Appendix

Appendix A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10089

Non-Argument Calendar

D.C. Dockets No. 1: 18 cv-03817-AT

David Thorpe,

Plaintiff-Appellant

Versus

DEXTER DUMAS, an individual,

GEORGE JENKINS, an individual,

LAUREN BOONE, an individual,

JEFFREY S. CONNELLY, an individual,

FANI WILLIS, an individual, et al.,

Defendants-Appellees.

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

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(September 17, 2019)

Before ED CARNES, Chief Judge, WILLIAM PRYOR, and GRANT, Circuit Judges.

PER CURIAM:

David Thorpe, a p.cg sg litigant, was indicted in Georgia state court for armed robbery, aggravated assault, and battery. More than two years after the indictment the State dropped all charges against him. Thorpe filed a 42 U.S.C. 1983 action against a law enforcement officer, four prosecutors, and a judge, all of whom were involved in his prosecution. He alleged they violated his Fourth, Eighth, and Fourteenth Amendment rights. He also brought state law claims for malicious prosecution, intentional infliction of emotional distress, and false imprisonment.
The district court dismissed all of Thorpe's claims on procedural grounds.

1.

Officer Dexter Dumas arrested Thorpe in August 2014. Thorpe was later released on bond under the condition that he wear an ankle monitor. Eight months after he was released Thorpe asked Judge Glanville, who was presiding over his criminal case, to modify his bond and order the removal of his ankle monitor. Judge Glanville

denied those requests. In March 2016 Thorpe again requested a

bond modification. This time Judge Glanville approved the removal of Thorpe's ankle monitor. By then Thorpe had worn the ankle monitor for 586 days. The prosecution dropped the charges against him in October 2016.

Thorpe filed claims against: Officer Dumas; George Jenkins. Lauren Boone. and Jeffrey Connelly, the prosecutors who worked on his case; Deputy District Attorney Fani Willis, the attorney who supervised the prosecutors; and Judge Glanville. Thorpe attempted to serve the defendants through certified mail.

Jenkins. Boone. and Connelly moved to dismiss Thorpe's complaint under Fed. R. Civ. P. 12(b)(5) for insufficient service of process. Officer Dumas filed a separate Rule 12(b)(5) motion. Willis and Judge Glanville moved to dismiss the complaint under Rule 12(b)(6) based on prosecutorial and judicial immunity. The district court granted all three motions and dismissed Thorpe's claims. Thorpe filed a motion for reconsideration. which the court denied. This is Thorpe's appeal. He contends that service was proper, immunity does not apply, and the district court wrongly denied his motion for reconsideration. We address each contention in turn.

11.

Thorpe first challenges the dismissal for insufficient service of process of his claims against Dumas and three prosecutors (Jenkins, Boone. and

Connelly). In an appeal from a district court's judgment granting a Rule 12(b)(5) motion to dismiss

for insufficient service of process. we review de novo questions of law. Prewitt Enters., Inc. v. Org. of Petroleum Exporting Countries, 353 F.3d 916, 920 (1 Ith Cir. 2003). Any findings of fact are reviewed only for clear error. Id.

A plaintiff must properly serve process for the court to have personal jurisdiction over the defendant. Omni Capital Intern. Ltd. v. Rudolf Wolff & Co. Ltd., 484 U.S. 97, 104 (1987). Rule 4(e) allows service of process by:

> (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made: or
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> (2) doing any of the following:
>
> (A) delivering a copy of the summons and of the complaint to the individual personally.
>
> (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
>
> (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Fed. R. Civ. P. 4(e)(1)— (2). Georgia allows service of process under the same circumstances. See Ga. Code Ann. 9-11-4.

Thorpe contends that the district court erred in two ways. First, he argues that he properly served Dumas, Jenkins, Boone, and Connelly. Second, he argues that those defendants waived proper service of process by not addressing personal jurisdiction in their first answer to his second amended complaint.

Thorpe attempted to serve Dumas, Jenkins, Boone, and Connelly through certified mail. The parties disagree whether he sent the certified mail to only the

defendants themselves or whether he also sent copies to the defendants' authorized agents. The distinction makes no difference. Rule 4 does not authorize service of process through the mail. Nor does Georgia law.

Rule 4 allows service of process either by "delivering a copy of the summons and of the complaint to the individual personally" or by "delivering a copy of each to an agent authorized by appointment or by law to receive service of process." Fed. R. Civ. P. 4(e)(2). While we have not addressed in a published opinion whether "delivery" under Rule 4 can be accomplished through certified mail, other circuits have service by certified mail generally does not constitute "delivery" under subsections of Rule 4. See, e.g., Yates v. Baldwin, 633 F.3d 669, 672 (8th Cir. 2011) (holding that mail does not satisfy delivery under Rule 40)); Peters v. United States, 9 F.3d 344, 345 (5th Cir. 1993) (holding that certified mail does not satisfy "delivery" under Rule 4(e)); Green v. Humphrey Elevator & Truck Co., 816 F.2d 877, 882 (3d Cir. 1987) (holding mailing alone does not satisfy

"delivery" under Rule 40)). Georgia state law also requires in-person service. Camp v. Coweta County, 625 S.E.2d 759, 761 n.4 (Ga. 2006). So certified mail, even to an authorized agent, does not satisfy Rule 4's service requirements.

