

Brian

August 19, 1998

VIA CERTIFIED NO.: Z 110 316 301
RETURN RECEIPT REQUESTED

The Honorable Barry E. Krischer, Esq.
State Attorney, Palm Beach County, Florida
401 North Dixie Highway
West Palm Beach, Florida 33401-4209

Re: Claimant: Rick A. Swope
Date of Birth: 05-20-56
SS#: 381-62-2031

Dear State Attorney Krischer:

This law firm represents Rick A. Swope. Pursuant to F.S. 768.28(6), please consider this correspondence as formal notice of claims by Mr. Swope against the Palm Beach County State Attorney's Office ("PBSAO"), and Assistant State Attorneys Ira Karmelin and Theodore Booras and any other individuals who may be involved in, or responsible for, this incident.

Mr. Swope has retained us to represent him in order to pursue false arrest, federal civil rights, and defamation claims against the above-named parties. Pursuant to F.S. 768.28(6)(c), we are further obliged to inform you, on behalf of Mr. Swope, that he has no outstanding "prior adjudicated claims" in excess of \$200.00 owed to the State, its agencies, officers or subdivisions.

The following is a brief description of the events upon which we base our claim:

Mr. Swope has enjoyed an extensive, varied, and often commended career in law enforcement in the military and in several different public law enforcement organizations. After more than five (5) years with the Broward Sheriff's Office, Mr. Swope elected to resign from the law enforcement community and pursue his private business interests.

During his tenure as a deputy sheriff, Mr. Swope was active in the Broward County DUI enforcement unit; helped to set up and

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maintain certain breath-testing machines; and became a traffic homicide investigator (THI). Upon entering the private sector, Claimant founded Swope Reconstruction, a company specializing in accident reconstruction services, and DUI consulting. Mr. Swope has been declared an expert in the areas of DUI testing and enforcement, breath testing, instrument maintenance and operation, extrapolation and accident reconstruction by numerous courts in several states, including Florida (including the Circuit and County Courts in the Fifteenth Judicial Circuit in and for Palm Beach County, Florida).

In order to further his education, he enrolled in a program known as Master of Science in the Management of Technology at the University of Miami during the Fall Semester of 1995. Mr. Swope successfully completed this program, earning his degree on December 15, 1995. Unfortunately, due to an accounting error by the University of Miami, the initial physical diploma conferring the degree earned in December of 1995 was not issued by the University of Miami until June 20, 1997.

In the course and scope of his consulting services in several cases, Mr. Swope testified under oath in depositions and in court proceedings in the County Court in and for Palm Beach County, Florida regarding his education, experience, and qualifications. He truthfully reported his graduation date as the date on which he earned his Master of Science degree in the Management of Technology. Documents and testimony which have been obtained from University of Miami officials, establish that this degree is a "dual" degree and Mr. Swope is entitled to legitimately acknowledge his successful participation in this collegiate program.

Certain Assistant State Attorneys in the Fifteenth Judicial Circuit in and for Palm Beach County - and Assistant State Attorneys Ira Karmelin and Ted Booras in particular - began a campaign to discredit and defame the character, reputation and qualifications of Mr. Swope. In particular, Karmelin and/or Booras began checking the references and qualifications listed by Mr. Swope in his multi-page curriculum vitae. Checking on over seven pages of text, Karmelin and/or Booras were unable to find a single improper entry with the exception of a claim by Karmelin and/or Booras that Mr. Swope was being untruthful about receiving the Master of Science degree in the Management of Technology, NOT IN THE RECEIPT OF THE DEGREE ITSELF, but only as to the date the degree was earned. Booras and/or Karmelin based this assertion solely on the strength of a telephone call with an employee of the University of Miami (not under oath) and a review of an uncertified copy of a college transcript, which "review" was performed, upon

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information and belief, by an assigned investigator who himself has no four-year college degree.

Based upon the foregoing, Karmelin and Booras caused to be filed into the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, a three count Information charging the crimes of Perjury (two counts) and Perjury by Contradictory Statements. This matter was assigned case #97-9443 A02 and to Criminal Division y, the Honorable John L. Phillips, Circuit Judge presiding. A "not in custody" capias was issued for Mr. Swope's arrest. Well-knowing Mr. Swope's reputation in the legal community, including his history and reputation as a law enforcement officer; well-knowing his repeated and routine appearances on behalf of numerous attorneys, representing many different citizens accused; and well-knowing that the likelihood of flight was minuscule, Karmelin and Booras elected not to extend Mr. Swope the courtesy of allowing Mr. Swope to surrender to the authorities to face these unfounded charges. Instead, Karmelin personally contacted Broward County authorities in order to have Mr. Swope physically arrested and taken into custody by the very agency for which he had worked - the Broward Sheriff's Office - while Mr. Swope was physically present in the Broward County Courthouse, present and preparing to testify in a trial underway at that time. The arrest was effected, pursuant to Mr. Karmelin's request, on August 28, 1997.

