libel violated Echols's rights under the First Amendment.

We acknowledge that some of our sister circuits have held that defamation is not actionable as retaliation in violation of the First Amendment, but their decisions do not persuade us. These circuits have held that an official's defamatory speech by itself cannot constitute retaliation in violation of the First Amendment. *See id.* at 687 (holding that an official's speech, "even if defamatory," does not amount to retaliation unless it is a threat, coercion, or intimidation); *Colson*, 174 F.3d at 512 (holding that allegedly defamatory accusations, "while they may chill speech, are not actionable under our First Amendment retaliation jurisprudence"); *Gini v. Las Vegas Metro.*

Police Dep't, 40 F.3d 1041, 1045 (9th Cir. 1994). The decisions of both the Fourth and the Fifth Circuits provide little explanation for their reasoning, but they appear to rest on a misreading of *Paul v. Davis*, 424 U.S. 693 (1976), that originated in the Ninth Circuit, *see Suarez Corp.*, 202 F.3d at 687, 688 & n.14; *Colson*, 174 F.3d at 512, 514 & n.10; *Gini*, 40 F.3d at 1045. In *Gini*, the Ninth Circuit held that, under *Paul*, defamation is not actionable as retaliation absent harm to a more tangible interest than reputation. 40 F.3d at 1045. But in *Paul*, the Supreme Court addressed a distinct issue; it held that defamation standing alone cannot deprive a plaintiff of his right to *due process*. 424 U.S. at 712. And whether defamation may constitute a violation of procedural due process does not dictate whether it can constitute retaliation in violation of the First Amendment. "The fact that reputation, the interest that the law of defamation primarily protects, is not a form of constitutional liberty or property [under the Due Process Clause] doesn't mean that freedom of speech is not a constitutionally protected liberty—as of course it is." *Tierney v. Vahle*, 304 F.3d 734, 741 (7th Cir. 2002) (rejecting the Ninth Circuit's reasoning in *Gini*).

We reject the notion that the First Amendment protects an official's defamatory speech from a claim of retaliation. After a plaintiff engages in protected speech, an official may retaliate with physical or economic harm, but he may also retaliate with injurious speech. We agree with other circuits that sometimes "defamation inflicts sufficient harm on its victim to count as retaliation." *Id.*; *see also Zutz v. Nelson*, 601 F.3d 842, 849 (8th Cir. 2010); *Mattox v.*

City of Forest Park, 183 F.3d 515, 521 & n.3 (6th Cir. 1999). To decide whether defamation in a particular case is retaliatory, the Sixth and Eighth Circuits apply the same test of ordinary firmness as they would for any other claim of retaliation. *See Mezibov v. Allen*, 411 F.3d 712, 721 (6th Cir. 2005) ("[T]he appropriate formulation of the 'adverse action' prong in [this] case is whether the alleged defamation would deter [a person] of ordinary firmness [in the plaintiff's position] from continuing [to engage in protected speech]."); *see also Zutz*, 601 F.3d at 849 (applying the ordinary firmness test to retaliation based on an official's alleged defamation). We agree with this approach and decline to create special rules for claims of retaliation based on an official's defamation.

We next consider whether Lawton's alleged libel *per se* would have deterred a person of ordinary firmness from exercising his rights under the First Amendment. *See Bennett v. Hendrix*, 423 F.3d 1247, 1254 (11th Cir. 2005); *see, e.g.*, *Bloch v. Ribar*, 156 F.3d 673, 681 (6th Cir. 1998) (holding that, in response to a rape victim's criticism of the investigation, a sheriff's release of confidential and humiliating information about the victim's rape would likely deter a person of ordinary firmness from engaging in protected speech). An objective standard governs our inquiry. *Bailey*, 843 F.3d at 481. And "since there is no justification for harassing people for exercising their constitutional rights," the adverse effect"need not be great." *Bennett*, 423 F.3d at 1254 (citation omitted).

Lawton's alleged libel *per se* that Echols remained under indictment would likely deter a person of

ordinary firmness from engaging in protected speech. When Echols exercised his freedom of speech and right to petition the government by seeking compensation for his wrongful convictions, Lawton allegedly retaliated by defaming him. Lawton allegedly misled legislators to believe, as a matter of fact, that Echols remained under indictment for kidnapping and rape—the very charges for which Echols had been wrongly convicted. Lawton, more than any other official, spoke with authority and credibility because he represented the state in its earlier prosecution of Echols for kidnapping and rape and continued to hold that office. But Lawton allegedly knew that the state had entered a *nolle prosequi* on these charges four years earlier. *See State v. Sheahan*, 456 S.E.2d 615, 617 (Ga.Ct. App. 1995) ("The entry of the *nolle prosequi* rendered the charge[s] dead . . . ."). If a district attorney defamed a former prisoner for seeking legislative compensation for his wrongful convictions and derailed that legislative effort, a person of ordinary firmness would likely be deterred from speaking again on that matter lest the prosecutor continue to tarnish his reputation or, worse, initiate a wrongful prosecution. So Echols's complaint states a claim of retaliation under the First Amendment.

2. Lawton Did Not Violate a First Amendment Right That Was Clearly Established.

To defeat Lawton's qualified immunity, Echols must also prove that Lawton violated a constitutional right that "was 'clearly established' at the time of the challenged conduct." *Plumhoff v. Rickard*, 572 U.S. 765, 778 (2014) (quoting *al-Kidd*, 563 U.S. at 735). An

official's conduct violates clearly established law when "the contours of [the] right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *al-Kidd*, 563 U.S. at 741 (alterations adopted) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640(1987)). We consider the official's conduct in "the specific context of the case,"not as "broad general proposition[s]." *Bailey*, 843 F.3d at 484; *see also al-Kidd*, 563 U.S. at 742 ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality."). And we ask the "salient question . . . whether the state of law at the time of [an official's conduct] provided 'fair warning,'" to every reasonable official that the conduct clearly violates the Constitution. *Mikko*, 857 F.3d at 1146.