And contrary to Thorpe's contentions, neither Dumas, nor Jenkins, nor Boone, nor Connelly waived service of process. See Pardazi v. Cullman Med. Ctr.,

896 F.2d 1313, 1317 (1 Ith Cir. 1990) (holding that objections to service of process can be waived if not addressed in the first responsive motion to the complaint). In their original motions to dismiss and their motions to dismiss the first amended complaint — the defendants' first response to each of Thorpe's complaints all four of them argued that process was insufficient. [1] Because Thorpe did not properly serve Dumas, Jenkins, Boone, or Connelly, we affirm the dismissal of

Thorpe's claims against them.

111.

Thorpe next challenges the district court's finding that Deputy District

[1] Thorpe asserts in his reply brief that the district court should have recognized there were extenuating circumstances and that he was unable to effectively serve process in time. Because he failed to make that argument in his opening brief before this Court, he has forfeited it. Timson v. Sampson, 518 F.3d 870, 874 (1 Ith Cir. 2008).

Attorney Willis and Judge Glanville were immune from suit. We review dg novo questions of absolute immunity. Stevens v. Osuna. 877 F.3d 1293. 1301 (1 Ith Cir.2017). We must accept as true the allegations of the complaint and any reasonable inference we can draw from them. Long v. Satz. 181 F.3d 1275. 1278 (1 Ith Cir. 1999).

Thorpe sued Willis and Judge Glanville in their individual and official capacities. We address the claims against each defendant in turn. Prosecutors have absolute immunity from 1983 individual capacity claims for actions they take in the "initiation and pursuit of criminal prosecution." Jones v. Cannon. 174 F.3d 1271. 1281 (1 Ith Cir. 1999). Our analysis of those actions is functional; we consider the nature of the function the defendant performed. not the defendant's job title. Hart v. Hodges. 587 F.3d 1288, 1294-95 (1 Ith Cir. 2009). Section 1983 provides prosecutors with absolute immunity for functions "intimately associated with the judicial phase of the criminal process," including "refusing to investigate." Id. at 1295. Willis is entitled to absolute prosecutorial immunity. Even accepting as true Thorpe's allegations that Willis "oversaw"' the other attorneys, "assigned" them to the case. "knew of' the charges against Thorpe, and "failed to act," all of those actions involve Willis' preparation for trial. Trial preparation is a prosecutorial function. and Willis has prosecutorial immunity for it.

B.

Judges have absolute judicial immunity from damages in individual capacity suits so long as they were not acting in the "clear absence of all jurisdiction." Sibley v. Lando, 437 F.3d 1067, 1070 (1 Ith Cir. 2005). We consider four factors to determine whether a judge is acting within the scope of his judicial capacity: whether "(1) the act complained of constituted a normal judicial function: (2) the
events occurred in the judge's chambers or in open court: (3) the controversy involved a case pending before the judge: and (4) the confrontation arose immediately out of a visit to the judge in his judicial capacity." Id..

Thorpe complained that Judge Glanville wrongfully denied his request to modify the conditions of his bond. Judge Glanville's consideration of Thorpe's request for bond modification is a normal judicial function. It took place in the judge's chambers or in open court. The request involved a case pending before Judge Glanville. And Thorpe's claims arise immediately out of that interaction.
Judge Glanville's actions thus fall squarely within judicial immunity.

c.

Thorpe also requested declaratory relief in his claims against Willis and Judge Glanville in their official capacities. While the Eleventh Amendment generally prohibits federal courts from

hearing suits brought against state officials[2] in their official capacity, there is one exception. Summit Med. Assocs., P.C. v. Pryor, 180 F.3d 1326, 1336 (1 Ith Cir. 1999). A plaintiff can sue a state officer "seeking prospective equitable relief to end continuing violations of law." Id. (citing Ex parte Young, 209 U.S. 123 (1908)). But a plaintiff may not use Ex parte Young "to adjudicate the legality of past conduct." Id. At 1337. Thorpe contends that the district court ignored his claims for declaratory relief in his first amended complaint: and that because he requested declaratory relief— specifically, a written acknowledgement of past wrongs — his claims are not barred by the Eleventh Amendment. We disagree. Thorpe is attempting to read judicate the past conduct of Willis and Judge Glanville. He does not claim there is any ongoing violation of his constitutional rights. So Ex parte Young does not

[2] The Georgia Constitution gives in state courts the judicial power of the state. Ga. Const. Art. VI, 1. And we have held that, under Georgia law, a prosecutor "exercising [her] discretion in prosecutorial decisions" is a state official who is acting on the State's behalf. Owens v. Fulton County, 877 F.2d 947, 951 (1 Ith Cir. 1989). The Eleventh Amendment applies both to Judge Glanville and Willis.

apply. The district court was correct to dismiss the claims against Willis and Judge Glanville.

IV.

Finally, Thorpe contends that the district court was biased against him and wrongly denied his motion for reconsideration. But a motion for reconsideration cannot be used to relitigate old matters. Richardson v. Johnson, 598 F.3d 734, 740 (1 Ith Cir. 2010). Because Thorpe's argument is a rehash of the reasons, he believes the district court should not have ruled against him, the denial of his motion was not an abuse of discretion. Id.

