**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action No. 22-cv-01136-CNS-JPO

BRIAN HICKS,

Plaintiff,

v.

THE CITY AND COUNTY OF DENVER;
TIMOTHY TWINING;
MARK CHUCK;
JANE/JOHN DOE #1;
JANE/JOHN DOE #2; and
JANE/JOHN DOE #3,

Defendants.

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**RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

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Magistrate Judge James P. O'Hara

This matter comes before the Court on City and County of Denver's and Mark Chuck's Motion to Dismiss Plaintiff's Second Amended Complaint Under F.R.C.P. 12(b)(6) (the "Denver Motion") [#43], and Defendant Timothy Twining's Motion to Dismiss Plaintiff's Second Amended Complaint ("Mr. Twining's Motion") [#44] (collectively, the "Motions"). The Motions have been referred to this Court [#46]. This Court has carefully considered the Motions and related briefing, the entire case file and the applicable case law, and has determined that oral argument would not materially assist in the disposition of the Motions. For the following reasons, the Court respectfully **RECOMMENDS** that Mr.

Twining's Motion be **GRANTED**, and that the Denver Motion be **GRANTED IN PART** and **DENIED IN PART** as set forth below.

## I. BACKGROUND[1]

Plaintiff is currently incarcerated at the Bent County Correctional Facility. [#41 at 2] $3,406.00 of Plaintiff's money had been held as evidence in a criminal case against Plaintiff. [*Id.* at 3] Following Plaintiff's criminal trial, the resolution of his appeal, and the denial of his petition for writ of certiorari, Plaintiff sought an order from the district court that sentenced him that the $3,406.00 be returned to Plaintiff. [*Id.*] Plaintiff asserts that the money was not used as evidence in the prosecution's case-in-chief at trial, was not contraband, and was not subject to forfeiture. [*Id.* at 4] The sentencing court exercised jurisdiction over the motion, and ordered the prosecution to respond. [*Id.*] In response to Plaintiff's motion, "the Denver District Attorney's Office, through its Chief Deputy District Attorney Timothy Twining, conceded that the prosecution had no 'cognizable basis to assert retention' [of Plaintiff's] cash." [*Id.*] Mr. Twining, however, "urged the court to enter an order directing [that] the money be applied to the restitution balance" in Plaintiff's case. [*Id.*] After considering the arguments, the sentencing court concluded that "it did not have legal authority to apply the money to [Plaintiff's] restitution balance under the circumstances," but it also "denied [Plaintiff's] request to have the money returned." [*Id.*] The sentencing court did, however, return other personal items to Plaintiff that had been seized along with the money—such as clothing, sneakers, and a wallet. [*Id.*]

[1] The facts are drawn from the allegations in Plaintiff's Second Amended Complaint (the "Complaint") [#41], which must be taken as true when considering a motion to dismiss. *Wilson v. Montano*, 715 F.3d 847, 850 n.1 (10th Cir. 2013) (citing *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011)).

Plaintiff appealed the sentencing court's order denying the release of the money. [*Id.*] The Appellate Division of the Colorado Attorney General's office, "at the direction of [Mr.] Twining, subsequently objected to the release of [Plaintiff's] cash, despite conceding that there were no 'direct legal grounds' authorizing the continued retention of the funds." [*Id.* at 5] The Colorado Court of Appeals observed that there was a split of authority on the issue, but concluded that the sentencing court lacked jurisdiction to order the return of his money. [*Id.*] The court therefore vacated all orders entered by the sentencing court "to the extent they address[ed] [Plaintiff's] request for return of the cash." [*Id.*] Plaintiff filed a petition for writ of certiorari with the Colorado Supreme Court to "resolve the split of authority" and "clarify that trial courts do indeed have ancillary jurisdiction to decide post sentence motions for the return of property." [*Id.*] Plaintiff's petition was denied. [*Id.*]

Plaintiff then turned to the Denver City and County Municipal Code of Ordinances and the Denver Police Department's Operations Manual. [*Id.*] Plaintiff alleges that neither Denver, nor the Denver Police Department, have procedures in place to address property retention issues. [*Id.* at 7] Plaintiff did determine that—according to the Municipal Code and the Denver Police Department's Operations Manual—the Commander of the Major Crimes Division, the Commanding Officer of the Homicide Unit, the Custodian of Property, and the Denver District Attorney's Office were responsible for deciding to retain or release property held as evidence in cases such as Plaintiff's. [*Id.*] Plaintiff learned that Defendant Mark Chuck was the Commander of the Major Crimes Division, and mailed a certified letter addressed to Commander Chuck requesting that the money be released immediately. [*Id.*] The letter contained verification that the criminal cases against Plaintiff had concluded, and that the Denver District Attorney's Office had conceded that there

was no cognizable basis to hold the funds. [*Id.* at 7-8] The letter was delivered, and a Denver Police Department representative signed for its receipt. [*Id.* at 12] Plaintiff did not receive a response from Commander Chuck or any other Dever Police Department representative. [*Id.* at 8]

Plaintiff' original Complaint was docketed on May 6, 2022, and alleged that the failure to return his money violated Plaintiff's constitutional rights. [#1] Plaintiff's operative Complaint asserts Fourth Amendment, substantive due process, and procedural due process claims against Defendants. [#41 at 8-18] Commander Chuck and the City and County of Denver filed their Motion to Dismiss Plaintiff's Second Amended Complaint on January 17, 2024 [#43], and Mr. Twining filed his Motion to Dismiss Plaintiff's Second Amended Complaint on January 24, 2024 [#44]. Plaintiff filed his responses on March 11, 2024 [#47] and April 8, 2024 [#49], respectively. The Court deems these responses timely filed. [#58] Defendants filed their respective replies on March 25, 2024, and April 26, 2024. [##48; 57]

## II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) empowers a court to dismiss a complaint for "lack of subject-matter jurisdiction." Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case, but only a determination that the court lacks authority to adjudicate the matter. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). A court lacking jurisdiction "must dismiss the cause at any stage of the proceeding in which it becomes apparent that

jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a motion under Rule 12(b)(6), a court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (alteration in original) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). Nonetheless, a plaintiff may not rely on mere labels or conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

"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 *Twombly*, 550 U.S. at 570). Plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). "The burden is on the plaintiff to frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." *Id.* (quoting *Twombly*, 550 U.S. at 556). The court's ultimate duty is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

"A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). "The *Haines* rule applies to all proceedings involving a pro se litigant." *Id.* at 1110 n.3. The court, however, cannot be a pro se litigant's advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

## III. ANALYSIS

### A. Mr. Twining's Motion

#### i. Eleventh Amendment Immunity

Mr. Twining argues that he is entitled to Eleventh Amendment immunity for Plaintiff's claims against him in his official capacity. [#44 at 6-9] Because this argument implicates this Court's subject matter jurisdiction, the Court addresses it at the outset. *Fent v. Okla. Water Res. Bd.,* 235 F.3d 553, 559 (10th Cir. 2000) ("[O]nce effectively asserted [Eleventh Amendment] immunity constitutes a bar to the exercise of federal subject matter jurisdiction." (emphasis omitted)).