Echols can "demonstrate that the contours of the right were clearly established in one of three ways." *Loftus v. Clark-Moore*, 690 F.3d 1200, 1204 (11th Cir. 2012) (alteration adopted) (citation and internal quotation marks omitted). First, he can point us to a "materially similar case [that] has already been decided." *Id.* (citation and quotation marks omitted). Second, he can point us to "a broader, clearly established principle that should control the novel facts of the situation." *Id.* (alterations adopted). Third, "the conduct involved in the case may so obviously violate the [C]onstitution that prior case law is unnecessary." *Id.* at 1205 (alterations adopted). Echols's arguments fail under all of these approaches.

Echols contends that an assortment of decisions clearly established Lawton's violation of his rights, but

he cites no controlling precedent that would have provided Lawton fair notice that his conduct would violate the First Amendment. Although "[w]e do not require a case directly on point, [some] existing precedent must have placed the . . . constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. We look only to binding precedent at the time of the challenged conduct—that is, "the decisions of the Supreme Court, the Eleventh Circuit, or the highest court of the state." *Bailey*, 843 F.3d at 483–84. And a clearly established violation of state law cannot put an official on notice that his conduct would also violate the Constitution because "section 1983 protects only against violations of federally protected rights." *Casnines v. Murchek*, 766 F.2d 1494, 1501 n.10 (11th Cir. 1985).

Echols relies either on precedents that are inapposite, *see, e.g.*, *United States v. Noriega*, 117 F.3d 1206, 1220 (11th Cir. 1997) (discussing a prosecutor's duty not to present false evidence during a judicial proceeding), or on decisions that are not precedential, *see, e.g.*, *Lucas v. Parish of Jefferson*, 999 F. Supp. 839 (E.D. La.1998). And he relies on decisions from other jurisdictions, some of which even postdate Lawton's alleged violation, *see, e.g.*, *Whitlock v. Brueggemann*, 682 F.3d 567, 581 (7th Cir. 2012). Although Lawton clearly would have had fair notice that his alleged writing constituted libel *per se* under state tort law, he would not have understood that his alleged libel would have violated the First Amendment. No controlling precedent put Lawton's alleged violation beyond debate.

Echols also relies on the broader principle "that the act of retaliation for the exercise of constitutional rights is clearly established as a violation," but this general principle is too broadly stated to control our inquiry. "[S]ome broad statements of principle in case law [that] are not tied to particularized facts . . . can clearly establish law applicable in the future to different sets of detailed facts."*Vinyard v. Wilson*, 311 F.3d 1340, 1351 (11th Cir. 2002). But the principle must establish with "obvious clarity" that "in the light of pre-existing law the unlawfulness [of the official's conduct is] apparent." *Id.* at 1353. True, "it is'settled law' that the government may not retaliate against citizens for the exercise of First Amendment rights." *Bennett*, 423 F.3d at 1256. But that general principle does not resolve with "obvious clarity" that defamation may constitute retaliation in violation of the First Amendment. *See also Reichle v. Howards*, 566 U.S. 658,665 (2012) (rejecting the argument that "the general right to be free from retaliation for one's speech" clearly establishes a violation of the First Amendment).

Echols also fails to persuade us that Lawton's conduct "so obviously violate[d] the [C]onstitution that prior case law is unnecessary." *Loftus*, 690 F.3d at 1205. "This narrow category encompasses those situations where the official's conduct lies so obviously at the very core of what the relevant constitutional provision prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law." *Id.* (alteration adopted) (internal quotation marks omitted) (quoting *Terrell v. Smith*, 668 F.3d 1244, 1257 (11th Cir. 2012)).

"[I]n the absence of controlling precedent, cases decided outside this Circuit can buttress our view that the applicable law was *not* already clearly established" because "[w]e must not hold [officials] to a higher standard of legal knowledge than that displayed by the federal courts in reasonable and reasoned decisions." *Youmans v. Gagnon*, 626 F.3d 557, 565 (11th Cir. 2010).

Lawton's conduct does not fall within this "narrow category." As we have explained, our sister circuits are divided over whether an official's defamatory speech is actionable as retaliation under the First Amendment. It has certainly not been obvious to the federal courts that an official's defamatory speech lies at the core of what the First Amendment prohibits. "[W]here judges thus disagree on a constitutional question," we cannot "expect that reasonable [officials] know more than reasonable judges about the law." *Id.* (citations and quotation marks omitted). So we cannot say that it would have been "readily apparent" to every reasonable official that Lawton's alleged defamation violated the First Amendment. *Id.*

Critics of the doctrine of qualified immunity condemn "letting [an] official duck consequences for bad behavior." *Zadeh v. Robinson*, 902 F.3d 483, 498 (Willett, J., concurring dubitante) (5th Cir. 2018); William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018). And we too condemn Lawton's alleged conduct. But the Supreme Court has long ruled that qualified immunity protects a badly behaving official unless he had fair notice that his conduct would violate the Constitution, *District of Columbia v. Wesby*,

138 S. Ct. 577, 589–91 (2018); *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018), though at least one justice may harbor doubts, *see Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J.,concurring in part and in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."). "Because the Constitution's general provisions can be abstract," fair notice protects an official from "liab[ility] for conduct that [he could] reasonably believe[] was lawful." Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1873 (2018). So even when an official behaves badly, "qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 563 U.S. at 743.