AFFIRMED.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DAVID THORPE, :

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Plaintiff, :

:

v. :

:

DEXTER DUMAS, GEORGE :
CIVIL ACTION NO.
JENKINS, LAUREN BOONE, :
1:18-cv-3817-AT
JEFFREY S. CONNELLY, FANI :
WILLIS, and URAL GLANVILLE, :
:
Defendants. :

ORDER

This matter is before the Court on the Motions to Dismiss Plaintiff's

Amended Complaint of Defendants Dexter Dumas, Judge Ural Glanville, Fani Willis, George Jenkins, Lauren Boone, and Jeffrey S. Connelly [Docs. 16, 19, 22]. Plaintiff's Motion for Clerk's Entry of Default against Defendants Lauren Boone, Dexter Dumas, Jeffrey Connelly, and George Jenkins [Doc. 24], Motion for Leave to File Excess Pages by Ural Glanville and Fani Willis [Doc. 18]. Second Motion to Stay Discovery by Ural Glanville and Fani Willis [Doc. 20].

Plaintiff, who is *pro se*, filed a Complaint pursuant to 28 U.S.C. § 1983[3] seeking damages for alleged civil rights violations arising out of his arrest and Case 1:18-cv-03817-AT Document 30 filed 11/08/18 Page 1 of 18 ensuing prosecution in Fulton County Superior Court. Plaintiff also brings state law claims of malicious prosecution, intentional infliction of emotional distress, and false imprisonment. (Am. Compl., Doc. 12 ¶¶ 93-119.) Plaintiff asserts claims against the presiding judge, Ural Glanville; the supervising prosecutor, Fani Willis; prosecutors, George Jenkins, Lauren Boone, and Jeffrey Connelly; and a police investigator, Dexter Dumas. Because it is unclear to the Court whether Plaintiff is suing these Defendants in their individual and/or official

[3] Plaintiff's first claim is for a violation of 42.U.S.C. § 1983. However, by its plain terms, Section 1983 does not itself create any substantive rights, but instead provides a method for redress for the deprivation of rights established elsewhere in the Constitution or federal laws. *See Barfield v. Brierton*, 883 F.2d 923, 934 (11th Cir. 1989) ("Section 1983 alone creates no substantive rights; rather it provides a remedy for deprivations of rights established elsewhere in the Constitution or

capacities, the Court will construe both possibilities for the purposes of ruling on the Motions to Dismiss.[2]

I. Background

Plaintiff alleges the following conduct by Defendants resulted in violations of certain protections guaranteed to him by the Fourth, Eighth, and Fourteenth Amendments to the Federal Constitution, and constitute malicious prosecution, intentional infliction of emotional distress, and false imprisonment under state law:

- After the Atlanta Police Department received a complaint from an alleged victim, Detective Dumas obtained an arrest warrant for Plaintiff Thorpe for the capital felony of armed robbery plus battery. (Am. Compl. ¶¶ 12-13.)

federal laws.") (citing *Baker v. McCollan*, 443 U.S. 137, 144 n. 3, 99 S. Ct. 2689, 2694 n. 3, 61 L. Ed. 2d 433 (1979)). Therefore, the Court construes Counts two through four as constitutional claims pursuant to 42 U.S.C. § 1983. [2] The Court recognizes that Plaintiff is appearing pro se. Thus, his complaint is more leniently construed and "held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citations and internal quotation marks omitted); *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998).

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- Plaintiff Thorpe was arrested on August 2, 2014. (*Id.* ¶ 17.) He "made his first appearance on August 4, 2014 and because of the capital

felony charge, Thorpe was denied bail and informed that any bond issues had to be heard by a higher court." (*Id.*) On August 9, 2014, Thorpe was indicted for armed robbery, aggravated assault, and battery. (*Id.*)

- The Fulton County District Attorney's Office "had knowledge and were in possession of evidence that refuted their fundamentally unfair charges [against Plaintiff Thorpe]." (*Id.* ¶ 19.) Thorpe and his attorney began requesting *Brady* material from Defendant Jenkins in August of 2014. (*Id.* ¶ 20.)
- Defendants Jenkins, Boone, and Connelly failed to investigate his case and prosecuted him without probable cause. (*Id.* ¶¶ 94-95.)
- Defendant Jenkins "chose not to address the requested Brady [sic]

material." (*Id.* ¶ 21.) Despite knowing "that he lacked the credible evidence necessary to secure a conviction against Thorpe, [Defendant Jenkins] elected to proceed with the unwarranted prosecution of Thorpe." (*Id.* ¶ 22.) Sometime around September 2014, Defendant Jenkins "came into the knowledge of exculpatory evidence which refuted the probability of the armed robbery [,]" aggravated assault, and battery allegations Thorpe faced. (*Id.* ¶¶ 25-27.)

- All three of the prosecutors assigned to his case continued the prosecution despite having exculpatory evidence in their possession. (*Id.* ¶¶ 25-27, 33-36, 40.)
- As a condition of his bond, Thorpe was required to wear an ankle monitor and report for weekly supervision. (*Id.* ¶¶ 31, 32.) Judge Glanville did not rule on Thorpe's request for a bond modification. (*Id.* ¶¶ 43-45, 84, 87.) The requirements of wearing an ankle monitor, paying the bond company, and reporting to weekly supervision was excessive. (*Id.* ¶ 88.)
- Judge Glanville recused himself from Mr. Thorpe's case. (*Id.* ¶ 51)
- Deputy Willis, as the supervising attorney in the prosecutor's office is responsible for Defendant Jenkins, Boone, and Connelly's failure to investigate. (*Id.* ¶ 52.)
- The State of Georgia dismissed the charges against Mr. Thorpe on October 20, 2016. (*Id.* at ¶ 51.)
- Finally, "[a]s a direct and proximate result of Defendants' actions or failure to act, Thorpe has been emotionally, physically, and financially damaged." (*Id.* ¶ 60)