The Eleventh Amendment provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Supreme Court has recognized, however, that "States' sovereign immunity is not limited to the literal terms of the Eleventh Amendment." *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 446 (2004). "Although the text of the Amendment refers only to suits against a State by citizens of

another State, [the Supreme Court] ha[s] repeatedly held that an unconsenting State also is immune from suits by its own citizens." *Id.*

"Eleventh Amendment immunity extends to state agencies that act as arms of the state, but it does not extend to counties, cities, or other political subdivisions of the state." *Ambus v. Granite Bd. Of Educ.,* 975 F.2d 1555, 1560 (10th Cir. 1992). "The arm-of-the-state doctrine bestows immunity on entities created by state governments that operate as alter egos or instrumentalities of the states." *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 574 (10th Cir. 1996). Moreover, "[u]nder the Eleventh Amendment, a plaintiff's claims are barred when brought against a state agent in their official capacity." *Kirchner v. Marshall*, No. 22-cv-01512-CNS-MEH, 2023 WL 110953, at *3 (D. Colo. Jan. 5, 2023) (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991) and *Johnson v. Swibas*, No. 14-CV-02258-BNB, 2014 WL 5510930, at *2 (D. Colo. Oct. 31, 2014)).

Plaintiff sues Mr. Twining, the "Chief Deputy District Attorney," in his official capacity. [#41 at 2, 4] "Official-capacity suits . . . 'generally represent . . . another way of pleading an action against an entity of which an officer is an agent.'" *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55 (1978)). Federal courts have uniformly held that district attorneys' offices in Colorado, and their employees sued in their official capacities, are entitled to Eleventh Amendment immunity. *Carbajal v. McCann*, 808 F. App'x 620, 638 (10th Cir. 2020) ("[Tenth Circuit] binding precedent hold that district attorneys' offices in Colorado enjoy Eleventh Amendment immunity."); *Romero v. Boulder Cnty. DA's Off.*, 87 F. App'x 696, 698 (10th Cir. 2004) ("[D]istrict attorn[ies] [are] state officer[s] under Colorado law."); *Rozek v. Topolnicki*, 865 F.2d 1154, 1158 (10th Cir. 1989) (holding a Colorado Office of

the District Attorney was an agency of the state and therefore entitled to Eleventh Amendment immunity); *Sanchez v. Hartley*, 65 F. Supp. 3d 1111, 1126 (D. Colo. 2014) (agreeing "with the weight of state and federal case law, and find[ing] that the District Attorney's Office is an arm of the State of Colorado, and thus protected from suit by the Eleventh Amendment," and collecting cases), *aff'd in part, appeal dismissed in part*, 810 F.3d 750 (10th Cir. 2016); *Bragg v. Off. of the Dist. Atty., Thirteenth Jud. Dist.*, 704 F. Supp. 2d 1032, 1067 (D. Colo. 2009) ("[T]he Court concludes that [the District Attorney's Office for the 13th Judicial District] is a state agency with the power to assert the defense of sovereign immunity under the Eleventh Amendment."); *Musick v. Pickering*, No. 05-cv-01361-REB-OES, 2005 WL 2739028, at *2 (D. Colo. Oct. 24, 2005) ("[I]t is abundantly clear that the District Attorney's Office and [a deputy district attorney] in his official capacity enjoy Eleventh Amendment immunity from plaintiff's federal claims.").

Plaintiff appears to concede in his Complaint that Mr. Twining is a "state officer whose authority emanates from the Colorado Constitution and state statutes." [#41 at 9] Plaintiff nevertheless argues that Mr. Twining's actions were taken as a "municipal agent" because the City and County of Denver deferred to or consulted with the district attorney's office regarding the retention of the money at issue. [#49 at 4-8] Accordingly, Plaintiff argues that his claims against Mr. Twining in his official capacity are not directed at the District Attorney's office, but at the City and County of Denver. [*See id.* at 8]

Plaintiff alleges that Mr. Twining violated Plaintiff's rights by making arguments on behalf of the state in state court. [#41 at 4-5] To be sure, Mr. Twining's prosecutorial decisions may have had an impact on the City and County of Denver's decision to retain Plaintiff's money. But the "entity of which [Mr. Twining] [wa]s an agent" remained the

district attorney's office while Mr. Twining advocated in court, and this is the entity that Plaintiff seeks relief against. *Graham*, 473 U.S. at 165; [*see also* #41 at 19 (seeking "an injunction" ordering "the Denver D.A.'s Office" to release and return Plaintiff's funds); #49 at 9 (acknowledging that Plaintiff seeks an order for "a state agency to return confiscated cash")]. Plaintiff's official capacity claims against Mr. Twining for his prosecutorial conduct therefore function as claims against the district attorney's office, and this Court must treat them accordingly. *Graham*, 473 U.S. at 165-66. Tenth Circuit precedent establishes district attorney offices in Colorado are entitled to Eleventh Amendment immunity, and this Court is bound by that determination. *Rozek*, 865 F.2d at 1158; *Carbajal*, 808 F. App'x at 638 ("[Tenth Circuit] binding precedent hold that district attorneys' offices in Colorado enjoy Eleventh Amendment immunity."). The Court therefore finds that the Eleventh Amendment bars Plaintiff's claims against Mr. Twining in his official capacity unless an exception applies.

There are two primary exceptions to the sovereign immunity doctrine: Congress may abrogate a state's Eleventh Amendment immunity, or a state may waive its sovereign immunity and consent to be sued. *Ruiz*, 299 F.3d at 1181. Neither exception applies here. Section 1983 "does not abrogate state sovereign immunity." *Wood*, 414 F. App'x at 105 (*citing Will*, 491 U.S. at 71); *See Ellis v. Univ. of Kansas Med. Ctr.*, 163 F.3d 1186, 1196 (10th Cir. 1998) (explaining that Congress did not abrogate Eleventh Amendment immunity when it enacted 42 U.S.C. § 1983 (citing *Quern v. Jordan*, 440 U.S. 332, 345 (1979)). And Plaintiff does not argue that Colorado has consented to this suit. [*see generally* #49]; *see also Havens v. Colo. Dep't of Corr.*, 897 F.3d 1250, 1260 (10th Cir. 2018) (explaining that the "onus is on [the plaintiff] to demonstrate that [the state's]

assertion of Eleventh Amendment sovereign immunity does not bar [the relevant] claim" (collecting cases)).

Plaintiff does argue that his claim against Mr. Twining in his official capacity may proceed pursuant to the *Ex parte Young* doctrine. The *Ex parte Young* doctrine provides that, under appropriate circumstances, "[t]he Eleventh Amendment does not bar a suit against state officials in their official capacities if it seeks prospective relief for the officials' ongoing violation of federal law." *Harris v. Owens*, 264 F.3d 1282, 1290 (10th Cir. 2001). "Determining whether a request for injunctive relief is prospective requires a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Buchheit v. Green*, 705 F.3d 1157, 1159 (10th Cir. 2012) (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002)). "[The *Ex parte Young* doctrine] does not allow an award for monetary relief that is the practical equivalent of money damages, even if this relief is characterized as equitable." *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1189 (10th Cir. 1998) (citing *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)), *abrogated on other grounds as recognized in Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007).