Recall that the Constitution does not provide the only standard for redress for those wronged by public officials. For example, Lawton's alleged conduct could have been reviewed and sanctioned by the State Bar. *See* Ga. R. Prof'l Conduct 3.8(g), 8.4. Echols could have also filed a claim under state tort law against Lawton. *See Cottrell*, 788 S.E.2d at 780–81. But Echols chose to frame his complaint as a federal case alleging a violation of the Constitution, 42 U.S.C. § 1983.

Section 1983 is not a "font of tort law [that] converts [every] state law tort claim[] into [a] federal cause[] of action." *Waddell*, 329 F.3d at 1305 (citation and internal quotation marks omitted). When a plaintiff complains that a public official has violated the Constitution, qualified immunity shields the official from individual liability unless he had fair notice that

his alleged conduct would violate "the supreme Law of the Land." U.S. Const. Art. VI. Because Lawton lacked that fair notice, he enjoys qualified immunity from Echols's claim of retaliation.

B. Lawton Enjoys Qualified Immunity from Echols's Claim Under the Due Process Clause.

We also agree with the district court that Lawton enjoys qualified immunity from Echols's claim that Lawton violated his right to substantive due process, but we again do so for a different reason. The district court ruled that Echols failed to state a claim under the standards that govern substantive due process because Echols failed to allege either a violation of a fundamental liberty or government conduct that shocks the conscience, but Echols's claim fails for a simpler reason: the text of the First Amendment sets the specific standard for it. As we have already explained, the First Amendment protects Echols's right to be free from retaliation by Lawton, a public official, for the exercise of Echols's right to speak. *See Bailey*, 843 F.3d at 480–81. And the Due Process Clause cannot be used to supplement that substantive right.

"Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (alteration omitted) (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion)); *see also Graham v. Connor*, 490 U.S. 386, 395 (1989). In the Bill of Rights, the "Framers

sought to restrict the exercise of arbitrary authority by the [g]overnment in particular situations." *Albright*, 510 U.S. at 273 (plurality opinion). So when the Framers considered a matter and drafted an amendment to address it, *id.* at 274, a substantive-due-process analysis is inappropriate, *Lewis*, 523 U.S. at 843. We must "analyze[] [the claim] under the standard appropriate to that specific provision, not under the rubric of substantive due process." *Lewis*, 523 U.S. at 843 (quoting *United States v. Lanier*, 520 U.S.259, 272 n.7 (1997)).

The district court's error was understandable. Confusion in jurisprudence that can be fairly described as untethered from the text of the Constitution—on its face, after all, "the Due Process Clause guarantees *no* substantive rights, but only(as it says) process," *United States v. Carlton*, 512 U.S. 26, 40 (1994) (Scalia, J., concurring in the judgment)—should not be surprising. For that reason, the Supreme Court has been "reluctant to expand the concept of substantive due process." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). So where, as here, a specific constitutional provision covers a plaintiff's claim, the requirements of that provision "are not to be supplemented through the device of 'substantive due process.'" *Albright*, 510 U.S. at 276 (Scalia, J., concurring).

IV. CONCLUSION

We **AFFIRM** the judgment in favor of Lawton.

GILMAN, Circuit Judge, concurring:

I fully concur in the lead opinion's holding that Echols's complaint states a valid claim of retaliation under the First Amendment. Reluctantly, I also agree that Lawton is entitled to qualified immunity on this claim because the then-existing law in the Eleventh Circuit did not clearly establish that Lawton's egregious conduct violated Echols's constitutional rights. Several pertinent cases from other circuits hold that defamatory speech by a public official does not constitute First Amendment retaliation "in the absence of a threat, coercion, or intimidation," *see, e.g.*, *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 687 (4th Cir. 2000), and none of these actions were attributed to Lawton in Echols's complaint. And although authority exists to the contrary, *see, e.g.*, *Tierney v. Vahle*, 304 F.3d 734, 740 (7th Cir. 2002) (concluding that "defamation inflicts sufficient harm on its victim to count as retaliation [and thus] be capable of deterring the exercise of free speech"),the Eleventh Circuit has not previously opined one way or the other on this issue. This lack of consensus supports the proposition that Lawton's defamatory statement that Echols was still under indictment for kidnapping and rape, as vindictive and unjustified as that statement appears to be, was not a clearly established violation of Echols's First Amendment rights.

I further agree with the lead opinion's conclusion that clear Supreme Court precedent prevents Echols from invoking the rubric of substantive due process as a basis to hold Lawton accountable for a First Amendment violation. But for this binding precedent,

I would have concluded that Lawton's statement "shocks the conscience." An official's conduct most likely shocks the conscience—and thus violates an individual's substantive-due-process rights—if the conduct was "intended to injure in some way unjustifiable by *any* government interest." *Davis v. Carter*, 555 F.3d 979, 982 (11th Cir. 2009) (emphasis added) (citation omitted).

As applied to the present case, there can be no doubt that Lawton's false statement to the Georgia legislature that Echols was still under indictment for kidnapping and rape was intended to injure Echols. This leaves the question of what possible governmental interest justified Lawton in making that libelous statement. I can think of none. Nor has any such justification been articulated by either Lawton or the district court. I suggest that this total silence is due to the fact that no such justification exists.

In any event, we are bound by Supreme Court precedent from providing relief to Echols on the basis of substantive due process. My only comfort with this result is knowing that if another official in this circuit henceforth engages in conduct similar to Lawton's, he or she will not be entitled to hide behind the doctrine of qualified immunity.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

CASE NO. CV408-023

[Filed July 28, 2017]

DOUGLAS ECHOLS,

Plaintiff,

v.

SPENCER LAWTON, in his individual capacity,

Defendant.

ORDER

Before the Court is Defendant's Motion to Dismiss Amended Complaint by Special Appearance (Doc. 29.) For the following reasons, Defendant's motion is **GRANTED**. As a result, Plaintiff's complaint is **DISMISSED**. The Clerk of Court is **DIRECTED** to close this case.

