UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

PAUL J. WASSEL JR., #200625, Plaintiff, v. ERIC RICHARD TORBECK, et al., Defendants.	CIVIL ACTION NO. 3:22-cv-00145 (MARIANI, J.) (SAPORITO, M.J.)

REPORT AND RECOMMENDATION

This is a federal civil rights action, which commenced on January 28, 2022, when the clerk received and lodged for filing a *pro se* complaint, signed and dated by the plaintiff, Paul J. Wassel Jr. on January 23, 2022. (Doc. 1.) At the time, Wassel was incarcerated as a pretrial detainee at Pike County Correctional Facility ("PCCF"), located in Pike County, Pennsylvania. The complaint was accompanied by a motion for leave to proceed *in forma pauperis*, which we have granted in a separate, contemporaneous order. (Doc. 2.) For the reasons that follow, we recommend that the action be dismissed for failure to state a claim, pursuant to 28 U.S.C. § 1915A(b)(1), 28 U.S.C. § 1915(e)(2)(B)(ii), and 42 U.S.C. § 1997e(c)(1).

I. BACKGROUND

At the time this action commenced, Wassel was a pretrial detainee at PCCF, awaiting trial on various felony and misdemeanor drug charges. On March 11, 2022, following a jury trial, Wassel was found guilty on two counts of felony conspiracy to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance, and on three related misdemeanor drug counts. *See Commonwealth v. Wassel*, Docket No. CP-52-CR-0000325-2020 (Pike Cty. (Pa.) C.C.P.).[1] He is presently awaiting sentencing, which is currently scheduled to take place on June 3, 2022. *See id.*

For the most part, the plaintiff's claims arise out these criminal proceedings. The *pro se* complaint identifies seventeen named defendants:[2] (1) Hon. Gregory H. Chelak, a state common pleas judge who presided over Wassel's criminal trial proceedings; (2) Hon. Deborah

[1] In addition to the allegations of the complaint and the exhibits attached thereto by the plaintiff, we have considered publicly available state court criminal docket records. A district court, of course, may properly take judicial notice of state court records, as well as its own. *See* Fed. R. Evid. 201; *Sands v. McCormick*, 502 F.3d 263, 268 (3d Cir. 2007); *Ernst v. Child & Youth Servs. of Chester Cty.*, 108 F.3d 486, 498–99 (3d Cir. 1997); *Pennsylvania v. Brown*, 373 F.2d 771, 778 (3d Cir. 1967).

[2] The complaint also includes unidentified "John Doe" state trooper and county investigator defendants.

Fischer, a state magisterial district judge who presided over Wassel's preliminary criminal proceedings; (3) Raymond Tonkin, the county district attorney who prosecuted the state criminal case against Wassel; (4) Corporal Shawn Smith, a Pennsylvania state trooper; (5) Trooper Travis Graziano, a Pennsylvania state trooper; (6) Trooper Nicholas Stroud, a Pennsylvania state trooper; (7) Trooper Pricilla Richards, a Pennsylvania state trooper; (8) Detective Mike Jones, an investigator with the Pike County District Attorney's Office ("DA's Office"); (9) Detective Christian Robinson, an investigator with the DA's Office; (10) Detective Luis Rodriguez, an investigator with the DA's Office; (11) Detective Church, an investigator with the DA's Office; (12) Eric Richard Torbeck, an alleged confidential informant; (13) Warden Craig Lowe, the warden of PCCF; (14) the Pennsylvania State Police ("PSP"); (15) the Criminal Investigative Division ("CID") of the Pike County DA's Office; (16) Pike County; and (17) the United States of America. The gist of the *pro se* complaint is that the district attorney, the several state troopers and county investigators, and the confidential informant lacked probable cause to arrest, detain, and prosecute Wassel for the various drug offenses of which he was recently convicted; from this, we liberally

construe the *pro se* complaint to assert § 1983 claims against these individual defendants and the state agencies or municipalities that employ them for false arrest, false imprisonment, and malicious prosecution in violation of the Fourth Amendment.[3] In addition, the complaint alleges a variety of errors by the two state court judges in conducting the criminal proceedings against him, which we liberally construe as § 1983 procedural due process claims under the Fourteenth Amendment.

These false arrest, false imprisonment, and malicious prosecution claims arise out of the June 25, 2020, arrest of Wassel at a motel in Pike County, and his subsequent detention and criminal prosecution.

The alleged confidential informant, defendant Eric Torbeck, had made arrangements for Wassel to provide a car and travel with a nonparty individual, Kenneth Smith, to transport a quantity of illegal drugs from Patterson, New Jersey, to Pike County. At the behest of the police, Torbeck had set up a "controlled buy" from Smith at the motel in

[3] *See generally Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244–46 (3d Cir. 2013) (discussing a court's obligation to liberally construe *pro se* pleadings and other submissions, particularly when dealing with imprisoned *pro se* litigants).

Pike County. He informed police that Smith and Wassel would be operating a white Chevrolet Malibu sedan, and he informed police of their expected departure and arrival times. Torbeck informed police that Smith and Wassel would be transporting heroin/fentanyl in packaging bearing a "Mike Tyson" stamp. He indicated that they would likely hide packets of heroin/fentanyl in their socks, and that Smith preferred to hide his heroin/fentanyl under the hood of a car in which he was traveling. Torbeck also advised police that Smith typically carried "protection," which Torbeck understood to mean a firearm.

At 4:30 a.m. on June 25, 2020, waiting police observed a white Chevrolet Malibu crossing a toll bridge from New Jersey into Pike County. One of the defendant state troopers followed the Malibu and observed two occupants. The Malibu pulled into the motel parking lot where the controlled buy had been set up, and it was encountered by the other defendant state troopers and county investigators. The operator of the vehicle was identified as Smith, and the sole passenger was identified as Wassel. When interviewed, they provided inconsistent statements.

The state trooper speaking with Wassel began to perform a "pat down" search of Wassel's person. Wassel informed the trooper that he

was in possession of "weed" and removed a small, clear plastic baggie of marijuana from his own pants pocket. He also informed the trooper that he had a medical marijuana card. But the trooper observed that the baggie was not labeled and did not appear to be from a licensed dispensary.