After his arrest, but before his scheduled arraignment, a number of prominent attorneys contacted the Office of the State Attorney in an effort to minimize the damage which had already been inflicted upon Mr. Swope. Efforts were made by various attorneys to explain to attorneys in the your Office the fundamental differences between acquiring a degree in a course of study and receiving the physical diploma acknowledging the acquisition of the degree. These efforts proved fruitless and your staff elected to continue to pursue this frivolous criminal action, thus exacerbating Mr. Swope's humiliation and compounding his damages.

The undersigned law firm filed its Notice of Appearance as attorneys of record, together with a Plea of Not Guilty together with standard defense discovery pleadings under date of September 29, 1997. This firm also filed a Motion to Dismiss and a Defendant's First Witness List under date of October 29, 1997. On October 29, 1997, a status conference was held. Well knowing the bona fides of the defense and well-knowing that this prosecution was fatally flawed, Karmelin refused to dismiss the case by announcing a nolle prosequi, instead asserting that the State would

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continue to maintain this prosecution against Mr. Swope. The case was thus set on the trial docket for status conference on December 4, 1997.

In the interim, on or about the 30th day of September, 1997, the undersigned spoke with Assistant State Attorney Booras by mobile telephone. During that call, the undersigned attempted to explain the obvious defects in this prosecution in order to bring about a rapid conclusion by way of nolle prosequi, once again attempting to mitigate Mr. Swope's damages. Mr. Booras replied that he "knew" that a civil action would follow prosecution at the time he signed his name to the Information. The substance of this conversation was memorialized in correspondence dispatched by the undersigned to Mr. Booras under date of October 7, 1997, a copy of which is attached to this correspondence for your convenience and marked as Exhibit "A".

In violation of the Rules of Professional Conduct and the Florida Rules of Criminal Procedure, Karmelin contacted witnesses listed by the defense and subpoenaed them for the purpose of giving "investigative statements" after receiving this firm's notice of appearance; after receiving the Defense Witness List; and, after being fully advised by the undersigned that these defense witnesses would not only exonerate Mr. Swope but expose the frivolous nature of this prosecution. Fortunately, the undersigned was contacted by a spokesman for the witnesses and thus was able to attend, since the Office of the State Attorney, Karmelin and/or Booras gave no notice to defense counsel. Further, Karmelin had one or more conversations with these defense witnesses and/or their legal representatives. During these conversations, Karmelin threatened the University of Miami and its employees with prosecution for various crimes, including tampering with or the destruction of evidence in the event that the University of Miami failed to provide him with certain documents which he wanted. Predictably, these witnesses established the truth - a degree is one thing, a diploma is quite another - and there was then, and is now, no reason to prosecute Mr. Swope. It is also important to note that these intended-to-be surreptitious statements, which Karmelin wanted taken outside the presence of Swope's legal counsel, were the first sworn, investigative statements taken in this so-called investigation and prosecution. These statements were taken approximately eight weeks after Mr. Swope's arrest and more than five months after Karmelin's first contact with the University of Miami. It is truly a challenge to pick the correct adjective to describe this "investigation" by your office. Malicious, incompetent, inept, non-existent, and vindictive are a few that immediately come to mind.

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Once these statements were taken, it was obvious to even the most novice lawyer that this prosecution was ill conceived, improperly commenced and wholly frivolous. Yet Mr. Karmelin and your office continued to resist and refuse requests to dismiss this case. In fact, despite our many years as friends, you repeatedly failed to return any of my telephone calls either.

Inevitably, the day came when your office had to "fish or cut bait." The criminal proceedings were terminated in favor of Mr. Swope when your office filed a written Nolle Prose [sic] of all charges on November 10, 1997. It would be bad enough if the misconduct ended there, but it continued. Chronicled below are further statements made to the press by Mr. Karmelin after the termination of the prosecution, which are tantamount to accusing Mr. Swope not only of perjuring himself, but also suborning perjury and/or tampering with witnesses from the University of Miami.