BACKGROUND

This case revolves around Plaintiff Douglas Echols's exoneration for rape and kidnapping convictions.[1] In 1987, Plaintiff was convicted in the Superior Court of Chatham County of those two offenses and sentenced to a fifteen–year term of imprisonment. (Doc. 26, ¶¶ 8, 13.) While imprisoned, Plaintiff endured numerous attacks because he had been convicted of a sex offense. (Id. ¶¶ 14-16.) Plaintiff was also dishonorably discharged from the United States Army. (Id. ¶ 17.) After serving five years in prison, Plaintiff was released on parole, monitored using an ankle bracelet, and required to register as a sex offender. (Id. ¶¶ 19-21.) In an effort to secure meaningful employment, Plaintiff violated his parole by traveling outside the Savannah area. (Id. ¶ 22.) Ultimately, Plaintiff served an additional two-years imprisonment based on that parole violation. (Id.)

In July 2001, a DNA test conducted by a third party determined that the semen obtained from the rape victim was not from Plaintiff. (Id. ¶ 23.) Plaintiff promptly presented this DNA evidence to the Chatham County District Attorney-Defendant Spencer Lawton. (Id. ¶ 24.) Defendant ordered additional DNA testing from the Georgia State Crime Lab, which confirmed

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[1] At this stage of the litigation, the Court must accept the allegations in Plaintiff's amended complaint as true and draw all reasonable inferences in his favor. See Chaparro v. Carnival Corp., 693 F. 3d 1333, 1335 (11th Cir. 2012) .The Court has related the facts accordingly, but expresses no opinion as to what a fully developed record would actually show.

that the semen collected in connection with the rape conviction was not from Plaintiff. (Id. ¶¶ 25–26.)

After hearing this new evidence, the Chatham County Superior Court concluded that it was "so material that it would likely result in a different outcome at trial." (Id. ¶ 27.) That court granted Plaintiff a new trial, and the rape and kidnapping indictment against Plaintiff was dismissed. (Id. ¶¶ 27–28.) Ultimately, the State declined to proceed and entered a nolle prosequi with respect to those charges. (Id. ¶ 29.)

Based on the vacated convictions, a local member of the Georgia House of Representative presented House Resolution 96 to the Georgia General Assembly. (Id. ¶ 36.) That resolution sought to provide Plaintiff with $1,600,000 in compensation for losses related to his vacated convictions. (Id.) On two occasions, the Georgia Claims Advisory Board considered House Resolution 96 and unanimously determined that Plaintiff should receive compensation in an amount to be determined by the General Assembly. (Id. ¶¶ 38-39.)

Somewhere in this process, Defendant[2] sent Senator Jack Hill a February 8, 2006 letter regarding House Resolution 96. (Id. ¶ 40.) Defendant also emailed a memorandum to several other legislators. (Id. ¶ 41.) In these communications,[3] Defendant "claimed that

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[2] At that time, Defendant was still serving as the Chatham County District Attorney.

[3] The Court notes that neither party placed in the record copies of these communications. There is no general prohibition on placing

Plaintiff's conviction and imprisonment for the crimes of rape and kidnapping were proper and fitting, even though Plaintiff's conviction had been vacated and a new trial had been granted." (Id. ¶ 45.) In addition, Defendant stated that Plaintiff remained under indictment, despite knowing that a nolle prosequi had been entered on those charges in October 2002. (Id. ¶¶ 46–47.) Defendant also opined that "the Georgia Legislature should not give Plaintiff the benefit of the presumption of innocence of the crimes of rape and kidnapping for which he had been imprisoned," and that "the vacation of Plaintiff's conviction[s] and grant of a new trial did not establish Plaintiff's innocence." (Id. ¶ 48.) Defendant "insisted that Plaintiff should not be compensated for his imprisonment for nearly sixteen years under [ ] conviction[s] that had been overturned, unless Plaintiff actually proved that he was innocent of the crimes of rape and kidnapping." (Id. ¶ 49.) According to Plaintiff, the General Assembly failed to pass House Resolution 96 "specifically due to Defendant Lawton's correspondence." (Id. ¶ 55.)

Based on those events, Plaintiff filed a complaint in this court (Doc. 1), which he later amended (Doc. 26).

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items in the record at this early stage in the proceedings. Moreover, the Court may consider an extrinsic document when ruling on a motion to dismiss if that document is "(1) central to the plaintiff's claim, and (2) its authenticity is not challenged." SFM Holdings, Ltd. v. Banc of Am. Sec., LLC, 600 F.3d 1334, 1337 (11th Cir. 2010) (citing Day v. Taylor, 400 F.3d 1272, 1276 (11th Cir. 2005)). Regardless, neither Plaintiff nor Defendant thought to submit these documents. As a result, the Court pressed forward without the benefit of actually knowing what Defendant told members of the General Assembly.

In the amended complaint, Plaintiff brings three substantive counts against Defendant, all based on 42 U.S.C. § 1983. (Id. ¶¶ 56–66.) In Count One, Plaintiff alleges that Defendant violated § 1983 by denying Plaintiff's "constitutional rights to substantive and procedural due process, which rights are fundamental and guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution." (Id. ¶ 57.) Count Two argues that Defendant interfered and abridged "Plaintiff's constitutional rights to freedom of speech and right to petition the Government for redress of his grievances, which rights are fundamental and guaranteed by the First and Fourteenth Amendments." (Id. ¶ 61.) Finally, Count Three claims that Defendant "retaliate[d] against Plaintiff Douglas Echols for exercising his constitutional rights to freedom of speech and to petition the Government for redress of his grievances." (Id. ¶ 65.) Based on these claims, Plaintiff seeks both compensatory and punitive damages, as well as attorney fees and costs. (Id. ¶ 71.)