The state trooper later placed Wassel in handcuffs and informed him that he was under arrest. The state trooper then performed a search of Wassel incident to arrest, locating an empty glassine packet stamped "Mike Tyson" in Wassel's pants pocket, and nine full glassine packets of heroin/fentanyl stamped "Mike Tyson" that had been bound together with a rubber band and hidden in his sock.

Both Smith and Wassel were taken into custody and transported to a state police barracks. The Malibu was towed to the barracks and placed in secured storage. State troopers later obtained and executed a search warrant for the vehicle. Under the hood of the vehicle, they found a watertight plastic container. Inside the container, they found 46 bricks of heroin/fentanyl and three bundles of heroin/fentanyl in glassine packets stamped "Mike Tyson." They also found an iPhone, U.S. currency, and drug paraphernalia.

After being advised of his *Miranda* rights, Wassel informed one of the investigating state troopers that Smith had offered him a brick of heroin as payment to drive him. Wassel stated that, when they arrived in Patterson, New Jersey, Smith gave him a bundle of heroin, and Wassel related that he had assumed Smith would give him the rest when they got back from Patterson.

Based on the foregoing, one of the defendant state troopers filed a criminal complaint against Wassel, asserting the felony and misdemeanor charges described previously. Wassel was arraigned that same day, June 25, 2020, and bail of $800,000 was set. But Wassel was unable to post bail, and he remained in pretrial custody.

Following a preliminary hearing on July 8, 2020, the charges were bound over to the court of common pleas. On June 23, 2021, defense counsel filed a pretrial suppression motion, seeking to suppress the evidence and statements obtained from Wassel and the vehicle on the grounds that the investigating police officers lacked probable cause to search his person or to obtain a search warrant for the car, and that the statements were obtained when investigators continued to question Wassel after he had invoked his right to counsel. The state trial court

held a hearing on the suppression motion on September 30, 2021, and the parties subsequently filed briefs on the matter. On January 12, 2022, the state trial court denied the motion in its entirety, finding that police had probable cause to suspect criminal activity, to conduct an investigatory detention, and to arrest Wassel, and that Wassel was clearly advised of his *Miranda* rights and indicated that he understood those rights before engaging in a police interview where he made incriminating statements.

As noted above, on March 11, 2022, following a jury trial, Wassel was found guilty of several felony and misdemeanor drug offenses arising out of the June 25, 2020, encounter, and he is currently awaiting sentencing.

The *pro se* complaint also appears to assert § 1983 claims against the warden of PCCF arising out of allegedly unconstitutional conditions of confinement, which we liberally construe as § 1983 substantive due process claims under the Fourteenth Amendment.[4] The plaintiff generally alleges that he contracted COVID while incarcerated at PCCF and was confined to his cell for 23 or 23½ hours per day for extended

[4] *See generally City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983); *Bell v. Wolfish*, 441 U.S. 520, 539 (1979); *Kost v. Kozakiewicz*, 1 F.3d 176, 188 (3d Cir. 1993).

periods of his pretrial incarceration. There are few specific facts alleged in support of this claim.

Finally, the *pro se* complaint names the United States as a defendant but omits any specific factual allegations of conduct by federal government, its agencies, or its officers.

II. LEGAL STANDARDS

A. Lack of Subject Matter Jurisdiction

The plaintiff bears the burden of establishing the existence of subject matter jurisdiction when challenged under Rule 12(b)(1). *See Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991). A defendant may challenge the existence of subject matter jurisdiction in one of two fashions: it may attack the complaint on its face, or it may attack the existence of subject matter jurisdiction in fact, relying on evidence beyond the pleadings. *See Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000); *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). Where a defendant attacks a complaint as deficient on its face, "the court must consider the allegations of the complaint as true." *Mortensen*, 549 F.2d at 891. "In deciding a Rule 12(b)(1) facial attack, the court may only consider the allegations

contained in the complaint and the exhibits attached to the complaint; matters of public record such as court records, letter decisions of government agencies and published reports of administrative bodies; and 'undisputably authentic' documents which the plaintiff has identified as a basis of his claims and which the defendant has attached as exhibits to his motion to dismiss." *Medici v. Pocono Mountain Sch. Dist.*, No. 09-CV-2344, 2010 WL 1006917, at *2 (M.D. Pa. Mar. 16, 2010). However, when a motion to dismiss attacks the existence of subject matter jurisdiction in fact, "no presumptive truthfulness attaches to plaintiff's allegations," and "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Mortensen*, 549 F.2d at 891. Here, we have considered a facial challenge to the existence of subject matter jurisdiction on the court's own motion. *See Liberty Mut. Ins. Co. v. Ward Trucking Corp.*, 48 F.3d 742, 750 (3d Cir. 1995) ("Federal courts have an ever-present obligation to satisfy themselves of their subject matter jurisdiction and to decide the issue *sua sponte* . . . ."); *Johnson v. United States*, Civil No. 1:CV-08-0816, 2009 WL 2762729, at *2 (M.D. Pa. Aug. 27, 2009).

B. Failure to State a Claim

Under 28 U.S.C. § 1915A, the court is obligated to screen a civil complaint in which a prisoner is seeking redress from a governmental entity or an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a); *James v. Pa. Dep't of Corr.*, 230 Fed. App'x 195, 197 (3d Cir. 2007). The court must dismiss the complaint if it "fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915A(b)(1). The Court has a similar obligation with respect to actions brought *in forma pauperis* and actions concerning prison conditions. *See* 28 U.S.C. § 1915(e)(2)(B)(ii) (*in forma pauperis*); 42 U.S.C. § 1997e(c)(1) (prison conditions). *See generally Banks v. Cty. of Allegheny*, 568 F. Supp. 2d 579, 587–89 (W.D. Pa. 2008) (summarizing prisoner litigation screening procedures and standards).

The legal standard for dismissing a complaint for failure to state a claim under § 1915A(b)(1), § 1915(e)(2)(B)(ii), or § 1997e(c)(1) is the same as that for dismissing a complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Brodzki v. Tribune Co.*, 481 Fed. App'x 705, 706 (3d Cir. 2012) (per curiam); *Mitchell v. Dodrill*, 696 F. Supp. 2d 454, 471 (M.D. Pa. 2010); *Banks*, 568 F. Supp. 2d at 588. "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)). In deciding the motion, the 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). Although the court must accept the fact allegations in the 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)). Nor is it required to credit factual allegations contradicted by indisputably authentic documents on which the complaint relies or matters of public record of which we may take judicial notice. *In re Washington Mut. Inc.*, 741 Fed. App'x 88, 91 n.3 (3d Cir. Sept. 25, 2018); *Sourovelis v. City of Philadelphia*, 246 F. Supp. 3d 1058, 1075 (E.D. Pa. 2017); *Banks*, 568 F.

Supp. 2d at 588–89.

III. DISCUSSION

A. Claims Against the United States of America

The United States of America is named in the caption of the complaint, and it is included in the list of named defendants. But, in our review of the prolix *pro se* complaint, we are unable to locate any specific factual allegations regarding any conduct whatsoever by the federal government, its agencies, or its officers, and thus the plaintiff has failed to state a claim upon which relief can be granted. *See Hudson v. McKeesport Police Chief*, 244 Fed. App'x 519, 522 (3d Cir. 2007) (per curiam); *United States ex rel. Tyrrell v. Speaker*, 471 F.2d 1197, 1204 (3d Cir. 1973); *Bilbro v. Haley*, 229 F. Supp. 3d 397, 406 (D.S.C. 2017); *Marvasi v. Shorty*, 70 F.R.D. 14, 22–23 (E.D. Pa. 1976).

Moreover, as noted above, it is the plaintiff's burden to establish the existence of subject matter jurisdiction. *See Kehr Packages*, 926 F.2d at 1409. Thus, a party attempting to sue the United States bears the burden of pleading facts to establish a waiver of sovereign immunity, a burden which this plaintiff has failed to meet. *See Nellson v. U.S. Fed. Bureau of Prisons*, Civil Action No. 3:20-cv-00963, 2022 WL 471019, at *5 (M.D. Pa.

Jan. 24, 2022) (collecting cases), *report and recommendation adopted by* 2022 WL 468041 (M.D. Pa. Feb. 15, 2022); *see also Malone v. Bowdoin*, 369 U.S. 643, 645 (1962) (claimant must plead source of waiver of sovereign immunity); *McMillan v. Dep't of Interior*, 907 F. Supp. 322, 325 (D. Nev. 1995) ("[A] party suing the United States must point to an unequivocal waiver of sovereign immunity."); *Alnor Check Cashing v. Katz*, 821 F. Supp. 307, 311 (E.D. Pa. 1993) ("Any party attempting to sue the United States bears the burden of proving that Congress has waived sovereign immunity.").

Accordingly, we recommend that any claims against the United States be dismissed for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure,[5] or, in the alternative, for failure to state a claim upon which relief can be granted, pursuant to 28 U.S.C. § 1915A(b)(1) and 28 U.S.C. §1915(e)(2)(B)(ii).

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[5] A Rule 12(b)(1) motion is the proper mechanism for raising the issue of sovereign immunity because "[s]overeign immunity is jurisdictional in nature." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994); *see also Richards v. United States*, 176 F.3d 652, 654 (3d Cir. 1999) ("Sovereign immunity not only protects the United States from liability, it deprives a court of subject matter jurisdiction over claims against the United States."). A court may properly raise the issue of federal sovereign immunity *sua sponte*. *United States v. Bein*, 214 F.3d 408, 412 (3d Cir. 2000).

B. Claims Against State Actors

The remainder of Wassel's federal civil rights claims are asserted against state actors pursuant to 42 U.S.C. § 1983. Section 1983 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 establish a § 1983 claim, a plaintiff must establish that the defendants, 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). To avoid dismissal for failure to state a claim, a civil rights complaint must state the conduct, time, place, and persons responsible for the alleged civil rights violations. *Evancho v. Fisher*, 423 F.3d 347, 353 (3d Cir. 2005).

1. Pennsylvania State Police

The PSP is an agency of the Commonwealth of Pennsylvania, and as such, it is not a "person" amenable to suit under § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 63–71 (1989); *Mitchell v. Miller*, 884 F. Supp. 2d 334, 355 n.6 (W.D. Pa. 2012).

Moreover, absent abrogation by Congress or waiver by the state, the Eleventh Amendment to the United States Constitution provides that states, and their constituent agencies or departments, are immune from suit in federal court. *Pennhurst State. Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101–02 (1984); *Nails v. Pa. Dep't of Transp.*, 414 Fed. App'x 452, 455 (3d Cir. 2011) (per curiam); *Nat'l Indem. Co. v. Grimm*, 760 F. Supp. 489, 494 (W.D. Pa. 1991). The PSP is one such state agency entitled to Eleventh Amendment immunity from suit. *Atkin v. Johnson*, 432 Fed. App'x 47, 48 (3d Cir. 2011) (per curiam) ("[T]he Eleventh Amendment bars claims for damages against the PSP, a state agency that did not waive its sovereign immunity."); *Kintzel v. Kleeman*, 965 F. Supp. 2d 601, 606 (M.D. Pa. 2013) ("Eleventh Amendment . . . protection extends to state agencies and departments, such as the Pennsylvania State Police."). The Commonwealth of Pennsylvania has expressly declined to waive its

sovereign immunity in federal court. *See* 42 Pa. Cons. Stat. Ann. § 8521(b); *Nails*, 414 Fed. App'x at 455; *Grimm*, 760 F. Supp. at 494.

Accordingly, we recommend that the plaintiff's claims against the Pennsylvania State Police be dismissed for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure,[6] or, in the alternative, for failure to state a claim upon which relief can be granted, pursuant to 28 U.S.C. § 1915A(b)(1) and 28 U.S.C. §1915(e)(2)(B)(ii).

2. Criminal Investigative Division

The *pro se* complaint names both the CID and Pike County itself as defendants. But the CID and the DA's Office to which it belongs are governmental sub-units, which cannot be sued alongside the municipality to which they belong, as each is merely an administrative arm of the municipality itself, rather than a distinct entity. *See*

[6] A Rule 12(b)(1) motion is the proper mechanism for raising the issue of whether Eleventh Amendment immunity bars the exercise of federal jurisdiction. *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 694 n.2 (3d Cir. 1996) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98–100 (1984)). Although it is not required to do so, a court may raise an Eleventh Amendment issue *sua sponte*. *Bowers v. Nat'l Collegiate Athletic Ass'n*, 346 F.3d 402, 417 (3d Cir. 2003); *Richard E. Pierson Constr. Co. v. Philadelphia Reg'l Port Auth.*, 348 F. Supp. 3d 410, 413 (E.D. Pa. 2018).

Bonenberger v. Plymouth Twp., 132 F.3d 20, 25 n.4 (3d Cir. 1997); *see also Jackson v. City of Erie Police Dep't*, 570 Fed. App'x 112, 114 n.2 (3d Cir 2014); *Ballard v. City of Scranton*, Civil Action No. 3:20-CV-1623, 2021 WL 469391, at *4 (M.D. Pa. Jan. 14, 2021); *Graham-Smith v. Wilkes-Barre Police Dep't*, No. 3:14cv2159, 2015 WL 2384274, at *2 (M.D. Pa. May 19, 2015). Accordingly, we recommend that any claims against the CID be dismissed as duplicative of claims against Pike County,[7] pursuant to the Court's inherent authority to control its docket and avoid redundant or duplicative claims. *See Comsys, Inc. v. City of Kenosha*, 223 F. Supp. 3d 792, 802 (E.D. Wis. 2016); *Giannone v. Ayne Inst.*, 290 F. Supp. 2d 553, 566 (E.D. Pa. 2003).

3. Pike County

The *pro se* complaint seeks to hold Pike County liable for the allegedly unconstitutional conduct of the several defendants who serve

[7] *See Brock v. Allegheny Cty. Dist. Attorney Office*, Civil Action No. 12-0914, 2013 WL 3989452, at *3 (W.D. Pa. Aug. 2, 2013); *Retzler v. Bristol Twp.*, Civil Action No. 08-3269, 2009 WL 691993, at *3 (E.D. Pa. Mar. 11, 2009); *see also Briggs v. Moore*, 251 Fed. App'x 77, 79 (3d Cir. 2007) (per curiam); *Reitz v. Cty. of Bucks*, 125 F.3d 139, 148 (3d Cir. 1997); *Benard v. Washington Cty.*, 465 F. Supp. 2d 461, 470 (W.D. Pa. 2006); *Open Inns, Ltd. v. Chester Cty. Sheriff's Dep't*, 24 F. Supp. 2d 410, 416 n.13 (E.D. Pa. 1998).

as investigators with the county DA's Office.

"On its face, § 1983 makes liable 'every person' who deprives another of civil rights under color of state law." *Burns v. Reid*, 500 U.S. 478, 497 (1991) (Scalia, J., concurring in part and dissenting in part). In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court of the United States established that municipalities and other local governmental units are included among those "persons" subject to liability under § 1983. *Id.* at 690. Pike County is such a municipality subject to liability as a "person" under § 1983. *See id.* at 694; *Mulholland v. Gov't Cty. of Berks*, 706 F.3d 227, 237 (3d Cir. 2013).

But "[u]nder *Monell*, a municipality cannot be subjected to liability solely because injuries were inflicted by its agents or employees." *Jiminez v. All American Rathskeller, Inc.*, 503 F.3d 247, 249 (3d Cir. 2007). Rather, a municipality can be liable under § 1983 only if the conduct alleged to be unconstitutional either "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or is "visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels."

Monell, 436 U.S. at 690–91. "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Jiminez*, 503 F.3d at 249. "A plaintiff must identify the challenged policy, attribute it to the [municipality] itself, and show a causal link between execution of the policy and the injury suffered." *Losch v. Borough of Parkesburg*, 736 F.2d 903, 910 (3d Cir. 1984). The complaint in this case does not identify any such policy or custom adopted or promulgated by Pike County, it's DA's Office, or the CID.

Accordingly, we recommend that the plaintiff's § 1983 claims against the Pike County be dismissed for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and 28 U.S.C. § 1915A(b)(1).

4. State Court Judges

The plaintiff has asserted § 1983 claims against two state court judges who presided over different phases of his criminal proceedings, Judge Chelak and Judge Fischer. These claims are barred by the doctrine of absolute judicial immunity.

"A judicial officer in the performance of his duties has absolute

immunity from suit and will not be liable for his judicial acts." *Azubuko v. Royal*, 443 F.3d 302, 303 (3d Cir. 2006) (per curiam). "Like other forms of official immunity, judicial immunity is immunity from suit, not just from ultimate assessment of damages." *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (per curiam). "[S]o long as (1) the judge's actions are taken in his judicial capacity (determined by the nature of the acts themselves) and (2) the judge has some semblance of jurisdiction over the acts, he will have immunity for them." *Mikhail v. Kahn*, 991 F. Supp. 2d 596, 660 (E.D. Pa. 2014) (citing *Gallas v. Supreme Court of Pa.*, 211 F.3d 760, 768–69 (3d Cir. 2000); *see also Mireles*, 502 U.S. at 11–12. Indeed, "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978) (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871)). "This immunity applies even when the judge is accused of acting maliciously and corruptly . . . ." *Pierson v. Ray*, 386 U.S. 547, 554 (1967). "Although unfairness and injustice to a litigant may result on occasion, 'it is a general principle of the highest importance to the proper administration

of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.'" *Mireles*, 502 U.S. at 12 (quoting *Bradley*, 80 U.S. (13 Wall.) at 347).

Based on the allegations of the *pro se* complaint, the plaintiff's claims against Judge Chelak and Judge Fischer *exclusively* concern judicial acts taken by each in his or her role as a presiding judge in the plaintiff's state court criminal proceedings, and no acts alleged were taken in the complete absence of all jurisdiction. *See Mireles*, 502 U.S. at 12–13; *Gallas*, 211 F.3d at 768–69; *Mikhail*, 991 F. Supp. 2d at 660. Thus, the plaintiff's claims for damages against these state court judges must be dismissed on the ground of absolute judicial immunity. Any claims for injunctive relief against the judges similarly must be dismissed. *See* 42 U.S.C. § 1983 (generally prohibiting injunctive relief against judicial officers); *Ball v. Butts*, 445 Fed. App'x 457, 458 (3d Cir. 2011) (per curiam) (holding that a request for injunctive relief "was subject to dismissal [for failure to state a claim] because such relief is not available against 'a judicial officer for an act . . . taken in such officer's judicial capacity'"); *Azubuko*, 443 F.3d at 303–04 ("In 1996, Congress amended 42 U.S.C.

§ 1983 to provide that 'injunctive relief shall not be granted' in an action brought against 'a judicial officer for an act or omission taken in such officer's judicial capacity . . . unless a declaratory decree was violated or declaratory relief was unavailable.'").

Accordingly, we recommend that the plaintiff's § 1983 claims against Judge Chelak and Judge Fischer be dismissed for failure to state a claim upon which relief can be granted, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and 28 U.S.C. § 1915A(b)(1).

5. Claims for Injunctive Relief

In addition to damages, the plaintiff has requested various forms of injunctive relief. The plaintiff seeks an order by this court directing the state court or state prosecutor to drop all charges and release him from custody.[8] In the alternative, he seeks an order directing a change in

[8] We note also that some of the injunctive relief sought by Wassel—his immediate release from custody—is simply not cognizable in a federal civil rights action. *See Heck v. Humphrey*, 512 U.S. 477, 481 (1994) ("[H]abeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release . . . .") (citing *Preiser v. Rodriguez*, 411 U.S. 475, 488–90 (1973)); *Thomas v. Morganelli*, Civil Action No. 16-2161, 2016 WL 7116011, at *5 (E.D. Pa. Dec. 7, 2016) (finding federal district court lacked jurisdiction to invalidate plaintiff's state conviction because "a federal court may not 'compel a state court to exercise a jurisdiction

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venue for his state criminal proceedings and his release on unsecured bail, an order by this court directing the state court to enter various orders in the criminal proceedings relating to the production of items in discovery, or an order by this court directing the state court to hold a new suppression hearing at which Eric Torbeck would be required to testify.

We find that *Younger* abstention principles dictate dismissal of these claims for injunctive relief. *Younger* established a principle of abstention when federal adjudication would disrupt an ongoing state criminal proceeding. *See generally Younger v. Harris*, 401 U.S. 37 (1971). "Abstention under Younger is appropriate only where: (1) there are ongoing state proceedings that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise the federal claims." *Lui v. Comm'n on Adult Entm't Establishments*, 369 F.3d 319, 326 (3d Cir. 2004).

All three requirements for abstention are met here. First, there is an ongoing criminal prosecution against the plaintiff in state court.

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entrusted to it' or 'review a decision of a state tribunal'") (quoting *In re Grand Jury Proceedings*, 654 F.2d 268, 278 (3d Cir. 1981)).

Second, it is beyond cavil that the state has important interests in preventing violations of its criminal laws and in protecting its citizens from the illegal distribution of controlled substances. *See Nivens v. Gilchrist*, 319 F.3d 151, 154 (4th Cir. 2003); *Watts v. Burkhart*, 854 F.2d 839, 846–47 (6th Cir. 1988). Third, the state court criminal proceedings appear to afford Wassel an adequate opportunity to raise his federal claims—and based on the allegations of the complaint and the state court materials appended to it as supporting exhibits, he appears to have actually raised these very same issues in the state criminal proceedings, albeit without success. *See Lazaridis v. Wehmer*, 591 F.3d 666, 670–71 (3d Cir. 2010) (per curiam) (explaining that *Younger* requires only an opportunity to present federal claims in state court, and the burden rests with plaintiff to show that state procedural law bars presentation of the claims). Finally, there is no indication "of bad faith, harassment or some other extraordinary circumstance, which might make abstention inappropriate." *Anthony v. Council*, 316 F.3d 412, 418 (3d Cir. 2003); *see also Wattie-Bey v. Attorney Gen.'s Office*, 424 Fed. App'x 95, 97 (3d Cir. 2011) (per curiam) (quoting *Anthony*).

Accordingly, we recommend that the court abstain from exercising

jurisdiction over the plaintiff's § 1983 claims for injunctive relief, and these claims for injunctive relief be dismissed *sua sponte* under the *Younger* abstention doctrine, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[9]

6. Damages Claim Against DA Tonkin

The plaintiff has asserted a § 1983 claim for damages against the district attorney who has been prosecuting the criminal charges against him, Raymond Tonkin.

The plaintiff's claim against DA Tonkin is based solely on his conduct as an advocate in the judicial phase of the criminal process—that is, initiating a prosecution and presenting the state's case—and thus the plaintiff's § 1983 claim is barred by the doctrine of absolute prosecutorial

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[9] Although the issue of *Younger* abstention implicates the court's exercise of jurisdiction over a case, the Third Circuit has noted that "[d]ismissal on abstention grounds without retention of jurisdiction is in the nature of a dismissal under Fed. R. Civ. P. 12(b)(6)." *Gwynedd Props., Inc. v. Lower Gwynedd Twp.*, 970 F.2d 1195, 1206 n.18 (3d Cir. 1992); *see also PDX N., Inc. v. Comm'r N.J. Dep't of Labor & Workforce Dev.*, 978 F.3d 871, 881 n.8 (3d Cir. 2020) (suggesting that *Younger* abstention is properly considered under Rule 12(b)(6) or Rule 12(c)), *cert. denied*, 142 S. Ct. 69 (2021). Thus, we consider abstention under the Rule 12(b)(6) standard, rather than Rule 12(b)(1). Moreover, we note that "a court may raise *Younger* abstention sua sponte." *Altice USA, Inc. v. N.J. Bd. of Pub. Utils.*, 26 F.4th 571, 575 n.2 (3d Cir. 2022); *see also O'Neill v. City of Philadelphia*, 32 F.3d 785, 786 n.1 (3d Cir. 1994).

immunity. *See Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976); *Walker v. City of Philadelphia*, 436 Fed. App'x 61, 62 (3d Cir. 2011) (per curiam); *see also Kulwicki v. Dawson*, 969 F.2d 1454, 1465 (3d Cir. 1992) (noting that this absolute immunity "extends to 'the preparation necessary to present a case,' and this includes the 'obtaining, reviewing, and evaluation of evidence'").

Accordingly, we recommend that the plaintiff's § 1983 claim against DA Tonkin be dismissed for failure to state a claim upon which relief can be granted, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and 28 U.S.C. § 1915A(b)(1).

7. Fourth Amendment Claims

The plaintiff has asserted § 1983 claims for false arrest, false imprisonment, and malicious prosecution against the four state troopers, the four county detectives, and the alleged confidential informant, Eric Torbeck, arising out of the same June 25, 2020, incident. But these claims are barred by the favorable termination rule articulated by the Supreme Court of the United States in *Heck v. Humphrey*, 512 U.S. 477 (1994). *See Bucano v. Sibum*, Civil Action No. 3:12-CV-606, 2012 WL 2395262, at *7 (M.D. Pa. June 12, 2012) (*Heck*'s favorable termination rule applies to

plaintiff who has been convicted but is still awaiting sentencing).

In *Heck*, the Supreme Court held that, where judgment in favor of a plaintiff in a § 1983 action for damages would necessarily imply the invalidity of the plaintiff's criminal conviction or sentence, the plaintiff must first demonstrate that "the criminal proceedings have terminated in the plaintiff's favor." *Id.* at 489. "[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus [under] 28 U.S.C. § 2254." *Id.* at 486–87 (footnote omitted). In *Wilkinson v. Dotson*, 544 U.S. 74 (2005), the Supreme Court reaffirmed the favorable termination rule and broadened it to encompass equitable remedies as well, holding that "a state prisoner's § 1983 action is barred (absent prior invalidation)—no matter what the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if*

success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson*, 544 U.S. at 81–82.

Here, Wassel's malicious prosecution claims are clearly barred by *Heck* because favorable termination is a necessary element of the claim itself. *See Massey v. Pfeifer*, 804 Fed. App'x 113, 115 (3d Cir. 2020) (per curiam); *Olick v. Pennsylvania*, 739 Fed. App'x 722, 725–26 (3d Cir. 2018) (per curiam); *see also Heck*, 512 U.S. at 484 ("One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused.").

Although "*Heck* does not automatically bar [Wassel's] claims of false arrest and false imprisonment[,] . . . there are circumstances in which *Heck* may bar such claims." *Olick*, 739 Fed. App'x at 726; *see also Montgomery v. De Simone*, 159 F.3d 120, 126 n.5 (3d Cir. 1998) (recognizing that, "[b]ecause a conviction and sentence may be upheld even in the absence of probable cause for the initial stop and arrest," claims of false arrest and false imprisonment do not *necessarily* implicate the validity of a conviction or sentence). Here, Wassel's arrest and pre-arraignment incarceration were based on *the very same conduct* for which he was ultimately convicted—his possession of controlled substances

(heroin/fentanyl and marijuana) and drug paraphernalia, and his participation in a conspiracy to manufacture, deliver, or possess with intent to manufacture or deliver controlled substances—and thus success on his false arrest and false imprisonment claims in this case would necessarily imply the invalidity of his state court conviction. *See Olick*, 739 Fed. App'x at 726 ("If we were to accept Olick's contentions, and he were to prevail on his false arrest and false imprisonment claims, it would therefore necessarily imply the invalidity of the state court fact finding and, under the circumstances of this case, his harassment conviction."); *Fields v. City of Pittsburgh*, 714 Fed. App'x 137, 140–41 (3d Cir. 2017) ("Fields' success on his false arrest claim depends on a finding that the officers lacked probable cause to arrest him, which would directly impugn the validity of his resulting guilty plea.") (internal quotation marks and brackets omitted); *Yoast v. Pottstown Borough*, 437 F. Supp. 3d 403, 426 n.80 (E.D. Pa. 2020) ("Because Yoast's imprisonment was based on the same conduct that he was convicted for, if his imprisonment was not lawful then conviction was not either valid.").

Even if the *Heck* doctrine did not bar Wassel's Fourth Amendment claims, these defendants would be entitled to dismissal on the facts

alleged in the complaint. All three Fourth Amendment claims—false arrest, false imprisonment, and malicious prosecution—require a plaintiff to plead or prove that the arrest, detention, or prosecution occurred without the existence of probable cause. *See Murphy v. Bendig*, 232 Fed. App'x 150, 153 (3d Cir. 2007) (per curiam); *Sheedy v. City of Philadelphia*, 184 Fed. App'x 282, 284 (3d Cir. 2006) (per curiam). "Probable cause exists where the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested." *United States v. Cruz*, 910 F.2d 1072, 1076 (3d Cir. 1990); *see also Andrews v. Scuilli*, 853 F.3d 690, 697 (3d Cir. 2017) (recognizing that the very same probable cause analysis applies whether considering false arrest or malicious prosecution claims). "Courts determine the existence of probable cause by using an objective standard." *Wychunas v. O'Toole*, 252 F. Supp. 2d 135, 142 (M.D. Pa. 2003). "Thus, a police officer will be liable for civil damages for an arrest if 'no reasonably competent officer' would conclude that probable cause existed." *Id.*

Here, prior to Wassel's arrest, a confidential informant had set up

a "controlled buy" of heroin/fentanyl from Wassel's associate, Kenneth Smith, at a specified motel in Pike County, Pennsylvania. The confidential informant advised police that Smith and Wassel would be traveling from Patterson, New Jersey, to that motel in a white Chevrolet Malibu sedan, including their expected departure and arrival times. The confidential informant advised police that Smith and Wassel would be transporting heroin/fentanyl in packaging bearing a "Mike Tyson" stamp, and that they would likely hide packets of the drugs in their socks or under the hood of the car. The confidential informant further advised police that it was his understanding that Smith typically carried a firearm for protection.

At 4:30 a.m. on the date of Wassel's arrest, waiting police observed a car matching the description provided by the confidential informant approaching the motel from New Jersey. One of the defendant state troopers followed the car and observed two occupants, which was consistent with information provided by the confidential informant. The car pulled into the parking lot of the motel where the controlled buy had been scheduled to occur, and the occupants of the car were encountered by police and identified as Smith and Wassel.

When questioned, Smith and Wassel gave inconsistent statements. When the state trooper performing an investigatory stop of Wassel began conducting a pat-down search of Wassel's person, Wassel informed him that he was in possession of a quantity of "weed" and removed a clear plastic baggie filled with marijuana from his own pants pocket. Wassel also advised the trooper that he had a medical marijuana card. But the trooper observed that the baggie was not labeled and did not appear to be from a licensed dispensary.

Based on *all* of the foregoing information, the state court denied a motion to suppress filed by Wassel's defense counsel, finding probable cause existed. In doing so, the state court noted that, although Wassel had a medical marijuana card, the baggie was unlabeled and did not appear to come from a licensed dispensary, and that this information, together with the highly specific information provided by the confidential informant concerning the movements of Smith and Wassel, was sufficient to provide officers with probable cause to suspect criminal activity, to conduct an investigatory detention in the motel parking lot, and to arrest Wassel. (*See* Doc. 1-2.) We agree. The Pennsylvania courts have recognized that the lawful possession of medical marijuana, standing

alone, is insufficient to support probable cause. *See Commonwealth v. Barr*, 266 A.3d 25, 43 (Pa. 2021). But while such *lawful* activity alone cannot be the basis for probable cause, the lawful possession or use of marijuana may be considered together with other facts to support a probable cause finding. *See id.* Based on the facts alleged in the complaint and on the exhibits attached thereto by the plaintiff himself, we conclude that the marijuana found in Wassel's possession, which did not appear to be lawfully obtained from a licensed dispensary, together with the highly specific information provided by the confidential informant regarding the illegal drug trafficking activities of Smith and Wassel—all publicly observable aspects of which were fully corroborated by the officers' observations prior to Wassel's arrest—was sufficient for a reasonable officer to believe that a criminal offense had been or was being committed by Wassel; namely, the possession of illegal marijuana and the trafficking of illegal narcotics.

A subsequent search incident to arrest led police to discover an empty glassine packet stamped "Mike Tyson" in Wassel's front pocket, and a bundle of nine glassine packets filled with heroin/fentanyl and stamped "Mike Tyson" hidden in his sock, matching the confidential

informant's description of both the packaging of the drugs and the location where Smith and Wassel would secrete them. Wassel's vehicle[10] was later searched pursuant to a warrant, and, under the hood, police found a plastic container filled with 46 bricks of heroin/fentanyl and three additional bundles of heroin/fentanyl in glassine packets stamped "Mike Tyson." When interviewed by police, Wassel informed them that Smith had offered him a brick of heroin as payment to drive him to and from Patterson, New Jersey. He informed them that Smith had given him a bundle of heroin when they arrived at Patterson, and he assumed that Smith would give him the rest when they completed their travels.

Based on all of the foregoing, the subsequent criminal complaint filed by police, charging Wassel with two counts of felony conspiracy to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance, and one count each of possession of a controlled substance, possession of marijuana, and possession of drug paraphernalia, was sufficient for a reasonable officer to believe that the charged criminal offenses had been committed by Wassel.

We note that Wassel's defense counsel filed a motion to suppress

[10] Wassel apparently borrowed the car; he did not own it.

some or all of this evidence, which was denied by the state trial court. But even if the motion had been granted, we note that, "[w]hile the fruits of the allegedly illegal search may be inadmissible in criminal proceedings under the exclusionary rule, the illegality of said search does not vitiate the existence of probable cause in relation to the Court's analysis" of a civil action for false arrest, false imprisonment, or malicious prosecution. *Konopka v. Borough of Wyoming*, 383 F. Supp. 2d 666, 675 (M.D. Pa. 2005); *cf. Hector v. Watt*, 235 F.3d 154, 157 (3d Cir. 2000) ("Victims of unreasonable searches or seizures may recover damages directly related to the invasion of their privacy—including (where appropriate) damages for physical injury, property damage, injury to reputation, etc.; but such victims cannot be compensated for injuries that result from the discovery of incriminating evidence and consequent criminal prosecution.").

Finally, we note that the gist of the theory underpinning the plaintiff's false arrest, false imprisonment, and malicious prosecution claims appears to be that he was entrapped—i.e., he was "lured" or manipulated into accompanying Smith by the confidential informant, was also his personal drug dealer—and that probable cause was lacking

as a result. But it is well established that, whatever the merit of an entrapment defense offered in criminal proceedings, it does not *negate* probable cause. *See Johnson v. Koehler*, 733 Fed. App'x 583, 586 n.2 (3d Cir. 2018) (per curiam) ("[M]ere solicitation by the government, without more, is not 'inducement' for purposes of an entrapment defense, and, in any event, probable cause to arrest is not necessarily negated by a defendant's successful assertion at trial of an entrapment defense.") (internal citation and quotation marks omitted); *Mills v. City of Harrisburg*, 589 F. Supp. 2d 544, 552 & n.4 (M.D. Pa. 2008) (recognizing "the inefficacy of entrapment to support § 1983 liability or to negate probable cause") (collecting cases). Moreover, although entrapment may indeed be *considered* by the court as a factor in its probable cause analysis, *see Mills*, 589 F. Supp. 2d at 552 n.4, it is clear from the plaintiff's recent conviction that any such defense, presumably asserted at trial, was rejected by the jury.

Accordingly, we recommend that the plaintiff's § 1983 false arrest, false imprisonment, and malicious prosecution claims against Corporal Smith, Trooper Graziano, Trooper Stroud, Trooper Richards, Detective Jones, Detective Robinson, Detective Rodriguez, Detective Church, and

Eric Torbeck be dismissed for failure to state a claim upon which relief can be granted, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and 28 U.S.C. § 1915A(b)(1).

8. Conditions-of-Confinement Claims

The plaintiff has also asserted unrelated § 1983 claims for damages against Craig Lowe, the warden of PCCF, based on the allegedly unconstitutional conditions of his confinement while awaiting trial.

Wassel alleges that, throughout his nearly two-year period of pretrial incarceration, he has been restricted to his cell for 23 or 23½ hours per day for extended periods of time due to COVID lockdowns and due to his voluntary placement in protective custody.[11] He alleges that he has contracted COVID twice while incarcerated at PCCF, which required him to be quarantined or isolated further. He alleges that he has been subjected to an excessive number of cell assignment changes—more than 60 moves while incarcerated at PCCF—and he has been forced

[11] Wassel alleges that he *placed himself* into protective custody because Smith had been telling other inmates that Wassel was an informant who had set Smith up for arrest. After an unspecified number of months, Wassel alleges that he "could no longer stand being around" the other inmates in the restrictive housing unit, and so he returned to general population "under duress."

to share a cell with as many as three other inmates at a time. He alleges that, at one point, he was confined to his cell for three-days straight without a break, during which time he was not fed, allegedly in retaliation for his refusal to share a cell with a specific inmate whom he believed had "grave emotional and mental disorders." He alleges that jail officials refused to allow him to use the telephone to speak with his dying father, who had been a hospice patient and passed away while Wassel was incarcerated. He also alleges that he filed grievances about some or all of these prison conditions, but they were "lost" by prison officials.

Nowhere does the complaint allege *any* conduct whatsoever by Warden Lowe himself. The only facts alleged with respect to the warden are his name and his position as warden of the prison where the alleged civil rights violations took place. Thus, Wassel appears to seek to hold Lowe vicariously liable for the allegedly unconstitutional conduct of other prison officials based on the warden's failure to take action to prevent or remedy the allegedly unconstitutional conditions of confinement described above. But "[c]ivil rights claims cannot be premised on a theory of *respondeat superior*. Rather, each named defendant must be shown, via the complaint's allegations, to have been personally involved in the

events or occurrences which underlie a claim." *Millbrook v. United States*, 8 F. Supp. 3d 601, 613 (M.D. Pa. 2014) (citation omitted). As previously explained by the Third Circuit:

> A defendant in a civil rights action must have personal involvement in the alleged wrongs . . . . [P]ersonal 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). Although a supervisor cannot encourage constitutional violations, a supervisor has "no affirmative constitutional duty to train, supervise or discipline so as to prevent such conduct." *Chinchello v. Fenton*, 805 F.2d 126, 133 (3d Cir. 1986).

Accordingly, we recommend that the plaintiff's § 1983 conditions-of-confinement claims against Warden Lowe be dismissed for failure to state claim upon which relief can be granted, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), 28 U.S.C. § 1915A(b)(1), and 42 U.S.C.§ 1997e(c)(1).

C. Leave to Amend

The Third Circuit has instructed that if a civil rights complaint is vulnerable to dismissal for failure to state a claim, the district court must

permit a curative amendment, unless an amendment would be inequitable or futile. *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002). This instruction applies equally to *pro se* plaintiffs and those represented by counsel. *Alston v. Parker*, 363 F.3d 229, 235 (3d Cir. 2004). In this case, based on the facts alleged in the complaint, the attached exhibits thereto, and state court records of which we may properly take judicial notice, it is clear that amendment would be futile with respect to the plaintiff's claim against the United States and his § 1983 claims arising out of the circumstances of his arrest and prosecution. But it is not clear that amendment would be futile with respect to the plaintiff's § 1983 claims concerning the conditions of his pretrial confinement, particularly his claim that he was denied food for three days. *See, e.g.*, *Dickens v. Taylor*, 671 F. Supp. 2d 542, 555 (D. Del. 2009). Therefore, we recommend that the plaintiff's claims be dismissed with leave to file an amended complaint *expressly limited to his claims concerning prison conditions while incarcerated as a pretrial detainee.*

IV. RECOMMENDATION

For the foregoing reasons, it is recommended that:

1. The plaintiff's claims against the United States of America

and the Pennsylvania State Police be dismissed for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, or, in the alternative, for failure to state a claim upon which relief can be granted, pursuant to 28 U.S.C. § 1915A(b)(1) and 28 U.S.C. §1915(e)(2)(B)(ii);

2. The plaintiff's claims against the Criminal Investigative Division of the Pike County District Attorney's Office be dismissed as duplicative of claims against Pike County, pursuant to the Court's inherent authority to control its docket and avoid redundant or duplicative claims;

3. The court abstain from exercising jurisdiction over the plaintiff's § 1983 claims for injunctive relief, and these claims for injunctive relief be dismissed *sua sponte* under the *Younger* abstention doctrine, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure;

4. The plaintiff's § 1983 conditions-of-confinement claims against Warden Craig Lowe be dismissed for failure to state claim upon which relief can be granted, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), 28 U.S.C. § 1915A(b)(1), and 42 U.S.C.§ 1997e(c)(1);

5. The remainder of the plaintiff's § 1983 claims be dismissed for failure to state a claim upon which relief can be granted, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and 28 U.S.C. § 1915A(b)(1);

6. The plaintiff be granted leave to file an amended complaint *expressly limited to his claims concerning prison conditions while incarcerated as a pretrial detainee* within a specified time period following adoption of this report; and

7. The matter be remanded to the undersigned for further proceedings.

Dated: June 2, 2022

s/Joseph F. Saporito, Jr.
JOSEPH F. SAPORITO, JR.
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

PAUL J. WASSEL JR., #200625, Plaintiff, v. ERIC RICHARD TORBECK, et al., Defendants.	CIVIL ACTION NO. 3:22-cv-00145 (MARIANI, J.) (SAPORITO, M.J.)

NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing Report and Recommendation dated June 2, 2022. Any party may obtain a review of the Report and Recommendation pursuant to Local 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.

Failure to file timely objections to the foregoing Report and Recommendation may constitute a waiver of any appellate rights.

Dated: June 2, 2022

s/Joseph F. Saporito, Jr.
JOSEPH F. SAPORITO, JR.
United States Magistrate Judge