II. Standard of Review on Motion to Dismiss

This Court may dismiss a pleading for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A pleading fails to state a claim if it does not contain allegations that support recovery

under any recognizable legal theory. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL

PRACTICE & PROCEDURE § 1216 (3d ed. 2002); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Generally, notice pleading is all that is required for a valid complaint. *See Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir.1985), *cert. denied*, 474 U.S. 1082 (1986). Under notice pleading, the plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. *See Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007)). In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light most favorable to the plaintiff. *See Hill v. White*, 321 F.3d 1334, 1335

(11th Cir. 2003); *see also Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir.1994) (noting that at the pleading stage, the plaintiff "receives the benefit of imagination").

A complaint should be dismissed under Rule 12(b)(6) only where it appears that the facts alleged fail to state a "plausible" claim for relief. *Twombly*, 550 U.S. at 555-556; Fed. R. Civ. P. 12(b)(6). A complaint may survive a motion to dismiss for failure to state a claim, however, even if it is "improbable" that a plaintiff would be able to prove those facts and even if the possibility of recovery is extremely "remote and unlikely." *Twombly*, 550 U.S. at 556 (citations and quotations omitted). A claim is plausible where the plaintiff alleges factual content that "allows the court to draw the reasonable inference that the defendant

is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. at 678. The plausibility standard requires that a plaintiff allege sufficient facts "to raise a reasonable

expectation that discovery will reveal evidence" that supports the plaintiff's claim. *Twombly*, 550 U.S. at 556. A Plaintiff is not required to provide "detailed factual allegations" to survive dismissal, but the "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555.

The Court recognizes that Plaintiff is appearing *pro se*. Thus, the Complaint is more leniently construed and "held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)

(citations and internal quotation marks omitted); *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998). However, nothing in that leniency excuses a plaintiff from compliance with threshold requirements of the Federal Rules of Civil Procedure. *See Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1998), *cert. denied*, 493 U.S. 863 (1989). Nor does this leniency require or allow courts "to rewrite an otherwise deficient pleading [by a *pro se* litigant] in order to sustain an action." *GJR Invs., Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1369 (11th Cir.

1998).

III. Discussion

A. Defendants Dumas, Jenkins, Boone, and Connelly's Motion to Dismiss. Defendants Dumas, Jenkins, Boone, and Connelly seek dismissal of Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(5) for insufficient service of process because Defendants were served by mail.[4]

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[4] "Service of process is a jurisdictional requirement: a court lacks jurisdiction over the person of a defendant when the defendant has not been served." *Pardazi v. Cullman Med. Ctr.*, 896 F.2d 1313, 1317 (11th Cir. 1990). Thus, the Court begins its inquiry here, as the Court cannot reach the merits of the plaintiff's claims against improperly served defendants unless and until those defendants are properly served or service of process is waived. *See* Fed. R. Civ. P. 4(m); *Jackson v. Warden, FCC Coleman-USP*, 259 F. App'x 181, 183 (11th Cir. 2007).

The Court notes that Defendant Dumas also seeks dismissal of Plaintiff's Amended Complaint because Plaintiff's claims are barred by the two-year statute of limitations. Defendants Jenkins, Boone, and Connelly seek dismissal on the following additional grounds: (1) as prosecutors they are entitled to absolute immunity; (2) Plaintiff's claims are barred by the statute of limitations; (3)

Plaintiff has failed to properly serve Defendants as required under the Federal Rules of Civil Procedure. Under Fed. R. Civ. P. 4(e). an individual must be served either: (1) "following state law . . . in the state where the district court is located or where service is made" or doing one of the following: (A) "delivering a copy of the summons and of the complaint to the individual personally; (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process." Fed. R.

Civ. P. 4(e)(1)-(2). The Eleventh Circuit has held that Rule 4(e) requires personal service on an individual absent waiver. *Natty v. Morgan*, 615 F. App'x 938, 939 (11th Cir. 2015) (finding that service was "insufficient because [the plaintiff] simply mailed papers to the defendants"). In *Natty*, the Court upheld dismissal of a *pro se* action on grounds of imperfect service where the plaintiff's only attempt at service was sending by mail a copy of the papers to the defendants. *Id.* The Federal Rules of Civil Procedure permit service "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located." Fed. R. Civ. P. 4(e)(1). Thus, the Court must also examine whether Plaintiff complied with Georgia law governing service of process. *See Usatorres v. Marina Mercante Nicaraguenses, S.A.*, 768 F.2d 1285, 1286 n. 1 (11th Cir.1985); Fed. R. Civ. P. 4(e)(1).

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they have absolute immunity from the state law claims: and (4) Plaintiff has failed to allege facts that establish a claim for malicious prosecution.