In his Motion to Dismiss, Defendant contends that Plaintiff's § 1983 claims lack merit because Plaintiff has failed to identify any specific right, privilege, or immunity secured by the Constitution or laws of the United States that was denied by Defendant. (Doc. 29, Attach. 1 at 7.) In addition, Defendant argues that he is entitled to both prosecutorial (id. at 15-20) and qualified immunity (id. at 21-25).

In response, Plaintiff maintains that Defendant deprived Plaintiff of his constitutional rights by denying him substantive due process (Doc. 30 at 10-11); procedural due process (id. at 15-17); liberty, property,

and the presumption of innocence (id. at 12-14); and the First Amendment right to petition and seek redress from the General Assembly (id. at 17-18). Also, Plaintiff argues that Defendant is not entitled to absolute prosecutorial immunity because the nolle prosequi entered on the rape and kidnapping charges ended the judicial process. (Id. at 3-8.) Finally, Plaintiff reasons that qualified immunity is inapplicable in this case because Defendant was not exercising his discretionary authority and deprived Plaintiff of clearly established constitutional rights. (Id. at 18-20.)

ANALYSIS

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure 8 (a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). "A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" Id. (quoting Twombly, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Id. (quoting Twombly, 550 U.S. at 557) (alteration in original).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id.

(quoting Twombly, 550 U.S. at 570). For a claim to have facial plausibility, the plaintiff must plead factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1261 (11th Cir. 2009) (quotations omitted) (quoting Iqbal, 556 U.S. at 678). Plausibility does not require probability, "but it asks for more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557) . Additionally, a complaint is sufficient only if it gives "fair notice of what the . . . claim is and the grounds upon which it rests." Sinaltrainal, 578 F.3d at 1268 (quotations omitted) (quoting Twombly, 550 U.S. at 555) .

When the Court considers a motion to dismiss, it accepts the well-pleaded facts in the complaint as true. Sinaltrainal, 578 F.3d 1252 at 1260. However, this Court is "not bound to accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678. Moreover, "unwarranted deductions of fact in a complaint are not admitted as true for the purpose of testing the sufficiency of [plaintiff's] allegations." Sinaltrainal, 578 F.3d at 1268 (citing Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1248 (11th Cir. 2005)). That is, "[t]he rule 'does not impose a probability requirement at the pleading stage,' but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." Watts v. Fla. Int'l

Univ., 495 F.3d 1289, 1295-96 (11th Cir. 2007) (quoting Twombly, 550 U.S. at 545).

II. 42 U.S.C. § 1983

Section 1983 does not include any provision that creates substantive rights, but provides only a remedy for "deprivations of federal statutory and constitutional rights." Almand v. DeKalb Cty., 103 F.3d 1510, 1512 (11th Cir . 1997) (citing Whiting v . Traylor, 85 F.3d 581, 583 (11th Cir. 1996)). A requirement of any valid claim under § 1983 is the alleged deprivation of at least one of the plaintiff's federal constitutional or statutory rights by a defendant acting under color of state law.[4] Id. (citing Harvey v. Harvey, 949 F.2d 1127, 1130 (11th Cir. 1992)). The specific facts peculiar to each case determine whether a plaintiff was deprived of such a right. Singletary v. Vargas, 804 F.3d 1174, 1180 (11th Cir. 2015) (citing McCullough v. Antolini, 559 F.3d 1201, 1202 (11th Cir. 2009)). In this case, Plaintiff alleges that Defendant's actions deprived him of substantive due process (Doc. 30 at 10-14); procedural due process (id. at 15-17); and the First Amendment rights to petition and seek redress from the General Assembly (id. at 17-18).

A. Substantive Due Process

In his amended complaint, Plaintiff alleges that Defendant's actions denied Plaintiff his constitutional right to substantive due process. (Doc. 26 ¶ 57.) In his

[4] This case does not involve the alleged deprivation of any federal statutory rights. In addition, the parties agree that Defendant was acting under color of state law at all times relevant to this case.

Motion to Dismiss, Defendant argues that Plaintiff has failed to identify any fundamental "right itself that merits substantive due process protection." (Doc. 29, Attach. 1 at 10.) In response, Plaintiff claims that Defendant denied him substantive due process by depriving Plaintiff of liberty, property, and the presumption of innocence. (Doc. 30 at 12-15.) In addition, Plaintiff claims that Defendant's conduct is actionable under substantive due process because it "shocks the conscience." (Id. at 10-11.)

The notion of substantive due process works to "protect[] those rights that are fundamental, that is, rights that are implicit in the concept of ordered liberty." Kentner v. City of Sanibel, 750 F.3d 1274, 1279 (11th Cir. 2014) (quotations omitted) (quoting McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994)). Fundamental rights are those found in the Constitution, id. (citing DeKalb Stone, Inc. v. Cty. Of DeKalb, Ga., 106 F.3d 956, 959 n.6 (11th Cir. 1997)), and a small class of unenumerated rights such as the penumbral right of privacy, McKinney, 20 F. 3d at 1556 (citing Planned Parenthood v. Casey, 505 U.S. 833, ___ (1992)). The Supreme Court strongly cautions against expanding the scope of substantive due process because of the inability to sufficiently narrow its parameters by providing reasonable "guideposts for responsible decisionmaking." Collins v. City of Harker Heights, Tex., 503 U.S. 115, 125 (1992) (citing Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225-26 (1985)). At its heart, substantive due process is "intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" Id. at 126 (quoting

DeShaney v. Winnebago Cty. Dept. of Soc. Servs., 489 U.S. 189, 196 (1989)).