Plaintiff seeks the following injunctive relief: "[A]n injunction ordering . . . the Denver D.A.'s Office . . . to release and return [Plaintiff's] funds." [#41 at 19] In sum, Plaintiff alleges that Mr. Twining improperly withheld Plaintiff's money by arguing in court that it should be applied to his restitution award, and Plaintiff seeks an order that the district attorney's office return that money. This relief is not "properly characterized as prospective," *Buchheit*, 705 F.3d at 1159, but is "the practical equivalent of money damages," *ANR Pipeline Co.*, 150 F.3d at 1189. The Court agrees with Plaintiff's

contention that cases seeking to "correct a previous wrong" may still fit within the *Ex parte Young* if the case seeks *bona fide* prospective relief. [#49 at 8-9]; *see also Opala v. Watt*, 454 F.3d 1154, 1158 (10th Cir. 2006) ("[T]he mere fact that [the plaintiff] was seeking to 'right a previous wrong' d[oes] not disqualify the action from the *Ex Parte Young* exception."). Here, however, Plaintiff seeks to "correct [Mr. Twining's] previous wrong" through a court order that a state agency return funds owed to Plaintiff. [#41 at 19 (seeking "an injunction" ordering "the Denver D.A.'s Office" to release and return Plaintiff's funds); #49 at 9 (acknowledging that Plaintiff seeks an order for "a state agency to return confiscated cash")] *Ex parte Young* does not permit such relief. *Hakeem v. Kansas Dep't of Hum. Servs.*, No. 22-3144, 2022 WL 16642268, at *5 (10th Cir. Nov. 3, 2022) ("Here, although [the plaintiff] characterizes the relief he seeks as injunctive, equitable, and prospective, it is not. He seeks the return of funds that were previously taken from him. He alleges no ongoing constitutional violations that can be remedied by prospective, injunctive relief."); *see also Edelman*, 415 U.S. at 668 (explaining that the *Ex parte Young* doctrine did not permit an "award of monetary relief" that was "indistinguishable in many aspects from an award of damages against the State" and "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials").

Accordingly, the Court finds that Plaintiff's claims against Mr. Twining in his official capacity are barred by the Eleventh Amendment, and respectfully RECOMMENDS that such claims be DISMISSED WITHOUT PREJUDICE. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir. 2006) ("A longstanding line of cases from this circuit

holds that where the district court dismisses an action for lack of jurisdiction . . . the dismissal must be without prejudice.").

**ii. Absolute Immunity**

Mr. Twining next asserts that he has absolute immunity for the claims against him in his individual capacity. [#44 at 3-6] "Absolute prosecutorial immunity is a complete bar to a suit for damages under 42 U.S.C. § 1983." *Mink v. Suthers*, 482 F.3d 1244, 1258 (10th Cir. 2007) (citing *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976)). "[A] prosecutor is entitled to absolute immunity for those actions that cast him in the role of an advocate initiating and presenting the government's case." *Id.* at 1261. Put differently, "prosecutors are absolutely immune for those activities 'intimately associated with the judicial phase of the criminal process.'" *Id.* at 1259 (quoting *Imbler*, 424 U.S. at 430). In contrast, absolute immunity will not necessarily apply "when a prosecutor is not acting as 'an officer of the court,' but is instead engaged in other tasks, say, investigative or administrative tasks." *Van de Kamp v. Goldstein*, 555 U.S. 335, 342 (2009) (citing *Imbler*, 424 U.S. at 431, n.33).

Here, Plaintiff alleges that he filed a motion in state court for the money at issue to be returned to him. [#41 at 3] The state court "ordered the prosecution to respond." [*Id.* at 4] Mr. Twining, on behalf of the state, filed a response arguing that the money should not be returned to Plaintiff but should instead be applied to Plaintiff's restitution balance. [*Id.*] The state court determined that it lacked authority to apply the money to Plaintiff's restitution balance, but denied Plaintiff's request for the money to be returned. [*Id.*] Plaintiff appealed, and Mr. Twining "direct[ed]" or was otherwise involved in the appellate briefing wherein the state again argued against a court order that the money be returned

to Plaintiff. [*Id.* at 5] Plaintiff alleges that Mr. Twining should not have taken these actions, but should have instead "instructed the [Denver Police Department] to release and return [Plaintiff's] funds." [*Id.* at 9] The Court does not discern any other factual allegations regarding Mr. Twining in Plaintiff's Complaint.[2] The Court finds that Mr. Twining is entitled to absolute immunity for Plaintiff's claims arising from these actions.

Plaintiff asserts that Mr. Twining, by arguing against the release of Plaintiff's money, was acting in an administrative capacity and therefore not entitled to prosecutorial immunity. [#49 at 2-4] Plaintiff cites to cases where prosecutors were denied absolute immunity in managing the disposition of seized property. [#49 at 4 (citing *Coleman v. Turpen*, 697 F.2d 1341 (10th Cir. 1982) and *Lavicky v. Burnett*, 758 F.2d 468 (10th Cir. 1985)). Each of these cases involved prosecutors unlawfully disposing of the plaintiffs' property outside of the context of the judicial process. In *Coleman*, the Tenth Circuit held that a prosecutor did not have absolute immunity for claims arising when the Plaintiff's seized property (a camper and tools) was illegally sold to pay off a storage bill. 697 F.2d at 1345-46. The court explained that the prosecutor was not acting as an advocate, but

[2] The Court understands Plaintiff's Complaint to allege that Mr. Twining's involvement in and authority over the funds terminated following the resolution of Plaintiff's motion and appeal. [*See, e.g.*, #41 at 9 (alleging that "the prosecuting attorney in a criminal case has the authority to direct the Custodian of Property for the [Denver Police Department] to retain any personal property seized or held as evidence in any pending or prospective trial, until final disposition of the criminal charges and/or the conclusion of the appeals in a case.")] Plaintiff specifically alleges that, following the Colorado Supreme Court's refusal to review the denial of Plaintiff's motion for the return of his property, Denver had a duty to release Plaintiff's funds and that this "duty to return the funds was not constrained by the courts or the Denver D.A.'s office in any way." [*Id.* at 13] Similarly, in his briefing, Plaintiff argues that: "[Mr.] Twining had the ultimate decision-making authority regarding the retention and/or disposition of [Plaintiff's] cash throughout the course of the criminal proceedings . . . . However, following the Supreme Court's refusal to resolve [Plaintiff's] request for the return of his money, [Commander] Chuck possessed the authority to release the funds." [#47 at 11]

as an administrator.[3] *Id.* at 1346. Similarly, in *Lavicky* the prosecutor allowed other individuals to take parts that did not belong to them from the plaintiff's seized truck before returning the truck to the plaintiff, leaving the truck "essentially stripped." 758 F.2d at 472. The Tenth Circuit, relying on *Coleman*, determined that this management of seized property by the prosecutor did not fall within his "prosecutorial role" because the prosecutor "was acting as an administrator, not as an advocate" with respect to the post-trial disposition of the truck. *Id.* at 476 (quoting *Coleman*, 697 F.2d at 1346). In both cases, the prosecutors' actions took place outside of the courtroom and were not subject to judicial supervision.

Mr. Twining's court-related actions are distinguishable from the extra-judicial conduct at issue in *Coleman* and *Lavicky*. As opposed to disposing of Plaintiff's property through extra-judicial avenues, Mr. Twining's allegedly unlawful conduct consisted of formulating arguments to be considered by state courts.[4] These arguments revolved around the issue of restitution, which is part of Plaintiff's sentence under Colorado law. *People v. Dunlap*, 222 P.3d 364, 368 (Colo. App. 2009) ("[R]estitution is part of a defendant's sentence."). Although Mr. Twining's actions took place post-conviction, "[a]bsolute immunity applies to the adversarial acts of prosecutors during post-conviction proceedings . . . where the prosecutor is personally involved in the subsequent proceedings and continues his role as an advocate." *Ellibee v. Fox*, 244 F. App'x 839,

[3] Notably, in the same case, the court held that the prosecutor *was* entitled to absolute immunity regarding his role in keeping the plaintiff's cash pending the plaintiff's appeals and future hearings, as this retention constituted "part of his presentation of the State's case." *Coleman*, 697 F.2d at 1344. This was true even though the cash was not used as evidence in the criminal case. *Id.* at 1343.