Under Georgia law, a plaintiff may serve an individual defendant "by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process." O.C.G.A. § 9-11-4 (e)(7). On September 28, 2018, Plaintiff filed a Proof of Service with the Court purporting to show that the Complaint was "served via certified mail" to George Jenkins on August 14, 2018, to Lauren Boone on August 15, 2018, to Jeffrey Connelly on August 15, 2018, Fani Willis on August 14, 2018, Ural Glanville on August 14, 2018, to Atlanta Police Department Headquarters for Dexter Dumas on August 14, 2018, and to Atlanta Police Department Zone 1 for Dexter Dumas on August 21, 2018. (Doc. 17.) Both Federal and Georgia law on service of process require "personal service" – service by hand delivery of the complaint and summons.[5] For this reason, Plaintiff's attempted service by mail is insufficient under both the Fed. R. Civ. P. 4 and

[5] However, neither Federal Rule 4 nor O.C.G.A. § 9-11-4 permit a party to the action to personally serve process of the complaint and summons. *See* Fed. R. Civ. P. 4 (providing that "[a]ny person who is at least 18 years old and not a party may serve a summons and complaint," or "[a]t the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court"); O.C.G.A. § 9-11-4 (providing that process shall be served by: (1) the sheriff's office of the county where the action is brought or where the defendant is found; (2) the marshal or sheriff of the court; (3) any U.S. citizen specially appointed by the court for that purpose; (4) a person 18 years or older who is not a party and has been appointed by the court to serve process; or (5) a certified process server).

O.C.G.A. § 9-11-4 (e)(7). Accordingly, Defendants Dumas, Jenkins, Boone, and Connelly's Motions to Dismiss (Docs. 17, 22) are **GRANTED** and Plaintiff's claim against those Defendants are **DISMISSED without prejudice**

Motion to Dismiss of Defendants Judge Glanville and Willis Defendants Glanville and Willis seek dismissal of Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6) because Defendants contend, they are entitled to absolute and Eleventh Amendment immunity.[6] Plaintiff has sued

[6] Defendants Glanville and Willis also seek dismissal based on the following grounds: (1) Plaintiff's claims against Defendant Glanville are barred by the statute of limitations; (2) pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiff has failed to state a claim upon which relief may be granted; (3) Defendants are entitled to qualified immunity; (4) Plaintiff's state law tort claims are barred; and (5) the Georgia Tort Claims Act does not permit punitive damages.

Defendants Glanville and Willis as individuals. (*See* Am. Compl.) However, it is unclear to the Court whether Plaintiff is suing these Defendants in their individual and/or official capacities. As Defendants sought dismissal on both absolute and Eleventh Amendment immunity, for the purposes of ruling on this Motion to Dismiss, the Court will construe both possibilities. 1. Individual Capacity Claims Defendants Glanville and Willis are entitled to absolute immunity from liability for Plaintiff's alleged claims asserted against them in their individual capacities. A. Defendant Glanville : "Judges are entitled to absolute judicial immunity from damages for those acts taken while they are acting in their judicial capacity unless they acted in the *clear* absence of *all* jurisdiction" over the subject matter. *Bolin v. Story*, 225 F.3d 1234, 1239 (2000) (citing *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978)) (emphasis added). "This immunity applies *even when* the judge's acts are in error, malicious, or were in excess of his or her jurisdiction." *Id.* Plaintiff here alleges that Defendant Glanville "stepped outside the bounds of his jurisdiction by violating an American Citizens [sic] Right to have his attorney argue to [sic] why the bond modification should occur." (Am. Compl. ¶ 87.) Plaintiff argues that by "fail[ing] to provide Thorpe with a timely bond hearing in regard to the removal of Thorpe's ankle monitor," Defendant Glanville violated Thorpe's constitutional rights. (*Id.* ¶ 89-90.) As the Supreme Court explained in *Stump v. Sparkman*, "the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge," and a judge does not act in "clear absence of all jurisdiction" if "at the time he took the challenged action he had jurisdiction over the

subject matter before him." 435 U.S. at 356.[7] In other words, if the court has constitutional or statutory

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[7] The Court makes a distinction between "excess of jurisdiction" and the "clear absence of all jurisdiction over the subject matter":

> Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend.

Stump v. Sparkman, 435 U.S. at 356, n. 6 (citing *Bradley v. Fisher*, 80 U.S. 335, 351-52 (1872)). The Court explained this distinction with the following example: "if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune." *Id.*, n. 7.

jurisdiction over the subject matter of the proceeding. "[a] judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." *Id.* at 359; *Harris v. Deveaux*, 780 F.2d 911, 916 (11th Cir. 1986) (holding that the test regarding whether a judge acted in the "clear absence of all jurisdiction . . . is only satisfied if a judge completely lacks subject matter jurisdiction"). O.C.G.A. § 15-6-8 provides that "[t]he superior courts have authority: [t]o exercise original, exclusive, or concurrent jurisdiction, as the case may be, of all causes, both civil and criminal." Such jurisdiction includes felony offenses of armed robbery, aggravated assault, and battery. There is no question that Defendant Glanville was acting in his judicial capacity in presiding over the proceeding involving the state's prosecution of Plaintiff and that the court properly exercised jurisdiction in that matter. Defendant Glanville is therefore entitled to absolute judicial immunity from Plaintiff's suit under federal and state law. *See Dykes v. Hosemann*, 776 F.2d 942, 946-47 (11th Cir. 1985) (en banc) (finding judge was entitled to absolute immunity from suit where it was clear that he had subject matter jurisdiction over the underlying dependency proceeding where state statute provided that "[t]he circuit court shall have exclusive original jurisdiction of proceedings in which a child is alleged to be dependent," and that question whether he may have incorrectly concluded that minor actually was dependent did not affect the fact that it was within his power to make that determination); *Robinson v. Becker*, 595 S.E.2d 319, 321 (Ga. Ct. App. 2004) (finding that superior court judge engaged in a judicial act in banning plaintiff from courthouse