Moreover, only official conduct that is arbitrary or conscience-shocking will rise to the level of a substantive due process violation. Davis v. Carter, 555 F.3d 979, 982 (11th Cir. 2009). In this respect, the category of actionable conduct is only that which falls at the far "end[ ] of the tort law's spectrum of culpability." Cty. of Sacramento v. Lewis, 523 U.S. 833, 848 (1998). Conduct shocks the conscience when it is most likely "intended to injure [the plaintiff] in some way unjustifiable by any government interest." Id. at 849.

1. Liberty, Property, and the Presumption of Innocence

Plaintiff attempts to ground his substantive due process claim in the denial of his fundamental rights to liberty, property, and the presumption of innocence. (Doc. 30 at 12-15.) The complaint bases this claim on the notion that Defendant's comments were the direct cause of the General Assembly's failure to pass House Resolution 96, resulting in Plaintiff losing the $1,600,000 in compensation proposed in that resolution. However, Plaintiff fails to meaningfully articulate how Defendant's conduct deprived him of any specific interests previously recognized in federal court. Rather, Plaintiff seems to rest on the general idea that Defendant's false statements deprived him of two protected interests: (1) a property interest in the $1,600,000 he would have received absent Defendant's conduct and (2) Plaintiff's liberty interest in being presumed innocent of any crime.

In support of this argument, Plaintiff relies almost entirely on the Fifth Circuit Court of Appeal's decision in In re Smith, 656 F.2d 1101 (5th Cir. 1981). In that case, federal prosecutors identified the petitioner during the factual summaries of guilty pleas in two separate cases, neither of which named him as a co-defendant, as the individual that accepted bribes while head of the Army and Air Force Exchange Service ("AAFES"). Id. at 1102-03. In addition, the petitioner was never indicted for any crime. Id. at 1104. When the petitioner attempted to retire, AAFES denied him additional retirement benefits under an Executive Management Program because he was identified in the plea colloquies as having received bribes. Id. at 1105. As a result, the petitioner sought a Writ of Mandamus directing the district court to strike his name from the plea colloquies. Id. The petitioner claimed that he was entitled to relief because the prosecutor's characterization of his involvement "so damaged his name, reputation, and economic interests that the government's actions [ ] violated his liberty and property interests contrary to the due process protection afforded by the Fifth Amendment of the United States Constitution." Id.

The Fifth Circuit agreed that the petitioner's name should be stricken from the records because its inclusion was "a violation of his liberty and property rights guaranteed by the Constitution." Id. at 1107. Also, including the petitioner's name denied him the presumption of innocence by implicating him "in criminal conduct without affording him a forum for vindication." Id. The Fifth Circuit reasoned that including the petitioner's name was unnecessary,

immaterial, and irrelevant to the plea colloquies, and neither served a legitimate purpose nor advanced the interest of the criminal justice system. Id. at 1106-07.

The factual scenario in this case, however, is markedly different. First, Defendant's statements were not made in connection with any ongoing criminal proceeding, but rather during the deliberative process regarding a proposed house resolution that would have compensated Plaintiff for the vacated convictions. The presumption of innocence is a right enjoyed by individuals in the context of criminal proceedings, not legislative debates. See, e.g., Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." (quotations omitted and emphasis added) (quoting Coffin v. United States, 156 U.S. 432, 453 (1895))); United States v. Sarda-Villa, 760 F.2d 1232, 1240 (11th Cir. 1985) (Johnson, J., concurring) ("[T]he presumption of innocence [ ] must be maintained until the verdict is issued in a criminal proceeding."). In his response, Plaintiff has failed to identify any authority for the proposition that he was constitutionally entitled to a presumption of innocence under these circumstances. For its part, this Court has been similarly unsuccessful.

Second, the statements in Smith implicating the petitioner were made during criminal proceedings involving other individuals, but the petitioner was never actually indicted for those offenses. As a result, the petitioner was deprived of a forum that provided

him an opportunity for vindication. In this case, however, Plaintiff was not deprived of any such forum because the information establishing that his convictions had been vacated, a new trial granted, and a nolle prosequi entered on the rape and kidnapping indictment were all part of the public record and readily available. While Plaintiff alleges that Defendant falsely stated that Plaintiff was under indictment for that charge, Plaintiff had already cleared his name and possessed all the documentation necessary to prove the inaccuracy of Defendant's statement. Moreover, there are no allegations Plaintiff was precluded from presenting this information to the General Assembly, or that its members were prevented from obtaining it from the public record. Therefore, it is difficult for this Court to conclude that Plaintiff was falsely accused of committing a crime of which he would be unable to conclusively prove himself free from any legal guilt. Once again, neither Plaintiff nor this Court has located any authority indicating that Defendant's actions in this case worked to deprive him of an effective forum for vindication. Heeding the Supreme Court's warning against expanding the scope of substantive due process protections, this Court is unwilling to find that falsely informing state legislators contemplating a resolution that an individual remained under indictment violates the right to be presumed innocent.

Moreover, due process does not protect property interests in benefits to which individuals have little more than "an abstract need or desire," or merely "a unilateral expectation." Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 756 (2005) (quotations omitted)

(quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)). Instead, the individual must "have a legitimate claim of entitlement to it." Id. (quotations omitted) (quoting Roth, 408 U.S. at 577). In this case, Plaintiff has grounded his § 1983 claims on the receipt of the $1,600,000. However, Plaintiff has failed to establish an entitlement to this benefit. Compensating Plaintiff for the period of time he served in prison for vacated convictions might have been the right thing to do, but Plaintiff has not pointed this Court to any authority that would establish an entitlement to these funds. Absent this entitlement, Plaintiff lacks a property interest protected by the due process clause.