[4] Indeed, Mr. Twining was ordered to respond to Plaintiff's motion by a state court judge. [#41 at 4]

844 (10th Cir. 2007) (quoting *Spurlock v. Thompson*, 330 F.3d 791, 799 (6th Cir. 2003)). Mr. Twining's alleged actions—making arguments on behalf of the state in response to Plaintiff's motions and appeals in his criminal case—are plainly "intimately associated with the judicial phase of the criminal process" and were taken in the role of an advocate.[5] *Imbler*, 424 U.S. at 430. Absolute immunity therefore bars Plaintiff's suit for damages[6] against Mr. Twining in his individual capacity for his actions taken in state court and with respect to Plaintiff's appeal.

Accordingly, the Court finds that Plaintiff's claims against Mr. Twining in his individual capacity are barred by absolute prosecutorial immunity, and respectfully RECOMMENDS that such claims be DISMISSED WITHOUT PREJUDICE.[7]

**B. The Denver Motion**

Having determined that Plaintiff's claims against Mr. Twining (in both his official and individual capacities) should be dismissed, the Court turns to Plaintiff's claims against Denver and Commander Chuck.

**i. Fourth Amendment Claim**

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[5] Again, the Court does not discern any factual allegations that Mr. Twining took action with respect to Plaintiff's property besides arguing in state court that it be applied toward Plaintiff's restitution balance.

[6] "Under § 1983, a plaintiff cannot sue an official in their individual capacity for injunctive or declaratory relief." *Chilcoat v. San Juan Cnty.*, 41 F.4th 1196, 1214 (10th Cir. 2022) (citing *Brown v. Montoya*, 662 F.3d 1152, 1161 n.5 (10th Cir. 2011)).

[7] "A dismissal with prejudice is appropriate when the defendants are immune from suit and further amendment of the plaintiff's complaint would be futile." *Gabriel v. El Paso Combined Cts.*, 842 F. App'x 231, 235 (10th Cir. 2021). While Plaintiff's current allegations regarding Mr. Twining only relate to actions taken in his role as an advocate, *see supra* notes 2 & 5, it is not clear to the Court that any further amendment on this issue would be futile. *See Oxendine v. Kaplan*, 241 F.3d 1272, 1275 (10th Cir. 2001) (holding that when the plaintiff is proceeding pro se, dismissal with prejudice is only appropriate "where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend" (quotation omitted)).

Plaintiff asserts a claim of "Unreasonable Seizure/Deprivation of Property in Violation of the Fourth Amendment." [#41 at 8] The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Supreme Court has recognized that "[t]he 'basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" *Carpenter v. United States*, 585 U.S. 296, 303 (2018) (quoting *Camara v. Mun. Ct. of City and Cnty. of San Francisco*, 387 U.S. 523, 528 (1967)). Denver and Commander Chuck argue that Plaintiff has failed to state a claim under the Fourth Amendment. [#43 at 9] The Court agrees.

Plaintiff's Complaint includes no allegations regarding the facts or circumstances surrounding the seizure of his money, and nowhere does Plaintiff allege that the seizure itself was unlawful. [*See* #41] Instead, Plaintiff alleges that the continued retention of his funds, as opposed to the seizure itself, has violated his Fourth Amendment rights. [#41 at 8-14] The Tenth Circuit, however, has explained that claims "related to the continued retention of [the plaintiff's] property, as opposed to the initial seizure," do not arise under the Fourth Amendment. *Snider v. Lincoln Cnty. Bd. of Cnty. Comm'rs*, 313 F. App'x 85, 92-93 (10th Cir. 2008). Instead, in cases that "involve both the seizure and detention of personal property," courts are to "analyze the propriety of the initial seizure by police under the Fourth Amendment," whereas the "ultimate disposition of the property [must] comply with the protections of procedural due process." *Id.* at 93 (citing *Winters v. Bd. of County Comm'rs*, 4 F.3d 848, 853, 856 (10th Cir.1993)); *see also Kripp v. Luton*, 466 F.3d 1171, 1173 (10th Cir. 2006) (distinguishing Fourth Amendment claim regarding illegal

search and seizure from claim alleging deprivation of property in forfeiture process, which was "essentially a . . . due process claim alleging procedural and substantive due process violations from the search, seizure and subsequent forfeiture proceeding").

This approach is supported across the Circuits. Indeed, one district court has observed that: "Every single Circuit that has either squarely ruled on or briefly considered this issue has found that the prolonged retention of lawfully seized property does not implicate the Fourth Amendment's protection against unreasonable seizures." *Cameron v. D.C.*, No. 21-CV-2908 (APM), 2022 WL 3715779, at *3-4 (D.D.C. Aug. 29, 2022) (collecting cases, including the Tenth Circuit's decision in *Snider v. Lincoln County*); *see also Denault v. Ahern*, 857 F.3d 76, 84 (1st Cir. 2017) ("To the extent a plaintiff may challenge on federal constitutional grounds the government's retention of personal property after a lawful initial seizure in circumstances such as these, that challenge sounds in the Fifth Amendment rather than in the Fourth Amendment*."), superseded by rule on other grounds as recognized in Gonpo v. Sonam's Stonewalls & Art*, LLC, 41 F.4th 1, 10 (1st Cir. 2022); *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 187 (2d Cir. 2004) ("Where . . . an initial seizure of property was reasonable, defendants' failure to return the items does not, by itself, state a separate Fourth Amendment claim of unreasonable seizure."); *Lee v. City of Chicago*, 330 F.3d 456, 466 (7th Cir. 2003) ("Once an individual has been meaningfully dispossessed, the seizure of the property is complete, and once justified by probable cause, that seizure is reasonable. The [Fourth] amendment then cannot be invoked by the dispossessed owner to regain his property.").

Because Plaintiff does not challenge the initial seizure of his funds but only their extended retention, the Court finds that Plaintiff has failed to state a claim under the

Fourth Amendment. The Court therefore respectfully RECOMMENDS that Denver's Motion be GRANTED to the extent that it seeks dismissal of Plaintiff's Fourth Amendment claim.

**ii. Due Process Claims**

Plaintiff next asserts substantive and procedural due process claims regarding the retention of his funds. [#41 at 14-18] Property rights are protected by the due process clause of the Fourteenth Amendment, which provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "The Due Process Clause encompasses two distinct forms of protection: (i) procedural due process, which requires a state to employ fair procedures when depriving a person of a protected interest; and (ii) substantive due process, which guarantees that a state cannot deprive a person of a protected interest for certain reasons." *ETP Rio Rancho Park, LLC v. Grisham*, 522 F. Supp. 3d 966, 1018 (D.N.M. 2021); *see also Browder v. City of Albuquerque*, 787 F.3d 1076, 1078 (10th Cir. 2015) ("The Supreme Court has interpreted [the Fourteenth Amendment] as guaranteeing not only certain procedures when a deprivation of an enumerated right takes place (procedural due process), but also as guaranteeing certain deprivations won't take place without a sufficient justification (substantive due process).").

