UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

BERNARD APPEL, Plaintiff, v. CODY PHILLIPS et al., Defendants.	CIVIL ACTION NO. 1:19-CV-00788 (CONNER, C.J.) (MEHALCHICK, M.J.)

REPORT AND RECOMMENDATION

Plaintiff Bernard Appel commenced this action on May 6, 2019, asserting civil rights claims under 42 U.S.C. § 1983 and state law against three sets of defendants: (1) Cody Phillips and Jarreau Dodson,[1] the Middlesex Township police officers who allegedly seized and detained him during a traffic stop on November 6, 2018, without probable cause and falsely arrested, charged, and imprisoned Appel ("Officer Defendants"); (2) Judges Paul Fegley and Thomas A. Placey of the Cumberland County Court of Common Pleas, who handled aspects of Appel's criminal proceeding arising from the stop ("Judicial Defendants"); and (3) Public Defenders Michael Halkias and Christopher Sherwood, Cumberland County Commissioners Vincent Difilippo, Jim Hertzler, and Gary Eichelberger, Cumberland County District Attorney (DA) Merle Ebert, and Assistant District Attorneys (ADA) Kimberly Metzger, Courtney Hair, and Scott Jocken ("County Defendants"). (Doc. 1, at 2-3).[2]

Each set of defendants now moves to dismiss Appel's complaint. (Doc. 15; Doc. 26;

[1] In his complaint, Appel references Dodson only by his last name. Defendants have clarified that the Dodson referenced in Appel's complaint is Jarreau Dodson. (Doc. 26, at 1).

[2] Appel sues the Officer Defendants in their individual capacity only; as to all other defendants, Appel sues them in their individual *and* official capacities. (Doc. 1, at 2-3).

Doc. 30). Appel has not opposed these motions. For the reasons that follow, it is recommended that all three motions to dismiss (Doc. 15; Doc. 26; Doc. 30) be **GRANTED** without prejudice except as to the claims against Attorneys Dodson and Phillips, that Appel's complaint (Doc. 1) be dismissed, and that Appel be granted leave to file an amended complaint as to all defendants but for Attorneys Dodson and Phillips.

I. BACKGROUND

The allegations in Appel's complaint concern his November 6, 2018 arrest and subsequent prosecution for drug-related charges of which defendants presumed Appel was guilty based on the color of his skin and prior criminal history. (Doc. 1, at 6). According to Appel, the Officer Defendants and the Cumberland County Criminal Justice System[3] (CCCJS) "unlawfully seized and detained [him] without probable cause and falsely arrested, charged, and imprisoned [him] for offenses related to Possession with Intent to Deliver controlled substances . . . ." (Doc. 1, at 7). During Appel's "initial seizure and detention, he was [] subjected to an unlawful search of his cellphone and an unreasonable government intrusion into his privacy . . . ." (Doc. 1, at 7). All defendants "possessed but disregarded exculpatory audiovisual bodycam footage of [the Officer Defendants] attempting to physically and psychologically intimidate and coerce another person into incriminating [Appel] for the possession of the illegal drugs with which that person was found and admitted to possession of . . . ." (Doc. 1, at 7).

[3] Appel defines "Cumberland County Criminal Justice System" to include "the prosecutors and District Attorney of the Office of the District Attorney of Cumberland County, the attorneys and Chief Public Defender of the Office of the Public Defender of Cumberland County, the judiciary and courts of Cumberland County, and the individual commissioners of the Board of County Commissioners of Cumberland County, as well as the Board as a policy[] and decisionmaking body, and the County of Cumberland itself." (Doc. 1, at 7).

On November 12, 2018, at Appel's first scheduled preliminary hearing concerning the drug charges, Judge Fegley, Officer Phillips, Assistant District Attorney (ADA) Kimberly Metzger, and the CCCJS attempted to "persuade [Appel] to go forward with his preliminary hearing without a record of those proceedings being made." (Doc. 1, at 7). When Appel refused to move forward with the hearing, the hearing was continued, and the continuance "was imputed to [Appel] by the court." (Doc. 1, at 7). Then, at the December 31, 2018 preliminary hearing, Judge Fegley, Officer Phillips, ADA Metzger, and the CCCJS "gave false and misleading testimony in order to ensure [Appel's] continued unlawful detention and false, bad faith, and malicious imprisonment and prosecution." (Doc. 1, at 7-8). Appel alleges that "the affidavit of probable cause upon which [his] charges are based and supported contains deliberate misstatements of material facts . . . made with reckless disregard for the truth and for the specific purpose of continuing [Appel's] unlawful detention and false, bad faith, and malicious prosecution." (Doc. 1, at 8).