The problem with Plaintiff's claims is an inability to sufficiently articulate the specific fundamental right or protected interest that he was deprived. In this Court's exhaustive review, it was unable to locate any case sufficiently similar to the unique facts presented here, finding instead only persuasive authority that leads this Court to the conclusion that finding a substantive due process violation in this case would be an impermissible expansion of due process far beyond the availability of any meaningful guideposts. Absent these beacons, this Court is reluctant to stray from the narrow due process path previously laid out by federal courts. As a result, the Court concludes that Plaintiff has failed to state a valid § 1983 claim based on substantive due process.

2. Shocking the Conscience

Plaintiff included in his brief a section entitled "Substantive due process-conduct that 'shocks the conscience.'" (Doc. 30 at 10.) However, that section

contains no real argument to support the contention that Defendant's conduct rises to that level. Instead, Plaintiff merely recounts the facts and concludes that Defendant's "conduct rises to the level of a constitutional violation." (Id. at 11.) This is a wholly conclusory statement that Plaintiff failed to support with any legal authority. As a result, Plaintiff has failed to establish that Defendant's conduct shocks the conscience as a matter of law.

Moreover, this Court concludes that Defendant's conduct does not pass the conscience shocking threshold. This category is reserved for only the most egregious conduct that is completely unrelated to any governmental interest. Lewis, 523 U.S. 833, 846 (1998). To be sure, Defendant's alleged comments, if true, are ill-advised, imprudent, and disheartening. The alleged conduct, if true, also falls far below the standard citizens should expect from their chief prosecutor and courts of law should expect from their officers. In this Court's opinion, however, Defendant's alleged conduct is insufficiently egregious to rise to the level necessary to find a due process violation, and Plaintiff has failed to offer any support suggesting otherwise.

B. Procedural Due Process

In his response, Plaintiff also states that he was denied "other protections under the Fourteenth Amendment."(Doc. 30 at 15.) It is unclear, but this appears to be some sort of procedural due process argument based on defamation.[5] Generally, "[t]o

[5] Plaintiff's complaint never mentions defamation, slander, or libel.

prevail [on a] procedural due process claim, [a plaintiff] must establish: (1) a constitutionally protected interest in life, liberty or property; (2) governmental deprivation of that interest; and (3) the constitutional inadequacy of procedures accompanying the deprivation. Bank of Jackson Cty. v. Cherry, 980 F.2d 1354, 1357 (11th Cir. 1992). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (internal quotation omitted).

In cases where a plaintiff alleges a procedural due process deprivation based upon defamation by a government actor, the Supreme Court has established a "stigma-plus" test. Paul v. Davis, 424 U.S. 693, 711-12 (1976). "To establish a liberty interest sufficient to implicate the fourteenth amendment safeguards, the individual must be not only stigmatized but also stigmatized in connection with a denial of a right or status previously recognized under state law." Smith ex rel. Smith v. Siegelman, 322 F.3d 1290, 1296-97 (11th Cir. 2003). To avoid dismissal, a plaintiff must allege "(1) a false statement (2) of a stigmatizing nature (3) [deprivation of a tangible interest in addition to the stigma (the "plus")] (4) made public (5) by the government[actor] (6) without a meaningful opportunity for . . . name clearing." Buxton v. City of Plant City, 871 F.2d 1037, 1042-43 (11th Cir. 1989).

In this circuit, the tangible interest must be more than speculative. In the employment context, for example, "a 'discharge or more' is required in order to satisfy the 'plus' element of the stigma-plus test. A transfer or a missed promotion is not enough." Cannon

v. City of W. Palm Beach, 250 F.3d 1299, 1303 (11th Cir. 2001). "[T]he deleterious effects that flow directly from a sullied reputation, such as the adverse impact on job prospects, are normally insufficient." Siegelman,322 F.3d at 1298 (11th Cir. 2003). The tangible interest must be a "right or status [that] has been previously recognized and protected under state law." Behrens v. Regier, 422 F.3d 1255, 1261 (11th Cir. 2005).

In this case, Plaintiff alleges that Defendant made stigmatizing misrepresentations about him in a letter to the General Assembly and that these statements prevented him from receiving compensation for being imprisoned on convictions that were later vacated. The Court concludes that Plaintiff has not alleged a sufficient tangible interest to establish a procedural due process claim. In this context, an individual cannot have a "tangible interest" in matters pending before a legislative body. See Behrens, 422 F.3d at 1261 (requiring plaintiff to "show that his alleged right or status has been previously recognized and protected under state law" (citing Paul, 424 U.S. at 710-11)). Uncertain prospects in a proposed House Resolution do not rise to the standard required by the Eleventh Circuit to establish a tangible interest. Accordingly, Plaintiff has failed to state a § 1983 claim based on the denial of procedural due process.

C. Denial of First Amendment Rights

In Count Two, Plaintiff alleges that Defendant's misrepresentations interfered with his constitutional rights to freedom of speech and his right to petition the Government for redress of his grievances. (Doc. 26 ¶¶ 61-62.) However, Plaintiff's amended complaint fails to allege that his speech was actually restricted in any way. Rather, Plaintiff's factual allegations establish that he did exercise both his freedom of speech and right to petition by seeking compensation for the time he was incarcerated. Those endeavors were simply unsuccessful. Even if House Resolution 96 failed due only to Defendant's conduct, those actions did not work to deprive him of his First Amendment rights. Accordingly, the Court finds that the amended complaint fails to state a § 1983 claim based on the denial of Plaintiff's First Amendment rights to freedom of speech and to petition the Government.