**a. Substantive Due Process**

The Court first considers Plaintiff's substantive due process claim. "A violation of substantive due process may arise in two ways—from (1) legislative acts that infringe on a fundamental right, or (2) official conduct that deprives a person of life, liberty, or property in a manner so arbitrary as to shock the judicial conscience." *Lindsey v. Hyler*, 918 F.3d

1109, 1115 (10th Cir. 2019). Plaintiff's Complaint, which alleges a deprivation through official conduct as opposed to legislative acts, must therefore satisfy the "shock-the-conscience" standard. "This standard is exacting." *Id.* at 1116. "'[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense,'" and "not even '[i]ntentionally or recklessly causing injury through the abuse or misuse of government power is [] enough.'" *Id.* (quoting *Onyx Props., LLC v. Bd. of Cnty. Comm'rs*, 838 F.3d 1039, 1048-49 (10th Cir. 2016)). Instead, "[t]he plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." *Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1222-23 (10th Cir. 2006) (quoting *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995)). Tenth Circuit precedent "recognize[s] a [Section] 1983 claim for a violation of Fourteenth Amendment substantive due process rights [only] in the narrowest of circumstances." *Becker v. Kroll*, 494 F.3d 904, 922 (10th Cir. 2007).

While Plaintiff does allege a potential "misuse of government power," the Court finds that the alleged conduct does not shock the judicial conscience. Plaintiff alleges that Denver, through its final policymakers including Commander Chuck, has improperly retained $3,406.00 of Plaintiff's money. [*See* #41 at 3-4] There is no allegation that the funds were improperly seized or disposed of. Plaintiff further alleges that the retention of the funds was rooted in a desire to apply the funds to Plaintiff's restitution balance, [*Id.* at 4]—a "reasonable justification in the service of a legitimate governmental objective." *Browder*, 787 F.3d at 1078-79 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)). Plaintiff also alleges that the length of the delay has been exacerbated by legal uncertainty in Colorado state courts, [#41 at 4-6], mitigating the "degree of

outrageousness" of any hesitancy to act in the face of this uncertainty. *Camuglia*, 448 F.3d at 1222.

Moreover, Plaintiff has failed to allege that the magnitude of potential or actual harm caused by the retention of his funds is one of constitutional proportions. Again, a plaintiff bringing a substantive due process claim based on official conduct must demonstrate both "a degree of outrageousness" *and* "a magnitude of potential or actual harm" that is conscience shocking. *Camuglia*, 448 F.3d at 1222-23. Here, Plaintiff alleges that $3,406.00 of his money has been wrongfully retained. [#41 at 1-2] Certainly, the retention of $3,406.00 of one's funds is a major inconvenience. In some cases, the extended inability to access such a sum may amount to a conscience-shocking injury.[8] But Plaintiff has not alleged any harm caused by the retention of his money besides the fact of its retention, and the Court finds that, without more, the actual or potential harm of Plaintiff's inability to access $3,406.00 does not shock the judicial conscience. *See Seymour v. Garfield Cnty.*, 580 F. Supp. 3d 1039, 1057 (D. Utah 2022) (finding that the harms of "temporary dispossession of property" and "illegal downloading of sensitive financial documents" were not conscience shocking).

Thus, because neither the conduct at issue nor the harm it allegedly caused meets the "rigorous standard" applied to substantive due process claims, *Becker*, 494 F.3d at

[8] For example, an individual may reasonably rely on such a sum for essentials such as rent, food, or medical necessities. The Court does not cast doubt on the ability of such an individual to plausibly allege that the magnitude of the potential or actual harm caused by an arbitrary retention of this money rises to a conscience-shocking level. The Court simply finds that Plaintiff has made no allegation of a conscience-shocking harm in this case.

923, the Court respectfully RECOMMENDS that Denver's Motion be GRANTED to the extent that it seeks dismissal of Plaintiff's substantive due process claim.

**b. Procedural Due Process**

The Court finally turns to Plaintiff's procedural due process claim. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (quotations omitted). The Tenth Circuit has "held that, '[t]o assess whether an individual was denied procedural due process, courts must engage in a two-step inquiry: (1) did the individual possess a protected interest such that the due process protections were applicable; and, if so, then (2) was the individual afforded an appropriate level of process.'" *Brown v. Montoya*, 662 F.3d 1152, 1167 (10th Cir. 2011) (quoting *Merrifield v. Bd. of Cnty. Comm'rs*, 654 F.3d 1073, 1078 (10th Cir. 2011)). The Denver Motion does not appear to challenge either of these two-prongs, but instead argues that: Plaintiff has failed to adequately allege a municipal liability claim against Denver [#43 at 7-8], Commander Chuck is entitled to qualified immunity [*id.* at 9-11]; Plaintiff's claim is barred due to the existence of an adequate state remedy [*id.* at 11]; and Plaintiff's claim is barred by the statute of limitations [*id.* at 6-7]. The Court considers each argument in turn.

To the extent that Plaintiff asserts this claim against Denver, Denver argues that Plaintiff's Complaint does not adequately allege a theory of municipal liability. [#43 at 7-8] "[M]unicipalities and municipal entities . . . are not liable under 42 U.S.C. § 1983 solely because their employees inflict injury on a plaintiff." *Fofana v. Jefferson Cnty. Sheriff's Off.*, No. 11-cv-00132-BNB, 2011 WL 780965, at *2 (D. Colo. Feb. 28, 2011) (citing *Monell*

*v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694 (1978); *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993)). Instead, "[t]o hold a municipality liable under § 1983, a plaintiff must prove (1) the existence of a municipal policy or custom by which the plaintiff was denied a constitutional right and (2) the policy or custom was the moving force behind the constitutional deprivation." *Crittenden v. City of Tahlequah*, 786 F. App'x 795, 800 (10th Cir. 2019) (citing *Monell*, 436 U.S. at 694). A municipal policy or custom may take the form of:

> (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.

*Bryson v. City of Okla. City*, 627 F.3d 784, 788 (10th Cir. 2010) (quotations and alteration omitted). Plaintiff argues that he states a claim for municipal liability under the following theories: formal regulation, final policymaker, ratification, and failure to train. [#47 at 7-13]

Denver argues that Plaintiff's Complaint relies exclusively on the "final policymaker theory," yet only provides "conclusory statements" that the individual Denver Defendants had final policymaking authority. [#43 at 8] Denver relatedly argues that Plaintiff has failed to allege that "a final policymaker made the decision not to return the money." [*Id.*] While the Court agrees that Plaintiff's Complaint relies on the final policymaker theory,[9]

[9] In briefing, Plaintiff asserts that he has also adequately alleged municipal liability under the formal regulation, final policymaker, ratification, and failure to train theories. [#47 at 7-13] As for the formal regulation theory, Plaintiff does identify formal written municipal

the Court finds that Plaintiff's allegations are not conclusory. In the context of evaluating a Complaint's allegation of action by a final policymaker, the Tenth Circuit has clarified that in order to state a claim, "[a]t a minimum, [a plaintiff's] complaint must identify [the] policy-makers and the specific actions they took that resulted in the deprivation of [the plaintiff's constitutional] rights." *London v. Beaty*, 612 F. App'x 910, 914 (10th Cir. 2015). Plaintiff has done this. Plaintiff's Complaint alleges that the following municipal employees have final policymaking authority regarding the disposition of seized property: the Commander of the Homicide Unit for the Denver Police Department (the "Homicide Commander"); the Custodian of Property for the Department of Safety and the Denver Police Department (the "Custodian"); and Commander Chuck.[10] [#41 at 12] Plaintiff supports these allegations with citations to municipal policy granting the identified individuals responsibility over seized property or otherwise requiring consultation with these individuals before returning the property. [*id.* at 11-12]; *see also Crowson v. Washington Cnty.*, 983 F.3d 1166, 1191 (10th Cir. 2020) (explaining that a "municipality may not escape liability by acting through twenty hands instead of two"). Plaintiff has alleged that, together, these individuals had the final authority over property retention decisions, and that Denver offered no meaningful avenues of review of their decisions.