during criminal trial and stating that "[j]udicial immunity protects judges against state law claims, as well as civil rights actions brought under 42 U.S.C. § 1983"); *Maddox v. Prescott*, 449 S.E.2d 163, 165 (Ga. Ct. App. 1994) ("Our courts have consistently held that judges are immune from liability in civil actions for acts performed in their judicial capacity.") Accordingly, the Court **GRANTS** Defendant Glanville's Motion to Dismiss [Doc. 19] Plaintiff's claims against him in his individual capacity. b. Defendant Willis Prosecutors are also entitled to absolute immunity from damages for all actions they take associated with the judicial process as an advocate for the government, including those taken in initiating a prosecution, presenting the government's case, and all appearances before the court. *See Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976); *Hart v. Hodges*, 587 F.3d 1288, 1295 (11th Cir. 2009) (citing *Imbler*); *Bolin*, 225 F.3d at 1242 (same); *Rowe v. City of Fort Lauderdale*, 279 F.3d 1271, 1279 (11th Cir. 2002). Prosecutors even have absolute immunity when "filing an information without investigation, filing charges without jurisdiction [or probable cause], filing a baseless detainer, offering perjured testimony, suppressing exculpatory evidence, [and] refusing to investigate . . ." *Hart v. Hodges*, 587 F.3d at 1295 (quoting *Henzel v. Gerstein*, 608 F.2d 654, 657 (5th Cir. 1979)); *Holt v. Crist*, 233 F. App'x 900, 903 (11th Cir. 2007) (stating that prosecutorial immunity "extends to charging a defendant without probable cause"). "While not undertaken literally at the direction of the court, these activities are so intimately associated with the judicial phase of the criminal process as to cloak the prosecutors with absolute immunity from suits for damages." *Hart*,

587 F.3d at 1295 (quoting *Allen v. Thompson*, 815 F.2d 1433 (11th Cir. 1987); *Imbler*, 424 U.S. at 430 (holding absolute immunity was available for prosecutor's activities in initiating a prosecution and in presenting the state's case because they were "intimately associated with the judicial phase of the criminal process"). District attorneys are similarly entitled to prosecutorial immunity for actions arising under state law.

Pursuant to Art. VI, Sec. VIII, Par. I(e) of the Georgia Constitution of 1983, district attorneys have immunity from private actions "arising from the performance of their duties." The rationale behind this immunity is that prosecutors, like judges, should be free to make decisions properly within the

> purview of their official duties without being influenced by the shadow of liability. Therefore, a district attorney is protected by the same immunity in civil cases that is applicable to judges, provided that his acts are within the scope of his jurisdiction.[8] The determining factor appears to be whether the act or omission is "intimately associated with the judicial phase of the criminal process."

Robbins v. Lanier, 402 S.E.2d 342, 343-44 (Ga. Ct. App. 1991) (citing *Holsey v. Hind*, 377 S.E.2d 200, 201 (Ga. Ct. App. 1988) and *Smith v. Hancock*, 256 S.E.2d 627 (Ga. Ct. App. 1979)) (internal quotations omitted). A district attorney's initiation and prosecution of a case involving criminal charges is an act "intimately associated with the judicial phase of the criminal process." *Id.*; *see also Holsey v.*

Hind, 377 S.E.2d 200, 201 (Ga. Ct. App. 1988); *Kadivar v. Stone*, 804 F.2d 635, 637 (11th Cir. 1986).

Defendant Willis is therefore entitled to absolute prosecutorial immunity from Plaintiff's suit under federal and state law. Accordingly, the Court **GRANTS** Defendant Willis's Motion to Dismiss [Doc.

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[8] In Georgia's "criminal justice system, the district attorney represents the people of the state in prosecuting individuals who have been charged with violating [the] state's criminal laws." *State v. Wooten*, 543 S.E.2d 721, 723 (Ga. 2001). The district attorney "has broad discretion in making decisions prior to trial about who to prosecute, what charges to bring, and which sentence to seek." *Id.*

19] Plaintiff's claims against her in her individual capacity.

2. Official Capacity Claims

Because a suit against a party in his official capacity is considered a suit against the government entity he or she represents, Defendants Glanville and

Willis are entitled to Eleventh Amendment immunity from liability to the extent

Plaintiff alleges claims asserted against them in their official capacities. *See Kentucky v. Graham*, 473 U.S. 159, 165-69 (1985) ("[A]bsent [a] waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court. This bar remains in effect when State officials are sued for damages in their official capacity . . . because . . . a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents.") (internal quotations and citations omitted).

a. Defendant Glanville

The Georgia constitution vests state court judges with the judicial power of the State. Ga. Const. art. VI, § I, ¶ I. A qualified judge may therefore exercise the state's "judicial power in any court upon the request and with the consent of the judges of that court and of the judge's own court under rules prescribed by law." Ga. Const. art. VI, § 1, ¶ III. As Defendant Glanville is a state official, he is entitled to Eleventh Amendment immunity to the extent Plaintiff has asserted damages claims against him in his official capacity. *See Simmons v. Conger*, 86 F.3d

1080, 1085 (11th Cir. 1996) (applying Eleventh Amendment immunity to judge sued in

official capacity).