Assistant Public Defender Christopher Sherwood was appointed to represent Appel at the beginning of 2019. (Doc. 1, at 8). Since then, "[Appel] has continuously requested a copy of his full and complete discovery files, with particular emphasis on the bodycam footage . . . ; however, [] Sherwood refuses to share [Appel's] discovery materials with him" because Sherwood's boss, the County's Chief Public Defender, Michael Halkias, "will not allow him to share those discovery materials with [Appel]." (Doc. 1, at 8). Appel also asked Sherwood to file a petition for a writ of habeas corpus, but Sherwood "refuses to do so." (Doc. 1, at 8). Sherwood and Halkias refused to act in Appel's best interest and instead deferred to the agenda of the Office of the District Attorney and the Cumberland County District Attorney himself, Merle Ebert, whom Appel asserts is a former colleague of Sherwood and Halkias.

(Doc. 1, at 8).

Appel pleaded guilty, in satisfaction of the drug charges, to one count of possession with intent to deliver cocaine, and Judge Placey sentenced him to one to two years' imprisonment, among other conditions.[4] Notwithstanding his guilty plea, Appel maintains his innocence and believes that the Officer Defendants' bodycam footage from the time of seizure on November 6, 2018 will irrefutably show that "there can be no possible legal or judicial justification for [Appel's] continued detention or prosecution." (Doc. 1, at 8). Appel adds, "[t]he fact that [he] is still sitting in jail is demonstrable and absolute proof that the Cumberland County Criminal Justice System is unfair, unjust, unconstitutional, and utterly corrupt in every aspect." (Doc. 1, at 8). Appel did not appeal his judgment of sentence following the plea of guilty.

Finally, Appel alleges that all defendants engaged in a conspiracy whereby they "carried on, managed and promoted and encouraged – either explicitly or implicitly – a long-accepted and well-established policy, p[ra]actice, or custom of depriving indigent criminal defendants of the privileges and protections accorded to them" under state and federal law "for the purpose of maintaining a corrupt and unconstitutional criminal ju[s]tice system." (Doc. 1, at 10).

As bases for liability, Appel asserts both federal and state claims. His federal claims are based on (1) unlawful seizure and detention and unreasonable government intrusion into

[4] Although Appel provided few details concerning his guilty plea, the Court may "take judicial notice of the resolution of the resolution of that case." *Mosby v. O'Brie*, 532 F. App'x 84, 85 (3d Cir. 2013). Here, the Court takes judicial notice of his plea of guilty, the charge to which he pleaded guilty (before Judge Placey), and the sentence he received. *Commonwealth v. Appel*, CP-21-CR-0000054-2019 (Cumberland County Com. Pl.), *available at* http://ujsportal. pacourts.us.

privacy; (2) due process of law; (3) equal protection under the law; and (4) ineffective assistance of counsel. His state claims are for (1) false arrest; (2) false imprisonment; (3) intentional misrepresentation; (4) intentional invasion of privacy; (5) intentional infliction of emotional distress; (6) "malpractice – breach of contract and professional negligence"; (7) negligence; and (8) willful misconduct. (Doc. 1, at 10). He asks the Court to exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

Additionally, Appel asserts a RICO claim against the defendants based on the allegation that they "individually and in conspiratorial agreement with each other and their associates within the [CCCJS], have participated in and continue to participate in an ongoing corrupt enterprise under color of official right and the guise of the [CCCJS] . . ." based on various predicate offenses. (Doc. 1, at 10-11). He asserts that "the RICO activities and corrupt enterprise alleged herein are related to and part of those already alleged in another case currently pending before this Court: JOHN WILLIAMS, et al. v. BRADON TOOMEY, et al., CASE NO. 1:18-CV-1687." (Doc. 1, at 11). That case was dismissed and closed in August 2019. *Williams et al. v. Toomey et al.*, No. 1:18-CV-1687 (M.D. Pa. *filed* Aug. 24, 2018).

Appel seeks non-monetary damages – e.g., an order compelling the Judicial Conduct Board of the Commonwealth of Pennsylvania to institute disciplinary and possible removal and disbarment proceedings against the judges and attorneys named herein – as well as monetary damages. (Doc. 1, at 12).

II. LEGAL STANDARDS

A. MOTION TO DISMISS STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes a defendant to move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "Under Rule 12(b)(6), a motion to dismiss may be granted only if, accepting all well-

pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds the plaintiff's claims lack facial plausibility." *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 84 (3d Cir. 2011) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)). Although a court must accept the fact allegations in a complaint as true, it is not compelled to accept "unsupported conclusions and unwarranted inferences, or a legal conclusion couched as a factual allegation." *Morrow v. Balaski*, 719 F.3d 160, 165 (3d Cir. 2013) (quoting *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007)). Additionally, a court need not assume that a plaintiff can prove facts that the plaintiff has not alleged. *Associated Gen. Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983).