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policy in his Complaint, but he consistently alleges that the policy requires the return of his property. [*See* #41 at 9-11] Thus, the identified formal policy could not be the "moving force" behind the deprivation of Plaintiff's property. And Plaintiff's Complaint does not allege any facts sufficient to state a claim under a ratification or failure to train theories, as it consistently alleges that the individual Denver Defendants are final policymakers (as opposed to subordinates requiring ratification) and fails to identify any lapse in training or supervision of these decision makers. [*See, e.g.*, #41 at 12, 14]

[10] While Plaintiff only names the Custodian and the Homicide Commander as unidentified "Doe Defendants," Denver makes no argument that this insufficiently identifies these policymakers at the motion to dismiss stage.

*See Randle v. City of Aurora*, 69 F.3d 441, 448-50 (10th Cir. 1995) (remanding a matter for further development on whether certain city officials exercised final policymaking authority in a particular area when the level of constraint placed on those officials was unclear and the officials' decisions in that area were not subject to review)*; Flanagan v. Munger*, 890 F.2d 1557, 1569 (10th Cir. 1989) (holding that an individual was a final policymaker because, "for all intents and purposes the [individual's] discipline decisions are final, and any meaningful administrative review is illusory."); *Starrett v. Wadley*, 876 F.2d 808, 818-19 (10th Cir.1989) (attributing an act of an induvial to the county because the individual "had final authority to set employment policy as to the hiring and firing of his staff" and the county did not offer "meaningful avenues of review" of these actions). The Court finds that, at this stage in the proceedings, Plaintiff has met the pleading "minimum" of identifying the relevant policymakers. *London*, 612 F. App'x at 914. And Plaintiff's Complaint identifies the actions that these policymakers took—deciding to retain Plaintiff's property. [#41 at 13] This allegation is plausibly supported by the simple fact that Plaintiff's property has not been returned to him by those responsible for its retention and disposal.[11] "Although [D]efendants may establish that the alleged actions did not in fact occur or that they were not within the authority of [D]efendants, at this stage in the litigation dismissal is inappropriate." *Wilson v. Civ. Town of Clayton*, 839 F.2d 375, 381

[11] Of course, there are other plausible inferences that may be drawn from this fact, such as an inference that the decisionmakers or those responsible for its return simply neglected their duties. However, at this stage the Court must draw all reasonable inferences in favor of Plaintiff, and the Court finds that Plaintiff's allegation that Denver has continued to retain his property despite Plaintiff's fairly extensive efforts to have it returned plausibly supports the inference that the final policymakers identified by Plaintiff have made the decision to retain Plaintiff's property.

(7th Cir. 1988). The Court therefore finds that Plaintiff's Complaint adequately alleges a theory of municipal liability against Denver on Plaintiff's procedural due process claim.

As for Plaintiff's procedural due process claim against Commander Chuck, Commander Chuck asserts that he is entitled to qualified immunity. "Qualified immunity 'protects government officials from liability for civil damages insofar as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."'" *Weise v. Casper*, 593 F.3d 1163, 1166 (10th Cir. 2010) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). To defeat a claim of qualified immunity, a plaintiff must demonstrate: (1) that the facts alleged make out a violation of a constitutional right, and (2) that the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *See Thomas v. Durastanti*, 607 F.3d 655, 662 (10th Cir. 2010). With regard to the second prong of the qualified immunity analysis, the plaintiff must demonstrate that the constitutional right was clearly established at the time of the misconduct. *Thomas*, 607 F.3d at 662. As the Tenth Circuit has explained:

> A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. Although plaintiffs can overcome a qualified-immunity defense without a favorable case directly on point, existing precedent must have placed the statutory or constitutional question beyond debate. The dispositive question is whether the violative nature of the *particular conduct* is clearly established. . . . Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.

*Aldaba v. Pickens*, 844 F.3d 870, 877 (10th Cir. 2016) (quotations and citations omitted).

Commander Chuck argues that Plaintiff's Complaint "does not allege [that Commander Chuck] personally seized or withheld the money from [Plaintiff]," and that, at most, Plaintiff's Complaint merely alleges that Commander Chuck failed to respond to

Plaintiff's letter seeking the return of his money. [#43 at 9-10] Commander Chuck argues that "[t]here is no precedent showing that a commander violates a person's rights simply because he did not respond to the person's demand letters." [*Id.* at 10]

Plaintiff's claim, however, does not arise from Commander Chuck's failure to respond to Plaintiff's letter. Instead, Plaintiff alleges that his funds, which were not used as evidence, have been retained long after the termination of his criminal case. [*See* #41 at 18] Plaintiff further alleges that Commander Chuck, as one of the plausibly alleged final policymakers for Denver with respect to the disposition of Plaintiff's funds, has failed to return those funds, and that Plaintiff has no process to challenge that decision. [*See id.* at 15-16, 18] It has been clearly established since at least 1985 that this course of conduct constitutes a due process violation. *Coleman v. Turpen*, 697 F.2d 1341 (10th Cir. 1982) (explaining that the retention of a plaintiff's funds following his criminal case "is a deprivation within the meaning of the fourteenth amendment," that the plaintiff "has a cause of action under section 1983 unless the State has provided him with due process," and that "[i]f [the plaintiff] has had no opportunity to show that the property was not used as evidence against him and should not be retained under [state law], he has been deprived of his property without due process"); *see also Lavicky v. Burnett*, 758 F.2d 468, 472 (10th Cir. 1985) (recognizing that *Coleman* "held that a prisoner may assert a [Section] 1983 cause of action for deprivation of property without due process when the state retained money, not used as evidence, that it had seized from the prisoner").[12]

[12] The Court notes that Plaintiff did not cite *Coleman* or *Lavicky* in response to Commander Chuck's assertion of qualified immunity, [*see* #47 at 14-16], and that a plaintiff bears the burden of citing to clearly established law. *See Thomas v. Durastanti*, 607 F.3d 655, 669 (10th Cir. 2010). However, the Tenth Circuit has reversed a trial court's dismissal of a pro se plaintiff's claims—where the trial court found the plaintiff had failed

Because Plaintiff has adequately alleged that Commander Chuck has played an active role in the decision to retain of Plaintiff's funds, and it is clearly established that this retention without process violated Plaintiff's due process rights, the Court finds that Commander Chuck is not entitled to qualified immunity for Plaintiff's claim against him.

Denver and Commander Chuck next assert that Plaintiff's procedural due process claim must fail because Plaintiff currently has an adequate state remedy. [#43 at 11] An "unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post[-]deprivation remedy for the loss is available." *Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *See also Akervik v. Ray*, 24 F. App'x 865, 869 (10th Cir. 2001) ("[No] action [will] lie for the intentional deprivation of property if there is a meaningful post[-]deprivation remedy for the loss available."). Thus, for unauthorized deprivations, a plaintiff's complaint must allege facts sufficient to plausibly establish the lack of an adequate post-deprivation state remedy. *Hudson*, 468 U.S. at 532-33; *see also Stengel v. N.M. Corr. Dep't*, 640 F. App'x 701, 704 (10th Cir. 2016) (affirming dismissal where plaintiff did not allege that a taking was authorized, and did not allege the lack of meaningful post-deprivation state remedies).