Accordingly, the Court **GRANTS** Defendant Glanville's Motion to Dismiss

[Doc. 19] Plaintiff's claims against him in his official capacity.

b. Defendant Willis

The Eleventh Circuit has held that a Georgia district attorney is a state official — rather than a county official — when he is "exercising his discretion in prosecutorial decisions." *Owens v. Fulton County*, 877 F.2d 947, 950-51 (11th Cir.

1989); *Neville v. Classic Gardens*, 141 F. Supp. 2d 1377, 1382 (S.D. Ga. 2001)

("Engaging in a prosecutorial function is the act of a State, not a county, official.").

McClendon v. May, 37 F.Supp.2d 1371, 1375–76 (S.D. Ga. 1999), *aff'd*, 212 F.3d 599 (11th Cir. 2000); *see also State v. Wooten*, 543 S.E.2d 721, 723 (Ga. 2001) ("the district attorney represents the people of the state in prosecuting individuals who have been charged with violating [the] state's criminal laws").

Thus, to the degree that Plaintiff seeks to hold Defendant Willis liable in her official capacity for acts

within the realm of her prosecutorial discretion, Willis is considered a State official entitled to Eleventh Amendment immunity. *Neville*, 141 F. Supp. 2d at 1382 ("The Eleventh Amendment bars federal courts from hearing pendant [S]tate [law] claims for damages brought against State officers who are sued in their official capacities."); *McClendon v. May*, 37 F. Supp. 2d at 1375–76 (S.D. Ga. 1999) (finding that "for all his acts undertaken within the realm of his prosecutorial role, [the] district attorney [] acted as a state official [and] is entitled to Eleventh Amendment immunity on his official capacity claims for his conduct before the grand jury"), *aff'd*, 212 F.3d 599 (11th Cir. 2000); *Abiff v. Slaton*, 806 F.

Supp. 993, 996–97 (N.D. Ga. 1992) (holding that county prosecutors enjoyed official capacity, Eleventh Amendment immunity from § 1983 claim), *aff'd*, 3 F.3d 443 (11th Cir. 1993).

Accordingly, the Court **GRANTS** Defendant Willis's Motion to Dismiss

[Doc. 19] Plaintiff's claims against her in her official capacity.

III. Conclusion

For the foregoing reasons, as to service deficiencies, the Court **GRANTS without prejudice** the Motions to Dismiss of Defendants Dumas, Jenkins, Boone, and Connelly [Docs. 16, 22]. Dismissal, without prejudice, while having the effect of discontinuing this federal action, will enable Plaintiff, should he choose to do so, to refile his claims and properly serve Defendants

Dumas, Jenkins, Boone, and Connelly. However, Defendants Jenkins, Boone, and Connelly are likely also entitled to immunity; and the claims against Defendant Dumas are likely barred by the applicable statute of limitations. Thus, the Court cautions that refiling may be futile, i.e. that these claims, if refiled, may well be dismissed due to these defenses.

The Court **GRANTS with prejudice** the Motion to Dismiss of Defendants

Glanville and Willis [Doc. 19]; and **DENIES AS MOOT** Plaintiff's Motion [Doc.

24] and Defendants Glanville and Willis's Motion to File Excess Pages and Stay

Discovery [Docs. 18, 20]. The Clerk is **DIRECTED** to close the case.

IT IS SO ORDERED this 8th day of November 2018.

AMY TOTENBERG

UNITED STATES DISTRICT JUDGE

Appendix C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10089-HH

David Thorpe,

Plaintiff-Appellant

Versus

DEXTER DUMAS, an individual,

GEORGE JENKINS, an individual,

LAUREN BOONE, an individual,

JEFFREY S. CONNELLY, an individual,

FANI WILLIS, an individual, et al.,

Defendants-Appellees.

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

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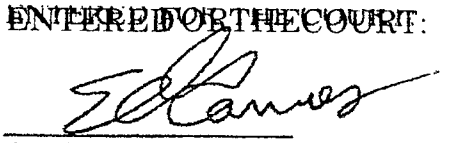
BEFORE: ED CARNES, Chief Judge, WILLIAM PRYOR, and GRANT, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by David Thorpe is DENIED.

ENTERED FOR THE COURT:



CHIEF JUDGE

ORD-41

Appendix D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

DAVID THORPE, an individual,

Plaintiff,

Civil Action File

No. 1:18-CV-3817AT

v.

DEXTER DUMAS, an individual, GEORGE JENKINS, an individual, LAUREN BOONE, an individual, JEFFREY S. CONNELLY, an individual, FANI WILLIS, an individual, and URAL GLANVILLE, an individual,

Defendants.

FIRST AMENDED COMPLAINT

COMES NOW David Thorpe, the plaintiff in the above captioned matter and pursuant to Federal Rule of Civil Procedure 15-1 (b), respectfully files this the first amended complaint. The plaintiff seeks to amend the original complaint to assist and clarify the statement of claims for the Defendants' counsel. (a) Please note the removal of FCDA an entity from the complaint (b) please note the amendment in the claims (counts) section (c) small grammatical corrections throughout.

Appendix E

Case 1:18-cv-03817-AT Document 24 filed 10/23/2018 page 1 or 7

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

FILED IN CLERKS OFFICE
U.S.D.C. - ATLANTA
Oct 23, 2018
JAMES N. HATTEN, CLERK
"s/" by Deputy Clerk

DAVID THORPE, an individual,

Plaintiff,

Civil Action File

v.