I am also advised that your office is engaging in a continued harassment of my client. Specifically, Mr. Swope is being set for depositions and is not being paid for his time, contrary to the custom and policy for expert witnesses who appear in Palm Beach County cases. He is also being harassed and "grilled" on matters totally unrelated to his testimony in any particular case, presumably with the intent to entrap or induce him into making some type of statement which your office can then "prosecute". Tactically, you must recognize that this is merely evidence of the continuing efforts of your office to unjustly harass Mr. Swope in an attempt to destroy his credibility and his livelihood. These tactics demonstrate a continued vendetta against Mr. Swope.

In addition to pursuing state law remedies, it is our intention to pursue federal civil rights claims against Messrs. Karmelin and Mr. Booras. Since F.S. 768.28 does not apply to federal civil rights claims, these claims will not be subject to the presumptive statutory "cap" of \$100,000.00. Furthermore, they will also carry a prevailing party attorneys' award pursuant to 42 U.S.C. 1988.

When prosecutors engage in investigatory activities, the cloak of absolute immunity is lost. Prosecuting attorneys are only entitled to qualified immunity in civil rights cases. See, e.g., Marrero v. Hialeah, 625 F.2d 499 (5th Cir. 1980), Schlosser v. Coleman, 818 F. Supp. 1534 (M.D. Fla. 1993) Messrs. Karmelin and Booras failed to properly investigate this matter. Mr. Swope should never have been arrested. It is our belief that a jury will have no hesitation in concluding that Messrs. Karmelin and Booras were either "plainly incompetent" or "knew they were violating

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Plaintiff's constitutional rights", especially in light of Booras' statement that he "knew" that a civil action would follow prosecution at the time he signed his name to the Information. See, Pattern Jury Instructions, 11th Circuit Court of Appeals.

After the prosecution against Mr. Swope was abandoned, Mr. Karmelin made several slanderous statements meant to be disseminated in the media. Specifically, Mr. Karmelin's statements that "when the case was filed, it was a slam-dunk" and that "in the light least favorable to Mr. Swope, he lied and got people to change their story" are not protected, privileged comments and they are defamatory in their content. Marx v. Gumbinner, 855 F.2d 783 (11th Cir. 1988). Karmelin also published his vendetta against Swope by communication, both verbal and written, with various prosecuting attorneys within, and outside of the state of Florida, advising them in advance that criminal charges would be filed against Mr. Swope and accusing Mr. Swope of being a liar and/or untruthful under oath.

In addition to the false arrest, and as a direct result of the negative publicity generated by that arrest and Mr. Karmelin's defamatory statements, Mr. Swope suffered serious injuries to his reputation. He has needlessly suffered shame, humiliation, mental anguish, and has incurred other pecuniary damages including, but not limited to, significant lost income. These losses, which have been suffered in the past, can reasonably be expected to be suffered in the future as well.

I place you on notice that we will request all books, papers, reports, memoranda, telephone records, facsimile transmissions, notes and other papers which relate to all attempts by your office to prosecute our client for the offenses of Perjury in your Case No. 97-09443 CF A02; the efforts of your office to publish, publicize and disseminate information on this matter; and your conferences, meetings and discussions (including meetings with County Attorneys) after the termination of this action. Mr. Karmelin was very blunt in his "warning" to the University of Miami about "destruction of evidence". I trust he will have the same concern for the integrity of the Office of the State Attorney as a party in the civil justice process and will not destroy any of the records and documents related to this case.

Finally, in an effort to settle this matter short of what is certain to be newsworthy, protracted litigation, demand is hereby made for the sum of \$3,000,000.00 for the damages sustained by Mr. Swope. This offer will remain open until the close of business on September 11, 1998, after which time we will file the enclosed

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Complaint. You will notice that the enclosed Complaint does not contain any state law claims against the PBSAO. It is our intention to amend the Complaint to add those claims at the end of the "investigation" period contemplated in F.S. 768.28(6), or as soon as your office formally denies our claim, whichever comes first. We await your response within the above-referenced time frame.

Respectfully,

McGEE, GAINNEY & HUSKEY, P.A.


C. Edward McGee, Jr., Esq.
For the Firm

JDH/mmm

cc: Department of Insurance
Tallahassee, Florida
(via Certified Mail, Return Receipt Requested)
Mr. Rick A. Swope
Fredrick R. Susaneck, Esq.

CEM/JDH/MMM

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