As an initial matter, this principle does not apply to Plaintiff's claims against Denver. The Tenth Circuit has explained that the existence of an adequate post-

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to identify a case demonstrating his right was clearly established—by itself pointing to caselaw sufficiently similar to the facts alleged and finding the plaintiff's right was clearly established. *See Jordan v. Jenkins*, 73 F.4th 1162, 1174 & n.10 (10th Cir. 2023) (recognizing that the plaintiff did not cite the caselaw that the Court relied on, but instructing courts to "use its full knowledge of its own and other relevant precedents" in engaging in a qualified immunity analysis (quotation omitted)); *Ali v. Duboise*, 763 F. App'x 645, 651-52 (10th Cir. 2019).

deprivation state remedy is "irrelevant and does not bar a [section] 1983 claim" when the deprivation is "pursuant to an affirmatively established or de facto policy, procedure, or custom." *Walters v. Corr. Corp. Of Am.*, 119 F. App'x 190, 192 (10th Cir. 2004) (quotations omitted). "[S]tating a claim for municipal liability by definition establishes a policy, procedure, or custom." *Lops v. Haberman*, No. CV 00-1268 JP/LFG, 2001 WL 37125205, at *1 (D.N.M. Mar. 7, 2001) (citing *Wilson*, 839 F.2d at 380). As discussed above, Plaintiff has adequately alleged that the improper decision to retain his funds with no process can be attributed to Denver because the decision was made by Denver's final policymakers. Accordingly, such a deprivation was pursuant to a de facto policy. *See id.* at *1-2 (finding that the existence of an adequate post-deprivation remedy did not require dismissal of a plaintiff's procedural due process claim when the plaintiff had adequately alleged that the employee's actions had been made a de facto policy through ratification by a policymaker); *see also New Windsor Volunteer Ambulance Corps, Inc. v. Meyers*, 442 F.3d 101, 115 (2d Cir. 2006) (explaining that adequate post-deprivation remedies do not bar claims "where the deprivation was caused by high-ranking officials who had final authority over the decision-making process" (quotation omitted)).

To the extent that Plaintiff's claims against Commander Chuck in fact rest on unauthorized actions,[13] the Court still declines to hold that Plaintiff's claim against Commander Chuck must be dismissed due to the existence of an adequate state remedy. Plaintiff alleges that there is no process by which an individual may seek review of decisions to retain seized property following the conclusion of a criminal case. [#41 at

[13] Again, the Court has simply found that Plaintiff has adequately alleged that Commander Chuck acted as a final policymaker in retaining Plaintiff's funds. Any final determination on this question must await further factual and legal development.

17] Plaintiff further alleges that he attempted to regain his property through a motion in state court, but that the Colorado Court of Appeals held that the district court lacked jurisdiction over such a motion. [*Id.* at 5] Plaintiff sought review by the Colorado Supreme Court, but his petition for review was denied. [*Id.* at 6] This adequately alleges that Plaintiff has been denied an adequate state remedy.

Denver and Commander Chuck argue that "months after [Plaintiff] filed his original complaint, the Colorado Supreme Court ruled that convicted defendants may move for the return of lawfully seized property while postconviction proceedings are pending." [#43 at 11 (citing *Woo v. El Paso Cnty. Sheriff's Off.*, 528 P.3d 899 (Colo. 2022)] Plaintiff, however, alleges that he attempted this precise remedy, and his motion was dismissed for lack of jurisdiction. [#41 at 5-6] Denver and Commander Chuck do not cite, and the Court does not find, support for the notion that a state may extinguish a valid procedural due process claim months after it was filed by creating or otherwise making available a remedy that the plaintiff has already attempted. To the contrary, in these situations the state's action becomes "complete" when "it provides or refuses to provide a suitable postdeprivation remedy." *Hudson*, 468 U.S. at 534; *see also Reed v. Goertz*, 598 U.S. 230, 236 (2023) (explaining that a procedural due process claim is "complete" when "the State fails to provide due process" (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)). Here, Plaintiff was explicitly and directly refused the postdeprivation remedy that Defendants assert is now available, and his request for review of that refusal by the Colorado Supreme Court was denied. By the time that the Colorado Supreme Court apparently recognized the availability of the remedy that Plaintiff was denied, the violation had already occurred, and Plaintiff's claim for that violation of procedural due process is

not impacted by the state's course-reversal made after Plaintiff had filed the action before the Court.

Finally, Denver and Commander Chuck assert that Plaintiff's procedural due process claim is barred by the statute of limitations. [#43 at 6-7] "[A]lthough a statute of limitations bar is an affirmative defense, it may be resolved on a Rule 12(b)(6) motion to dismiss 'when the dates given in the complaint make clear that the right sued upon has been extinguished.'" *Radloff-Francis v. Wyo. Med. Ctr., Inc.*, 524 F. App'x 411, 413 (10th Cir. 2013) (quoting *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980)); *see also Bullington v. United Air Lines Inc.*, 186 F.3d 1301, 1310 n.3 (10th Cir. 1999) ("Rule 12(b)(6) is a proper vehicle for dismissing a complaint that, on its face, indicates the existence of an affirmative defense such as noncompliance with the limitations period."), *implicitly overruled on other grounds as recognized by Boyer v. Cordant Techs.*, 316 F.3d 1137, 1140 (10th Cir. 2003). There is also authority supporting the ability of a court to consider, for limitations purposes, dates contained in documents proper for judicial notice at the motion to dismiss stage. *See Wei v. Univ. of Wyo.*, 759 F. App'x 735, 739-40 (10th Cir. 2019) (explaining that a district court was "entitled" to "glean[] the date it found relevant for the limitation calculation by taking judicial notice" of a particular court filing).

Plaintiff's claims arise under Section 1983. [#41 at 1] "Section 1983 provides a cause of action for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws' by any person acting under color of state law." *Pierce v. Gilchrist*, 359 F.3d 1279, 1285 (10th Cir. 2004) (quoting 42 U.S.C. § 1983). Because Section 1983 does not contain a statute of limitations, courts look to the corresponding state statute of

limitations. *See Fratus v. DeLand*, 49 F.3d 673, 675 (10th Cir. 1995) ("For section 1983 actions, state law determines the appropriate statute of limitations."). "'[T]he statute of limitations for § 1983 actions brought in Colorado is two years from the time the cause of action accrued,' unless this period is equitably tolled." *Romero v. Lander*, 461 F. App'x 661, 666 (10th Cir. 2012) (quoting *Fogle v. Pierson*, 435 F.3d 1252, 1258 (10th Cir. 2006)).

To determine if Plaintiff's action is barred by the statute of limitations, the Court must first determine when Plaintiff's action accrued. *City & Cnty. of Denver v. Bd. of Cnty. Cmm'rs of Adams Cnty.*, 543 P.3d 371, 377 (Colo. 2024) ("A statute of limitations without an accrual date is like an analog clock without gears—it never begins to run."). While Colorado law governs the two-year statute of limitations for § 1983 actions, the Court determines when the cause of action accrues under federal law. *Braxton v. Zavaras*, 614 F.3d 1156, 1159 (10th Cir. 2010).

As the Tenth Circuit has explained:

> In general, under the federal discovery rule, claims accrue and the statute of limitations begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action. In particular, a civil rights action accrues when facts that would support a cause of action are or should be apparent.