DEXTER DUMAS, an individual, GEORGE JENKINS, an individual, LAUREN BOONE, an individual, JEFFREY S. CONNELLY, an individual, FANI WILLIS, an individual, and URAL GLANVILLE, an individual,

Defendants.

MOTION FOR ENTRY OF DEFAULT

Plaintiff David Thorpe requests that the clerk of court enter default against defendants Lauren Boone, Dexter Dumas, Jeffrey Connelly, and George

Jenkins pursuant to Federal Rule of Civil Procedure 55(a). In support of this request plaintiff relies upon the record in this case and the affidavit submitted herein.

Dated this 23rd day of October, 2018.

"s/" David Thorpe
David Thorpe, Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

DAVID THORPE, an individual,

Civil Action File

Plaintiff,

v. **No. 1:18-CV-3817**

DEXTER DUMAS, an individual, GEORGE JENKINS, an individual, LAUREN BOONE, an individual, JEFFREY S. CONNELLY, an individual, FANI WILLIS, an individual, and URAL GLANVILLE, an individual,

Defendants.

CERTIFICATE OF SERVICE

I, David Thorpe, hereby certify that I am employed by Ultra Group and am of such age and discretion as to be competent to serve papers. I further certify that on this date I caused a copy of the Motion for Entry of Default, Affidavit in Support of Motion for Entry of Default and proposed Entry of

Default to be placed in a postage-paid envelope addressed to the defendants, at the addresses stated below, which are the last known addresses of said defendants, and deposited said envelopes in the United States mail.
Addressee: Name(s) and address(es) of defendant(s).
Staci J. Miller, 55 Trinity Avenue S.W Suite 5000, Atlanta, GA 30303 (Dexter Dumas)
Nancy L. Rowen, 141 Pryor Street Suite 4038, Atlanta, GA 30303 (Lauren Boone, George Jenkins and Jeffrey Connelly)

Dated this 23rd day of October, 2018

"s/" DAVID THORPE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

FILED IN CLERK'S OFFICE
U.S.D.C - ATLANTA
OCT. 23, 2018
JAMES N. HATTEN, CLERK
"s/" by DEPUTY CLERK

DAVID THORPE, an individual.

Civil Action File

Plaintiff.

v.

No. 1:18-CV-3817

DEXTER DUMAS, an individual, GEORGE JENKINS, an individual, LAUREN BOONE, an individual, JEFFREY S. CONNELLY, an individual, FANI WILLIS, an individual, and URAL GLANVILLE, an individual.

Defendants.

ENTRY OF DEFAULT

Plaintiff, David Thorpe, requests that the clerk of court enter default against defendants Lauren Boone, Dexter Dumas, Jeffrey Connelly, and George Jenkins pursuant to Federal Rule of Civil Procedure 55(a). It is appearing from the record that defendants have failed to appear, plead or otherwise defend, the default of defendants Lauren Boone, Dexter Dumas, Jeffrey Connelly, and George Jenkins is hereby

entered pursuant to Federal Rule of Civil Procedure 55(a).

Dated this _____ day of _____2018.

_____

James N. Hatten, Clerk of Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

DAVID THORPE, an individual,

Plaintiff,

Civil Action File

v.

No. 1:18-CV-3817

DEXTER DUMAS, an individual, GEORGE JENKINS, an individual, LAUREN BOONE, an individual, JEFFREY S. CONNELLY, an individual, FANI WILLIS, an individual, and URAL GLANVILLE, an individual,

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION FOR ENTRY OF DEFAULT

I, David Thorpe, being duly sworn, state as follows:

1. I am the plaintiff in the above-entitled action, and I am familiar with the file, records and pleadings in this matter.

2. The summons and complaint were filed on August 10. 2018 and an amended complaint September 19. 2018.

3. Defendant George Jenkins was served with a copy of the summons and complaint on August 14. 2018. as reflected on the docket sheet by the proof of service filed on September 19, 2018. Defendants Lauren Boone and Jeffrey Connelly were served with a copy of the summons and complaint on August 15. 2018. as reflected on the docket sheet by the proof of service filed on September 19. 2018. Defendant Dexter Dumas was served with a copy of the summons and complaint on August 19, 2018, as reflected on the docket sheet by the proof of service filed on September 19, 2018.

On the amended complaint Defendants through his attorney Dexter Dumas (Staci Miller). was served with a copy of the summons and complaint on September 24. 2018. Lauren Boone. Jeffrey Connelly. and George Jenkins (Nancy Rowen) were served with a copy of the summons and complaint on October 3, 2018.

4. An answer to the complaint for Dexter Dumas was due on October 9, 2018 and Lauren Boone. Jeffrey Connelly and George Jenkins was due on October 18. 2018.

5. Defendants have failed to appear, plead or otherwise defend within the
time allowed and, therefore. are now in default.

6. Plaintiff requests that the clerk of court enter default against the defendants.

's/' David Thorpe
David Thorpe, Plaintiff

Sworn to and subscribed before
me this 22nd day of October, 2018.

PETER F WALTERS
" s/" Peter Walters
NOTARY PUBLIC
Notary Public EXP. FEB. 26, 2021
My Commission Expires: February 26, 2021
DEKALB COUNTY, GA