In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the United States Supreme Court held that, when considering a motion to dismiss, a court should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. In evaluating a motion to dismiss, a court may consider the facts alleged on the face of the complaint, as well as "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

B. SECTION 1983 STANDARD

Simpson asserts a federal civil rights claim pursuant to 42 U.S.C. § 1983. Section 1983 provides a private cause of action for violations of federal constitutional rights. The statute provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .
>
> 42 U.S.C. § 1983.

Section 1983 does not create substantive rights, but instead provides remedies for rights established elsewhere. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). To succeed on a § 1983 claim, a plaintiff must demonstrate that the defendant, acting under color of state law, deprived the plaintiff of a right secured by the United States Constitution. *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1141 (3d Cir. 1995).

III. ANALYSIS

As a preliminary matter, the Court notes that because Appel is seeking damages for his conviction, imprisonment, consequences thereof, his challenges are better suited for a habeas petition. *See Leamer v. Fauver*, 288 F.3d 532, 542 (3d Cir. 2002) ("[W]henever the challenge ultimately attacks the 'core of habeas'—the validity of the continued conviction or the fact or length of the sentence—a challenge, however denominated and regardless of the relief sought, must be brought by way of a habeas corpus petition. Conversely, when the challenge is to a condition of confinement such that a finding in plaintiff's favor would not alter his sentence or undo his conviction, an action under § 1983 is appropriate."). Indeed, one of Appel's claims is that he had asked his attorney, Sherwood, to file a habeas petition, but Sherwood failed to do so. Unlike in his § 1983 claim, Appel can raise ineffective assistance of counsel in a habeas petition.

Regardless, for the following reasons, the Court is recommending dismissal of Appel's

claims based on immunity, pleading deficiencies, and other grounds.

A. OFFICER DEFENDANTS

The Officer Defendants move for dismissal of (1) all claims based on the favorable-termination-rule in *Heck v. Humphrey*, 512 U.S. 477 (1994); (2) all claims for Appel's failure to state a claim upon which relief can be granted; (3) the non-intentional state law tort claim because they are barred by the Political Subdivision Tort Claims Act and should therefore be dismissed *with* prejudice; and (4) the punitive-damages prayer for relief because Appel failed to plead allegations showing the level of reckless indifference sufficient to warrant an award of such damages. (Doc. 26, at 3, 5-6).

Appel's allegations specifically aimed at the Officer Defendants are that they illegally seized and searched him following a traffic stop. He also alleges that all defendants, including these officers, concealed exculpatory bodycam footage and engaged in a conspiracy to deprive him and other indigent defendants of their constitutional rights. As currently pleaded, the crux of Appel's claim is that the Officer Defendants' unconstitutional seizure and search yielded the drugs for which he was arrested, charged, and convicted upon his plea of guilty to possession with intent to deliver cocaine – and that they did so while concealing exculpatory evidence in conspiracy with others. Therefore, his claims against these defendants are barred under *Heck*. *See, e.g.*, *James v. York Cnty. Police Dep't*, 160 F. App'x 126, 133-34 (3d Cir. 2005) ("Jones bases his § 1983 claim on allegations that the improper search of his tool boxes produced the evidence, a rifle, that resulted in a charge of a prohibited firearm being filed against him and to which he subsequently pled guilty."). Appel asserts he was maliciously prosecuted, but he has failed to allege that "the criminal proceeding ultimately terminated in his favor, which means either a victory at trial, a reversal on appeal, expungement, or a

successful collateral challenge." *See Mosby*, 532 F. App'x at 85. He also alleges false arrest and imprisonment, which "may be maintained without showing a favorable determination, but only if it does not necessarily implicate the validity of a conviction or sentence," not the case here. *See Mosby*, 532 F. App'x at 86.[5]

Appel "ultimately pled guilty to [a] charge[] stemming from the arrest . . . . Consequently, he is barred from maintaining an action for a Fourth Amendment violation in securing that arrest, as this suit is an attempt to win in a civil case what he has lost in a criminal one." *See Mosby*, 532 F. App'x at 85. Whether characterized as an unlawful search or seizure, as a false arrest or imprisonment, or as a malicious prosecution, Appel's "claim clearly implicates the validity of his conviction and is barred by *Heck*." *See Jones v. Shelly*, No. 19-CV-4460, 2020 WL 374465, at *3 (E.D. Pa. Jan. 23, 2020) (citing *Keeling v. Att. Gen. for Pa.*, 575 Fed. App'x 16, 18 (3d Cir. 2014) ("Keeling affirmatively contends that the allegedly illegal search and seizure resulted in his unlawful conviction, and accordingly, he cannot bring this claim unless and until he successfully attacks his conviction."), and *Rosembert v. Borough of E. Lansdowne*, 14 F. Supp. 3d 631, 640 (E.D. Pa. 2014) (holding as barred by *Heck* allegations that plaintiff was searched and arrested without probable cause, which, if true, would require the suppression of evidence that would imply invalidation of the plaintiff's underlying conviction)).

Even assuming *Heck* does not bar these claims, all Appel's allegations are conclusory and speculative and therefore subject to dismissal pursuant to Rule 12(b)(6). He alleges that the officers made false statements, orally and in an affidavit of probable cause, but he does

[5] The same reasoning applies to Appel's allegations that these and all other defendants possessed but failed to disclose exculpatory bodycam footage: if he were to prevail on this claim, it would necessarily imply the invalidity of his underlying conviction.

not state any facts concerning what was said and how it was false. He alleges that various defendants, including the officers, prevented exculpatory evidence from coming to light, but he broadly attributes that conduct to several defendants and does not specific the Officer Defendants' role in that conduct, if any. As currently pleaded, the complaint does not state a claim for relief – and is, in any event, barred by *Heck* to the extent indicated herein.

Appel does appear to allege conduct that may, or may not, depending on the true import of allegations, fall outside the scope of *Heck*, such as his allegation that these defendants discriminated against him based on his race, and that all defendants conspired to deprive him of constitutional rights. Nevertheless, the Court agrees with the Officer Defendants that Appel has failed to adequately plead any such causes of action. As the Court notes, *infra*, the allegations of conspiracy are directed at all defendants without any factual allegations that would put each particular defendant on notice of the charges asserted against them. All that he has alleged are conclusory assertions that defendants (and the CCCJS) discriminated against him and conspired to deprive him and others of constitutional rights, e.g., right to fair trial.

The Court recommends dismissal of the claims against the Officer Defendants.

B. JUDICIAL DEFENDANTS

The Judicial Defendants move to dismiss the claims against them on the following grounds: (1) Eleventh Amendment immunity; (2) the courts over which these defendants preside are not "persons" subject to suit under 42 U.S.C. § 1983; (3) absolute judicial immunity; (4) the *Younger* abstention doctrine; (5) the request for equitable relief must be asserted in a writ seeking mandamus relief, not in a § 1983 complaint; and (6) failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). (Doc 15, at 2, 5-6, 8-9, 11, 13).

Upon careful review of the complaint, the Court finds that Appel's claims against the Judicial Defendants are not actionable under § 1983, are barred by Eleventh Amendment, and are barred by judicial immunity.

1. Official-Capacity Claims

A state judge "sued in his or her official capacity is not a 'person' within the meaning of § 1983 when the relief sought by the plaintiff is monetary damages." *Van Tassel v. Lawrence Cty. Domestic Relations Section*, 659 F. Supp. 2d 672, 696 (W.D. Pa. 2009), *aff'd sub nom. Van Tassel v. Lawrence Cty. Domestic Relations Sections*, 390 F. App'x 201 (3d Cir. 2010). This is so because "a suit against a State official in his or her official capacity is, in all respects other than name, a suit against the State." *Van Tassel*, 659 F. Supp. 2d at 695. Thus, for conduct taken in their official capacity, state judges are generally immune from liability because the state is the real party in interest, and the Eleventh Amendment bars suits against the state itself. *M.A. ex rel. E.S. v. State–Operated Sch. Dist. of Newark*, 344 F.3d 335, 344–45 (3d Cir. 2003). The "Eleventh Amendment protects state employees from federal suit unless Congress has specifically abrogated the state's immunity, or the state has waived its own immunity." *Gromek v. Maenza*, 614 F. App'x 42, 44 (3d Cir. 2015). In this regard, Congress "did not abrogate the states' immunity through the enactment of 42 U.S.C. § 1983," and the Commonwealth has not waived its immunity. *Gromek*, 614 F. App'x at 44; *O'Hara v. Indiana Univ. of Pennsylvania*, 171 F. Supp. 2d 490, 495 (W.D. Pa. 2001). Eleventh Amendment immunity, however, does not extend to "suits against individual state officials for prospective relief to remedy an ongoing violation of federal law." *M.A. ex rel. E.S.,* 344 F.3d at 344–45.

Here, the Eleventh Amendment bars Appel's official-capacity claims against the Judicial Defendants. His claims for money damages are outright barred – and while Appel

seeks non-monetary relief in the form of an order directing the Judicial Conduct Board to institute disciplinary proceedings against Judicial Defendants, the injury for which Appel seeks relief is a "past injury by a state official, even [though] styled as prospective relief . . . ." *See Jakomas v. McFalls*, 229 F. Supp. 2d 412, 426 (W.D. Pa. 2002). His claim for non-monetary relief – in essence, a "declaration that [the Judicial Defendants] had previously violated his rights" – "is not a proper use of a declaratory judgment, which is meant to define the legal rights and obligations of the named parties in anticipation of future conduct, not to proclaim their liability for past action." *See O'Callaghan v. Hon. X*, 661 F. App'x 179, 182 (3d Cir. 2016). Because Appel is not alleging a "continu[ing] [] violat[ion] of federal law," his claim for declaratory relief is barred by the Eleventh Amendment. *See Jakomas*, 229 F. Supp. 2d at 425.

2. Individual-Capacity Claims

To the extent Appel seeks "to impose individual liability on the [Judicial] Defendants, they are entitled to personal immunity" because "judges are immune from suit under § 1983 for actions arising from their judicial acts." *See Gromek*, 614 F. App'x at 45. Judicial immunity "is only lost where the judge's actions that gave rise to suit were: (1) nonjudicial in nature; or (2) were taken in the complete absence of all jurisdiction." *Andrews v. Hens-Greco*, 641 F. App'x 176, 179 (3d Cir. 2016) (internal quotation marks omitted). "When a judge has acted in his or her judicial capacity, as opposed to an executive or administrative capacity, he or she is entitled to absolute judicial immunity from damage claims even when his or her action was erroneous, done maliciously, or exceeded his or her authority." *Richardson v. Wilkinsburg Police Dep't*, No. CV 16-0129, 2016 WL 4141084, at *4 (W.D. Pa. Aug. 4, 2016) (citing *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978)); *see Pierson v. Ray*, 386 U.S. 547, 554 (1967) ("This immunity applies even when the judge is accused of acting maliciously and corruptly . . . .").

Evaluation of the immunity defenses raised here requires the Court to "decide whether the Complaint set forth allegations that, taken as true, establish that the application of an exception to the doctrine of absolute judicial immunity is above the speculative level." *See Kirkland v. DiLeo,* 581 F. App'x 111, 114–15 (3d Cir. 2014). The allegations in Appel's "complaint relate to actions taken by [the Judicial Defendants] in [their] capacity as [] judge[s]," and Appel "has not set forth any facts that would show that [their] actions were taken in clear absence of [] jurisdiction." *See Azubuko v. Royal*, 443 F.3d 302, 303 (3d Cir. 2006). Presiding over sentencing and preliminary hearings, and accepting pleas, are "function[s] normally performed by a judge," and the parties knew they were "deal[ing] with the judge[s] in [their] judicial capacity." *See Thomas v. Schlegel*, No. CIV.A. 14-1282, 2015 WL 617867, at *5 (E.D. Pa. Feb. 11, 2015); *see also, e.g.*, *Friend v. Vann*, 614 F. App'x 593, 596 (3d Cir. 2015) ("Friend's allegations against Judge Vann stem from her signing an arrest warrant and presiding over the trial of one of Friend's acquaintances."); *Richardson*, 2016 WL 4141084, at *5 ("[P]residing over preliminary hearings and ordering detention are normal acts performed by magisterial district judges. [T]hese acts occurred in open court in a pending criminal case over which [the judge] presided. Nor does the bare allegation that [the judge] denied Plaintiff access to his recorded transcripts of hearings implicate a non-judicial function. The alleged denial was made in the pending criminal matter over which [the judge] presided.").[6]

Indeed, Appel's principal, overarching complaint appears to be that he is innocent and that the Judicial Defendants (along with all other defendants) prevented from coming to light

[6] In sharp contrast are those cases where a judge is, for example, acting in an administrative capacity or as a prosecutor and not in a judicial capacity. *Richardson*, 2016 WL 4141084, at *4.

bodycam footage demonstrating his innocence. That the judge may have made decisions concerning whether or not to admit evidence, and it is not entirely clear exactly what is alleged, does not suffice to demonstrate non-judicial conduct to which immunity would not attach. "This is so even where, as here, there is an allegation that the judicial ruling came about as the result of collusion and/or bribery." *Strawbridge v. Bednarik*, 460 F. Supp. 1171, 1172 (E.D. Pa. 1978) (citing *Pierson*, 386 U.S. at 554).

The only arguably non-conclusory allegation of impropriety is that Judge Flegely attempted to force Appel to proceed to the hearing without it being recorded, but that allegation is insufficient to overcome judicial immunity, particularly given that Appel advanced the same claim broadly against several parties without any factual allegations in support. *See Bartol v. Barrowclough*, 251 F. Supp. 3d 855, 859 (E.D. Pa. 2017) (recognizing insufficiency of complaints asserting "multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against" (internal quotation marks omitted)). Further, Appel has "not pointed to any rule or other authority indicating that [the Judicial Defendants] did not have the authority" to preside over Appel's criminal proceedings. *See Andrews*, 641 F. App'x at 180 (internal quotation marks omitted).

Appel's other allegations, those asserting conspiracy and federal RICO Act claims, are entirely conclusory and do not suffice to demonstrate an exception to the application of judicial immunity "above the speculative level." *See Kirkland*, 581 F. App'x at 114–15. In asserting unconstitutional conspiracy, "a plaintiff must assert facts from which a conspiratorial agreement can be inferred." *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 178 (3d Cir. 2010). Absent from Appel's complaint is "enough factual matter

(taken as true) to suggest that an agreement was made," in other words, "plausible grounds to infer an agreement." *See Great W. Mining & Mineral Co.*, 615 F.3d at 178. Regarding his RICO claim, Appel attempts to incorporate claims asserted in an unrelated case that has since been dismissed. *See Williams v. Toomey*, No. 1:18-CV-1687 (M.D. Pa. *filed* Aug. 24, 2018). His otherwise bare and conclusory allegations do not establish this claim.[7]

In short, looking to the "'nature' and 'function'" of the judges' acts and not the acts themselves, the Court is compelled to conclude that the conduct giving rise to Appel's claims was judicial conduct and therefore cloaked with judicial immunity. *See Mireles*, 502 U.S. at 13. Appel alleges "official acts, which were not taken in the absence of jurisdiction, for which [the Judicial Defendants are] immune from suit." *See Friend*, 614 F. App'x at 596.

3. Miscellaneous Arguments

Because the Court is recommending dismissal of these claims on immunity grounds, it does not reach the Judicial Defendants' remaining arguments. However, the Court notes that Appel has fallen short of establishing a *prima facie* cause of action against the Judicial Defendants. He has not pleaded non-conclusory allegations suggesting a plausible claim for relief.

C. COUNTY DEFENDANTS

The County Defendants, including Appel's defense attorney and the Chief Public Defender, the Cumberland County DA and ADAs, and Cumberland County Commissioners, move to dismiss based on the follow grounds, among others: (1) failure to

[7] Appel appears to base his conspiracy and RICO claims on fraud allegations. Fraud, in turn, requires a heightened level of pleading whereby plaintiffs must specify the fraud with particularity as to each defendant. *See Bolick v. Ne. Indus. Servs. Corp.*, No. 4:14-CV-00409, 2015 WL 13357964, at *10 (M.D. Pa. Jan. 14, 2015). His "vague and conclusory statements are simply insufficient to state a valid RICO claim." *See Bolick*, 2015 WL 13357964, at *10.

plead with particularity under Rule 8 of the Federal Rule of Civil Procedure; (2) failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rule of Civil Procedure; (3) prosecutorial and municipal immunity; and (4) the favorable-termination-rule under *Heck*; (5) failure to plead allegations establishing conspiracy, fraud, and invasion-of-privacy causes of action; (6) failure to plead facts warranting punitive damages. (Doc. 31).

1. Public Defenders

Because "attorneys are not subject to § 1983 claims on the basis that they are officers of the court" – "whether they are private attorneys or public defenders" – Appel's "claims [can]not proceed against attorneys [Phillips] and [Dodson] under § 1983." *See Rushing v. Pennsylvania*, 637 F. App'x 55, 57 (3d Cir. 2016). Thus, to the extent that Appel contends he was deprived of effective assistance of counsel during his criminal proceedings, "ineffective assistance of appointed counsel in representing a defendant is not actionable under § 1983." *See Introcaso v. Meehan*, 338 F. App'x 139, 142 (3d Cir. 2009).

As these claims are untenable and not amenable to non-futile amendment, the Court recommends that the Public Defenders be dismissed from this case *with* prejudice.

2. Cumberland County DA and ADAs

Preliminarily, while Appel broadly asserts liability on the part of the Cumberland County DA and ADAs, the only non-conclusory allegations he asserts against any of these defendants is that ADA Metzger and other defendants (1) attempted to persuade him to go forward with a preliminary hearing without a record of such proceedings being made; and (2) "gave false and misleading testimony in order to ensure [Appel's] continued unlawful detention and false, bad faith, and malicious imprisonment and prosecution." (Doc. 1, at 7-8). It is not clear from the complaint what unconstitutional conduct Appel attributes

specifically to ADA Metzger, much less any of the other prosecutorial defendants, and he has not remedied that pleading deficiency with his other allegations, e.g., that all defendants concealed exculpatory bodycam footage and conspired to deprive him of constitutional rights. As defendants observe, Appel's allegations leave "defendants having to guess what of the many things discussed constituted [unconstitutional conduct] on their part." *See Binsack v. Lackawanna County Prison*, 438 F. App'x 158 (3d Cir. 2011).

In any event, Appel's core claim appears to be a malicious prosecution cause of action, which is barred by *Heck*, and his allegations appear to fall squarely within the doctrine of prosecutorial immunity. The "common law cause of action for malicious prosecution provides the closest analogy" to Appel's claims, and "a successful malicious prosecution plaintiff may recover, in addition to general damages, compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of the society" – relief similar to that sought by Appel here. *See Torres v. McLaughlin*, 163 F.3d 169, 173 (3d Cir. 1998) (internal quotation marks omitted). Because his criminal proceedings have not terminated in his favor, Appel's cause of action for malicious prosecution is barred by *Heck*.

Further, a "prosecutor is immune from damages in a § 1983 action for her initiation of a prosecution and presentation of a state's case," which the allegations show here. *See Gause v. Haile*, 559 F. App'x 196, 198 (3d Cir. 2014). Appel has pleaded no allegations indicating that any of the prosecutor defendants were engaged in an administrative (rather than a prosecutorial) capacity at the time of the allegedly unconstitutional conduct, or that the prosecutors' conduct was unrelated to Appel's pending prosecution. *Cf. Odd v. Malone*, 538 F.3d 202, 215 (3d Cir. 2008) (rejecting application of prosecutorial immunity to claim that

prosecutor improperly retained a witness whose testimony was "no longer relevant to an ongoing prosecution").

While Appel's allegation that ADA Metzel (and other defendants) attempted to force him to proceed with an unrecorded preliminary hearing does not appear to be a claim that necessarily implies the invalidity of Appel's conviction, the Court is unable to discern from the complaint's allegations the exact nature of Appel's claim. As already noted, these allegations do not specify ADA Metzel's conduct but rather attribute the conduct to multiple defendants without clarification or supporting factual averments. Appel's assertion that these defendants "attempted" to persuade him does not provide notice of the harm for which Appel seeks redress. Viewed as a whole, the allegations advanced by Appel appear to fold back into a claim for malicious prosecution, which, as the Court has noted, is barred by *Heck*. Presumably, this claim is based on alleged due process violations, which may form the basis of a malicious prosecution claim, but only upon a showing of a favorable termination of the underlying prosecution. *See, e.g.*, *Torres v. McLaughlin*, 163 F.3d 169, 172 (3d Cir. 1998).

3. Cumberland County Commissioners

Turning to Appel's claims against the Cumberland County commissioners, these claims are based on the slimmest of conclusory allegations in the complaint and fail to state a claim for relief under Rule 12(6)(6). The only allegations specifically concerning these defendants is that they conspired to carry on, manage, promote, and encourage, "explicitly or implicitly," a policy, practice, or custom of depriving indigent defendants of their constitutional rights. (Doc. 1, at 10). These allegations are insufficient to state a claim for relief under Rule 12(b)(6).

First, Appel has not alleged any personal involvement on the part of these

commissioner defendants. A "defendant in a civil rights action must have personal involvement in the alleged wrongs to be liable, and cannot be held responsible for a constitutional violation which he or she neither participated in nor approved." *Baraka*, 481 F.3d at 210 (internal citations and quotation marks omitted). "Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity." *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988). An allegation seeking to impose liability on a defendant based on supervisory status, without more, will not subject the official to § 1983 liability. *Padilla v. Beard*, No. CIV. 1:CV-06-0478, 2006 WL 1410079, at *3 (M.D. Pa. May 18, 2006); *Rode*, 845 F.2d at 1207.

Second, Appel has failed to plead with any non-speculative, conclusory allegations that defendants set forth a policy, practice, or custom that injured him under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). Under *Monell*, a municipality may be held liable when the execution of a policy or custom of such municipality or corporation "inflicts the injury" for which the plaintiff seeks redress. *Monell*, 436 U.S. at 694; *see Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 584 (3d Cir. 2003). Given Appel's allegations, and lack of allegations concerning personal involvement, it appears that his claims against the individual Board of Commissioners members are claims, in essence, against the municipality (i.e., the County itself), the liability of which must be established under *Monell*. *See, e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) ("There is no longer a need to bring official-capacity actions against local government officials, for under *Monell*, [] local government units can be sued directly for damages and injunctive or declaratory relief.").

Proving a government policy or custom can be accomplished in a number of different

ways. *Bielevicz*, 915 F.2d at 850. "Policy is made when a 'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy or edict." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1480 (3d Cir. 1990) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986)). Custom, in contrast, can be proven by demonstrating that a given course of conduct, although not specifically endorsed or authorized by state or local law, is so well-settled and permanent as to virtually constitute law. *Andrews*, 895 F.2d at 1480.

Here, the alleged policy, practice, or custom is not sufficiently identified. Appel has not alleged specific actions, if any, taken by the Cumberland County Board of Commissioners, or its commissioners. Appel alleges that these defendants conspired with all other defendants in discriminating against him based on his indigency and race without specifying any policy, custom, practice or usage employed by the Board or the named commissioner defendants. Appel alleges that defendants, explicitly or implicitly, held a "long-accepted and well-established policy, p[ra]actice, or custom of depriving indigent criminal defendants of the privileges and protections accorded to them." This statement does not point to any municipal policy employed by the commissioner defendants, nor does it identify any conduct or activity on their part, or on the part of the Board itself.

As the Court is recommending dismissal of the claims against the County Defendants for the foregoing reasons, it does not reach their remaining arguments.

D. STATE LAW CLAIMS

Finally, because the Court is recommending dismissal of Appel's federal claims, it also recommends declining to exercise supplemental jurisdiction to hear Appel's state law claims. Where a district court has dismissed all claims over which it had original jurisdiction, it may

decline to exercise supplemental jurisdiction over state law claims. 28 U.S.C. § 1367(c)(3). Whether a court will exercise supplemental jurisdiction is within its discretion. *Kach v. Hose*, 589 F.3d 626, 650 (3d Cir. 2009). That decision should be based on "the values of judicial economy, convenience, fairness, and comity . . . ." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). Ordinarily, when all federal law claims have been dismissed and only state law claims remain, the balance of these factors indicates that the remaining claims properly belong in state court. *Cohill*, 484 U.S. at 350. The Court finds nothing in the record to distinguish this case from the ordinary one, and thus the balance of factors "point toward declining to exercise jurisdiction over the remaining state law claims." *See Cohill*, 484 U.S. at 350 n.7.

IV. LEAVE TO AMEND

The Third Circuit has instructed that district courts generally must permit a curative amendment if a complaint filed *pro se* is vulnerable to dismissal for failure to state a claim, unless an amendment would be inequitable or futile. *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002). As Appel's complaint in its current form does not state any claims over which the Court has jurisdiction that are not barred by immunity or *Heck* or upon which relief can be granted against any defendant, the Court is compelled to dismiss it. Appel's claims against Attorneys Dodson and Phillips are plainly without merit and cannot be saved by amendment – it is therefore recommended that those claims be denied without prejudice.

However, to preserve Appel's rights as a *pro se* litigant, the Court recommends granting him leave to file an amended complaint as to all other claims setting forth his factual allegations and legal claims in a manner that can be reviewed by the Court and, if necessary, answered by the defendants. Appel is advised that the amended complaint must be a pleading

that **stands by itself without reference to the original complaint**. *Young v. Keohane*, 809 F. Supp. 1185, 1198 (M.D. Pa. 1992) (emphasis added). By granting leave to file an amended complaint, the Court is *not* acknowledging the viability of any of the causes of action asserted by Appel. Indeed, it does not appear that any permutation of Appel's allegations can overcome, for example, the bar to suit that immunity imposes based on Appel's allegations against various defendants, or his apparent inability to set forth facts giving rise to a *prima facie* claim, particularly concerning fraud-based conspiracy or RICO Act violations. If he should choose to file an amended complaint, Appel should do so with due regard to the deficiencies in his original complaint, and he should base his allegations on an honest assessment of the facts he can allege in the context of federal court pleading requirements and the applicable substantive standards.

V. RECOMMENDATION

Based on the foregoing, the Court recommends that defendants' motions to dismiss (Doc. 15; Doc. 26; Doc. 30) be **GRANTED** without prejudice as to all claims but those asserted against Attorneys Cody Phillips and Jarreau Dodson, which should be dismissed with prejudice; that Appel's complaint (Doc. 1) be dismissed; and that Appel be granted leave to file an amended complaint asserting all claims but for those against Attorneys Cody Phillips and Jarreau Dodson.

Dated: April 13, 2020

s/ Karoline Mehalchick
KAROLINE MEHALCHICK
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

BERNARD APPEL, Plaintiff, v. CODY PHILLIPS et al., Defendants.	CIVIL ACTION NO. 1:19-CV-00788 (CONNER, C.J.) (MEHALCHICK, M.J.)

NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing **Report and Recommendation** dated **April 13, 2020**.

Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3, which provides:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Dated: April 13, 2020

s/ Karoline Mehalchick
KAROLINE MEHALCHICK
United States Magistrate Judge