*Alexander v. Oklahoma*, 382 F.3d 1206, 1215 (10th Cir. 2004) (citations and quotations omitted)*; see also Romero*, 461 F. App'x at 666. That is, "a civil rights action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Smith v. City of Enid*, 149 F.3d 1151, 1154 (10th Cir. 1998) (quoting *Baker v. Board of Regents*, 991 F.2d 628, 632 (10th Cir. 1993)). "Since the injury in a § 1983 case is the violation of a constitutional right, such claims accrue when the plaintiff knows or

should know that his or her constitutional rights have been violated." *Id.* (quotations omitted).

An accrual analysis in a Section 1983 case therefore "begins with identifying 'the specific constitutional right' alleged to have been infringed"—here, a procedural due process claim. *McDonough v. Smith*, 588 U.S. 109, 115 (2019) (quoting *Manuel v. City of Joliet*, 580 U.S. 357, 370 (2017)). "A procedural due process claim consists of two elements: (i) deprivation by state action of a protected interest in life, liberty, or property, and (ii) inadequate state process." *Reed*, 598 U.S. at 236. Such a claim is "'complete' only when 'the State fails to provide due process.'" *Id.* (quoting *Zinermon*, 494 U.S. at 125)). Thus, the violation occurs when due process is refused, and a plaintiff's claim accrues "when the plaintiff knows or should know" of this refusal. *City of Enid*, 149 F.3d at 1154.

Denver and Commander Chuck argue that "the government did not fail to provide [Plaintiff] with due process until the Colorado Supreme Court denied his second petition for writ of certiorari related to the denial of his motion for return of the money." [#43 at 5]; *see Reed*, 598 U.S. at 236-37 ("If any due process flaws lurk in [the relevant state] law, the state appellate process may cure those flaws[.]"). According to Colorado Supreme Court filings, Plaintiff's relevant petition for writ of certiorari was denied by that Court on April 27, 2020.[14] [#43-7 at 1] With the application of the prison mailbox rule,[15] Denver

[14] The Court may take judicial notice of certain "documents and docket materials filed in other courts," as relevant to this case. *Brickert v. Deutsche Bank Nat'l Tr. Co.*, 380 F. Supp. 3d 1127, 1133 n.1 (D. Colo. 2019) (quoting *Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1298 n.2 (10th Cir. 2014)).

[15] Under the prison mailbox rule, "an inmate who places a federal civil rights complaint in the prison's internal mail system will be treated as having 'filed' that complaint on the date

and Commander Chuck assert that Plaintiff's Complaint was filed on April 29, 2022—two years and two days after the denial of Plaintiff's petition for writ of certiorari. [#43 at 6] Denver and Commander Chuck argue that Plaintiff's procedural due process claim is therefore barred, as it was filed two days late. [*Id.*]

Even accepting these dates for the purposes of this 12(b)(6) motion to dismiss, the Court nevertheless declines to recommend dismissal of Plaintiff's procedural due process claim on limitations grounds. The focus of an accrual analysis is when the facts supporting a claim became or should have become apparent to the plaintiff. *Alexander*, 382 F.3d at 1215; *see also Smith v. City of Enid*, 149 F.3d at 1154 (explaining that Section 1983 claims accrue "when the plaintiff knows or should know that his or her constitutional rights have been violated"). The filings submitted for the Court's review on this issue indicate that Plaintiff, who was incarcerated, was proceeding pro se in state court when seeking the return of his funds. [##43-1 (Plaintiff's pro se Motion for Return of Property); 43-5 (Plaintiff's pro se notice of appeal)] It is far from clear that Plaintiff, as an incarcerated individual proceeding pro se, knew or should have known of the Colorado Supreme Court's April 27, 2020 order denying Plaintiff's petition for writ of certiorari before April 29, 2020. In similar contexts federal courts presume that mailed documents take at least three days to reach their intended recipient. *Cf. Lozano v. Ashcroft*, 258 F.3d 1160, 1164 (10th Cir. 2001) (explaining, in the context of mailed EEOC right-to-sue letters, that federal courts have presumed various receipt dates ranging from three to seven days after the letter was mailed); Fed. R. Civ. P. 6(d) (adding three (3) days to the time periods

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it is given to prison authorities for mailing to the court." *Price v. Philpot*, 420 F.3d 1158, 1165 (10th Cir. 2005).

prescribed by the Federal Rules when service of the triggering document is effectuated by mail).

Plaintiff also argues in his response that his appeal related to his motion for the return of property was not resolved "until April 29, 2020, when the mandate issued affirming the Colorado Supreme Court's denial of [Plaintiff's] petition for a writ of certiorari." [#47 at 5-6] No copy of this mandate was included for the Court's review, and, in reply, Denver and Commander Chuck do not challenge Plaintiff's assertion that the mandate (as opposed to the order) controls the accrual analysis. [#48 at 3-4] This provides further uncertainty regarding the accrual date of Plaintiff's procedural due process claim. Ultimately, the Court cannot determine from the face of the Complaint or the documents properly before the Court that Plaintiff knew, or should have known, of the state's final refusal to provide him with due process before April 29, 2020 (two years prior to the presumed filing date of Plaintiff's Complaint). The Court therefore finds that dismissal of Plaintiff's procedural due process claim on limitations grounds is inappropriate.[16] *Radloff-Francis*, 524 F. App'x at 413.

Accordingly, for the reasons set forth above, the Court respectfully RECOMMENDS that the Denver Motion be DENIED to the extent that it seeks dismissal of Plaintiff's procedural due process claims against Denver and Commander Chuck.

## IV. CONCLUSION

[16] Because the Court finds that dismissal of Plaintiff's procedural due process claim is inappropriate at this stage for the reasons stated, the Court does not consider the application of the continuing violations doctrine or the repeated violations doctrine to this claim.

In sum, the Court respectfully **RECOMMENDS** that Mr. Twining's Motion [#43] be **GRANTED** and that the Denver Motion [#44] be **GRANTED IN PART** and **DENIED IN PART**. Specifically, the Court respectfully **RECOMMENDS** that:

1. Plaintiff's claims against Mr. Twining in his official capacity be **DISMISSED WITHOUT PREJUDICE** based on Eleventh Amendment immunity;
2. Plaintiff's claims against Mr. Twining in his individual capacity be **DISMISSED WITHOUT PREJUDICE** based on absolute prosecutorial immunity;
3. Plaintiff's Fourth Amendment claims against Denver and Commander Chuck be **DISMISSED** for failure to state a claim;
4. Plaintiff's substantive due process claims against Denver and Commander Chuck be **DISMISSED** for failure to state a claim; and
5. The Denver Motion be **DENIED** to the extent that it seeks dismissal of Plaintiff's procedural due process claims against Denver and Commander Chuck.

The Clerk of Court is instructed to mail a copy of this Recommendation to Plaintiff.[17]

[17] Within fourteen days after service of a copy of this Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings of fact, legal conclusions, and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Griego v. Padilla (In re Griego)*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings of fact, legal conclusions, and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings of fact, legal conclusions, and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (holding that the district court's decision to review magistrate judge's recommendation *de novo* despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc.*, 52 F.3d

DATED: July 18, 2024

BY THE COURT:

s/ James P. O'Hara
United States Magistrate Judge

901, 904 (10th Cir. 1995) (finding that cross-claimant waived right to appeal certain portions of magistrate judge's order by failing to object to those portions); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding that plaintiffs waived their right to appeal the magistrate judge's ruling by failing to file objections). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (holding that firm waiver rule does not apply when the interests of justice require review).