In Count Three, Plaintiff alleges that Defendant retaliated against Plaintiff for exercising his constitutional rights to freedom of speech and to petition the government for redress of his grievances. (Id. ¶ 65.) Essentially, Plaintiff alleges that Defendant's misrepresentations to the General Assembly were in retaliation for his successful challenge of his criminal conviction and subsequent efforts to obtain compensation. The First Amendment prohibits the government from retaliating against individuals for engaging in protected speech. See, e.g., Bryson v. City of Waycross, 888 F.2d 1562, 1565 (11th Cir. 1989). To properly state a claim that a plaintiff was retaliated against for exercising his First

Amendment rights, the complaint must allege that (1) the plaintiff engaged in protected activity; (2) the defendant's actions adversely affected that activity; and (3) a causal connection between the activity and the defendant's action. Bailey v. Wheeler, 843 F.3d 473, 480 (11th Cir. 2016).

However, where the alleged retaliation consists of defamatory comments by a public official, most federal courts have narrowly construed the right to sue for retaliation under § 1983. "[I] n the absence of a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will imminently follow, such speech does not adversely affect a citizen's First Amendment rights, even if defamatory." Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 685 (4th Cir. 2000); see X-Men Sec., Inc. v. Pataki, 196 F.3d 56, 72 (2d Cir. 1999) (holding that, in the absence of threats, intimidation, or coercion, legislators' "disparaging, accusatory, or untrue statements" failed to state a claim); Colson v. Grohman, 174 F.3d 498, 512 (5th Cir. 1999) ("[A]ll harms that, while they may chill speech, are not actionable under our First Amendment retaliation jurisprudence."); Penthouse Int'l Ltd. v. Meese, 939 F.2d 1011, 1015-16 (D.C. Cir. 1991) (" [T] he Supreme Court has never found a government abridgment of First Amendment rights in the absence of some actual or threatened imposition of governmental power or sanction."); R.C. Maxwell Co. v. Borough of New Hope, 735 F.2d 85, 89 (3d Cir. 1984) (finding no claim because letters encouraged plaintiff to terminate lease, but did not threaten, intimidate, or coerce); Hammerhead Enters., Inc. v. Brezenoff, 707 F.2d 33, 38-39 (2d Cir. 1983) (concluding that

retaliation must "reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow"); contra Tierney v. Vahle, 304 F.3d 734, 740 (7th Cir. 2002) (stating in dicta that "defamation inflicts sufficient harm on its victim to count as retaliation"). In this case, Plaintiff's retaliation claim must be dismissed because he has failed to allege that Defendant used threats, intimidation, or coercion in response to any activity protected by the First Amendment.

In addition, damage to reputation is not actionable under § 1983 unless it is accompanied by a tangible interest. Paul, 424 U.S. at 701. Plaintiff cannot sidestep this requirement, which is necessary for a claim under the Due Process clause, "by alleging that defamation by a public official occurred in retaliation for the exercise of a First Amendment right." Gini v. Las Vegas Metro. Police Dept., 40 F.3d 1041, 1045 (9th Cir. 1994). As noted above, Plaintiff lacked any tangible property interest in proposed House Resolution 96. See supra pp. 16-17, 20-21. Accordingly Plaintiff has failed to state a valid § 1983 claim for retaliation.

D. Qualified Immunity

"Qualified immunity offers complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." Lee v. Ferraro, 284 F.3d 1188, 1193-94 (11th Cir. 2002) (internal quotations omitted) (quoting Thomas v. Roberts, 261 F.3d 1160, 1170 (11th Cir. 2001). The official must have been

"acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." Id. at 1194 (quotations omitted) (quoting Courson v. McMillian, 939 F.2d 1479, 1487 (11th Cir. 1991)). However, an official is not entitled to immunity if he violated a constitutional or statutory right that was "clearly established at the time of the challenged conduct." Mikko v. City of Atlanta, Ga., 857 F.3d 1136, 1144 (11th Cir. 2017) (quotations omitted) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011)) . The requirement that the right be clearly established "does 'not require a case directly on point, but existing precedent must have placed the . . . constitutional question beyond debate.'" Id. (quoting Ashcroft, 563 U.S. at 741).

There is little doubt that Defendant's comments were made within the scope of his discretionary authority. See Mikko, 857 F.3d at 1144 (recognizing that prosecutors may communicate with other officials about current or potential prosecutions). Also, this Court easily concludes that if Defendant did violate any of Plaintiff's constitutional rights, those rights were not clearly established at the time. This Court has poured over numerous cases and exhaustive treaties looking for any similar case from any federal jurisdiction. Despite those efforts, the Court was unable to locate any existing precedent sufficiently clear to place the unconstitutionality of Defendant's conduct beyond debate. Moreover, Plaintiff has failed to identify any case to fill this void. In this absence, the Court must conclude that Plaintiff's complaint fails to allege constitutional deprivations that were clearly

established at the time. As a result, Defendant would be entitled to qualified immunity.[6]

CONCLUSION

To some observers , this might seem a harsh result. Plaintiff certainly does present an emotionally compelling case to which this Court is sympathetic. This Court never lost sight of what Plaintiff claims happened in this case: Plaintiff was never compensated for the seven years he spent in prison for convictions that were later vacated. No doubt the natural reaction to Plaintiff' s allegations is a feeling that Defendant did something wrong. However , this Court must be guided by law, not emotion. Unfortunately for Plaintiff, our law does not provide a remedy for every wrong, and § 1983 does not provide him with the relief he seeks in this case.

For the reasons set forth above, Defendant's Motion to Dismiss must be **GRANTED**. As a result, Plaintiff's complaint is **DISMISSED**. The Clerk of Court is **DIRECTED** to close this case.

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[6] Because this Court has determined both that Defendant did not violate Plaintiff's constitutional rights, and that Defendant would be entitled to qualified immunity if he did, the Court will not address Defendant's argument that he is entitled to prosecutorial immunity.

SO ORDERED this 28th day of July 2017.

s/_____
WILLIAM T. MOORE, JR.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA