Delta County Prosecutor's Office

Lauren M. Wickman
Prosecuting Attorney
Civil Counsel
Beth Wickwire
Chief Assistant Prosecutor
Deputy Civil Counsel
Lauren Mattson
Assistant Prosecutor

September 3, 2025

[redacted]

[redacted]

[redacted]

I acknowledge receipt of your Freedom of Information Act request dated August 13, 2025 received by the Delta County Prosecutor's Office on August 14, 2025 for the following documents:

> Pursuant to Michigan Freedom of Information Act, MCL 15.231 et seq., I request copies of:
>
> **All complaints, grievances, or formal allegations filed against the Delta County Prosecutor's Office or its employees from January 1, 2019, through the date this request is processed.**
>
> This request includes but is not limited to:
>
> - Written complaints submitted by members of the public, law enforcement, court staff, or other government agencies;
> - Internal grievances filed by Prosecutor's Office employees;
> - Complaints submitted to oversight bodies, professional licensing boards, the State Bar of Michigan or the County Board of Commissioners
> - Any records of the resolution, investigation, or disposition of such complaints.
>
> Please include all responsive records regardless of whether they are labeled as "confidential," "personnel," internal," or "for administrative use only." Draft and final versions should be included.

Your request for records of "[a]ll complaints, grievances, or formal allegations filed against the Delta County Prosecutor's Office, or its employees from January 1, 2019, through the date of this request is processed" to include "[a]ny records of the resolution, investigation, or

310 LUDINGTON STREET, SUITE 237 ESCANABA MI 49829
(906)789-5115

disposition of such complaints" is **GRANTED**. In response to the granting of your request, please find the following documents:

- Kurtis Kobasic v Delta County and Lauren Wickman First Amended Complaint
- Kurtis Kobasic v Delta County and Lauren Wickman Release Motion for Summary Judgement
- Kurtis Kobasic v Delta County and Lauren Wickman Release and Settlement Agreement
- John Roberts v Jon Doe Delta County Prosecutor, et al, Complaint
- John Roberts v Jon Doe Delta County Prosecutor, et al, First Amended Complaint
- John Roberts v Jon Doe Delta County Prosecutor, et al, Delta County Prosecutor's Office and Lauren Wickman's Response in Opposition to Plaintiff's Motion to file First Amended Complaint as to Prosecutor Defendant's
- John Roberts v Jon Doe Delta County Prosecutor, et al, United States District Court Opinion Regarding Motions to Dismiss
- John Roberts v Jon Doe Delta County Prosecutor, et al, Order and Judgment Dismiss Case

Your request for records of "[w]ritten complaints submitted by members of the public, law enforcement, court staff, or other government agencies" to include "[a]ny records of the resolution, investigation, or disposition of such complaints" is **GRANTED.** In granting your response, please see the above-described documents.

Your request for records of "[i]nternal grievances filed by Prosecutor's Office employees" is **DENIED** as a review of the records reveal they do not exist. The undersigned hereby certifies that, after a search for records and to the best of the undersigned's knowledge and belief, the public records requested, and described below, do not exist within the records of the public body under the name nor any other name reasonably known to the public body.

Your request for records of "[c]omplaints submitted to oversight bodies, professional licensing boards, the State Bar of Michigan…" to include "[a]ny records of the resolution, investigation, or disposition of such complaints" is **DENIED** as pursuant to MCR 9.126 any such investigations not resulting inf formal charges are privileged form disclosure, confidential, and may not be made public. As such, any such records are exempt pursuant to MCL 15.243(1)(h).

Your request for records of "[c]omplaints submitted to … or the County Board of Commissioners" is **DENIED** as a review of the records reveal they do not exist. The undersigned hereby certifies that, after a search for records and to the best of the undersigned's knowledge and belief, the public records requested, and described below, do not exist within the records of the public body under the name nor any other name reasonably known to the public body.

If you disagree with this decision, you may submit an appeal to the chairperson of the Delta County Board of Commissioners, or seek judicial review in the Delta County Circuit Court. If you prevail in Circuit Court, you may be entitled to receive attorney fees, costs, and disbursements as well as actual or compensatory damages, and punitive damages of $1,000.00.

I have also included the website utilized to find Freedom of Information Act (FOIA) Written Policies, Guidelines, and Forms as well as the FOIA Appeal Form.

If you have any questions or concerns, please contact me.

Best Regards,

Lauren M. Wickman
Chief Prosecuting Attorney
Encl.

Emily Desalvo
FOIA Coordinator

County: Keep original and provide copy of both sides, along with Public Summary, to requestor at no charge.

Delta County
310 Ludington Street, Escanaba, MI 49829
Phone: 906-789-5100

Denial Form

Notice of Denial of FOIA Request

Michigan Freedom of Information Act, Public Act 442 of 1976, MCL 15.231, *et seq.*

Request No.: 25-197 Date Received: 08/14/2025
Date of This Notice: 09/03/2025
(Please Print or Type)

Check if received via: ☐ Email ☑ Fax ☐ Other Electronic Method
Date delivered to junk/spam folder: _____
Date discovered in junk/spam folder: _____

Name J [redacted]	Phone
Firm/Organization	Fax
Street [redacted]	Email [redacted]
City [redacted] State NC	Zip [redacted]

Request for: ☑ Copy ☐ Certified copy ☐ Record inspection ☐ Subscription to record issued on regular basis

Delivery Method: ☐ Will pick up ☐ Will make own copies onsite ☐ Mail to address above ☑ Email to address above
☐ Deliver on digital media provided by the County: _____

Record(s) You Requested: *(Listed here or see attached copy of original request)* See attached copy of original request.

☐ **All** **OR** ☑ **Part** of your request for records has been denied. Please refer to this form for an explanation. If you have any questions regarding this denial, contact Emily Desalvo at 906-789-5100

Reason for Denial:

☑ **1. Exempt from Disclosure:** This item is exempt from disclosure under FOIA Section 13, Subsection (1)(h) *(insert number)*, because: pursuant to MCR 9.126 any such investigations not resulting inf formal charges are privileged form disclosure, confidential, and may not be made public.

☑ **2. Record Does Not Exist:** This item does not exist under the name provided in your request or by another name reasonably known to the County A certificate that the public record does not exist under the name given is attached. If you believe this recorddoes exist, provide a description that will enable us to locate the record: _____

☐ 3. **Redaction:** A portion of the requested record had to be separated or deleted (redacted) as it is exempt under FOIA Section 13, Subsection _____ *(insert number)*, because: _____

A brief description of the information that had to be separated or deleted: _____

Notice of Requestor's Right to Seek Judicial Review

You are entitled under Section 10 of the Michigan Freedom of Information Act, MCL 15.240, to appeal this denial to the County Board of Commissioners or to commence an action in the Circuit Court to compel disclosure of the requested records if you believe they were wrongfully withheld from disclosure.If, after judicial review, the court determines that the County has not complied with MCL 15.235 in making this denial and orders disclosure of allor a portion of a public record, you have the right to receive attorneys' fees and damages as provided in MCL 15.240.
(See back of this form for additional information on your rights.)

Signature of FOIA Coordinater: Emily Desalvo

Date: 9-3-2025

FREEDOM OF INFORMATION ACT (EXCERPT)
Act 442 of 1976

15.240.amended Options by requesting person; appeal; actions by public body; receipt of written appeal; judicial review; civil action; venue; de novo proceeding; burden of proof; private view of public record; contempt; assignment of action or appeal for hearing, trial, or argument; attorneys' fees, costs, and disbursements; assessment of award; damages.

Sec. 10.

(1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:

(a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

(2) Within 10 business days after receiving a written appeal pursuant to subsection (1)(a), the head of a public body shall do 1 of the following:

(a) Reverse the disclosure denial.

(b) Issue a written notice to the requesting person upholding the disclosure denial.

(c) Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.

(d) Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the written appeal. The head of a public body shall not issue more than 1 notice of extension for a particular written appeal.

(3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a). If the head of the public body fails to respond to a written appeal pursuant to subsection (2), or if the head of the public body upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action under subsection (1)(b).

(4) In an action commenced under subsection (1)(b), a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. Venue for an action against a local public body is proper in the circuit court for the county in which the public record or an office of the public body is located has venue over the action. The court shall determine the matter de novo and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court.

(5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(6) If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

(7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of $1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

History: 1976, Act 442, Eff. Apr. 13, 1977 ;-- Am. 1978, Act 329, Imd. Eff. July 11, 1978 ;-- Am. 1996, Act 553, Eff. Mar. 31, 1997 ;-- Am. 2014, Act 563, Eff. July 1, 2015

County: Keep original and provide copy of both sides, along with Public Summary, to requestor at no charge.

Delta County
310 Ludington Street, Escanaba, MI 49829

Phone: 906-789-5100

Denial Appeal Form

FOIA Appeal Form—To Appeal a Denial of Records

Michigan Freedom of Information Act, Public Act 442 of 1976, MCL 15.231, *et seq.*

Request No.: 25-197 Date Received: _____ Check if received via: ☐ Email ☐ Fax ☐ Other Electronic Method
Date of This Notice: _____ Date delivered to junk/spam folder: _____
(Please Print or Type) Date discovered in junk/spam folder: _____

Name		Phone
Firm/Organization		Fax
Street		Email
City	State	Zip

Request for: ☐ Copy ☐ Certified copy ☐ Record inspection ☐ Subscription to record issued on regular basis
Delivery Method: ☐ Will pick up ☐ Will make own copies onsite ☐ Mail to address above ☐ Email to address above
☐ Deliver on digital media provided by the County: _____

Record(s) You Requested: *(Listed here or see attached copy of original request)* _____

Reason(s) for Appeal:

The appeal must identify the reason(s) for reversing the denial. You may use this form or attach additional sheets:

Requestor's Signature: _____ **Date:** _____

County Response:

The County must provide a response within 10 business days after receiving this appeal, including a determination or taking one 10-business day extension.

County Extension: We are extending the date to respond to your FOIA denial appeal for no more than 10 business days, until_____ (*month, day, year*). Only one extension may be taken per FOIA appeal.
Unusual circumstances warranting extension: _____

If you have any questions regarding this extension, contact: _____

County Determination:

☐ Denial Reversed ☐ Denial Upheld ☐ Denial Reversed in Part and Upheld in Part
The following previously denied records will be released: _____

Notice of Requestor's Right to Seek Judicial Review

You are entitled under Section 10 of the Michigan Freedom of Information Act, MCL 15.240, to appeal this denial to the County Board of Commissioners or tocommence an action in the Circuit Court to compel disclosure of the requested records if you believe they were wrongfully withheld from disclosure.If, after judicial review, the court determines that the County has not complied with MCL 15.235 in making this denial and orders disclosure of allor a portion of a public record, you have the right to receive attorneys' fees and damages as provided in MCL 15.240. (*See back of this form for additional information on your rights.*)

Signature of FOIA Coordinator: **Date:**

FREEDOM OF INFORMATION ACT (EXCERPT)
Act 442 of 1976

15.240.amended Options by requesting person; appeal; actions by public body; receipt of written appeal; judicial review; civil action; venue; de novo proceeding; burden of proof; private view of public record; contempt; assignment of action or appeal for hearing, trial, or argument; attorneys' fees, costs, and disbursements; assessment of award; damages.

Sec. 10.

(1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:

(a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

(2) Within 10 business days after receiving a written appeal pursuant to subsection (1)(a), the head of a public body shall do 1 of the following:

(a) Reverse the disclosure denial.

(b) Issue a written notice to the requesting person upholding the disclosure denial.

(c) Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.

(d) Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the written appeal. The head of a public body shall not issue more than 1 notice of extension for a particular written appeal.

(3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a). If the head of the public body fails to respond to a written appeal pursuant to subsection (2), or if the head of the public body upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action under subsection (1)(b).

(4) In an action commenced under subsection (1)(b), a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. Venue for an action against a local public body is proper in the circuit court for the county in which the public record or an office of the public body is located has venue over the action. The court shall determine the matter de novo and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court.

(5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(6) If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

(7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of $1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

History: 1976, Act 442, Eff. Apr. 13, 1977 ;-- Am. 1978, Act 329, Imd. Eff. July 11, 1978 ;-- Am. 1996, Act 553, Eff. Mar. 31, 1997 ;-- Am. 2014, Act 563, Eff. July 1, 2015.

Freedom of Information Act (FOIA) Written Policies, Guidelines, and Forms

To review all policies, guidelines, and forms related to FOIA, please visit Delta County's website at: www.deltacountymi.gov/foia

Upon request, a mailed copy of the polices, guidelines, and/or forms will be provided. Please contact the Delta County Administration Office at 906-789-5100 or by mail at:

Delta County Administration Office
310 Ludington Street, Suite 222
Escanaba, Michigan, 49829

Zimbra #25-197 **tracy@deltacountymi.org**

Fax received from 12065080851

From : TelNet Worldwide <noreply@notify.telnetfax.com>
Wed, Aug 13, 2025 12:01 PM
1 attachment

Sender : noreply@notify.telnetfax.com

Subject : Fax received from 12065080851

To : adminfax@deltacountymi.gov

External images are not displayed. Display images below

Logo

YOU HAVE RECEIVED A FAX!

You've received a fax!

To	+1 906-789-5197
Sender CSID	17194101487
Pages received	2
Receive time	8.13.2025 12:00:48 PM -04:00

View additional details inside the Fax portal

Login to secure portal

Logo

Contact Us

inbound_20250813040048O_5198a429ca8474731074e6ed25f20000.pdf
57 KB

Cover Note – FOIA Submission
Date: August 13, 2025

To:
FOIA Coordinator
Delta County Prosecutor's Office
310 Ludington Street
Escanaba, MI 49829
Fax: (906) 789-5197

This FOIA request is submitted for prompt processing under the Michigan Freedom of Information Act (MCL 15.231 et seq.).

Please note:

1. This request is intentionally worded to capture **all complaints** — public, internal, or from outside agencies — regardless of whether they were resolved, withdrawn, or remain pending.

2. A response stating that "no such records exist" will not be accepted unless accompanied by a **detailed certification** describing:

    - The complaint systems, logs, and databases searched;
    - The staff or custodians consulted;
    - The search terms and date ranges used.

3. Records marked as "confidential," "personnel," "administrative," or "internal" are still public records unless a valid statutory exemption applies. All **non-exempt, reasonably segregable portions** must be released.

4. If any records are withheld under the "personnel records" exemption or similar provisions, the response must still describe the document type, date, and general nature of the record so that the applicability of the exemption can be evaluated.

I expect acknowledgment within **five (5) business days** and full compliance within the statutory deadlines.

Sincerely,

[redacted]

Freedom of Information Act Request
Date: August 13, 2025

To:
FOIA Coordinator
Delta County Prosecutor's Office
310 Ludington Street
Escanaba, MI 49829
Fax: (906) 789-5197

RE: Request for Records – Complaints Filed Against the Prosecutor's Office

Dear FOIA Coordinator:

Pursuant to the Michigan Freedom of Information Act, MCL 15.231 et seq., I request copies of:

> **All complaints, grievances, or formal allegations filed against the Delta County Prosecutor's Office or any of its employees from January 1, 2019, through the date this request is processed.**

This request includes, but is not limited to:

- Written complaints submitted by members of the public, law enforcement, court staff, or other government agencies;
- Internal grievances filed by Prosecutor's Office employees;
- Complaints submitted to oversight bodies, professional licensing boards, the State Bar of Michigan, or the County Board of Commissioners;
- Any records of the resolution, investigation, or disposition of such complaints.

Please include all responsive records regardless of whether they are labeled as "confidential," "personnel," "internal," or "for administrative use only." Draft and final versions should be included.

If any portion of this request is denied, please provide the statutory exemption relied upon and the name/title of the person responsible for the denial, as required by MCL 15.235(5). Please release all reasonably segregable portions of otherwise exempt records.

I am willing to accept the records in electronic format (PDF preferred) via email at **parrjj03@gmail.com** to reduce costs. If fees will exceed $20, please provide an itemized cost estimate before proceeding.

Thank you for your attention to this request.

Sincerely,

[redacted]

County: Keep original and provide copy of both sides, along with Public Summary, to Requestor at no charge.

Delta County
310 Ludington St., Escanaba, MI 49829
Phone: 906-789-5100

Notice to Extend Response Time for FOIA Request

Michigan Freedom of Information Act, Public Act 442 of 1976, MCL 15.231, *et seq.*

Request No.: 25197 **Date Received:** 8/13/25
Date of This Notice: 8-19-25
(Please Print or Type)

Check if received via: ☐ Email ☒ Fax ☐ Other Electronic Method
Date delivered to junk/spam folder: _____
Date discovered in junk/spam folder: _____

Name [redacted]	Phone [redacted]
Firm/Organization	Fax
Street [redacted]	Email [redacted]
City [redacted]	State [redacted] Zip [redacted]

Request for: ☒ Copy ☐ Certified copy ☐ Record inspection ☐ Subscription to record issued on regular basis
Delivery Method: ☐ Will pick up ☐ Will make own copies onsite ☐ Mail to address above ☒ Email to address above
☐ Deliver on digital media provided by the County: _____

Record(s) You Requested: (Listed here or see attached copy of original request) **copy of original attached.**

We are extending the date to respond to your FOIA request for no more than 10 business days, until 9/3/25 *(month, day, year)*.
Only one extension may be taken per FOIA request. If you have any questions regarding this extension, contact Emily DeSalvo at 906-789-5100

Estimated Time Frame to Provide Records: 09/03/2025 *(days or date)*
The time frame estimate is nonbinding upon the County, but the County is providing the estimate in good faith. Providing an estimated time frame does not relieve a public body from any of the other requirements of this act.

Reason for Extension:

☒ **1.** The County needs to search for, collect, or appropriately examine or review a voluminous amount of separate and distinct public records pursuant to your request. Specifically, the County must:

☐ **2.** The County needs to collect the requested public records from numerous field offices, facilities, or other establishments that are located apart from the County office. Specifically, the County must coordinate documents from the following locations:

☐ **3.** Other (describe): _____

Signature of FOIA Coordinator: [signature] **Date:** 8-19-2025

(Form created by MTA, MAMA and CS&T, PC, May 2015)

[This page left blank on purpose.]

Zimbra Dupl 25-197 **tracy@deltacountymi.org**

Fax received from 16305663366

From : TelNet Worldwide <noreply@notify.telnetfax.com>
Wed, Aug 13, 2025 12:02 PM

1 attachment

Sender : noreply@notify.telnetfax.com

Subject : Fax received from 16305663366

To : adminfax@deltacountymi.gov

External images are not displayed. Display images below

Logo

YOU HAVE RECEIVED A FAX!

You've received a fax!

To	+1 906-789-5197
Sender CSID	17194101487
Pages received	2
Receive time	8.13.2025 12:02:29 PM -04:00

View additional details inside the Fax portal

Login to secure portal

Logo

Contact Us

inbound_20250813040229O_5198a42b53de747710012f06b8270000.pdf
57 KB

Cover Note – FOIA Submission
Date: August 13, 2025

To:
FOIA Coordinator
Delta County Prosecutor's Office
310 Ludington Street
Escanaba, MI 49829
Fax: (906) 789-5197

This FOIA request is submitted for prompt processing under the Michigan Freedom of Information Act (MCL 15.231 et seq.).

Please note:

1. This request is intentionally worded to capture **all complaints** — public, internal, or from outside agencies — regardless of whether they were resolved, withdrawn, or remain pending.

2. A response stating that "no such records exist" will not be accepted unless accompanied by a **detailed certification** describing:

    - The complaint systems, logs, and databases searched;
    - The staff or custodians consulted;
    - The search terms and date ranges used.

3. Records marked as "confidential," "personnel," "administrative," or "internal" are still public records unless a valid statutory exemption applies. All **non-exempt, reasonably segregable portions** must be released.

4. If any records are withheld under the "personnel records" exemption or similar provisions, the response must still describe the document type, date, and general nature of the record so that the applicability of the exemption can be evaluated.

I expect acknowledgment within **five (5) business days** and full compliance within the statutory deadlines.

Sincerely,

Freedom of Information Act Request
Date: August 13, 2025

To:
FOIA Coordinator
Delta County Prosecutor's Office
310 Ludington Street
Escanaba, MI 49829
Fax: (906) 789-5197

RE: Request for Records – Complaints Filed Against the Prosecutor's Office

Dear FOIA Coordinator:

Pursuant to the Michigan Freedom of Information Act, MCL 15.231 et seq., I request copies of:

> **All complaints, grievances, or formal allegations filed against the Delta County Prosecutor's Office or any of its employees from January 1, 2019, through the date this request is processed.**

This request includes, but is not limited to:

- Written complaints submitted by members of the public, law enforcement, court staff, or other government agencies;
- Internal grievances filed by Prosecutor's Office employees;
- Complaints submitted to oversight bodies, professional licensing boards, the State Bar of Michigan, or the County Board of Commissioners;
- Any records of the resolution, investigation, or disposition of such complaints.

Please include all responsive records regardless of whether they are labeled as "confidential," "personnel," "internal," or "for administrative use only." Draft and final versions should be included.

If any portion of this request is denied, please provide the statutory exemption relied upon and the name/title of the person responsible for the denial, as required by MCL 15.235(5). Please release all reasonably segregable portions of otherwise exempt records.

I am willing to accept the records in electronic format (PDF preferred) via email at **parrjj03@gmail.com** to reduce costs. If fees will exceed $20, please provide an itemized cost estimate before proceeding.

Thank you for your attention to this request.

Sincerely,

[redacted]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KURTIS KOBASIC, Plaintiff, v. DELTA COUNTY AND LAUREN WICKMAN, Defendants.	))) 2:20 cv-00113) Hon. Robert J. Jonker)))

FIRST AMENDED COMPLAINT FOR CONSTITUTIONAL VIOLATIONS, DECLARATORY RELIEF, AND RELIANCE ON JURY DEMAND ALREADY FILED

Plaintiff Kurtis Kobasic ("Plaintiff"), by and through his attorney, Celeste M. Dunn, PLC, states for his First Amended Complaint as follows:

1. This is a civil action arising under 42 U.S.C. § 1983 and common law avenues of recovery for deprivations of Plaintiff's constitutional rights against Defendants and conversion.

2. Plaintiff also seeks a declaratory judgment that a state court order to euthanize his dog are void because he is an owner of the dog Turbo and was not a party to an action against Turbo.

3. Plaintiff also seeks preliminary and permanent injunctive relief to prevent the dog at issue's pre-mature euthanasia while these claims are pending.

JURISDICTION

4. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331,

1367(a), 1341 and 2201.

VENUE

5. Venue is proper under 28 U.S.C. § 1391(b).

6. The incidents that give rise to this suit all occurred in Escanaba, which is situated in Delta County, Michigan.

7. Defendant Delta County is an agency of a political subdivision of the State of Michigan acting under color of State law, and is a person for purposes of a 42 U.S.C. § 1983 action. Its employee and attorney, Lauren Wickman, was at all pertinent times, acting under color of State law, and is the complaining witness and made certain attestations pursuant to the former MCR 2.114 (now MCR 1.109) to certain facts and circumstances that were not within her personal knowledge in an underlying case, *In re Turbo*.

COLOR OF STATE LAW

8. At all times relevant herein, Defendants acted under color of state law.

FACTUAL BACKGROUND

9. On June 30, 2017, Plaintiff co-owned with non-party Valerie Kobasic ("Valerie Kobasic") a dog named "Turbo."

10. Turbo was purchased by Plaintiff's girlfriend.

11. On June 30, 2017, it was alleged that dog Turbo killed another dog that was on a tie out. No evidence was presented that the deceased dog was on its owner's property or otherwise under its owner's control at the time of the alleged incident as is

required under Michigan law. The owner of the deceased dog was not present. Defendant Lauren Wickman attested to the Complaint, attesting to allegations not within her personal knowledge.

12. Prior to Delta County, through its employee Lauren Wickman, filing the action, upon information and belief, the City of Escanaba denied a warrant request and did not pursue any claims against Valerie Kobasic nor Plaintiff nor dog Turbo.

13. During trial, Lauren Wickman, presented testimony from a ten year old witness who testified:

> The Court: Mr. Bennett [the 10 year old] did you- -did you see one of the dogs biting the other one?
> The Witness: I think so your Honor.
> The Court: What do you mean you think so?
> The Witness: I think I saw but I can't exactly remember.
> The Court: Okay. Fair Enough. What do you mean when you said that the one dog- the orange dog- was eating the other dog? What was that about?
> The Witness: It-it looked like it was eating the other dog, but- I wasn't really sure.

Trial Testimony, page 15.

14. Lauren Wickman presented a veterinarian and elicited testimony, admittedly, beyond the expert's expertise. The veterinarian, Dr. Laskaska, testified to Turbo being dangerous but then admitted "[b]ehavior is not really my area of expertise. However, it's always a dangerous situation when one dog is confined and the other one isn't." Trial Testimony, page 31. The veterinarian never met dog Turbo.

15. Officer Meyette testified that dog Turbo was "not vicious." Trial Testimony, page 35.

16. Defendant Lauren Wickman, in her sworn complaint, pled two allegations against dog Turbo, one cause of action pursuant to MCL 287.286a and the other pursuant to MCL 287.322. Defendant Lauren Wickman utilized a Michigan Supreme Court Form which doesn't follow the law, and on appeal, Defendant Lauren Wickman admitted as much in regards to MCL 287.286a.

17. Both MCL 287.286a and MCL 287.321, *et seq*., require that all owners be served. MCL 287.286a falls within the Dog Law and owner is defined as: "'[o]wner' when applied to the proprietorship of a dog means every person having a right of property in the dog, and every person who keeps or harbors the dog or has it in his care, and every person who permits the dog to remain on or about any premises occupied by him." MCL 287.321 defines "owner" as "a person who owns or harbors a dog or other animal." The summons must be issued to the owners under both statutes.

18. Both MCL 287.286a and MCL 287.322 require that a complaint be "sworn" prior to jurisdiction vesting. On July 10, 2017, Defendant Lauren Wickman attested under oath that Turbo was a dangerous animal and she did not have the requisite personal knowledge in which to make that attestation. The attestation was governed, at the time, by the former MCR 2.114(D) which required that the signature of the party "constitutes certification by the signer that: (1) he or she has read the document; (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law...." Violation of this rule subjects the signer to sanctions, which may include costs and

attorney fees. MCR 2.114(E). Upon information and belief, Lauren Wickman never investigated the ownership of dog Turbo. Despite this, she attested to the ownership, and the Complaint was filed in the District Court in Escanaba, Michigan. Plaintiff was not a named party.

19. As a co-owner, Plaintiff is a necessary party in any proceeding affecting Turbo because Turbo is Plaintiff's property. MCR 2.205.

20. The show cause hearing was held, Valerie Kobasic, the only owner named proceeded *in pro per*. Valerie Kobasic was provided ten days trial notice from the time she was served with the Complaint and Summons on July 18, 2017 to the actual trial date of July 28, 2017. Valerie Kobasic was not able to secure an attorney nor was she provided any factual basis of the Complaint except for an attached police report. The district court judge ordered dog Turbo to be destroyed. A stay of proceedings followed.

21. An appeal was filed and the matter affirmed by the Escanaba Circuit Court judge sitting as the appellate court on an appeal of right. Two applications for leave have been filed with the Michigan Court of Appeals denying the application in a two to one vote and the Michigan Supreme Court denying leave.

22. Plaintiff's ownership has not been adjudicated nor included in any of the prior hearings.

23. Valerie Kobasic also did not know applicable law, which would have been persuasive in defending against the State's request to kill Turbo. She did not know proper objections.

24. On December 23, 2019, Plaintiff's counsel sent a letter to Escanaba County via both its counsel Lauren Wickmen and the Board of Commissioners notifying them that proceeding without service upon Plaintiff rendered any order void. MCR 2.205; MCL 287.286a; MCL 287.322. Adjudication of property without joinder of such necessary parties is void. *Reinecke v. Sheehy*, 47 Mich. App. 250, 255 (1973) (judgment void against party not served); *Markstrom v. United States Steel Corporation*, 182 Mich. App. 570, 574 (1989), *rev'd on other grounds*, 437 Mich. 936 (1991) (settlement not binding on owner not joined as necessary party).

25. Plaintiff, in the December 23, 2019 letter, also included Turbo's Rabies Vaccination Certificate which was in his name and identified him, Kurtis Kobasic, as the owner. No response to the December 9, 2019 letter was received. Exhibit A, December 9, 2019 Letter and Exhibit B, Vaccination Certificate. Under Michigan law, the owner vaccinates the dog.

26. Defendants are on notice of Plaintiff's ownership interest and, originally, woefully ignored same; additionally, the original attestation failed to properly investigate and secure all owners. When acting under color of state law, they are bound to follow and abide by Plaintiff's constitutional rights.

27. Defendant Delta County has since acknowledged Plaintiff's ownership interest but is still denying Plaintiff's constitutional rights; Delta County has represented that they don't want to provide Plaintiff due process as a new trial may jeopardize their case.

28. Defendant Lauren Wickman is not immune from this suit as it is a civil action, not a criminal proceeding. brought by animal control or investigating officers.

29. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...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. Sect. 1983.

COUNT I
VIOLATION OF CIVIL RIGHTS
42 U.S.C. § 1983 AND FOURTH AMENDMENT

30. Plaintiff re-alleges all of the preceding paragraphs as if set forth fully herein.

31. The Fourth Amendment of the United States Constitution, U.S. Const. amend. IV, prohibits the government from unreasonably seizing or destroying or seizing a citizen's property. "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

32. "[T]here is a constitutional right under the Fourth Amendment to not have one's dog unreasonably seized." *Brown v. Battle Creek Police Department,* 844 F.3d 556, 566 (6th Cir. 2016). Owners of dogs, even alleged dangerous ones, are still entitled to constitutional and fourth amendment protections. *Smith v Detroit*, *et al*, Sixth Circuit Court of Appeals 17-1907, October 15, 2018.

33. "The destruction of property by state officials poses as much of a threat, if not more, to people's right to be 'secure . . . in their effects' as does the physical taking of them." *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994), overruled on other grounds, *Robinson v. Solano County*, 278 F.3d 1007, 1013 (9th Cir. 2002) (citation omitted).

34. "The killing of [a] dog is a destruction recognized as a seizure under the Fourth Amendment" and can constitute a cognizable claim under § 1983. *Id.*

35. Dogs are more than just a personal effect. *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose,* 402 F.3d 962, 975 (9th Cir. 2005) (holding that defendant police's shooting of plaintiff's dogs was an unreasonable seizure).

36. The emotional attachment to a family's dog is not comparable to a possessory interest in furniture. *Id*.

37. Indeed, Plaintiff's Fourth Amendment interests involved are substantial because "the bond between a dog owner and his pet can be strong and enduring," and Plaintiff thinks of Turbo "in terms of an emotional relationship, rather than a property relationship." *Altman v. City of High Point, N.C.*, 330 F.3d 194, 205 (4th Cir. 2003). Plaintiff utilizes dog Turbo for emotional support.

38. Defendants' acts described herein were objectively unreasonable. Defendants' orders were achieved without all owners as respondents. Every order achieved is void as all property owners were not included in the case. There is no order that allows the seizure of this property against Plaintiff.

39. Defendant Delta County continues to pursue euthanasia despite its

knowledge and acknowledgement of Plaintiff's ownership interest.

40. Indeed, Defendant's acts described herein both individually and collectively were and are intentional, grossly negligent, and/or amount to reckless or callous indifference to Plaintiffs' constitutional rights.

41. Both Defendant Delta County and Defendant Lauren Wickman's actions were unreasonable under the totality of the circumstances and therefore constituted an unreasonable seizure under the Fourth Amendment. Their positions and Fourth Amendment violations continue to this day.

42. No governmental interest justifies the intrusion involved in this case.

43. The right to possess a dog is clearly established. *Lesher v. Reed*, 12 F.3d 148, 150-51 (8th Cir. 1994).

44. As a direct and proximate cause of Defendants' unlawful seizure of Turbo, Plaintiff has suffered and continues to suffer damages, including mental pain and anguish that flow naturally from the constitutional violations. *Moreno v. Hughes*, 2016 U.S. Dist. 5697 (E.D. Mich. Jan. 19, 2016) (holding that mental anguish and suffering damages are recoverable under the Civil Rights Act where police officers violate the Fourth Amendment by unreasonably shooting plaintiffs' dog).

Compensatory Damages

45. Under 42 U.S.C. § 1983 Plaintiff is entitled to an award of compensatory damages.

Punitive Damages

46. Defendants' actions were:

Reckless;

Showed and show callous indifference toward the rights of Plaintiff; and

Were taken in the face of a perceived risk that the actions would violate federal law.

47. Plaintiff is entitled to an award of punitive damages against Defendant, in order to punish them and to deter others.

Attorney's Fees

48. Under 42 U.S.C. § 1988 if Plaintiff is the prevailing party in this litigation, then he will be entitled to receive an award of reasonable attorney's fees, non-taxable expenses and costs.

WHEREFORE, Plaintiff requests the declaratory relief describe herein, compensatory damages in a fair and reasonable amount, for punitive damages, for reasonable attorney's fees, for non-taxable expenses, for costs, and Plaintiff prays for such other relief as may be just under the circumstances and consistent with the purpose of 42 U.S.C. § 1983.

COUNT II
VIOLATION OF CIVIL RIGHTS
42 U.S.C. § 1983 AND FOURTEENTH AMENDMENT
PROCEDURAL DUE PROCESS

49. Plaintiff re-alleges all of the preceding paragraphs as if set forth fully herein.

50. The Fourteenth Amendment provides "nor shall any state deprive any person of life, liberty or property, without due process of law." U.S. Const. amend.

XIV, sect. 1, cl. 3.

51. To establish a procedural due process claim under 42 U.S.C. Sect. 1983, a plaintiff must show that (1) it had a life, liberty, or property interest protected by the Due Process Clause; (2) it was deprived of this protected interest; and (3) the state did not afford it adequate procedural rights. See *Daily Servs., LLC v. Valentino*, 756 F.2d 893, 904 (CA6 2014).

52. Plaintiff has a protected property interest in his dog Turbo. MCL 287.286a; MCL 287.321, *et seq., Brown*, *supra*., *Smith*, *supra*.

53. Plaintiff's protected property interest in his dog Turbo has been, and is being, denied due to the void order, restraint on property, and continued quest for permanent destruction without Plaintiff being provided process.

54. Defendants held a hearing and pursued a case without Plaintiff. Defendant Lauren Wickman attested under oath as to the ownership never making the requisite inquiry. Plaintiff, even now, has continued to protect his Procedural Due Process Rights which Defendant Delta County continues to fight to deprive him of same. There is no adequate post-deprivation remedy.

55. Therefore, Plaintiff has a constitutionally protected interest that is being affected as a direct and proximate cause of Defendants' actions of achieving orders without him included as Respondent, nor allowing him to exert his due process rights when he asked to do so; Defendant Delta County continues to violate Plaintiff's procedural due process, which they admitted as such and that the motivation was for

strategic purposes. As a direct and proximate cause of Defendants' actions, Plaintiff has been and continues to be damaged.

Compensatory Damages

56. Under 42 U.S.C. § 1983 Plaintiff is entitled to an award of compensatory damages.

Punitive Damages

57. Defendant's actions were:

Reckless;

Showed callous indifference toward the rights of Plaintiff; and

Were taken in the face of a perceived risk that the actions would violate federal law.

58. Plaintiff is entitled to an award of punitive damages against Defendant, in order to punish them and to deter others.

Attorney's Fees

59. Under 42 U.S.C. § 1988 if Plaintiff is the prevailing party in this litigation, then he will be entitled to receive an award of reasonable attorney's fees, non-taxable expenses and costs.

WHEREFORE, Plaintiff requests the declaratory relief describe herein, compensatory damages in a fair and reasonable amount, for punitive damages, for reasonable attorney's fees, for and non-taxable expenses, for costs, and Plaintiff prays for such other relief as may be just under the circumstances and consistent with the purpose of 42 U.S.C. § 1983.

COUNT III
VIOLATION OF CIVIL RIGHTS
42 U.S.C. § 1983 AND FOURTEENTH AMENDMENT
SUBSTANTIVE DUE PROCESS AS TO DEFENDANT DELTA COUNTY

60. Plaintiff re-alleges all of the preceding paragraphs as if set forth fully herein.

61. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that no State can "deprive any person of life, liberty or property, without due process of law." U.S. Const. amend. XIV, sect. 1, cl.3.

62. The substantive component of the Due Process Clause prohibits government from taking action that "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty." *United States v Salerno*, 481 U.S. 739, 746 (1987).

63. Plaintiff has a protected property interest in his dog Turbo.

64. Defendants have been on notice of Plaintiff's property interest, and Defendant Delta County has admitted that Plaintiff is an owner.

65. Defendant Delta County's position shocks the conscience and interferes with Plaintiff's deeply-rooted property rights as they continue every day to violate his rights as outlined in the General Allegations and each of the Counts of this Complaint, which are incorporated into this Paragraph by reference.

66. There is no compelling governmental interest achieved by the continual denial of due process nor is there any rational basis to deprive Plaintiff of his property interest without affording him due process.

67. In the alternative, pursuing euthanization without due process is not reasonably related to a legitimate governmental interest.

68. Defendant Delta County's actions are a direct and proximate cause of the violation of substantive due process. As a direct and proximate cause of these actions, Plaintiff has been damaged.

Compensatory Damages

69. Under 42 U.S.C. § 1983 Plaintiff is entitled to an award of compensatory damages.

Punitive Damages

70. Defendant's actions were:

Reckless;

Showed callous indifference toward the rights of Plaintiff; and

Were taken in the face of a perceived risk that the actions would violate federal law.

71. Plaintiff is entitled to an award of punitive damages against Defendant, in order to punish them and to deter others.

Attorney's Fees

72. Under 42 U.S.C. § 1988 if Plaintiff is the prevailing party in this litigation, then he will be entitled to receive an award of reasonable attorney's fees, non-taxable expenses and costs.

WHEREFORE, Plaintiff requests the declaratory relief describe herein, compensatory damages in a fair and reasonable amount, for punitive damages, for

reasonable attorney's fees, for and non-taxable expenses, for costs, and Plaintiff prays for such other relief as may be just under the circumstances and consistent with the purpose of 42 U.S.C. § 1983.

COUNT IV

POLICY AND CUSTOM LIABILITY

73. Plaintiff re-alleges all of the preceding paragraphs as if set forth fully herein.

74. Defendant Delta County is and was aware of Plaintiff's Kurtis Kobasic's ownership interests.

75. Defendant Delta County had been informed, again, on, or about December 9, 2019 via letter from Mr. Kurtis Kobasic's counsel. Defendant Delta County's counsel, Lauren Wickman, was informed.

76. Defendant Delta County proceeded and continues to proceed with its case despite its scienter of the unadjudicated ownership interest.

77. Defendant Delta County's action and inaction demonstrate its policy of failing to recognize constitutionally protected property ownership rights that are clearly outlined in the federal system and in the Federal Sixth Circuit Court of Appeals.

78. Defendant Delta County's policy and custom violates both the 4th Amendment and 14th Amendment of the U.S. Constitution.

79. As a direct and proximate cause of Defendant Delta County's policy and custom, Plaintiff's constitutional rights have been and continue to be violated and have

caused Plaintiff to be damaged.

Compensatory Damages

80. Under 42 U.S.C. § 1983 Plaintiff is entitled to an award of compensatory damages.

Punitive Damages

81. Defendant's actions were:

Reckless;

Showed callous indifference toward the rights of Plaintiff; and

Were taken in the face of a perceived risk that the actions would violate federal law.

82. Plaintiff is entitled to an award of punitive damages against Defendant, in order to punish them and to deter others.

Attorney's Fees

83. Under 42 U.S.C. § 1988 if Plaintiff is the prevailing party in this litigation, then he will be entitled to receive an award of reasonable attorney's fees, non-taxable expenses and costs.

WHEREFORE, Plaintiff requests the declaratory relief describe herein, compensatory damages in a fair and reasonable amount, for punitive damages, for reasonable attorney's fees, for and non-taxable expenses, for costs, and Plaintiff prays for such other relief as may be just under the circumstances and consistent with the purpose of 42 U.S.C. § 1983.

COUNT V

DECLARATORY AND INJUNCTIVE RELIEF

84. Plaintiff re-alleges all of the preceding paragraphs as if set forth fully herein.

85. M.C.R. 2.205 provides that: "persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests."

86. Adjudication of property without joinder of such necessary parties is void. *Reinecke v. Sheehy*, 47 Mich. App. 250, 255 (1973) (judgment void against party not served); *Markstrom v. United States Steel Corporation*, 182 Mich. App. 570, 574 (1989), *rev'd on other grounds*, 437 Mich. 936 (1991) (settlement not binding on owner not joined as necessary party).

87. Plaintiff was not been joined in this case, which was a violation of M.C.R. 2.205, M.C.L. 287.286a and M.C.L. 287.321. Defendant has made no attempts to rectify their constitutional violations. Defendant admits that it wants to proceed without Plaintiff as Defendant may strategic problems.

88. Because of, *inter alia*, the failure to join Plaintiff Kurtis Kobasic as a necessary party, any and all orders in the case against Turbo are void. *Reinecke*, 47 Mich. App. at 255.

89. The order to euthanize must be enjoined on a temporary and permanent basis otherwise irreparable harm will occur.

WHEREFORE, Plaintiff requests the declaratory relief describe herein, compensatory damages in a fair and reasonable amount, for punitive damages, for reasonable attorney's fees, for and non-taxable expenses, for costs, and Plaintiff prays for such other relief as may be just under the circumstances and consistent with the purpose of 42 U.S.C. § 1983.

COUNT VI
CONVERSION

90. Plaintiff repeats his prior allegations.

91. "Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." *Thoma v. Tracy Motor Sales, Inc.,* 360 Mich. 434, 438, 104 N.W.2d 360 (1960)(quoting *Nelson & Witt v. Texas Co.,* 256 Mich 65, 70)).

92. Defendant's void orders achieved without Plaintiff served is a distinct act of dominion wrongfully exerted over Plaintiffs' dog in denial of or inconsistent with his rights.

WHEREFORE, Plaintiff requests relief under applicable law or in equity, including, without limitation, a judgment and an award of statutory treble damages and all reasonable costs, interest and attorney fees. M.C.L. § 600.2919a.

RELIANCE ON ORIGINAL DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demanded trial by jury in this action of all issues so triable contemporaneous with filing its original Complaint and relies on that Jury Demand.

Respectfully submitted,

CELESTE M. DUNN, PLC

By: /s/ Celeste M. Dunn

_____

Celeste M. Dunn (P61819)
Celeste M. Dunn, PLC
P.O. Box 230
Clarkston, MI 48347
(248) 701-3467

August 3, 2020

EXHIBIT A

December 9, 2019

Ms. Lauren Wickman, Esq.
Delta County Assistant Prosecuting Attorney
Suite 237 Second Floor
310 Ludington Street
Escanaba, Michigan 49829
(906) 789-5115
via e-mail lwickman@deltacountymi.org

Delta County Board of Commissioners
310 Ludington Street
Escanaba, Michigan 49829

Re: People of the State of Michigan v Valerie Kobasic, Turbo the Dog

Dear Ms. Wickman and Delta County Board of Commissioners:

I represent, Kurtis Kobasic, as an owner of Dog Turbo. Delta County, through its prosecutor and assistant prosecutor, Ms. Lauren Wickman is attempting to destroy a dog named Turbo, owned, in part by Valerie Kobasic without serving and including in the suit Mr. Kurtis Kobasic, also owner of dog Turbo. Without the proper owners sued as a part of the civil proceeding, any order to euthanize dog Turbo is void and in violation of MCL 287.286a and MCL 287.321, *et seq*.

As Delta County is well aware, MCR 2.205, Necessary Joinder of Parties, states:

> (A) Necessary Joinder. Subject to the provisions of subrule (B) and MCR 3.501, persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests.

Ms. Wickman did not join my client, which was required. Prior attempts to adjudicate jointly held property have historically and consistently been held void. *Reinecke v Sheehy*, 47 Mich App 250; 209 NW2d 460 (1973) (see below); *In re Cain Estate*, 147 Mich App 615, 382 NW2d 829 (1985) (decedent and his uncle had joint bank account, the Court held that the uncle was a necessary party to probate of deceased's will); *Markstrom v United States Steel Corporation*, 182 Mich App 570, 452 NW2d 820 (1989) (in trespass action, settlement not binding because one of five land owners was not party to settlement agreement and was not joined as necessary party under court rule). I attach a copy of a Huron County opinion regarding an alleged dangerous animal wherein the court ruled that the case must be dismissed as not all owners were served (wife served and husband not, case dismissed approximately 9 months later). *People v Schubach*, 19-195-GZ. (Exhibit 1)

In *Reinecke*, Mr. and Mrs. Reinecke were co-owners of land but only Mr. Reinecke was

served with the complaint in a forfeiture action. At trial, Mrs. Reinecke was called as a witness and she testified that only her husband was served with the summons and complaint although she obviously knew the case was proceeding. The Court of Appeals held: "From this testimony and the summons indicating on its face that only Clinton Reinecke was served with the complaint, we must conclude that no service was made on Josephene Reinecke personally and the district court did not squire proper jurisdiction....[t]he forfeiture judgment against the property held in tenancy by the entireties is, therefore, void." (Exhibit 2).

Any proceedings that result in taking the dog that do not include the owner would amount to Fifth and Fourteenth Amendment takings and violative of the U.S. Constitution as well as violate Michigan law. The Sixth Circuit held in *Smith v Detroit, et al*, Sixth Circuit Court of Appeals 17-1907, October 15, 2018, that "[i]t is settled in [Michigan] that dogs have value, and are the property of the owner as much as any other animal which one may have or keep." *Id.*, at 6, citing *Ten Hopen v Walker*, 55 NW 657, 658 (Mich. 1893). "By guaranteeing process to dog owners before their unlicensed dogs are killed, Michigan law makes clear that the owners retain a possessory interest in their dogs." *Id.*, at 8. In *Smith*, the police described the dogs as "vicious" which was insufficient to negate constitutional protections and due process. *Id.*

Here, it is clear that both MCL 287.321 (the statute Ms. Wickman has proceeded under) and MCR 2.205 require the owners be served. Although Ms. Wickman's arguments pursuant to MCL 287.286a were abandon, the Dog Law of 1919, likewise defines owner to include Mr. Kurtis Kobasic. I am enclosing one piece of evidence of his ownership interest, as illustration, but not limitation. (Exhibit 2).

Mr. Kobasic is willing to settle this matter with a dismissal of the order to euthanize with prejudice and without costs, and mutual releases of claims. This offer is open until Thursday December 11, 2019.

Very truly yours,

DAVID DRAPER

DIRECT: (313) 885-6800
E-MAIL: david@thedraperfirm.com

Enclosure
cc: Client (w/enclosure)

EXHIBIT B

RABIES VACCINATION CERTIFICATE

Owner's Name & Address Print - use ball point pen or type

PRINT LAST, FIRST	TELEPHONE
Kobasic Kurtis	(906) 420-0894
NO. STREET CITY STATE	ZIP
1823 1st Ave. South Escanaba, MI	49829
Patient Name: Turbo	RABIES TAG NUMBER 2659

SPECIES	SEX	AGE	SIZE	PREDOMINENT BREED	COLORS
Canine	M	9 months old (1yr)	58.8 lbs	Chow Chow	Rust
(If OTHER, please specify)					

DATE VACCINATED	PRODUCER	SIGNATURE
01/04/2016	Merial	[signature]
VACCINATION EXPIRES	1yr/3yr License Vaccine	ADDRESS
01/03/2017	1 Year	Best Friends Veterinary Clinic N16836 Bellefeuil Lane, D-3 Wilson, MI 49896 (906) 630-1429
	VACC. SERIAL (LOT) NUMBER 1215410A	

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KURTIS KOBASIC,

Plaintiff,

v

DELTA COUNTY and LAUREN WICKMAN,

Defendants.
_____/

HONORABLE ROBERT J. JONKER
U.S. DISTRICT COURT JUDGE

FILE NO. 2:20-cv-113-RJJ-MV

Celeste M. Dunn (P61819)
CELESTE M. DUNN, PLC
Attorney for Plaintiff
P.O. Box 230
Clarkston, MI 48347
(248) 701-3467
celestemdunnplc@gmail.com

Gregory R. Grant (P68808)
CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.
Attorneys for Defendants
310 W. Front Street, Ste. 221
Traverse City, MI 49684
(231) 922-1888/(231) 922-9888 Fax
ggrant@cmda-law.com

_____/

DEFEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

ISSUES PRESENTED

I. WHETHER PLAINTIFF IS ENTITLED TO THE "EXTRAORDINARY REMEDY" OF A PRELIMINARY INJUNCTION WHERE HE HAS NOT DEMONSTRATED A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS OR THAT THE INJUNCTION SERVES THE PUBLIC INTEREST?

Plaintiff answers "yes.

Defendants answer "no."

STATEMENT OF FACTS

Introduction.

Plaintiff Kurtis Kobasic brings this civil rights lawsuit against Delta County Chief Assistant Prosecutor Lauren Wickman and Delta County asserting violations of his Fourth and Fourteenth Amendment rights arising out of the state court proceedings and subsequent determination that his dog is dangerous and must be euthanized. At the eleventh hour, Plaintiff seeks a preliminary injunction enjoining the enforcement of a state-court September 1, 2020 order to euthanize his dog. That order requires euthanasia by September 22, 2020.

A preliminary injunction in this matter is unwarranted because Plaintiff cannot demonstrate a substantial likelihood of success on the merits of his claim as set forth in Defendants' pending motion to dismiss. **(ECF No. 9, PageID.60-91).** Moreover, because Plaintiff's dog has been determined to be dangerous by the state court, requiring destruction of the dog by statute, a preliminary injunction does not serve the public interest. Further, issuance of the requested injunction will only harm the public because the dog has continued to run loose, presenting a danger to the public. **(Exhibit 1, Case Reports).**

Substantive Facts.

In 2017, it was determined that non-party Valerie Kobasic's dog, "Turbo," killed another dog in Escanaba, Michigan. **(ECF No. 5, PageID.34, ¶ 11).** After proceedings in state district court, and appeals filed by Ms. Kobasic in circuit court, the Michigan Court of Appeals, and the Michigan Supreme Court, "Turbo" was deemed dangerous and ordered to be destroyed. **(ECF No. 5, PageID.37, ¶¶ 20-21; ECF No. 901, PageID.93-109).**

In a last-ditch effort to save the dog, Plaintiff Kurtis Kobasic, son of Valerie Kobasic, now

claims years later that he was a "co-owner" of "Turbo" and that he was never given notice of any proceedings to destroy the dog. **(ECF No. 5, PageID.34, ¶ 9).** In 2020, Plaintiff attempted to intervene in the state court matter as a nonparty and his motion was denied. **(ECF No. 9-2, PageID.148).**

Plaintiff has had ample opportunities to argue his case in state court and has failed. Plaintiff's complaint and his eleventh-hour request for a preliminary injunction are nothing more than an attempt to delay the destruction of a dog that has already been deemed legally dangerous. Because this matter is improper, frivolous, and should be dismissed as set forth in Defendants' pending motion to dismiss **(ECF No. 9, PageID.60-92)**, and the dog poses a continuing danger to the public, the "extraordinary remedy" of a preliminary injunction should not be granted.

ARGUMENT

I. The Standard for Preliminary Injunctive Relief.

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). Plaintiff bears the burden of demonstrating entitlement to preliminary injunctive relief and the burden is substantial. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). Such relief will only be granted where "the movant carriers his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002).

When considering a motion for preliminary injunction, courts balance the following factors" (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm without the injunction; (3) whether the issuance of the

injunction will cause substantial harm to others; and (4) whether the public interest is served by issuance of the injunction. *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 538 (6th Cir. 2007). "These factors are not prerequisites, but are factors that are to be balanced against each other." *Overstreet*, 305 F.3d at 573.

"The proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *Leary*, 228 F.3d at 739. Plaintiff must do more than just "create a jury issue," and persuade the court that it has a likelihood of succeeding on the merits of his claims. *Id.* "This is because the preliminary injunction is an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in limited circumstances which clearly demand it." *Id.*

Significantly, although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. Nat'l Bd. of Medical Examiners*, 225 F.3d 620, 625 (6th Cir. 2000). Moreover, "[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor." *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012). Because Plaintiff cannot demonstrate a likelihood of success on the merits, his motion for a preliminary injunction fails.

II. Plaintiff Is Not Entitled to Preliminary Injunctive Relief.

A. Plaintiff Has Not Shown a Strong Likelihood of Success on the Merits.

Plaintiff cannot demonstrate a likelihood of success on the merits of his claims as set forth in detail in the arguments in Defendants' pending motion to dismiss. **(ECF No. 9, PageID.60-91).** Defendants incorporate the arguments set forth in their motion to dismiss in this brief. First,

Plaintiff ignores the fundamental jurisdictional issues that preclude his claims in this court. Second, Plaintiff cannot prevail on the merits of his constitutional claims.

1. This Court Lacks Jurisdiction to Grant the Requested Relief.

Plaintiff cannot prevail because this Court cannot grant the relief he seeks. First, Plaintiff's claims are barred in part by the *Rooker-Feldman* doctrine. "The *Rooker-Feldman* doctrine bars lower federal courts from conducting appellate review of final state-court judgments because 28 U.S.C. § 1257 vests sole jurisdiction to review such claims in the Supreme Court." *Berry v. Schmitt*, 688 F.3d 290, 298 (6th Cir. 2012). This doctrine bars "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 289 (2005).

The doctrine also applies to a person in privity with the "state court loser." *McCormick v. Braverman*, 451 F.3d 382, 396 (6th Cir. 2006). Parties are in "privity" when they are "so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair v. Michigan*, 470 Mich. 105, 122; 680 N.W.2d 386 (2004). Privity requires a "substantial identity of interest and a working functional relationship in which the interests of the nonparty are presented and protected by the party in the litigation." *Id.*

Though Plaintiff was not named as a party in the state court action, he was certainly in privity with his mother Valerie Kobasic who was a party to the state court action. Plaintiff alleges that he "co-owned" "Turbo" with Valerie. **(ECF No. 5, PageID.34, ¶ 9).** On this basis, Valerie has already represented the same legal right that Plaintiff is trying to assert in the present litigation. Plaintiff and Valerie, as alleged co-owners of "Turbo" would share an identity of interests and the

same legal right to "Turbo."

To determine whether *Rooker-Feldman* bars a claim, courts look to the "source of the injury the plaintiff alleges in the federal complaint." *McCormick*, 451 F.3d at 393. If the source of the plaintiff's injury is the state-court judgment itself, then *Rooker-Feldman* applies. *Id.* "If there is some other source of injury, such as a third party's actions, then the plaintiff asserts an independent claim." *Lawrence v. Welch*, 531 F.3d 364, 368-69 (6th Cir. 2008).

Roch v. Humane Society of Bedford County, 134 Fed. Appx. 68, 71 (6th Cir. 2005) is illustrative. In that case, the Sixth Circuit concluded that the *Rooker-Feldman* doctrine barred the plaintiffs' § 1983 claims for unlawful seizure and unlawful taking arising out of a state court decision to allow the County to remove/euthanize their dogs on the basis that they were using a federal forum to attack the state court's judgment.

Like *Roch*, Plaintiff seeks to use a federal forum to attack the state court's judgment. The source of Plaintiff's alleged injuries is the underlying state court judgment ordering euthanasia. Plaintiff expressly "seeks declaratory judgment that a state court order to euthanize his dog are (sic) void" and "seeks preliminary and permanent injunctive relief to prevent the dog at issue's pre-mature euthanasia while these claims are pending." **(ECF No. 5, PageID.33, ¶¶ 2-3).** Plaintiff further alleges that "[t]he order to euthanize must be enjoined on a temporary and permanent basis otherwise irreparable harm will occur." **(ECF No. 5, PageID.49, ¶ 89).**

Plaintiff also complains of several injuries for which the source is the state court order. Specifically, Plaintiff complains of an allegedly "unlawful seizure" of "Turbo" by the "void" order in the state court case. **(ECF No. 5, PageID.40-41, ¶¶ 38, 44).** Plaintiff also complains that his "protected property interest in his dog 'Turbo" has been, and is being, denied due to the void order,

restraint on property, and continued quest for permanent destruction without . . . being provided process." **(ECF No. 5, PageID.43, ¶ 53).** Plaintiff also complains that Defendants' "void orders achieved without Plaintiff served is a distinct act of dominion wrongfully exerted over" his dog. Thus, these allegations are barred by the *Rooker-Feldman* doctrine.

Second, this Court should abstain from hearing Plaintiff's claims. Under the doctrine of *Younger* abstention, a federal court must decline to interfere with pending state or civil criminal proceedings when important state interests are involved. *Younger v. Harris*, 401 U.S. 37 (1971); *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982).

A federal court's abstention under *Younger* is appropriate when: (1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to litigate the plaintiff's federal constitutional claim. *Middlesex*, 457 U.S. at 432. All three prongs are met in this case.

The first *Younger* criterion is met. The Sixth Circuit has held that "if a state [judicial] proceeding is pending at the time the action is filed in federal court, the first criteria for *Younger* abstention is satisfied" *Fed. Express Corp. v. Tenn. Pub. Serv. Comm'n*, 925 F.2d 962, 969 (6th Cir. 1991). As of the date of Plaintiff's Amended Complaint, a state judicial proceeding was still pending in the 94th District for the County of Delta regarding "turbo."

The second *Younger* criterion is met. The state has an interest in eliminating the risk of harm presented by a dangerous animal and in enforcing its dangerous animal law to serve the public health and safety. See *Goodwin v. County of Summit, Ohio*, 45 F. Supp. 3d 692, 700 (N.D. Ohio 2014)(stating that important state interests "include[ ] enforcement of local or municipal ordinances relating to health, safety, and welfare of its citizens"); *Carroll v. City of Mount*

Clemens, 139 F.3d 1072, 1075 (6th Cir. 1998)(finding enforcement of housing ordnances enacted for health and safety purposes sufficiently important.

The third *Younger* criterion is met. The "pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims . . . ." *Moore v. Sims*, 442 U.S. 415, 425, 430 (1979). Courts presume that state courts are able to protect the interests of a federal plaintiff. *Penzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987). Accordingly, "[u]nless state law clearly bars the imposition of the constitutional claims," abstention is appropriate. *Sims*, 442 U.S. at 425.

The state district court proceedings afford Plaintiff an adequate opportunity for him to raise constitutional claims. In fact, Plaintiff filed a motion to intervene in the district court action which explicitly raised his constitutional claims. **(ECF No. 9-2, PageID.111-148).** Plaintiff always had an opportunity to file a motion to intervene, but due to his own unreasonable delay, chose to file almost three years after the case was initiated. Plaintiff even attended the trial court's hearing as clearly indicated by the hearing transcript, so his excuse for not attempting to intervene earlier is baseless. **(ECF No. 9-3, PageID.150-199; ECF No. 9-4, PageID.200-249).**

Further, Plaintiff's privy, Valerie is a party to the district court proceedings, shared the same interest, and could have raised the same constitutional claims. In fact, Valerie also raised due process claims in the state court proceeding. On this basis, the Court should abstain from hearing Plaintiff's claims under the *Younger* abstention doctrine.

For the same reasons, Plaintiff's claims are barred by the doctrine of res judicata and collateral estoppel as set forth in Defendants' motion to dismiss. **(ECF No. 9, PageID.60-91).**

2. Plaintiff Cannot Show a Likelihood of Success on the Merits of His Claims.

Even apart from the fundamental jurisdictional and abstention issues, Plaintiff cannot show a strong likelihood of success on the merits of his claims.

a. Plaintiff's Claims Are Barred By Prosecutorial Immunity.

Plaintiff cannot prevail on his constitutional claims against Prosecutor Wickman because she is entitled to absolute sovereign and prosecutorial immunity. First, Prosecutor Wickman is entitled to Eleventh Amendment immunity. "The Eleventh Amendment bars § 1983 suits against a state, its agencies, and its officials sued in their official capacities for damages." *Cady v. Arenac County*, 574 F.3d 334, 342 (6th Cir. 2009). Under Michigan law, county prosecuting attorneys are acting as agents of the state when they being prosecution based on state statutes. *Id.* at 343.

Second, Prosecutor Wickman is entitled to absolute prosecutorial immunity. Prosecutors generally "enjoy absolute immunity from civil liability for actions performed within the scope of their prosecutorial duties." *Hugger v. Bogen*, 503 Fed. Appx. 455, 459-60 (6th Cir. 2012). The Supreme Court uses a "functional approach" for determining whether a prosecutor "is acting within the scope of [her] duties as a prosecutor and when [she] is merely giving legal advice or investigating." *Howell v. Sanders*, 668 F.3d 344, 349 (6th Cir. 2012).

The key inquiry is "how closely related . . . the prosecutor's challenged activity [is] to [her] role as an advocate intimately associated with the judicial phase of the criminal process." Id. at 340-50. The prosecutor's "decision to file a criminal complaint and seek issuance of an arrest warrant are quasi-judicial duties involved in 'initiating a prosecution'" and are protected. *Ireland v. Tunis*, 113 F.3d 1435, 1446 (6th Cir. 1997). Furthermore, "[p]rosecutorial immunity extends to claims regarding the evaluation of evidence and the determination of probable cause." *Hugger*,

503 Fed. Appx. at 460.

Prosecutorial immunity has also been extended to civil proceedings. In *Cooper v. Parrish*, 203 F.3d 937 (6th Cir. 2000), state prosecutors were entitled to prosecutorial immunity for their actions in preparing and filing public nuisance and civil forfeiture complaints. Prosecutors are protected by absolute immunity "when their duties are functionally analogous to that of a prosecutor's, regardless of whether those duties are performed in the course of a civil or criminal action." *Id.* As long as "the prosecutors were functioning in an enforcement role and acting as advocates of the state in initiating and prosecuting judicial proceedings, they are entitled to an absolute immunity defense." *Id.*

In the present case, Plaintiff complains of Prosecutor' Wickman's various actions in initiating and prosecuting the action against Valerie under MCL 287.286a and MCL 287.322. **(ECF No. 5, PageID.35-36, 38, ¶¶ 12-14, 16-18, 26).** It cannot be disputed that in each of these actions cited by Plaintiff, Prosecutor Wickman was functioning in an enforcement role and acting as an advocate for the state. Thus, she is entitled to absolute prosecutorial immunity.

b. Plaintiff's Claims Are Barred by Qualified Immunity.

In addition to absolute immunity, Prosecutor Wickman is entitled to qualified immunity. "[G]overnment officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). When "a defendant raises qualified immunity as a defense, the plaintiff bears the burden of demonstrating that the defendant is not entitled to qualified immunity." *Everson v. Leis*, 556 F.3d 484, 494 (6th Cir. 2009).

The question of a defendant's qualified immunity invokes a two-pronged inquiry. First. "a court must decide whether the facts that the plaintiff has alleged or shown make up a violation of a constitutional right." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Second, "the court must decide whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct." *Id.* Plaintiff cannot demonstrate the violation of any clearly established constitutional right by Prosecutor Wickman. On this basis, Plaintiff cannot show a substantial likelihood of success on the merits of his claims.

Fourth Amendment

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

Contrary to Plaintiff's allegations, any alleged seizure of "Turbo" is not "unreasonable." To determine whether a seizure of a dog is reasonable, "a court must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion and determine whether the totality of the circumstances justified the particular sort of seizure." *Brown*, 844 F.3d at 568. "A seizure becomes unlawful when it is more intrusive than necessary." *Id.*

"Turbo's" potential destruction is not an unreasonable seizure because it is actually required by Michigan statute. MCL 287.322(3) states that "[a]fter a hearing, the magistrate or court *shall* order the destruction of the animal, at the expense of the owner, if the animal is found to

be a dangerous animal that caused serious injury or death to a person or a dog." (Emphasis Added). The district court has already determined that "Turbo is a dangerous animal that caused the death of a dog" and thus, destruction is required under MCL 287.322. That decision was appealed all the way to the Michigan Supreme Court without success.

Further, this statute implicates a significant government interest in protecting the public health and safety. See *Embassy Realty Investments, Inc. v. City of Cleveland*, 572 Fed. Appx. 339, 345 (6th Cir. 2014)(destruction of property designated as a public nuisance as a result of nuisance proceedings is not an "unreasonable" seizure). Thus, the potential destruction of "Turbo" is a "reasonable" seizure to protect the public health and safety. Thus, Plaintiff cannot show a violation of the Fourth Amendment.

Fourteenth Amendment- Procedural Due Process

The Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. Due process generally "requires that the state provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest." *Warren v. City of Athens*, 411 F.3d 697, 707-08 (6th Cir. 2005).

"To establish a procedural due process claim, a plaintiff must show (1) the existence of a protected property interest at issue, (2) a deprivation of that protected property interest, and (3) that he or she was not afforded adequate procedures." *Paterek v. Village of Armada*, 801 F.3d 630, 649 (6th Cir. 2015).

Plaintiff cannot establish that he was not afforded adequate procedures. Due process requires "notice reasonably calculated, under all circumstances, to apprise interested parties of the

pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cen. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Plaintiff cannot establish that he did not have notice of the action. "Notice mailed to a person's home generally satisfies due process." *Ming Kuo Yang v. City of Wyoming*, 793 F.3d 599, 602 (6th Cir. 2015). Further, Michigan law provides the process for notifying owners of unlicensed dogs of the proceedings:

> (1) A district court magistrate or the district or common pleas court shall issue a summons . . . to show cause why a dog should not be killed, upon a sworn complaint that any of the following exist:
>
> (a) After January 10 and before June 15 in each year a dog over 6 months old is running at large unaccompanied by its owner or is engaged in lawful hunting and is not under the reasonable control of its owner without a license attached to the collar of the dog.
>
> (b) A dog, licensed or unlicensed, has destroyed property or habitually causes damage by trespassing on the property of a person who is not the owner.
>
> (c) A dog, licensed or unlicensed, has attacked or bitten a person.
>
> (d) A dog has shown vicious habits or has molested a person when lawfully on the public highway.
>
> (e) A dog duly licensed and wearing a license tag has run at large contrary to this act.

MCL 287.286a.

Plaintiff alleges that Defendants initiated such a summons which was served on "co-owner" Valerie Kobasic. **(ECF No. 5, PageID.37, ¶20).** Valerie Kobasic has represented in the state court action that Plaintiff lived with her. **(ECF No. 9-4, PageID.231).** Thus, notice of the action was mailed to Plaintiff's home. This is sufficient notice.

To the extent that Plaintiff asserts that Defendants failed to follow state law procedures for notice **(ECF No. 5, PageID.36-37, ¶¶ 17-20)** in support of his due process claim, this is

insufficient to state a such a claim. See, e.g., *Bills v. Henderson*, 631 F.2d 1287, 1299 (6th Cir. 1980)(even where a state statute diagrams a procedure for depriving a citizen of a property right, a deviation from that procedure may not necessarily be viewed as a constitutional violation); *Purisch v. Tennessee Tech. Univ.*, 76 F.3d 1414, 1423 (6th Cir. 1996)("[v]iolation of a state's formal procedure, however, does not in and of itself implicate constitutional due process concerns").

Further, Plaintiff's allegations make clear that he had actual notice of the proceedings, which defeats his due process claim. See *Hroch v. Omaha*, 4 F.3d 693, 696 (8th Cir. 1993)("Because [the plaintiff] had actual notice that the City intended to condemn all buildings on the premises, there was no procedural due process violation"); *Roberts v. Girder*, 237 F.Supp.3d 548, 555 (E.D. Ky. 2017)("due process may be satisfied by actual notice of the decision to demolish the property and the consequences for the failure to timely challenge the determination"). Plaintiff clearly had notice of the proceedings because he was present at the hearing in the district court matter as evidenced by the transcript. **(ECF No. 9-4, PageID.239)**. On this basis, Plaintiff cannot allege that he was not afforded notice of the action.

Plaintiff also cannot estan;osj that he did not have an opportunity to be heard. "[A] predeprivation hearing of some sort is generally required to satisfy the dictates of due process." *Leary v. Daeschner*, 228 F.3d 728, 742 (6th Cir. 2000). Plaintiff had ample opportunity to be heard. Plaintiff's allegations make clear that a pre-deprivation hearing was held in this case. **(ECF No. 5, PageID.37, 43, ¶¶20, 22, 54).** In fact, Plaintiff attended the hearing as indicated by the hearing transcript. **(ECF No. 9-4, PageID.239).**

Further opportunities to be heard were provided on appeal. Plaintiff alleges that the matter

was appealed all the way to the Michigan Supreme Court. **(ECF No. 5, PageID.37, ¶ 21).** Notably, Plaintiff himself had the opportunity to be heard even though he was a non-party because he always had the opportunity to intervene in that action. This is evidenced by his very tardy motion to intervene that was ultimately denied. **(ECF No. 9-2, PageID.111-148).** Nothing prevented Plaintiff from filing such a motion earlier in the proceedings.

Fourteenth Amendment-Substantive Due Process

The Due Process Clause also offers substantive protection. "Substantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *Prater v. City of Burnside*, 289 F.3d 417, 431 (6th Cir. 2002). The Sixth Circuit has "identified substantive due-process claims as falling into two categories: (1) deprivations of a particular constitutional guarantee; and (2) actions that shock the conscience." *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 861 (6th Cir. 2012).

"To state a cognizable substantive due process claim, the plaintiff must allege conduct intended to injure in some way unjustifiable by any government interest and that is conscience-shocking in nature." *Mitchell v. McNeil*, 487 F.3d 374, 377 (6th Cir. 2007). "What seems to be required is an intentional infliction of injury . . . or some other governmental action that is arbitrary in the constitutional sense." *Stemler v. City of Florence*, 126 F.3d 856, 869 (6th Cir. 1997). "Conduct shocks the conscience if it violates the decencies of civilized conduct." *Range v. Douglas*, 763 F.3d 573, 589 (6th Cir. 2014).

Plaintiff makes conclusory allegations that the "County's position shocks the conscience . . ." **(ECF No. 5, PageID.45, ¶ 65; ECF No. 13, PageID.275)** but provides no factual allegations or assertions to support that conclusion. Plaintiff has not alleged any conduct intended to injure him

that shocks the conscience. On this basis, Plaintiff is not likely to prevail on a substantive due process claim.

Further, "[w]here a particular [a]mendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that [a]mendment, not the more generalized notion of substantive due process, must be the guide for analyzing such a claim." *Albright v. Oliver*, 510 U.S. 266, 266 (1994). Indeed, the Fourth Amendment, not substantive due process, provides the standard for analyzing claims involving unreasonable searches or seizures. *Graham v. Connor*, 490 U.S. 386, 395 (1989). If such an amendment exists, the substantive due process claim is properly dismissed. *Heike v. Guevara*, 519 F. App'x 911, 923 (6th Cir. 2013).

Plaintiff pleads that Defendants unreasonably seized the dog. **(ECF No. 5, PageID.40-41 ¶¶ 38, 41, 44).** The Fourth Amendment provides the explicit textual source of constitutional protection. Not the generalized notion of substantive due process. On this basis also, Plaintiff is not likely to prevail on his substantive due process claim.

c. Plaintiff Cannot Establish *Monell* Liability Against the County.

Plaintiff also has not shown a strong likelihood of success on his *Monell* claim against Delta County. A municipal entity cannot be held liable under a "respondeat superior" theory for the actions of its officers. *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 691 (1978). Instead, a municipality may only be liable "if the governmental body itself 'subjects' a person to a deprivation of rights or 'causes' a person 'to be subjected' to such deprivation. *Connick v. Thompson*, 563 U.S. 51, 60 (2011).

The constitutional violation must result from an official policy and the "plaintiff must

demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged and must demonstrate a causal link between the municipality's action and the constitutional violation. *Alman v. Reed*, 703 F.3d 887, 903 (6th Cir. 2003).

A plaintiff has four ways of proving the existence of an unconstitutional policy or custom: (1) the municipality's legislative enactments or official agency policies; (2) actions taken by officials with official decision making authority; (3) a policy of inadequate training or supervision, and (4) a custom of tolerance or acquiescence of federal rights violations. *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005).

Plaintiff alleges that Delta County has a "policy of failing to recognize property ownership rights that are clearly outlined in the federal system and in the Federal 6th Circuit Court of Appeals" which Plaintiff alleges "violates both the 4th Amendment and the 14th Amendment of the U.S. Constitution." **(ECF No. 5, PageID.47, ¶¶ 77-78).** But Plaintiff has not identified any official policy of the County of failing to recognize property ownership rights.

To the extent Plaintiff attempts to allege that the County has a "custom" of failing to recognize property ownership rights, he has failed to do so. A custom of tolerance to violations of constitutional rights also requires a showing that there was a pattern of deliberate indifference to similar instances. *Burgess v. Fisher*, 735 F.3d 462, 478 (6th Cir. 2013); *Thomas, supra* at 433. Plaintiff "can present evidence showing that the municipality possessed actual knowledge indicating a deficiency with the existing policy . . . such as where there have been recurring violations." *Heyerman v. County of Calhoun*, 680 F.3d 642, 648 (6th Cir. 2012). "Otherwise, the plaintiff must show that the need to act should have been plainly obvious to the policymakers who, nevertheless, are deliberately indifferent to the need." *Id.*

Plaintiff has not alleged or otherwise shown that there have been any similar instances of constitutional violations that resulted from the County's failure to recognize property ownership rights in dog cases. Thus, Plaintiff is not likely to prevail on the merits of this claim.

d. Plaintiff's State Law Claims Are Barred by Governmental Immunity.

Delta County is also entitled to governmental immunity against Plaintiff's state law conversion claim. Immunity against state-law claims is analyzed in accordance with Michigan governmental immunity law. *Smith v. County of Lenawee*, 600 F.3d 686, 690 (6th Cir. 2010); *Younes v. Pellerito*, 739 F.3d 885, 888 (6th Cir. 2014).

"Governmental immunity is not an affirmative defense proffered by governmental defendants, but rather is a characteristic of government; therefore "a party suing a unit of government must plead in avoidance of governmental immunity." *Mack v Detroit*, 467 Mich. 186, 203; 649 NW2d 47 (2002). "To be effective, such pleading must state a claim that fits within a statutory exception to immunity or include facts that indicate the action at issue was outside the exercise of a governmental function." *Id.*

"[A] governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). A governmental agency "can only be subject to suit if a plaintiff's case falls within a statutory exception to that immunity." *Id.* at 201. "[T]he immunity of governmental agencies is *broad*, and the statutory exceptions are to be *narrowly* construed." *Pohutski v. City of Allen Park*, 465 Mich. 675, 689; 641 N.W.2d 219 (2002)(Emphasis in Original).

The GTLA defines a "governmental agency" to include "a political subdivision." MCL 691.1401(a). A "political subdivision" means a "county." MCL 691.1401(e). Thus, as a

"governmental agency" the County has governmental immunity when "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). In this context, a "governmental function" is defined to include any "activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b).

Like immunity itself, governmental function "is to be broadly construed." *Maskery v. Board of Regents of Univ. of Mich.*, 468 Mich. 609, 613-14; 664 N.W.2d 165 (2003). Activity as a governmental function must be determined by the general activity and not the specific conduct involved at the time of the tort." *NL Ventures VI Farmington, LLC v City of Livonia*, 314 Mich. App 222, 224; 886 N.W.2d 772 (2015).

It cannot be disputed that the operation of a prosecutor's office is an activity that is expressly authorized by law and thus, a "governmental function." Thus, Delta County is entitled to governmental immunity against Plaintiff's state law tort claim.

Prosecutor Wickman enjoys general immunity as a governmental employee. Governmental employees acting within the scope of their authority and in the course of their employment are immune from tort liability unless (1) their conduct rises to the level of "gross negligence" that is the one, most immediate and direct cause of injury to the plaintiff, MCL 691.1407(2) or (2) their conduct constitutes an "intentional tort" done without good faith or with malice. *Odom v. Wayne County*, 482 Mich. 459, 479-80; 760 N.W.2d 217 (2008). Plaintiff has not alleged facts against Wickman that could establish either.

"Gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). Gross negligence "has been characterized as a willful disregard of safety measures and a singular disregard for substantial

risks." *Oliver v Smith,* 290 Mich. App. 678, 685 (2010). Facts showing no more than ordinary negligence do not satisfy this statutory definition. *Maiden v Rozwood,* 461 Mich. 109; 122-123 (1999). Wickman's conduct as alleged by Plaintiff set forth above does not rise to the level of "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

Plaintiff asserts a claim of "conversion" which is an intentional tort. See *Magley v. M & W Incorporated*, 325 Mich. App. 307, 314-15; 926 N.W2d 1 (2018). But Plaintiff has failed to allege facts that Wickman acted with "malice" or without "good faith." A lack of good faith is "malicious intent, capricious action or corrupt conduct or willful and corrupt misconduct." *Odom*, 482 Mich. at 474. "[W]illful and wanton misconduct is made out only if the conduct alleged shows an intent to harm, or, if not that, such indifference as to whether harm will result as to be the equivalent of a willingness that it does." *Id.* at 475.

Wickman's conduct as alleged by Plaintiff does not rise to the level of malice or a lack of good faith. Plaintiff has not alleged any conduct by Wickman that showed an intent to harm or such indifference as to whether harm will result as to be the equivalent to willingness that it does. Wickman is entitled to governmental immunity from Plaintiff's conversion claim. For this reason, Plaintiff has not shown that he is likely to prevail on the merits of his conversion claim.

e. Plaintiff Cannot Establish a Conversion Claim.

Even apart from immunity, Plaintiff has not shown a likelihood of success on his conversion claim. "Conversion, both at common law and under the statute, is defined as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Aroma Wines & Equip. Inc. v. Columbian Ditrib. Servs., Inc.*, 303 Mich. App. 441, 447; 844 N.W.2d 727 (2013). A defendant's actions are lawful if it has a

"legal right" to the property. *Magley*, 325 Mich. at 315 (citing *Gibbons v. Farwell*, 63 Mich. 344, 349; 29 N.W. 855 (1886)).

Plaintiff alleges that the state court orders are "a distinct act of dominion wrongfully But exerted over [his] dog in denial of or inconsistent with his rights." **(ECF No. 5, PageID.50, ¶ 91).** Plaintiff has not established that any of the orders constitute a "distinct act of dominion wrongfully exerted over" In fact, the alleged "seizure" of "Turbo," pursuant to court orders, is lawful and required by Michigan law. Further, as set forth above, there is no due process violation to invalidate the state court orders.

B. Issuance of the Injunction Will Cause Substantial Harm to Others and Does Not Serve the Public Interest.

The public interest also weighs heavily in favor of denying the preliminary injunction. Contrary to Plaintiff's assertions **(ECF No. 13, PageID.279-280)**, the issuance of the requested injunction will not only cause substantial harm to Defendants but it will also harm the residents of Delta County by allowing "Turbo" to pose a continuing threat to the public health and safety.

First, as set forth above, the state court has already determined that "Turbo is a dangerous animal that caused the death of a dog" and thus, destruction is required under MCL 287.311. Enjoining the enforcement of this statute would not serve the public interest in the public's health and safety. See ***Cornell v. City of Cleveland***, No. 1:06-cv-526, 2006 WL 8447841 at *1 (N.D. Ohio, 2006)("Any injunction against public officials, charged with the enforcement of public safety regulations, would cause substantial harm to others and would not serve the public interest").

Moreover, there have also been further incidents of "Turbo" running loose. **(Exhibit 1, Case Reports).** In fact, the most recent incident of "Turbo" getting loose was August 13, 2020. *Id.*

On this basis, "Turbo" remains a continuing threat to the public health and safety. "When a dog leaves the control of his owner and runs at large in a public space, the government interest in controlling the animal and preventing [harm to citizens] waxes dramatically, while the private interest correspondingly wanes." *Preston v. City of St. Clair Shores*, No. 14-cv-12751 2015 WL 12516687 at *4 (E.D. Mich. 2015)(quoting *Altman v. City of High Point, N.C.*, 300 F.3d 194, 205 (4th Cir. 2003)). Indeed, an "unleashed, uncontrolled, and unsupervised . . . dog ceases to become simply a personal effect and takes on the nature of a public nuisance." *Id.* Issuance of the requested injunction will allow the opportunity for further instances in which "Turbo" can run loose and injure a person or another dog again. Thus, the issuance of the requested injunction cannot serve the public interest.

CONCLUSION AND RELIEF REQUESTED

Plaintiff has not demonstrated a strong likelihood of success on the merits of his claims. Nor can Plaintiff demonstrate that the injunction serves the public interest. "Turbo" presents a danger to the public and despite that danger has been permitted to run loose in public. Plaintiff has not demonstrated that he is entitled to the "extraordinary remedy" of a preliminary injunction. Plaintiff's motion for a preliminary injunction should be denied.

Dated: September 21, 2020

CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.

/s/ Gregory R. Grant

Gregory R. Grant (P68808)
Attorneys for Def. DELTA COUNTY and WICKMAN
310 W. Front Street, Ste. 221
Traverse City, MI 49684
(231) 922-1888/(231) 922-9888 Fax
ggrant@cmda-law.com

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHN ROBERTS
Plaintiff,

vs.

JON DOE DELTA COUNTY PROSECUTOR,
TROOPER BELONGA,
PROSECUTOR LAUREN WICKMAN,
JOHN DOE MICHIGAN STATE TROOPER
SUPERVISOR.
_____/

Case No. 2:19-CV-00023-GJQ-MV
Hon. Gordon J. Quist
U.S. DISTRICT JUDGE

JURY TRIAL DEMANDED

REDETROIT EASTCOMMUNITY
LAW CENTER, PLLC
Lisa C. Walinske (P62136)
Attorney for Plaintiffs
30600 N. River Road
Harrison Twp., MI 48045
313-461-8440
lwalinske@redetroiteast.com

MICHIGAN DEP'T OF ATTORNEY GENERAL
COMPLEX LITIGATION DIVISION
John G. Fedynsky (P65232)
Attorney for Defendants Belonga and Michigan
State Police
PO Box 30736
Lansing, MI 48909
fedynskyj@michigan.gov

CUMMINGS, MCCLOREY, DAVIS & ACHO
Gregory Grant (P68808)
Attorney for Defendant County Prosecutor's Office
And Wickman
310 W. Front St. Ste.221
Traverse City, MI 49684
(231) 922-1888
ggrant@cmda-law.com

_____/

PLAINTIFF'S FIRST AMENDED COMPLAINT

INTRODUCTORY STATEMENT

1. Plaintiff John Roberts was detained, had his property confiscated, and was placed on medically restrictive bond conditions. Plaintiff Roberts used medical marijuana to treat a brain aneurism rupture that led to a stroke. When Plaintiff Roberts wasn't allowed his medicine because of the Defendants' combined actions, he suffered a full occlusion left artery of the brain. He now suffers tremors, confusion, difficulty concentrating, debilitating headaches, speaking difficulties, other neurological difficulties, and his quality of life has deteriorated.

2. In this action, Plaintiff alleges violations of his rights under the First, Fourth, Eighth and Fourteenth Amendments to the United States Constitution, as enforceable through 42 U.S. C. sec. 1983. Plaintiff further claims that his right to "life, liberty, and the pursuant of happiness" guaranteed by the Preamble of the United States Constitution was impinged by the actions of Defendants. He also brings a supplemental state law claim for malicious prosecution and breach of his Michigan constitutional rights.

JURISDICTION AND VENUE

3. This action arises under the Constitution and laws of the United States, including Article III, Section 1 of the United States Constitution and is brought pursuant to 42 U.S.C. §§ 1981, 1983 and 42 U.S.C. § 1988.

4. This Court has original jurisdiction over Plaintiff's federal claims under 28 U.S.C. § 1331 and 1343 because this is a civil action seeking redress for the deprivation of rights secured by the United States Constitution.

5. This Court has supplemental jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1367(a) because it is part of the same case or controversy as Plaintiff's federal claims.

6. Venue is proper under 28 U.S.C. § 1392(b)(2) because the events giving rise to the claims asserted occurred in Delta County, which is in the Western District of Michigan, Northern Division.

PARTIES

7. Plaintiff John Roberts is a 57-year-old resident of Bruce Crossing Michigan.

8. Defendant John Doe Prosecutor is the elected Prosecutor in the County of Delta at the time this offense was prosecuted Plaintiff. He is being sued in his official and personal capacity.

9. Prosecutor Lauren Wickman acted as the managing attorney for the Prosecutor's Office on this particular case. She is being sued in her official and individual capacity.

10. The Michigan State Police is a statewide law enforcement agency who is primarily responsible for patrolling Michigan's Upper Peninsula. The Michigan State Police provide law enforcement services in Michigan's Upper Peninsula. The Michigan State Police employ supervisors within their ranks for various troopers. John Doe Michigan State Trooper Supervisor was Defendant John Belonga' supervisor at all times relevant to this Complaint.

11. Defendant John Belonga is the officer of the Defendant Michigan State Police that detained Mr. Roberts, confiscated his property, and unlawfully seized evidence that eventually led to the prosecution of Mr. Roberts by Defendant Belonga. He is being sued in his official and individual capacity (hereinafter collectively referred to as "Police Defendants."

FACTS

12. On September 6, 2016, Defendant Trooper Belonga pulled over Plaintiff while he was driving through Delta County, Michigan.

13. The stated reason for the stop was improper use of the passing lane. Contrary to that stated reason, Plaintiff Roberts can be seen on the officer's vehicle camera in the left lane passing another vehicle in the right lane just prior to the stop.

14. Trooper Belonga's stop was pretext. It was not a valid stop.

15. Plaintiff is a member of the Oklevueha Native American Church ("ONAC"). Plaintiff is also an ordained medicine man for ONAC.

16. At the time of his stop, detention, and confiscation, Plaintiff was driving an ONAC registered vehicle and was performing the work of a medicine man for ONAC.

17. The vehicle even had ONAC and their religious beliefs pictured on the exterior of the church van Plaintiff Roberts was driving.

18. At the stop, Mr. Roberts immediately told Trooper Belonga that he is a member of ONAC where he makes and provides cannabis oil as a medicine man to cancer patients.

19. He then provided Trooper Belonga with a membership card from the ONAC, which lists him as a medicine man with the church.

20. Without being advised of his Miranda Rights, Mr. Roberts told the officer that he did not have a driver's license and that he gave some cannabis oil to a man in Mackinaw City before coming back over the bridge and heading home to Ontonagon.

21. After two hours of questioning in Trooper Belonga's squad car, Trooper Belonga confiscated the cannabis products that were in the church vehicle and released Plaintiff Robert's to travel home to Ontonagon.

22. Cannabis products are sacred sacraments of the ONAC and they were improperly taken by Trooper Belonga. Under Michigan law, cannabis is a protected medicinal product and

Plaintiff Robert's actions where protected by Michigan Medical Marijuana Act. ("MMMA"). *See* Section 8 of the MMMA.

23. In the weeks that followed, the Delta County Prosecutor Defendants, John Doe Elected Prosecutor and Prosecutor Wickman (hereinafter "Prosecutor Defendants"), pressed charges against Plaintiff's Roberts that do not exist under Michigan law.

24. The Prosecutor Defendants charged Plaintiff Roberts with Delivery and Manufacture of a Controlled Substance.

25. Under the undisputed facts Mr. Roberts did not give or deliver any cannabis to anyone in Delta County. The Prosecutor Defendants performed the administrative task of giving faulty legal advice to the Court and the Police Defendants.

26. The Delta County Prosecutors do not have jurisdiction over Emmet or Cheboygan Counties, where the supposed "delivery" occurred. They also have no jurisdiction in Ontonagon County where the supposed "manufacture" occurred. Nonetheless, the Defendants insisted on pursuing bond conditions and legally invalid charges that did not conform to Michigan law or jurisprudence.

27. Defendants insisted on bond conditions that contained a policy and practice that discriminated against persons with disabilities as prohibited by the Federal and Michigan Constitutions.

28. Plaintiff was just travelling through with medicinal marijuana in the church van, while doing work that was specifically protected by the MMMA, the First Amendment of the United States Constitution, and Article 8, sec 8. of the Michigan Constitution.

29. After the improper charges, Mr. Roberts' quality of life was in the hands of the Prosecutor Defendants.

30. Mr. Roberts treating physician indicated that Cannabis oil is the most effective medical treatment following Mr. Roberts brain aneurysm rupture in 2015. Mr. Robert's also had a prescription from his doctor to use medicinal marijuana that was valid at the time of the stop.

31. Regardless of his disabilities and medical prescriptions, Mr. Roberts was forced to comply with bond conditions that interfered with his right to free exercise of his religion. In this case, Mr. Robert's religion and his position as a medicine man with ONAC, subjected him to an unwarranted prosecution that was eventually dismissed by the Prosecution.

32. More importantly, use of Cannabis oil under the particular facts of this case is supported by Michigan's Public Health Code, Article 8 sec. 8 of the Michigan Constitution, the First, Fourth, Fourteenth Amendment, and Michigan Medical Marijuana Act ("MMMA"), MCL 333.26421 et seq.

33. The bond restriction prohibited Mr. Roberts from taking prescribed and recommended treatment of medical marijuana. When Mr. Roberts was off cannabis oil and compliant with state court bond restrictions (i.e. to not use cannabis while on bond), his medical condition irreversibly deteriorated as demonstrated by the full occlusion noted in the medical reports from the University of Michigan.

34. Before Mr. Roberts had even been convicted of a crime, the Defendants' combined actions deprived Mr. Roberts of his ability to medically rehabilitate himself, which impinges on state and federal constitutional guarantees regarding the protection of "life, liberty, and the pursuit of happiness."

35. The bond restriction on medical marijuana use is not supported by MCR 6.435, Section 8 of Michigan's MMMA, and MCL 333.7404.

36. Since Mr. Roberts was not guilty of any crime recognized in this state, this bond prohibition amounts to cruel and unusual punishment before Mr. Roberts has even been afforded his full due process right to a jury trial.

37. The charges against Plaintiff and the accompanying bond restrictions were legally invalid charges. MCR 6.435, MMMA section 8, and MCL 333.7404.

38. Delta County engaged in the improper prosecution of Mr. Roberts for these legally unsubstantiated charges. Delta County also rigorously pursued bond restrictions by providing false information to the Courts regarding the legal status of controlled substances cases for those protected by the MMMA. Eventually, and only after oral argument and extensive motion practice, did the Court allow Mr. Robert's medicinal use of marijuana while on bond. Unfortunately, it was too late. The full occlusion had already occurred.

39. Months later, after more Motions to Dismiss and only after approximately three hours of oral argument, when the Court was at the cusp of dismissing the action, did Delta County finally agree to put an end to the constitutional infringements and medical setbacks that Mr. Roberts was suffering. Delta County agreed to dismiss the charges. Nonetheless, Defendants combined actions leading up to that point had already irreversibly harmed Mr. Roberts.

40. Contrary to the false legal assertions of the Prosecutor in open Court, a valid and current MMMA card is not necessary under section 8 of the MMMA or Michigan's public health code. Absent such a card, Mr. Roberts cannot enjoy Section 4 of immunity from State prosecution

for manufacturing marihuana, because he does not meet the requirements of the plain language of that section of the statute.

41. The Michigan Medical Marihuana Act ("MMMA,") MCL 333.26421, et seq., allows for the use, growing, and or possession of marihuana by "registered qualifying patients," who suffer from "debilitating medical conditions" and whose doctors have concluded that the patient's use of "marihuana [sic]" will help their symptoms or control the side effects of their illnesses. Mr. Robert's had doctors certification for use of medicinal marijuana to treat his debilitating medical conditions.

42. A patient may possess no more than is "reasonably necessary to ensure the uninterrupted availability of marihuana." If charged with a marihuana offense, the registered patient has a statutory affirmative defense in MCL 333.26428(b), and, if a *prima facie* showing is made establishing the factors set forth in the statute, the charges must be dismissed.

43. This was/is the statutory law of this State; nonetheless, Delta County Defendants continued to not allow Mr. Roberts needed medication based solely upon Mr. Roberts' noncompliance with section 4 of the MMMA and the pretext charge under Michigan's Controlled substance statute.

44. The MMMA allows Mr. Roberts to possess and use medicinal marijuana for his debilitating medical condition.

45. Since his doctor has prescribed medical treatment with cannabis for a qualifying condition. MCL 333.26428(a)-(b), Defendants pursued bond conditions upon Mr. Roberts that were unsustainable at law. The legal profession should not be dictating or altering terms of medically approved treatments.

46. Our Supreme Court has already held that just because Mr. Roberts does not have a medical marijuana card and does not qualify him for Section 4 immunity, he is still, nonetheless, entitled to mandatory dismissal of his charges under Section 8. *People v Kolanek*, 491 Mich 382; 817 NW2d 528 (2012)(holding that a person not qualifying under Section 4 could nevertheless present a defense under Section 8).

47. The Prosecutor Defendants acted outside the scope of their role as prosecutor when they asked for and allowed, as a matter of practice and administrative policy, bond conditions that deprived Plaintiff his Fifth and First Amendment Rights.

48. Plaintiff may treat his own condition in any manner he sees fit. If his religion dictates the matter of his religious practice, so be it.

49. Defendants discriminated against Plaintiff, after learning that he was a medicine man of the Okleveuha Native American Church.

50. Defendants discriminated against Plaintiff after learning of his medical use of marijuana to treat serious neurological issues that resulted from his stroke.

51. Defendants discriminated Plaintiff because of statements he made regarding his beliefs concerning the medical marijuana act and the government's power to regulate his own health care terms.

52. Injecting, approving, and allowing bond conditions is an administrative task that is separate and apart from the judicial process.

53. Approving arrest warrants just because Plaintiff has certain religious beliefs is unconstitutional.

54. The Prosecutor Defendants include no use of marijuana as a pro forma condition on Defendants' bond restrictions in Delta County. Such an administrative action, outside the scope

of their prosecutorial duties deprived Plaintiff of his First and Fifth rights under the United States Constitution.

55. He brings this civil rights lawsuit because he was detained at an improper traffic stop without reasonable suspicion, placed on an unconstitutional bond restriction and then because he exercised his constitutional right to practice his religion, his ability to take his medications and free speech, he was then charged with a crime that does not exist in the State of Michigan. Defendants then maliciously and baselessly caused Plaintiff to be prosecuted with the serious charge of manufacturing and distributing a controlled substance, a charge that was subsequently dismissed by the Delta County Prosecutor's Office.

COUNT ONE

(42 U.S.C. § 1983)
Violation of the Fourth Amendment
Unlawful Detention
(*Police Defendants Only*)

56. Plaintiff incorporates all of the preceding paragraphs, including the allegations in the Introduction, as if they were fully set forth again at this point.

57. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures, and the Fourth Amendment is incorporated against the states by the Fourteenth Amendment.

58. Persons violating the Fourth Amendment, under color of state law, are liable at law and in equity under 42 U.S.C. § 1983.

59. Under the Fourth Amendment, police officers may not conduct even a brief *Terry* stop without reasonable suspicion that the person being stopped is involved in criminal activity.

60. Defendants, while acting under the color of state law, violated Plaintiff's clearly established right to be free from unreasonable seizure by unlawful detention on September 6th, 2016.

61. Plaintiff was given neither procedural nor substantive due process based upon his immediate admissions. Instead, he was held for two hours in Defendants' squad car. Then, without any notice of rights, and based upon discriminatory reasons of religion, disability, and choice of medical treatment he was improperly detained by the Police Defendants.

COUNT TWO

(42 U.S.C. § 1983)
Violation of the Fourth Amendment
Unlawful Seizure
(*Police Defendants Only*)

62. Plaintiff incorporates all of the preceding paragraphs, including the allegations in the Introduction, as if they were fully set forth again at this point.

63. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures, and the Fourth Amendment is incorporated against the states by the Fourteenth Amendment.

64. Persons violating the Fourth Amendment, under color of state law, are liable at law and in equity under 42 U.S.C. § 1983.

65. Under the Fourth Amendment, Defendants, while acting under the color of state law, violated Plaintiff's clearly established right to be free from unreasonable seizure of his personal property. The Police Defendants violated the clearly established constitutional rights to be free from unreasonable search, freedom of expression, and right to free exercise of religion.

Because the Police Defendants acted in a discriminatory manner, based upon Plaintiff's disabilities and religion, Plaintiff's constitutional and statutory rights were abrogated.

66. The Police Defendants illegal seizure of Plaintiff's medication and church sacraments violated both state statutory law and Plaintiff's 1st Amendment right to Freedom of Religion.

COUNT THREE

42 U.S.C. §1983
Violation of the First Amendment
Retaliation- Freedom of Religion

45. Plaintiff incorporates all of the preceding paragraphs, including the allegations in the Introduction, as if they were fully set forth again at this point.

46. The First Amendment to the United States Constitution prohibits abridgement of the freedom of speech, and the First Amendment is incorporated against the states by the Fourteenth Amendment. Persons violating the First Amendment, under color of state law, are liable at law and in equity under 42. U.S.C. § 1983.

47. The First Amendment protects the right to both free expression and free exercise of religious beliefs. It violated the First Amendment when the individual Defendants subjected him to serious criminal charges in retaliation for his exercise of free speech concerning his religion and position as a medicine man within ONAC.

48. The First Amendment protects every Americans right to freedom of religion and the free right to exercise that religion.

49. Defendants, while acting under the color of state law, violated Plaintiff's clearly established right against retaliation in violation of the First Amendment because Defendants'

decision to charge Plaintiff with a crime was motivated, at least in part, by Plaintiff's constitutionally protected right to freedom of religion.

COUNT FOUR

(42 U.S.C. §1983)
Violation of the First Amendment
Free Exercise of Religion

50. Plaintiff incorporates all of the preceding paragraphs, including the allegations in the Introduction, as if they were fully set forth again at this point.

51. The First Amendment to the United States Constitution prohibits the government from impinges on religious beliefs while protecting the free exercise of religion. The First Amendment is incorporated against the states by the Fourteenth Amendment.

52. Persons violating the First Amendment, under color of state law, are liable at law and in equity under 42. U.S.C. § 1983.

53. The First Amendment protects every Americans right to freedom of religion and the free right to exercise that religion.

54. Defendants, while acting under the color of state law, violated Plaintiff's clearly established right under First Amendment because Defendants' decision to charge Plaintiff with a crime impinged on Plaintiffs free exercise and his right to freedom of religion.

COUNT FIVE

(42 U.S.C. § 1983)
Violation of Fourteenth Amendment
Due Process

55. Plaintiff incorporates all of the preceding paragraphs, including the allegations in the Introduction, as if they were fully set forth again at this point.

56. The Fourth Amendment's protection against unreasonable seizures encompasses the right to be free from malicious prosecution.

57. Malicious prosecution is also prohibited by the Fourteenth Amendment's guarantee against the deprivation of liberty without due process of law.

58. Defendants, while acting under color of state law, violated Plaintiff's clearly established right under the Fourth and Fourteenth Amendments by unlawfully and maliciously causing a criminal prosecution to be instituted against him.

59. Defendants lacked probable cause to initiate criminal proceedings against Plaintiff; a reasonable person in Defendants' position would have known that the facts and circumstances were insufficient to justify a reasonable belief that Plaintiff had committed any offense; the criminal proceedings ended in Plaintiff's favor; and the criminal proceedings were the result of malice by Defendants.

COUNT SIX

(42 U.S.C. § 1983)
Violation of the Fourth Amendment
Malicious prosecution

60. Plaintiff incorporates all of the preceding paragraphs, including the allegations in the Introduction, as if they were fully set forth again at this point.

61. In Michigan, malicious prosecution is recognized under the common law by MCL § 600.2907.

62. Defendants tortuously and maliciously prosecuted Plaintiff.

63. Defendants caused criminal proceedings to be instituted against Plaintiff; the proceedings terminated in Plaintiff's favor; there was no probable cause to support the prosecution; and Defendants acted with malice.

COUNT 7
(42 U.S.C. § 1983)
Additional First, Fourth and Fourteenth Amendment Violations

64. Plaintiff incorporates all of the preceding paragraphs, including the allegations in the Introduction, as if they were fully set forth again at this point.

65. Plaintiff's constitutionally protected rights that Defendant also violated include the following:

a. his right to liberty protected in the substantive component of the Due Process Clause of the Fourteenth Amendment, which includes personal safety, freedom from captivity, and right to medical care and protection
b. his right to fair and equal treatment guaranteed and protected by the Equal Protection Clause of the Fourteenth Amendment

66. Defendants acting under color of state law, took Plaintiff's physical wellbeing into custody by not allowing his use of permissible medicinal use of cannabinoids, which was also supported by his religious belief in the healing properties of cannabinoids.

67. Defendants violated their affirmative duties with their intervention in preventing Mr. Roberts from taking his religiously prescribed and medicinally approved medicine of cannabinoids to treat his ruptured brain aneurysm complications and accompanying debilitating conditions.

68. Defendants, acting under color of state law and in concert with one another, by their conduct, showed intentional, outrageous, and reckless disregard for Plaintiff's constitutional rights. Further, their actions in limiting Plaintiff's right to treat his own disabling condition, given

his medical condition, showed deliberate indifference to Plaintiff 's serious medical needs and was a deprivation of his constitutionally protected rights.

69. As a direct and proximate result of Defendants' conduct, Plaintiff suffered physical and emotional injury, a full occlusion of his left-brain artery, complications and exacerbations of his debilitating conditions, loss of freedom, and other constitutionally protected rights described above.

70. Defendants, acting under color of state law, authorized, tolerated, ratified, permitted, or acquiesced in the creation of policies, practices, and customs, establishing a de facto policy of deliberate indifference to individuals such as Plaintiff.

71. As a direct and proximate result of these policies, practices, and customs, Plaintiff was deprived of his constitutionally protected rights described above.

PLAINTIFF REQUESTS that this Court enter judgment against Defendants in an amount consistent with the damages sustained.

COUNT 8
Eighth Amendment Violations

72. Plaintiff incorporates all of the preceding paragraphs, including the allegations in the Introduction, as if they were fully set forth again at this point.

73. The Eighth Amendment of the U.S. Constitution provides, in pertinent part, that excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishments be inflicted.

74. Defendants detention and restrictions upon Plaintiff creating a special relationship with him, violated Plaintiff's constitutionally protected Eighth Amendment rights by exhibiting deliberate indifference to his serious medical needs.

75. This violated his constitutionally protected Eighth Amendment right to be free from cruel and unusual punishment.

75. As a direct and proximate result of Defendants' actions, Plaintiff suffered physical and emotional injury, loss of freedom, and other constitutionally protected rights described above.

PLAINTIFFS REQUEST that this court enter judgment against Defendants in an amount consistent with the damages sustained.

COUNT 9
Personal Disabilities Civil Rights Act
MCL 37.1402

76. Plaintiff incorporates all of the preceding paragraphs, including the allegations in the Introduction, as if they were fully set forth again at this point.

77. Plaintiff is a person with a disability as that term is defined in the Persons with Disabilities Civil Rights Act because he has a determinable stroke and neurological problem that substantially limits one or more of her life activities and is unrelated to her ability to use and benefit from educational activities, programs, and facilities at an educational institution.

78. Because of his disability Plaintiff is unable live without intense headaches when not taking CBD and THC oil.

79. Plaintiff applied for permission to take his medications due to his neurological disabilities.

80. Plaintiff is qualified to use the THC & CBD under Michigan Law and her disability is unrelated to her ability to use and benefit from bond.

81. Defendants denied Plaintiff his medication needed because of his disability. Defendants have denied Plaintiff equal opportunity.

82. Pursuant to MCL 37.1402, Defendants combined actions operated to deny Plaintiff medication because of his disability.

83. As a direct and proximate result of Defendants' discrimination, Plaintiff has been damaged in an amount exceeding $25,000.

84. Plaintiff requests damages in an amount to be decided at trial plus and attorney fees as permitted under the Persons with Disabilities Civil Rights Act.

COUNT 10
42. U.S.C. § 1983
RELIGIOS DISCRIMINATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMANDEMNT AN 42 U.S.C. § 1981.

85. Plaintiff incorporates all of the preceding paragraphs, including the allegations in the Introduction, as if they were fully set forth again at this point.

86. 42 U.S.C. § 1983 provides that:

> Every person, who under color of any statute, ordinance, regulation, custom or usage of any state or territory of 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 law shall be liable to the party injured in an action at law, suit in equity, or other appropriate proceeding for redress…

87. Plaintiff in this action is a citizen of the United States and all of the individual police officer Defendants to this claim are persons for purposes of 42 U.S.C.§ 1983.

88. All individual Defendants to this claim, at all times relevant hereto, were acting under the color of state law in their capacity as Denver police officers and their acts or omissions were conducted within the scope of their official duties or employment.

89. At the time of the complained of events. Plaintiff had the clearly established constitutional right to be free religious discrimination in law enforcement by police officers and to enjoy the equal protection of the laws.

90. Title 42 U.S.C. § 1981 ("Section 1981") provides, in pertinent part:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make an enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

91. Plaintiff is a medicine man for the Oklevueha Native American Church and thus also had the clearly established statutory right under this provision of 42 U.S.C. § 1981 to be free from religiously motivated arrests, searches, seizures, and the filing of false charges.

92. Any reasonable police officer knew or should have known of these rights at the time of the complained of conduct as they were clearly established at the time.

93. Plaintiff's religion was a motivating factor in the decisions to use stop, arrest, seize then maliciously prosecute Plaintiff with false charges. Defendants' conduct was undertaken with the purpose of depriving Plaintiff of the equal protection and benefits of the law, equal privileges and immunities under the law, and due process in violation of the Fourteenth Amendment and § 1981.

94. Defendants engaged in the conduct described by this Complaint willfully, maliciously, in bad faith, and in reckless disregard of Plaintiff's federally protected rights.

95. The acts or omissions of all individual Defendants were moving forces behind Plaintiff's injuries.

96. These individual Defendants acted in concert and joint action with each other.

97. The acts or omissions of Defendants as described herein intentionally deprived Plaintiff of his constitutional and statutory rights and caused him other damages.

98. The Defendants are not entitled to qualified immunity for the complained of conduct.

99. The Defendants to this claim at all times relevant hereto were acting pursuant to municipal/county custom, policy, decision, ordinance, regulation, widespread habit, usage, or practice in their actions pertaining to Plaintiff.

100. As a proximate result of Defendants' unlawful conduct, Plaintiff has suffered actual physical and emotional injuries, and other damages and losses as described herein entitling him to compensatory and special damages, in amounts to be determined at trial. As a further result of the Defendants' unlawful conduct, Plaintiff has incurred special damages, including medically related expenses and may continue to incur further medically and other special damages related expenses, in amounts to be established at trial.

101. On information and belief, Plaintiff may suffer lost further earnings and impaired earnings capacities from the not yet fully ascertained sequelae of his neurological, in amounts to be ascertained in trial. Plaintiff is further entitled to attorneys' fees and costs pursuant to 42 U.S.C.§1988, pre-judgment interest and costs as allowable by federal law. There may also be special damages for lien interests.

102. In addition to compensatory, economic, consequential and special damages, Plaintiff is entitled to punitive damages against each of the individually named Defendants under 42 U.S.C.§1983, in that the actions of each of these individual Defendants have been taken maliciously, willfully or with a reckless or wanton disregard of the constitutional and statutory rights of Plaintiff.

COUNT 11
42 U.S.C.§ 1983 – Retaliation in Violation of the First Amendment

103. Plaintiff hereby incorporates all other paragraphs of this Complaint as if fully set forth herein.

104. 42 U.S.C. §1983 provides that:

> 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 law shall be liable to the party injured in an action at law, suit in equity, or other appropriate proceeding for redress…..

105. Plaintiff in this action is a citizen of the United States and all of the individual police officer Defendants to this claim are person for purposes of 42 U.S.C.§1983.

106. All individual Defendants to this claim, at all times relevant hereto, were acting under the color of state law in their capacity at State Police officers and their acts or omissions were conducted within the scope of their official duties or employment.

107. At the time of the complained of events, Plaintiff had the clearly established constitutional right to be free from retaliation for the exercise of protected speech. At the time of the complained events, had the clearly established constitutional right to be free to exercise his religion.

108. Any reasonable police officer knew or should have known of this right at the time of the complained of conduct as it was clearly established at that time.

109. Mr. Roberts exercised his constitutionally protected right to question law enforcement and/or engages in protected speech related to the constitutional rights of citizens with respect to searches of their property by the police and objectionable police conduct.

110. Retaliatory animus for Mr. Roberts exercise of his constitutionally protected right to question State Police regarding the scope of their legal authority to search his van was a substantially motivating factor in the excessive force used by individual Defendants.

111. The search, seizure, charges and eventual denial of prescribed medication would deter a person or ordinary firmness from continuing to engage in the protected conduct.

112. All of these Defendant officers participated in this use of these tactics as means of retaliation for his protected speech and none of the Defendants took reasonable steps to protect Plaintiff from this retaliation for the protected speech and protected free exercise of religion. They are each therefore liable for the injuries and damages resulting from objectively unreasonable and conscience shocking force of each other officer.

113. Defendants engages in the conduct described by this Complaint willfully, maliciously, in bad faith, and in reckless disregard of Mr. Roberts federal protected constitutional rights.

114. The acts or omissions of all individual Defendants were moving forces behind Plaintiff's injuries.

115. These individual Defendants acted in concert and joint action with each other.

116. The acts or omissions of Defendants as described herein intentionally deprived Plaintiff of his constitutional and statutory rights and caused him other damages.

117. Defendants are not entitled to qualified immunity for the complained of conduct.

118. The Defendants to this claim at all times relevant hereto were acting pursuant to municipal/county custom, policy, decision, ordinance, regulation, widespread habit, usage, or practice in their actions pertaining to Plaintiff.

119. As a proximate result of Defendants' unlawful conduct, Plaintiff has suffered actual physical emotional injuries, and other damages and losses as described herein entitling him to compensatory and special damages, in amounts to be determined at trial. As a further result of the Defendants' unlawful conduct, Plaintiff has incurred special damages, including medically related expenses and may continue to incur further medically and other special damages related expenses, in amounts to be established at trial.

120. On information and belief, Plaintiff may suffer lost future earnings and impaired earnings capacities from the not yet fully ascertained full occlusion of his brain, in amounts to be ascertained in trial. Plaintiff is further entitled to attorneys' fees and costs pursuant to 42 U.S.C. §1988, prejudgment interest and costs as allowable by federal law. There may also be special damages for lien interests.

121. In addition to compensatory economic, consequential and special damages, Plaintiff is entitled to punitive damages against each of the individually named Defendants under 42 U.S.C.§1983, in that the actions of each of these individual Defendants have been taken maliciously, willfully or with a reckless or wanton disregard of the constitutional rights of Plaintiff.

COUNT 12
42 U.S.C. § 1983
MALICIOUS PROSECUTION IN VIOLATION FOURTEENTH AMENDMENTS

122. Plaintiff hereby incorporates all other paragraphs of this Complaint as if fully set forth herein.

123. 42 U.S.C. § 1983 provides that:

> Every person, who under color of any statute, ordinance, regulation, custom or usage of state or territory of 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 law shall be liable to the party injured in an action at law, suit in equity, or other appropriate proceedings for redress…

124. Plaintiff in this action is a citizen of the United States and all of the individual police officer Defendants to this claim are persons for purposes of 42 U.S.C.§1983.

125. All individual Defendants to this claim, at all times relevant hereto, were acting under the color of state law in their capacity as police officers and their acts or omissions were conducted within the scope of their official duties or employment.

126. At the time of the complained of events, Plaintiff had the clearly established constitutional right to be free from malicious prosecution without probable cause under the Fourth Amendment and in violation of due process under the Fourteenth Amendment.

127. Any reasonable police office knew or should have known of these rights at the time of the complained of conduct as they were clearly established at that time.

128. Individual Defendants violated Mr. Robert Fourth and Fourteenth Amendment right to be free from malicious prosecution without probable cause and without due process when they worked in concert to secure false charges against him, resulting his unlawful bond conditions and prosecution.

129. Individual Defendants conspired and/or acted in concert to institute, procure and continue a criminal proceeding for manufacturing and delivery of controlled substance against Mr. Landau without probable cause.

130. Defendants engaged in the conduct described by this Complaint willfully, maliciously, in bad faith, and in reckless disregard of Mr. Roberts federal protected constitutional rights.

131. The prosecution against Mr. Roberts for the known to be false allegations of delivery or manufacturing of a controlled substance were malicious, shocking and objectively unreasonable in the light of the circumstances.

132. Those criminal proceedings terminated in Plaintiff's favor. The prosecutor dropped the charges without any compromise by Plaintiff, reflecting a prosecutorial judgment that the case could not be proven beyond a reasonable doubt.

133. The acts or omissions of all individual Defendants were moving forces behind Plaintiff's injuries.

134. These individual Defendants acted in concert and joint action with each other.

135. The acts or omissions of Defendants as described herein intentionally deprived Plaintiff of his constitutional and statutory rights and caused him other damages.

136. Defendants are not entitled to qualified immunity for the complained of conduct.

137. The Defendants to this claim at all time relevant hereto were acting pursuant to municipal/county custom, policy, decision, ordinance, regulation, widespread habit, usage, or practice in its actions pertaining to Plaintiff.

138. As a proximate result of Defendants' unlawful conduct, Plaintiff has suffered actual physical and emotional injuries, and other damages and losses as describe herein entitling him to compensatory and special damages, in amounts to be determined at trial. As a further result of the Defendants' unlawful conduct, Plaintiff has incurred special damages, including medically, related and may continue to incur further medically or other special damages related expenses, in amounts to be established at trial.

139. On information and belief, Plaintiff may suffer lost future earning and impaired earnings capacities from the not yet fully ascertained sequelae of his closed head injury, in amounts

to be ascertained in trial. Plaintiff is further entitled to attorneys' fees and cost pursuant to 42 U.S.C.§1983, in the actions of each of these individual Defendants have been taken maliciously, willfully or with a reckless or wanton disregard of the constitutional rights of the Plaintiff.

COUNT 13
Violation of 42 U.S.C. §1983
Deliberately Indifferent Policies, Practices, Customs, Training, and Supervision in violation of the Fourth, Fourteenth, and First Amendments and in violation of 42 U.S.C.§1981

140. Plaintiff hereby incorporates all other paragraphs of this Complaint as if full set forth herein.

141. 42 U.S.C. §1983 provides that:

> 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 law shall be liable to the party injured in an action at law, suit in equity, or other appropriate proceeding for redress….

142. Plaintiff in this action is a citizen of the United States and Defendants to this claim are persons for purposes of 42 U.S.C. §1983.

143. The Defendants to this claim at all times relevant hereto were acting under the color of state law.

144. Plaintiff had the following clearly established rights at the time of the complained of conduct:

a. the right to be secure in his person from unreasonable seizures through excessive force, under the Fourth Amendment;

b. the right to bodily integrity and to be free from by law enforcement under the Fourteenth Amendment;

c. the right to exercise his constitutional rights of free speech under the First Amendment without retaliation;

d. the right to be free from discrimination by police under the Equal Protection Clause of the Fourteenth Amendment and under 42 U.S.C. § 1981; and,

e. the right to be free from malicious prosecution under the Fourth and Fourteenth Amendments.

145. Defendants knew or should have known of these rights at the time of the complained of conduct as they were clearly established at that time.

146. The acts or omissions of these Defendants, as described herein, deprived Mr. Roberts of his constitutional and statutory rights and caused him other damages.

147. The acts or omissions of Defendants as described herein intentionally deprived Plaintiff of his constitutional and statutory rights and caused him other damages.

148. Defendants are not entitled to qualified immunity for the complained of conduct.

149. Defendants were at all times relevant, policymakers for the City of Escanaba County of Delta and the State Police Department and in that capacity established policies, procedures, customs, and/or practices for the same.

150. These Defendants developed and maintained policies, procedures, customs, and/or practices exhibiting deliberate indifference to the constitutional rights of citizens, which were moving forces behind and proximately caused the violation of Mr. Roberts constitutional and federal rights as set forth herein and in the other claims, resulted from a conscious or deliberate choice to follow a course of action from among various available alternatives.

151. Defendants have created and tolerated an atmosphere of lawlessness, and have developed and maintained long standing, department-wide customs, law enforcement related

policies, procedures, customs practices, and/or failed to properly constitutional rights of Plaintiff and of the public.

161. In light of the duties and responsibilities of those police officers that participate in arrests and preparation of police reports on alleged crimes, the need for specialized training and supervision is so obvious , and the inadequacy of training and/or supervision is so likely to result in the violation of constitutional and federal rights such as those described herein that the failure to provide such specialized training and supervision is deliberately indifferent to those rights.

162. The deliberately indifferent training and supervision provided by Defendants resulted from a conscious or deliberate choice to follow a course of action from among various alternatives available and were moving forces in the constitutional and federal violation injuries complained of by Plaintiff.

163. As a direct result of Defendants' unlawful conduct, Plaintiff has suffered actual physical and emotional injuries, and other damages and losses as described herein entitling him to compensatory and special damages, in amounts to be determined at trial. As a further result of the Defendants unlawful conduct, Plaintiff has incurred special damages, including medically related

DEMAND FOR RELIEF

Plaintiff request that this Court:

a. Assert jurisdiction over this matter;

b. Award compensatory and punitive damages in an amount to be proved at Trial;

c. Award Plaintiff costs and attorneys' fees pursuant to 42 U.S.C.§ 1988; and

d. Grant or award such other relief that this Court deems just.

Respectfully submitted,

REDETROIT EAST COMMUNITY LAW CENTER, PLLC

/s/ Lisa Walinske

BY:_____

Lisa Walinske (P62136)
Attorney for Plaintiffs
30600 N. River Road
Harrison Twp., MI 48045
(313) 461-8440
lwalinske@redetroiteast.com

Dated: May 17, 2019

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHN ROBERTS,

Plaintiff,

v.

Case No. 2:19-CV-23

JON DOE DELTA COUNTY PROSECUTOR, et al.,

HON. GORDON J. QUIST

Defendants.
_____/

OPINION REGARDING MOTIONS TO DISMISS

I. Procedural Overview

On January 26, 2019, Plaintiff, John Roberts, filed a complaint against the Delta County Prosecutor's Office, Michigan State Police Trooper Belonga,[1] Prosecutor Lauren Wickman, and the Michigan State Police (MSP), alleging a number of claims pursuant to 42 U.S.C. § 1983 and, arguably, a state-law malicious prosecution claim. Roberts's claims arose out of a September 16, 2016, traffic stop of Roberts by Trooper Belonga and a subsequent criminal prosecution by Delta County.

On March 19, 2019, Defendants Prosecutor's Office and Wickman filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) arguing that the Prosecutor's Office is not a legal entity capable of being sued and that Wickman, as a prosecutor, is entitled to absolute prosecutorial immunity or, alternatively, qualified immunity on Roberts's federal-law claims and governmental immunity on Roberts's state-law claim. (ECF No. 14.) Roberts responded on April 9, 2019. (ECF

[1] The complaint erroneously named Trooper Belonga as Trooper Bologna.

No. 18.) Although Roberts did not file a motion to amend, he attached a proposed amended complaint to his response. On April 23, 2019, the Prosecutor's Office and Wickman replied, arguing that Roberts's new allegations in his proposed amended complaint do not suffice to avoid dismissal. (ECF No. 19.)

On May 2, 2019, the MSP and Trooper Belonga moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that Roberts's claims against the MSP and Trooper Belonga in his official capacity are barred by the Eleventh Amendment, that Trooper Belonga is entitled to qualified immunity, and that the complaint otherwise fails to state a claim. In response, on May 17, 2019, Roberts filed his first amended complaint. (ECF No. 25.) On May 23, 2019, the Prosecutor's Office and Wickman filed a motion to strike the first amended complaint, arguing that Roberts filed the first amended complaint too late to qualify as an amendment as of right (at least as to the Prosecutor's Office and Wickman), and Roberts had not obtained written consent or leave from the Court before filing his amended pleading. (ECF No. 26.) On May 30, 2019, Roberts filed a motion to amend (ECF No. 29), as well as a response to the Prosecutor's Office and Wickman's motion to strike (ECF No. 30), arguing that the Court should grant his motion to amend. The Prosecutor's Office and Wickman responded to Robert's motion to amend on June 11, 2019 (ECF No. 34), arguing that the amendment is futile.

Finally, on June 3, 2019, the MSP and Trooper Belonga filed a motion to dismiss the first amended complaint. (ECF No. 31.) Roberts has responded to the motion (ECF No. 38), and the MSP and Trooper Belonga have replied (ECF No. 39.)

Given the existing procedural quagmire—with Roberts' first amended complaint being effective as to the MSP and Trooper Belonga but not as to the Prosecutor's Office and Wickman, and the MSP and Trooper Belonga moving for dismissal of the first amended complaint and the

Prosecutor's Office and Wickman opposing Roberts's motion to amend—the Court will grant Roberts's motion to amend and consider his first amended complaint the operative pleading. In addition to deciding the MSP and Trooper Belonga's motion to dismiss, the Court will treat the Prosecutor's Office and Wickman's opposition to the motion for leave to amend on the ground of futility, together with their motion and supporting briefs to dismiss the original complaint, as their motion to dismiss the first amended complaint.

For the following reasons, the Court will grant both motions to dismiss and dismiss Roberts's first amended complaint with prejudice.[2]

II. MOTION STANDARD

Pursuant to Federal Rule of Civil 8(a), a complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Detailed factual allegations are not required, but "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' required more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964–65 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103 (1957)). The court must accept all of the plaintiff's factual allegations as true and construe the complaint in the light most favorable to the plaintiff. *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009). The court must determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). Although the plausibility standard is not equivalent to a "'probability

[2] Although Roberts and the Prosecutor's Office and Wickman have requested oral argument, the Court finds that the briefs adequately develop the issues and oral argument is unnecessary.

requirement,' . . . it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556, 127 S. Ct. at 1965). "[W]here the well-pleaded facts do not permit the court to infer more than a sheer possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." *Id.* at 679, 129 S. Ct. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)).

In general, in deciding a Rule 12(b)(6) motion to dismiss the court is limited to considering only the pleadings. *See Rondigo, LLC v. Twp. of Richmond*, 641 F.3d 673, 682 (6th Cir. 2011) (noting that "Rule 12(b)(6) scrutiny is limited to the pleadings"). However, without converting the motion to one for summary judgment under Rule 56, a court may also consider "any exhibits attached [to the Complaint], public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008). Thus, in addition to Roberts's factual allegations in the amended complaint, the Court may also consider the dashboard video from the camera on Trooper Belonga's patrol cruiser of the September 16, 2016 traffic stop—as Roberts refers to the video in the first amended complaint and the traffic stop is central to Roberts's complaint—and the transcripts of the December 8, 2016 preliminary examination and the February 3, 2017, circuit court motion hearing—as they are public records of court proceedings. *See Buck v. Thomas M. Cooley Law Sch.*, 597 F.3d 812, 816 (6th Cir. 2009).

III. FACTS

The following facts are taken from Roberts's first amended complaint, Trooper Belonga's dash camera video, and the state-court transcripts.

On September 6, 2016, at approximately 6:20 p.m., Trooper Belonga was parked in his patrol car in the parking lot of a church on U.S. Highway 2 in downtown Rapid River, Michigan. The road at that point is four lanes, with a left-hand passing lane in each direction. As Trooper Belonga observed traffic, he noticed three vehicles traveling close together in the left-hand passing lane, including a silver sedan and a silver van. None of the vehicles was passing a vehicle in the right-hand lane or making a left-hand turn. Trooper Belonga pulled out of the church and initiated a stop of the silver sedan for driving in the passing lane.

Roberts was driving the silver sedan, which was registered to the Oklevueha Native American Church (ONAC). Trooper Belonga approached the passenger side of the vehicle as Roberts was attempting to exit the driver's side door. Roberts told Trooper Belonga that he had been following the silver van. Trooper Belonga asked Roberts if he would be willing to go back to Trooper Belonga's patrol car while Trooper Belonga checked everything out. Roberts agreed to go to Trooper Belonga's car. Soon after Roberts exited his vehicle, he told Trooper Belonga that his license had been suspended, and Roberts volunteered that he had been raided three times for providing cannabis oil. Roberts said that he did not have a medical marijuana card but he was using the ONAC card. Roberts retrieved his ONAC card from his vehicle to show Trooper Belonga, and he began to tell Trooper Belonga about making cannabis oil.

Roberts got into Trooper Belonga's patrol car and Trooper Belonga proceeded to question Roberts. Trooper Belonga asked Roberts for permission to search the vehicle, and Roberts consented to the search. Trooper Belonga's partner, Trooper Lajimodiere, searched the vehicle and found two bottles of oil in the trunk. Trooper Lajimodiere also found a syringe with "Simpson oil" underneath the front passenger seat. Trooper Belonga field tested the liquids in the bottles and one of them tested positive for marijuana. Roberts told Trooper Belonga that it takes a large

amount of marijuana to produce concentrated oil. Trooper Belonga took that oil and told Roberts that he would be doing a report. Roberts was released at the conclusion of the stop.

Roberts was subsequently charged in Delta County with possession with intent to deliver a controlled substance, a four-year felony. M.C.L. § 333.7401(2)(c). On December 8, 2016, District Judge Steven C. Parks conducted a preliminary examination to determine whether there was probable cause to bind Roberts over for further proceedings in the circuit court. The prosecutor presented testimony from Trooper Belonga regarding the stop of Roberts; the search of his vehicle; the field test results showing that the oil contained marijuana; and Roberts's admissions that the items belonged to him, that he had intended to deliver them to a woman in Mackinaw City, and that he created them. Roberts's counsel cross-examined Trooper Belonga on these issues. At the conclusion of the hearing, Judge Parks found probable cause for bind-over to circuit court. (ECF No. 32-3 at PageID.257.)

On February 3, 2017, Delta County Circuit Court Judge John B. Economopoulos held a hearing on two motions that Roberts filed. The first motion concerned the validity of the traffic stop, and the second motion requested amendment of Roberts's bond conditions to permit him to use marijuana for medicinal purposes. As to the first motion, Trooper Belonga testified about the circumstances surrounding the stop and was cross-examined by Robert's counsel. At the conclusion of the hearing, Judge Economopoulos found that "Trooper Belonga did have probable cause to believe that the defendant violated a traffic law and therefore the decision to stop the automobile under those circumstances was lawful and reasonable." (ECF No. 32-5 at PageID.289.) Before turning to the bond motion, Judge Economopoulos dismissed Trooper Belonga, noting that "this issue doesn't involve you." (*Id.*) Judge Economopoulos then heard argument from Wickman and Roberts's counsel regarding the merits of the bond conditions motion

and, for a number of reasons, including that Roberts did not currently have medical marijuana privileges under the Michigan Medical Marijuana Act (MMMA) and had a prior marijuana-related misdemeanor conviction, denied Roberts's motion to amend bond. (*Id.* at PageID.302.)

Subsequently, after Roberts filed "more Motions to Dismiss and only after approximately three hours of oral argument, when the Court was at the cusp of dismissing the action . . . Delta county agreed to dismiss the charges." (ECF No. 25 at PageID.138.)

IV. DISCUSSION

As mentioned above, the Court considers Roberts's first amended complaint (ECF No. 25) the operative pleading and, therefore, will grant Roberts's motion to amend and deny the Prosecutor's Office and Wickman's motion to strike.

In addition to adding new claims, the first amended complaint drops the Prosecutor's Office and adds "Jon [sic] Doe Delta County Prosecutor" and "John Doe Michigan State Trooper Supervisor" as Defendants. Although Roberts omits the MSP from the caption, because the first amended complaint continues to refer to the MSP, the Court will address the propriety of Roberts's claims directed at the MSP.

A. The MSP and Trooper Belonga's Motion to Dismiss

1. *Eleventh Amendment*

To the extent the MSP remains a Defendant in the first amended complaint, Roberts's claims against the MSP are barred by Eleventh Amendment immunity. It is well established that the MSP is an agency of the State of Michigan and is thus protected by sovereign immunity. *Lavrack v. City of Oak Park*, No. 98-1142, 1999 WL 801562, at *2 (6th Cir. Sept. 28, 1999); *see also Stewart v. Muskegon Heights Police Dep't*, No. 1:12-CV-718, 2012 WL 4501256, at *2 (W.D. Mich. Sept. 28, 2012) (holding that a claim against the Michigan State Police Forensic Science

Division was bared by the Eleventh Amendment); *Scott v. Michigan*, 173 F. Supp. 2d 708, 714 (E.D. Mich. 2001) (finding the Michigan State Police Department is an arm of the State of Michigan entitled to Eleventh Amendment immunity); *Haddad v. Fromson*, 154 F. Supp. 2d 1085, 1091 (W.D. Mich. 2001) (explaining that the Michigan State Police is a department of the State of Michigan "created by statute," and is thus entitled to Eleventh Amendment immunity) (citing M.C.L. § 16.250), *overruled on other grounds by Lapides v. Bd of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 122 S. Ct. 1640 (2002). Moreover, the Supreme Court has held that "a State is not a person within the meaning of § 1983." *Will v. Mich. Dep't of State Police*. 491 U.S. 58, 64, 109 S. Ct. 2304 2308 (1989); *see also Lavrack*, 1999 WL 801562, at *2 (stating that the Michigan State Police "is not a 'person' for purposes of § 1983") (citing *Howlett v. Rose*, 496 U.S. 356, 383, 110 S. Ct. 2430, 2447 (1990)).

Likewise, Roberts's claims against Trooper Belonga in his official capacity are barred by the Eleventh amendment. As the Supreme Court stated in *Will*, "a suit against a state official in his or her capacity is not a suit against the official but rather is a suit against the officer's office." 491 U.S. at 71, 109 S. Ct. at 2312 (citing *Brandon v. Holt*, 469 U.S. 464, 471, 105 S. Ct. 873, 877 (1985)). "As such, it is no different from a suit against the State itself." *Id.*

2. John Doe Michigan State Trooper Supervisor

Roberts's claim against newly-added Defendant John Doe, Michigan State Trooper Supervisor is subject to dismissal as well. The only allegation pertaining to this John Doe Defendant is as follows: "The Michigan State Police employ supervisors within their ranks for various troopers. John Doe Michigan State Trooper Supervisor was Defendant Belonga' [sic] supervisor at all times relevant to this Complaint." (ECF No. 25 at PageID.134.)

Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior or vicarious liability in claims under § 1983. *Iqbal*, 566 U.S. at 676, 129 S. Ct. at 1948; *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691, 90 S. Ct. 2018, 2036 (1978). A claimed constitutional violation must be based upon active unconstitutional behavior. *Grinter v. Knight* , 532 F.3d 567, 575–76 (6th Cir. 2008. The acts of one's subordinates are not enough; nor can supervisory liability be based on the mere failure to act. *Id.* at 576; *Greene v. Barber*, 310 F.3d 889, 899 (6th Cir. 2002). Here, Roberts alleges nothing more than John Doe was Trooper Belonga's supervisor.

In his response to the MSP and Trooper Belonga's motion, Roberts states that John Doe is actually Trooper Lajimodiere, whom transcripts and police reports show as the other arresting/supervising officer. Roberts states that he intends to add Trooper Lajimodiere through amendment, if one is allowed. (ECF No. 38 at PageID.344.) Amendment will not be allowed. First, "[t]he Sixth Circuit strongly disfavors requesting leave to amend pleadings in responsive briefs to motions to dismiss, as opposed to filing a separate, detailed motion to amend." *Rossi v. SunTrust Mortg., Inc.*, No. 3:11-cv-01045, at *7 (M.D. Tenn. Dec. 29, 2011) (citing *Begala v. PNC Bank, Ohio, N.A.*, 214 F.3d 776, 785 (6th Cir. 2000)). Second, adding Trooper Lajimodiere to the complaint would serve no purpose. As noted above, Roberts does not allege that the John Doe supervisor actively engaged in any unconstitutional conduct. Absent a basis for individual liability, any suit against Trooper Lajimodiere would be a suit against the State, barred by the Eleventh Amendment. Finally, Roberts simply has no basis for a claim against Trooper Lajimodiere in his individual capacity. As noted above, Trooper Lajimodiere showed up on the scene after Trooper Belonga had obtained consent from Roberts to search his vehicle. "A search by police . . . does not violate the Fourth Amendment if 'voluntary consent has been obtained,

either from the individual whose property is searched . . . or from a third party who possesses common authority over the premises.'" *Harajli v. Huron Twp.*, 365 F.3d 501, 506 (6th Cir. 2004) (quoting *Illinois v. Rodriguez*, 497 U.S. 177, 181, 110 S. Ct. 2793, 2797 (1990)). Given Roberts's consent to the search, Roberts has no viable claim against Trooper Lajimodiere.

3. Trooper Belonga

In his original complaint, Roberts alleged the following claims: (1) unlawful detention under the Fourth Amendment based on the traffic stop (Count One); (2) unlawful seizure of the cannabis oil under the Fourth Amendment (Count Two); (3) First Amendment retaliation based on free exercise of religion (Count Three); (4) violation of Roberts's First Amendment right to freedom of religion (Count Four); (5) violation of Fourteenth Amendment right to due process (Count Five); (6) malicious prosecution (apparently under state law) (Count Six); (7) violation of substantive due process (Count Seven); and (8) Eighth Amendment violation (Count Eight). In his first amended complaint, Roberts added the following claims: (1) violation of the Michigan Persons with Disabilities Civil Rights Act (PWDCRA), specifically, M.C.L. § 37.1402 (Count Nine); (2) violation of the Equal Protection Clause and 42 U.S.C. § 1981(Count Ten); (3) First Amendment retaliation (Count Eleven); (4) malicious prosecution in violation of the Fourteenth Amendment (Count Twelve); and (5) deliberately indifferent policies, practices, customs, training, and supervision in violation of the Fourth, Fourteenth, and First Amendments and 42 U.S.C. § 1981 (Count Thirteen).

Roberts is correct that Eleventh Amendment immunity does not apply to claims asserted against individual state actors in their individual capacities. *See Foulks v. Ohio Dep't of Rehab. & Corr.*, 713 F.2d 1229, 1233 (6th Cir. 1983). And, Roberts alleges that he is suing Trooper Belonga in his individual capacity. (ECF No. 25 at PageID.134.) Nonetheless, Trooper Belonga

moves for dismissal of these claims on the basis of qualified immunity and because Roberts fails to state viable claims. Roberts's claims fail for these and other reasons.

a. Roberts Has Abandoned Most of His Claims

First, fairly read, the only two claims that Roberts specifically addresses in his response to the MSP's and Trooper Belonga's motion are his claims for malicious prosecution and improper seizure. Moreover, as to those claims, it is not entirely clear whether Roberts intends to address his § 1983 malicious prosecution claim, his state-law malicious prosecution claim, or both, as he fails to cite Sixth Circuit or Michigan case law discussing the elements of such claims. In any event, giving Roberts the benefit of the doubt, the Court will address malicious prosecution under both § 1983 and Michigan law. In addition, as for the illegal seizure claim, although Roberts provides essentially no analysis of the claim, the Court will address it on the merits. As to all other claims—those as to which Roberts fails to mention, let alone provide any substantive analysis—the Court deems them abandoned.[3] *See Ullmo v. Ohio Turnpike & Infrastructure Comm'n*, 126 F. Supp. 3d 910, (N.D. Ohio 2015) (deeming "abandoned" claims as to which the plaintiff failed to respond to the defendant's arguments); *Bazinski v. JPMorgan Chase Bank, N.A.*, No. 13-14337, 2014 WL 1405253, at *2 (E.D. Mich. Apr. 11, 2014) ("Claims left to stand undefended against a motion to dismiss are deemed abandoned.").[4]

[3] In one section, captioned "Mr. Robert's [sic] Rights Were Violated by Defendants and Defendants Should Be Held Accountable," Roberts discusses his and the ONAC's religious beliefs and use of medicinal marijuana for healing purposes. Roberts fails to articulate how such discussion supports his First Amendment-based claims. Roberts fails to cite a single case in that section explaining how Trooper Belonga's seizure of the cannabis oil, with probable cause, violated Roberts's First Amendment rights to freely exercise his religion or why such rights would trump the existence of probable cause.

[4] Even if Roberts had not abandoned most of his claims, the Court would conclude that they fail on the merits for various reasons. By way of example: (1) to the extent Roberts claims that the traffic stop was unlawful, he is estopped from relitigating the issue because he had a full and fair opportunity to litigate the issue in state court, the issue was actually litigated in the criminal case, and Roberts fails to allege (and the dash camera video and transcripts of the state-court hearing refute) that Trooper Belonga made material false statements about the facts underlying the traffic stop, *see Spencer v. Cty. of Huron*, 717 F. App'x 555, 557–58 (6th Cir. 2017) (applying Michigan law of collateral estoppel); (2) Roberts's allegations of retaliation are based on nothing more than unsupported conclusions without any basis to infer that Trooper Belonga engaged in retaliatory conduct, particularly when the traffic stop was valid

b. Roberts Fails to Establish Malicious Prosecution Under Federal and State Law

As noted, Roberts argues that his malicious prosecution claim should not be dismissed. Although Roberts omits any discussion of his malicious prosecution claim under either federal or state law, the Court will analyze the claim under both laws.

In the Sixth Circuit, a malicious prosecution claim arises under the Fourth Amendment. *Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir. 2010). The elements of such claim are: "(1) a criminal prosecution was initiated against the plaintiff, and the defendant made[,] influenced, or participated in the decision to prosecute; (2) there was a lack of probable cause for the criminal prosecution; (3) the plaintiff suffered a deprivation of liberty, as understood under Fourth Amendment jurisprudence, apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor." *Sanders v. Jones* , 845 F.3d 721, 728 (6th Cir. 2017) (citing *Sykes*, 625 F.3d at 309–10).

Roberts's § 1983 claim fails because he cannot show lack of probable cause for the criminal prosecution. Federal courts must "give preclusive effect to state-court judgments whenever the courts of the State from which the judgment emerged would do so." *Haring v. Prosise* , 462 U.S. 306, 313, 103 S. Ct. 2368, 2373 (1983) (quoting *Allen v. McCurry*, 449 U.S. 90, 96, 101 S. Ct.

---

and Trooper Belonga's seizure of the cannabis oil was supported by probable cause; (3) Roberts alleges no facts supporting a procedural due process claim, he does not allege conduct by Trooper Belonga that "shocks the conscience" for purposes of a substantive due process claim, *see Puckett v. Lexington-Fayette Urban Cty. Gov't*, 566 F. App'x 462, 472 (6th Cir. 2014), and reliance on "the more generalized notion of substantive due process" is unwarranted because all of the interests that Roberts asserts are "protected under an 'explicit textual source of constitutional protection'" *id.* (citing *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871 (1989)); (4) any claim based on Roberts's bond conditions or the imposition of a bond condition prohibiting Roberts from using marijuana while on bond fails as to Trooper Belonga because Roberts alleges no fact indicating that Trooper Belonga had anything to do with imposing Roberts's bond conditions; (5) Roberts's Eighth Amendment claim fails because that amendment applies only to convicted prisoners, *see Phelps v. Coy*, 286 F.3d 295, 299 (6th Cir. 2002), and Roberts admits that the charge against him was dismissed before trial; (6) Roberts has no claim under § 1981 as discrimination on the basis of religion is not actionable under the statute, *Saint Francis Coll. V. Al-Khazraji*, 481 U.S. 604, 613, 107 S. Ct. 2022, 2028 (1987); *Runyon v. McCrary*, 427 U.S. 160, 167–68, 96 S. Ct. 2586, 2593 (1976); and (7) the provision that Roberts cites in support of his PWDCRA claim, M.C.L. § 37.1402, pertains to prohibited practices in educational institutions.

411, 415 (1980)). The Sixth Circuit has held that "[w]here a party has had a full and fair opportunity to litigate an issue in earlier state proceedings, he is precluded from relitigating the same issue in a later federal case." *Coogan v. City of Wixom*, 820 F.2d 170, 175 (6th Cir. 1987) (internal quotation marks omitted), *overruled on other grounds by Frantz v. Vill. of Bradford*, 245 F.3d 869, 874 (6th Cir. 2001). In *Coogan*, the court held that because the plaintiff had contested the issue of probable cause at his preliminary examination and had the right to call witnesses and cross-examine the state's witnesses, the plaintiff was foreclosed from relitigating probable cause in a subsequent § 1983 action. *Id.*

Under Michigan law, collateral estoppel applies when (1) there is an identity of parties across the proceedings, (2) there was a valid, final judgment in the first proceeding, (3) the same issue was actually litigated and necessarily determined in the first proceeding, and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding. *Darrah v. City of Oak Park*, 255 F.3d 301, 311 (6th Cir. 2001) (citing *People v. Gates*, 434 Mich. 146, 154–57, 452 N.W.2d 627, 630–31 (1990)). Michigan courts have applied collateral estoppel to bar relitigation of an issue in a civil case that was determined in a prior criminal trial. *See Webb v. City of Taylor*, No. 236153, 2002 WL 31947931, at *4 (Mich. Ct. App. Dec. 3, 2002). Moreover, Michigan courts have held that mutuality is not required when collateral estoppel is used defensively. *Monat v. State Farm Ins. Co.*, 469 Mich. 679, 691–92, 677 N.W.2d 843, 850 (2004).

In the instant case, all of the requirements of collateral estoppel, or issue preclusion, are met with regard to probable cause. That is, following an evidentiary hearing, District Judge Parks found that probable cause supported the drug charge; the issue of probable cause was actually litigated and necessarily determined in the criminal case; and Roberts had a full and fair

opportunity to litigate the issue by cross-examining the prosecution's witness, Trooper Belonga, and calling his own witnesses, had his counsel decided to do so.

The Sixth Circuit has held that a state-court probable cause determination at a preliminary examination is not always preclusive. That is, "[t]o the extent that a plaintiff in a § 1983 cause of action can point to instances where the consideration of falsehoods or the omission of material exculpatory evidence could have colored a state-court judge's probable-cause determination, there is no requirement that the initial finding be given preclusive effect in the federal-court action." *Autrey v. Stair*, 512 F. App'x 572, 579 (6th Cir. 2013); *see also Harcz v. Boucher*, 763 F. App'x 536, 544 (6th Cir. 2019) ("[A] prior probable cause finding does not prevent a plaintiff from relitigating probable cause where the plaintiff claims that the witness who testified at the state proceeding misstated or knowingly misrepresented facts used to establish probable cause." (citing *Darrah*, 255 F.3d at 311)). The Court notes that Roberts alleges that he was prosecuted "for the known to be false allegations of delivery or manufacturing of a controlled substance," (ECF No. 25 at PageID.156), but such allegation is conclusory and unsupported by factual content. Roberts does not allege that Trooper Belonga misstated facts or testified falsely during the preliminary examination and, based on its review of the dash camera video and the hearing transcript, the Court is unable to discern that Trooper Belonga made a false or misleading statement during the preliminary examination. In fact, Roberts concedes that the cannabis oil that Trooper Belonga seized contained marijuana and that he had previously delivered some oil to a woman in Mackinaw City. Instead, Roberts's false charge allegation is based on his assertion that he had an affirmative defense to the charge under § 8 of the MMMA. But this argument misapprehends the nature of probable cause. Section 8 of the MMMA provides an affirmative defense to criminal prosecution, and "if a defendant raises a § 8 defense, there are no material

questions of fact, and the defendant 'shows the elements listed in subsection (a),' then the defendant is entitled to dismissal of the charges following the evidentiary hearing." *People v. Kolanek*, 491 Mich. 382, 412, 817 N.W.2d 528, 545 (2012) (quoting M.C.L. § 333.26428(b)). Roberts concedes that he told Trooper Belonga that he did not have a valid MMMA card, and, having concluded that the cannabis oil tested positive for marijuana, Trooper Belonga had probable cause; he was not required to delve into whether Roberts had an affirmative defense under § 8 of the MMMA:

> [I]t is clear that a police officer is not required to inquire into facts and circumstances in an effort to discover if the suspect has an affirmative defense. The officer may not ignore information which becomes available in the course of routine investigations, but it is not a routine part of the prearrest investigation for police officers to inquire into affirmative defenses.

Fridley v. Horrighs, 291 F.3d 867, 873 (6th Cir. 2002); *see also Harvey v. Carr*, 616 F. App'x 826, 829 (6th Cir. 2015) (noting that officers need not "conduct pre-arrest quasi-trials whenever an investigative target asserts a purported legal excuse for his actions") (internal quotation marks and brackets omitted). In fact, the affirmative defense set forth in § 8 of the MMMA—which requires proof of several facts—is not the type of affirmative defense that would be clearly and readily apparent to an officer during a routine traffic stop. *See* M.C.L. § 333.36428(a)(1)–(3). That Roberts was ultimately able to establish a § 8 affirmative defense after an evidentiary hearing does not negate the state court's finding of probable cause. *See Johnson v. Williams*, No. 14-12790, 2016 WL 11472646, at *5 (E.D. Mich. Feb. 23, 2016) (concluding that while the fact that the plaintiff was in possession of an application and a physician's certification "might be relevant to an affirmative defense under § 8 of the Act, M.C.L. § 333.26428, it does not immunize an individual who does not meet the requirements of § 4 from arrest, prosecution, or search"), *report and recommendation adopted*, 2016 WL 1425706.

Roberts's § 1983 malicious prosecution claim against Trooper Belonga fails for another reason: the first amended complaint does not allege that Trooper Belonga made, influenced, or participated in the decision to initiate the prosecution. During the preliminary examination, Trooper Belonga testified that he did a report and sent it to the prosecutor. (ECF No. 32-3 at PageID.252.) Such conduct will not give rise to liability on a § 1983 malicious prosecution claim. Sixth Circuit law is "absolutely clear . . . that an officer will not be deemed to have commenced a criminal proceeding against a person when the claim is predicated on the mere fact that the officer turned over to the prosecution the officer's *truthful* materials." *Sykes*, 625 F.3d at 314 (italics added). Here, nothing in the first amended complaint or the other materials suggests that Trooper Belonga did anything other than turning over his apparently truthful report to the prosecutor. Such is not a basis for liability. *See Sampson v. Vill. Of Mackinaw City*, 685 F. App'x 407, 417–18 (6th Cir. 2017).

Under Michigan law, to succeed on a malicious prosecution claim, a plaintiff must prove that:

> (1) the defendant has initiated a criminal prosecution against him, (2) the criminal proceedings terminated in his favor, (3) the private person who initiated or maintained the prosecution lacked probable cause for his actions, and (4) the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice.

Miller v. Sanilac Cty., 606 F.3d 240, 248 (6th Cir. 2010) (quoting *Walsh v. Taylor*, 263 Mich. App. 618, 633–34, 689 N.W.2d 506, 516–17 (2004)). In Michigan, "[d]ue to the important state policy of encouraging citizens to report possible criminal violations within their knowledge, a defendant cannot be held liable for malicious prosecution unless he took some active role in instigating the prosecution." *Rivers v. Ex-Cell-O Corp.*, 100 Mich. App. 824, 832–33, 300 N.W.2d 420, 424

(1980). There can be no liability if the defendant "made full and fair disclosure of all of the material facts within his knowledge to the prosecutor, and the prosecuting attorney recommends a warrant." *Id.* at 833, 300 N.W.2d at 424. In such case, the defendant "has not 'instituted' the charge." *Id.* (quoting *Renda v. Int'l Union, UAW*, 366 Mich. 58, 83–87, 114 N.W. 343, 355–56 (1962)). Thus, private individuals and police officers can be liable "only if they knowingly furnish false information that the prosecutor relies and acts upon in initiating criminal proceedings." *Disney v. City of Dearborn*, No. 2:06-CV-12795, 2006 WL 2193029, at *4 (E.D. Mich. Aug. 2, 2006) (citing *Matthews v. Blue Cross & Blue Shield of Mich.*, 456 Mich. 365, 385–90, 572 N.W.2d 603, 613–15 (1998)).

Roberts's state-law malicious prosecution claim fails for the same reason as his § 1983 malicious prosecution claim. That is, he is estopped from relitigating the prior state-court probable cause determination. Moreover, Roberts alleges no fact showing that Trooper Belonga failed to make full and fair disclosure of all the material facts within his knowledge to the prosecutor.

c. Roberts's Unlawful Seizure Claim Fails

In Count Two, Roberts alleges that Trooper Belonga violated his Fourth Amendment right to be free of unreasonable seizures by seizing the cannibis oil during the traffic stop. "In general, like seizures of the person, seizures of personal property require probable cause." *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 543 (6th Cir. 2002). As with the malicious prosecution claims, the state-court's prior determination of probable cause precludes Roberts from relitigating the issue in federal court. Accordingly, this claim fails.

d. Trooper Belonga is Entitled to Qualified Immunity

Trooper Belonga argues that he is entitled to qualified immunity on Roberts's claims. The Court agrees.

"Under the doctrine of qualified immunity, 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Phillips v. Roane Cty.*, 534 F.3d 531, 538 (6th Cir. 2008) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982)). Once a defendant raises the qualified immunity defense, the burden shifts to the plaintiff to demonstrate that the defendant officer violated a right so clearly established "that every 'reasonable official would have understood that what he [was] doing violate[d] that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 2083 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987)). The analysis entails a two-step inquiry. *Martin v. City of Broadview Heights*, 712 F.3d 951, 957 (6th Cir. 2013). First, the court must "determine if the facts alleged make out a violation of a constitutional right." *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 815–16 (1982). Second, the court asks if the right at issue was "'clearly established' when the event occurred such that a reasonable officer would have known that his conduct violated it." *Id.* (citing *Pearson*, 555 U.S. at 232, 129 S. Ct. at 816). A court may address these steps in any order. *Id.* (citing *Pearson*, 555 U.S. at 236, 129 S. Ct. at 818). Thus, an officer is entitled to qualified immunity if either step of the analysis is not satisfied. *See Citizens in Charge, Inc. v. Husted*, 810 F.3d 437, 440 (6th Cir. 2016).

Roberts fails to show that Trooper Belonga violated Roberts's clearly established rights. "A government official will be liable for the violation of a constitutional right only if the right was clearly established . . . in light of the specific context of the case." *Hearring v. Sliwowski*, 712 F.3d 275, 279 (6th Cir. 2013) (internal quotation marks omitted). Roberts's central argument, as the Court understands it, is that, although Roberts told Trooper Belonga that he did not possess a

valid card under § 4 of the MMMA, Trooper Belonga lacked probable cause to seize the cannabis oil because Roberts had a valid defense under § 8 of the MMMA and because the cannabis oil was part of his religious practice as a member of the ONAC. Roberts cites no case that would have put a reasonable police officer in Trooper Belonga's position at the time he made the traffic stop on notice that he lacked probable cause to seize the cannabis oil, which tested positive for marijuana. *Cf. United States v. Barnes*, 677 F. App'x 271, 276–77 (6th Cir. 2017) (holding that the Controlled Substances Act did not substantially burden the defendant's religious practice as a member of the ONAC faith for purposes of the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*). Accordingly, Roberts's claims against Trooper Belonga are barred by qualified immunity.

B. Prosecutor Wickman and John Doe Prosecutor

1. Prosecutor Wickman

In moving to dismiss, Wickman argued that she is entitled to absolute prosecutorial immunity as to all of Roberts's federal- and state-law claims. The Court agrees.

Prosecutors are entitled to absolute immunity for their actions in prosecuting criminal conduct. The Supreme Court embraces a functional approach to determining whether a prosecutor is entitled to absolute immunity. *Kalina v. Fletcher*, 522 U.S. 118, 127, 118 S. Ct. 502, 508 (1997); *Burns v. Reed*, 500 U.S. 478, 486, 111 S. Ct. 1934, 1939 (1991); *accord Koubriti v. Convertino*, 593 F.3d 459, 467 (6th Cir. 2010); *Lomaz v. Hennosy*, 151 F.3d 493, 497 (6th Cir. 1998). Under a functional analysis, a prosecutor is absolutely immune when performing the traditional functions of an advocate. *Kalina*, 522 U.S. at 130, 118 S. Ct. at 509; *Spurlock v. Thompson*, 330 F.3d 791, 797 (6th Cir. 2003). The Supreme Court has held that a prosecutor is absolutely immune for the initiation and pursuit of a criminal prosecution. *Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S. Ct. 984, 995 (1976); *Lomaz*, 151 F.3d at 497. Acts which occur in the course of the prosecutor's role

as advocate are entitled to protection of absolute immunity, in contrast to investigatory or administrative functions that are normally performed by a detective or police officer, which are not accorded absolute immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 276–78, 113 S. Ct. 2606, 2615, 2617 (1993); *Grant v. Hollenbach*, 870 F.2d 1135, 1137 (6th Cir. 1989). In the Sixth Circuit, the focus of the inquiry is how closely related the prosecutor's conduct is to her role as an advocate intimately associated with the judicial phase of the criminal process. *Spurlock*, 330 F.3d at 797; *Ireland v. Tunis*, 113 F.3d 1435, 1443 (6th Cir. 1997).

Roberts's allegations in this first amended complaint, scant as they are, show that at all times Wickman was acting in her role as an advocate prosecuting a criminal case. Roberts attempts to avoid absolute immunity by alleging that Wickman "performed the administrative task of giving faulty legal advice to the Court and the Police Defendants," (ECF No. 25 at PageID.136) and arguing in his response to Wickman's motion that in proposing bond restrictions, Wickman was "operating as [a] medical practitioner[]." (ECF No. 18 at PageID.79.) Roberts fails to avoid absolute immunity. There is no factual support in the first amended complaint supporting Roberts's conclusory allegation that Wickman gave legal advice to Trooper Belonga (or any other law enforcement officer), and the assertion that Wickman gave legal advice to the court is a mischaracterization of Wickman acting in her role as an advocate. And, Robert's "medical practitioner" argument is absurd. In arguing for, and opposing Roberts's motion to modify his bond conditions, Wickman was acting as an advocate. *See Ghaith v. Rauschenberger*, 493 F. App'x 731, 739 n.4 (6th Cir. 2012) (stating that conduct of "appearing at a bond hearing and arguing against a reduction in bond . . . would be shielded by absolute prosecutorial immunity . . . since [the prosecutors] were acting as advocates").

Finally, because "Michigan standards for prosecutorial immunity are the same as federal standards," *West Mich. Film LLC v. Metz*, No. 319119, 2015 WL 404933, at *4 (Mich. Ct. App. Jan. 29, 2015) (citing *Bischoff v. Calhoun Cty. Prosecutor*, 173 Mich. App. 802, 807–08, 434 N.W.2d 249, 251–52 (1988)), absolute immunity bars Roberts's state-law claims against Wickman.

2. John Doe Delta County Prosecutor

Roberts alleges that John Doe Delta County Prosecutor was the elected Prosecutor of Delta County at the time of the offense was committed and that Roberts is suing this Defendant in his official and personal capacity. Roberts alleges that "John Doe Elected Prosecutor and Prosecutor Wickman . . . pressed charges against Plaintiff's [sic] Roberts that do not exist under Michigan law." (ECF No. 25 at PageID.136.) To the extent that Roberts alleges that the Delta County Prosecutor was involved in prosecuting Roberts, Roberts's claims are barred by absolute immunity. If, on the other hand, Roberts intended to name the Delta County Prosecutor as the policymaker for the Delta County Prosecutor's Office for purposes of asserting a claim pursuant to *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S. Ct. 2018 (1978), his allegations are wholly conclusory, as they fail to allege any specific policy, practice, or custom that violated Roberts's constitutional rights. *See Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 372–73 (6th Cir. 2011) (stating that "vague and conclusory allegations and arguments" are insufficient to establish the existence of a policy); *Taylor v. Stuck*, No. 11-15683, 2012 WL 1048643, at *4 (E.D. Mich. Mar. 28, 2012) ("To survive the City's Motion to Dismiss, Plaintiff must allege more than the conclusory legal statement that the City's 'policy, practice, and customs' caused Plaintiff injury."). Moreover, to the extent that the alleged policy pertains to bond conditions, in Michigan it is for the court, not the prosecutor, to determine what

bond conditions are "reasonably necessary." Mich. Ct. R. 6.106(D). Accordingly, any policy or custom of the prosecutor's office could not have violated Roberts's constitutional rights.

V. CONCLUSION

For the foregoing reasons, the Court will grant Roberts's motion to amend; deny Wickman's and the Prosecutor's Office motion to strike; grant Trooper Belonga and the MSP's motion to dismiss; and, treating Wickman and the Prosecutor's Office's opposition to Roberts's motion to amend as a motion to dismiss, dismiss all claims against Wickman and John Doe Prosecutor.

An Order consistent with this Opinion will enter.

Dated: August 19, 2019

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHN ROBERTS,

Plaintiff,

v.

Case No. 2:19-CV-23

JON DOE DELTA COUNTY PROSECUTOR, et al.,

HON. GORDON J. QUIST

Defendants.
_____/

ORDER AND JUDGMENT DISMISSING CASE

In accordance with the Opinion entered today,

IT IS HEREBY ORDERED as follows:

(1) Plaintiff's Motion to File First Amended Complaint (ECF No. 29) is **GRANTED,** Defendants Delta County Prosecutor's Office and Prosecutor Lauren Wickman's Motion to Strike (ECF No. 26) is **DENIED**, and the First Amended Complaint (ECF No. 25) is deemed the operative pleading;

(2) Defendants Michigan State Police and Trooper Belonga's Motion to Dismiss the First Amended Complaint (ECF No. 31) is **GRANTED**; and

(3) Defendants Delta County Prosecutor's Office and Prosecutor Lauren Wickman's Motion to Dismiss (ECF No. 14), which the Court considers a Motion to Dismiss the First Amended Complaint, is **GRANTED**.

IT IS FURTHER ORDERED that all of Plaintiff's claims are **dismissed with prejudice**.

This case is **concluded**.

Dated: August 19, 2019

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHN ROBERTS
Plaintiff,

Case No.
Hon.

vs.

DELTA COUNTY PROSECUTOR'S ,
OFFICE, TROOPER BOLOGNA,
PROSECUTOR LAUREN WICKMAN,
MICHIGAN STATE POLICE
_____/

JURY TRIAL DEMANDED

REDETROIT EASTCOMMUNITY
LAW CENTER, PLLC
Lisa C. Walinske
Attorney for Plaintiffs
30600 N. River Road
Harrison Twp., MI 48045
313-461-8440
www.redetroiteast.com

_____/

COMPLAINT

INTRODUCTORY STATEMENT

1. Plaintiff John Roberts was charged with a crime for innocently driving his car home from caring for a medical marijuana patient, something that law-abiding citizens can do every day under the MMMA and under enumerated rights guaranteed by our federal Constitution.

2. He brings this civil rights lawsuit because he was detained at a traffic stop without reasonable suspicion, placed on an unconstitutional bond restriction and then because he exercised his constitutional right to question authority he was then charged with a crime that does not exist in the State of Michigan.

Prosecutor Lauren Wickman acted as the managing attorney for the Prosecutor's Office on this particular case. She is being sued in her official capacity.

10 The Michigan State Police is a statewide law enforcement agency who is primarily responsible for patrolling Michigan's Upper Peninsula. Defendant John Belonga is the officer of the Defendant Michigan State Police that detained Mr. Roberts, confiscated his property, and unlawfully seized evidence that eventually led to the prosecution of Mr. Roberts by Defendant Belonga. He is being sued in his official capacity.

FACTS

11. Mr. Roberts was charged with Delivery and Manufacturing of Controlled Substance for possessing concentrated forms of cannabis, one known as Simpson Oil, and the other a topical oil when he was pulled over on September 6th, 2016.

12. Mr. Roberts immediately told Trooper Belonga that is a member of the Oklevueha Native American Church where he makes and provides cannabis oil.

13. Mr. Roberts was pulled over in a Church-owned vehicle with a syringe of CBD oil that is made specifically for treatment of neurological.

14. According to Trooper Belonga, Mr. Roberts told the officer that he did not have a driver's license and that he gave some cannabis oil to a man in Mackinaw City before coming back over the bridge and heading home to Ontonagon.

15. Delta County does not have jurisdiction over Emmet or Cheboygan Counties, where the supposed "delivery" occurred. Nonetheless, the Defendants insisted on pursuing bond conditions that did not conform to Michigan law or jurisprudence.

16. Under the undisputed facts Mr. Roberts did not give or deliver any cannabis to anyone in Delta County.

24. The bond restriction on medical marijuana use is not supported by MCR 6.435, Section 8 of Michigan's MMMA, and MCL 333.7404.

25. Since Mr. Roberts was not guilty of any crime recognized in this state, this bond prohibition amounts to cruel and unusual punishment before Mr. Roberts has even been afforded his full due process right to a jury trial.

26. The charges against Plaintiff and the accompanying bond restrictions were legally invalid charges. MCR 6.435, MMMA section 8, and MCL 333.7404.

27. Delta County engaged in the improper prosecution of Mr. Roberts for these legally unsubstantiated charges.

28. Only after hours of oral argument, when the Court was at the cusp of dismissing the action, did Delta County finally agree to put an end to the constitutional infringements and medical setbacks that Mr. Roberts was suffering. Delta County agreed to dismiss the charges.

29. A valid and current MMMA card is not necessary under section 8 of the MMMA or Michigan's public health code. Absent such a card, Mr. Roberts cannot enjoy Section 4 of immunity from State prosecution for manufacturing marihuana, because he does not meet the requirements of the plain language of that section of the statute.

30. The Michigan Medical Marihuana Act ("MMMA,") MCL 333.26421, et seq., allows for the use, growing, and or possession of marihuana by "registered qualifying patients," who suffer from "debilitating medical conditions" and whose doctors have concluded that the patient's use of "marihuana [sic]" will help their symptoms or control the side effects of their illnesses.

37. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures, and the Fourth Amendment is incorporated against the states by the Fourteenth Amendment.

38. Persons violating the Fourth Amendment, under color of state law, are liable at law and in equity under 42 U.S.C. § 1983.

39. Under the Fourth Amendment, police officers may not conduct even a brief *Terry* stop without reasonable suspicion that the person being stopped is involved in criminal activity.

40. Defendants, while acting under the color of state law, violated Plaintiff's clearly established right to be free from unreasonable seizure by unlawful detention on September 6th, 2016.

COUNT TWO

(42 U.S.C. § 1983)
Violation of the Fourth Amendment
Unlawful Seizure

41. Plaintiffs incorporate by reference paragraphs 1 through 40.

42. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures, and the Fourth Amendment is incorporated against the states by the Fourteenth Amendment.

43. Persons violating the Fourth Amendment, under color of state law, are liable at law and in equity under 42 U.S.C. § 1983.

44. Under the Fourth Amendment, Defendants, while acting under the color of state law, violated Plaintiff's clearly established right to be free from unreasonable seizure of his personal property.

52. Persons violating the First Amendment, under color of state law, are liable at law and in equity under 42. U.S.C. § 1983.

53. The First Amendment protects every Americans right to freedom of religion and the free right to exercise that religion.

54. Defendants, while acting under the color of state law, violated Plaintiff's clearly established right under First Amendment because Defendants' decision to charge Plaintiff with a crime impinged on Plaintiffs free exercise and his right to freedom of religion.

COUNT FIVE

(42 U.S.C. § 1983)
Violation of Fourteenth Amendment
Due Process

55. Plaintiffs incorporate by reference paragraphs 1 through 54.

56. The Fourth Amendment's protection against unreasonable seizures encompasses the right to be free from malicious prosecution.

57. Malicious prosecution is also prohibited by the Fourteenth Amendment's guarantee against the deprivation of liberty without due process of law.

58. Defendants, while acting under color of state law, violated Plaintiff's clearly established right under the Fourth and Fourteenth Amendments by unlawfully and maliciously causing a criminal prosecution to be instituted against him.

59. Defendants lacked probable cause to initiate criminal proceedings against Plaintiff; a reasonable person in Defendants' position would have known that the facts and circumstances were insufficient to justify a reasonable belief that Plaintiff had committed any offense; the criminal proceedings ended in Plaintiff's favor; and the criminal proceedings were the result of malice by Defendants.

66. Defendants acting under color of state law, took Plaintiff's physical wellbeing into custody by not allowing his use of permissible medicinal use of cannabinoids, which was also supported by his religious belief in the healing properties of cannabinoids.

67. Defendants violated their affirmative duties with their intervention in preventing Mr. Roberts from taking his religiously prescribed and medicinally approved medicine of cannabinoids to treat his ruptured brain aneurysm complications and accompanying debilitating conditions.

68. Defendants, acting under color of state law and in concert with one another, by their conduct, showed intentional, outrageous, and reckless disregard for Plaintiff's constitutional rights. Further, their actions in limiting Plaintiff's right to treat his own disabling condition, given his medical condition, showed deliberate indifference to Plaintiff 's serious medical needs and was a deprivation of his constitutionally protected rights.

69. As a direct and proximate result of Defendants' conduct, Plaintiff suffered physical and emotional injury, a full occlusion of his left brain artery, complications and exacerbations of his debilitating conditions, loss of freedom, and other constitutionally protected rights described above.

70. Defendants, acting under color of state law, authorized, tolerated, ratified, permitted, or acquiesced in the creation of policies, practices, and customs, establishing a de facto policy of deliberate indifference to individuals such as Plaintiff.

71. As a direct and proximate result of these policies, practices, and customs, Plaintiff was deprived of his constitutionally protected rights described above.

DEMAND FOR RELIEF

Plaintiff request that this Court:

a. Assert jurisdiction over this matter;

b. Award compensatory and punitive damages in an amount to be proved at Trial;

c. Award Plaintiff costs and attorneys' fees pursuant to 42 U.S.C.§ 1988; and

d. Grant or award such other relief that this Court deems just.

Respectfully submitted,

REDETROIT EAST COMMUNITY LAW CENTER, PLLC

/s/ Lisa Walinske

BY:_____

Lisa Walinske (P62136)
Attorney for Plaintiffs
30600 N. River Road
Harrison Twp., MI 48045
(313) 461-8440
lwalinske@redetroiteast.com

Dated: January 26, 2019

RELEASE AND SETTLEMENT AGREEMENT

I. Standard Definitions.

A. "Agreement": This Release and Settlement Agreement.

B. "Damages": Damages are defined as financial loss of any kind whatsoever and without exception, including financial loss, related to or resulting directly or indirectly from personal injuries, including but not limited to emotional or other non-physical injury(ies) of any kind whatsoever, whether or not said injury(ies) is/are currently known, foreseen or foreseeable, temporary or permanent and including but not limited to any loss, damages, or injury(ies) of any kind which are currently unknown, unforeseen and unforeseeable, and which accrue or become known at some future time, and including all claims for common law or statutory causes of action.

II. Variable Definitions.

A. "Plaintiff": **KURTIS KOBASIC** and any heirs, executors, administrators, successors and assigns, next of kin, natural and adopted children and any estate on whose behalf **KURTIS KOBASIC** is acting and executing this Agreement.

B. "Defendants": **DELTA COUNTY** and **LAUREN WICKMAN**, and all of their employees, officers, agents, and commissioners, past, present or future, whether acting within or without the scope of their employment.

C. "Occurrence": All allegations made by Plaintiff as alleged in the Pending Claim.

D. "Pending Claim": All claims brought or which could have been brought arising out of the Occurrence as more specifically set forth in a lawsuit captioned: *KURTIS KOBASIC v. DELTA COUNTY and LAUREN WICKMAN*, in the U.S. Western District Court of Michigan, File No. 2:20-cv-113-RJJ-MV and including all other common law, statutory claims, and all civil rights act claims ~~asserted or which could be asserted by Plaintiff~~. arising out of or related to the lawsuit KJK

E. Plaintiff and Defendants shall together be referred to as the "Parties."

III. Release.

That for and in consideration of the payments, terms, conditions, promises, and covenants in this Agreement, Plaintiff hereby forever release and discharge any and all claims, demands, actions, causes of action, and all other rights which he may have for Damages against Defendants, based upon or arising out of all claims asserted in the Pending Claims ~~and all claims brought or which could have been brought~~, in any forum by the Plaintiff, existing at the time of this KJK

Agreement.

That for and in consideration of the release, terms, conditions, promises, and covenants in this Agreement, Defendants hereby forever release and discharge any and all claims, demands, actions, causes of action, and all other rights which he/she/they/it may have for any claims of dangerous dog and/or euthanasia against dog Turbo and/or Plaintiff related to dog Turbo, based upon or arising out of any and all claims prior to February 16, 2022 brought or which could have been brought, by them, or any agent, assign, and/or attorney in any forum. Defendants represent and warrant that the claim related to an alleged scratch/bite incident in approximately Spring 2021 was not assigned to another prosecutor's office and they have full authority to preclude any such prosecution contained within the context of this Release.

IV. Full and Final Settlement.

Plaintiff acknowledges that he understands and agrees this Agreement is final, conclusive and binding on Plaintiff and his heirs, and that upon execution of this Agreement, all claims released in this Agreement shall cease and Defendants shall be fully and finally discharged from all claims for Damages.

Defendants acknowledge, understand, and agree that this Agreement is final, conclusive and binding on Defendants, their agents, assigns, and/or attorneys, and that upon execution of this Agreement, all claims related in any way to dog Turbo in this Agreement shall cease and Plaintiff and dog Turbo are fully and finally discharged from all orders of euthanasia and dangerous animal allegations which would have occurred and/or accrued from the beginning of time through February 16, 2022.

The Parties acknowledge and agree that the sole consideration for this Agreement is that stated in the Consideration Paragraph and that consideration is in full and final settlement of the Pending Claim and all claims made or which could have been made by the Plaintiff resulting from the Occurrence.

V. Consideration.

The sole and full consideration to be given by and on behalf of the Defendants for this Agreement and the agreements, promises and acknowledgments of the parties expressed herein, shall be:

Payment of **SIXTY THOUSAND DOLLARS AND ZERO CENTS ($60,000.00)** forthwith to the Plaintiff and Plaintiff's attorneys, which shall be fully inclusive of all Damages, interest, costs and attorney fees which are or might be payable as to Plaintiff, as well as the release against Plaintiff and/or dog Turbo as outlined herein and incorporated by reference from the

RJK

Release and Full and Final Settlement paragraphs above.

The Parties further agree to stipulate to set aside the preliminary injunction in File No. 2:20-cv-113-RJJ-MV, dated September 21, 2020 upon Judge Stephen Parks' signature and entry of the stipulated order stated as follows:

> (1) The Parties further agree to stipulate to dismiss and set aside any and all court orders with prejudice regarding the euthanasia of "Turbo," the dog owned and/or licensed in Delta County to Kurtis Kobasic and Valerie Kobasic, for any and all allegations that have occurred up to and including February 16, 2022. This paragraph does not apply to any court matters involving "Turbo" where the underlying incident occurred after February 16, 2022.

VI. Lien and Indemnity.

It is further understood and agreed that this Agreement and Release shall include the rights of recovery, if any, to any lienholder and/or statutory lienholder, including, but not limited to, Blue Cross, Medicare, Medicaid, and that the payment of the lien(s) shall be the sole responsibility of the Plaintiff and that he agrees to discharge such lien, if any, forthwith and agrees to hold the released parties harmless and indemnify them against the payment of any and all additional sums or money or damages, including costs and attorney fees.

Plaintiff hereby acknowledges receipt of a copy of this Agreement before signing same. It is understood that the provisions of this Release and Settlement Agreement are contractual and are not merely recitals and that the Plaintiff has read the foregoing Release and Settlement Agreement, understands it and signs same as his voluntary act and deed. Any contractual disputes regarding this Agreement shall be adjudicated by the Court, and the Court may award attorney fees at its discretion.

VII. Execution of Documents.

As part of this Agreement and for the consideration herein specified, the parties covenant that they, their assigns and their attorneys shall consent to and execute all incidental and supplemental documents, pleadings and papers, and take all supplementary steps necessary to give full force and effect to the terms of this Agreement. It is understood such supplemental steps shall include, but are not limited to, the signing and entry of an order of dismissal with prejudice and without costs relating to the pending claim and all actual or potential appeals therefrom, upon final payment of the settlement amount.

It is understood and agreed that this Agreement is the compromise of disputed claims, and that the payment made is not to be construed as an admission of liability on the part of the

KJK

Defendants, and that said Agreement denies liability and intends merely to avoid additional litigation.

IN WITNESS WHEREOF, Plaintiff has set forth his hand and seal this 16th day of March, 2022.

SHELLY A. FLOWER
NOTARY PUBLIC-DELTA COUNTY, MI
MY COMMISSION EXP 08/12/2024

PLAINTIFF:

Kurtis Kobasic

KURTIS KOBASIC

DEFENDANTS:

LAUREN WICKMAN

DELTA COUNTY
BY:
ITS:

As attorneys for Plaintiff and Defendant, I hereby certify that I have explained the legal meaning and importance of the foregoing instrument to Plaintiff prior to the execution thereof and this Agreement is hereby witnessed and approved by me.

Dated:_____

Celeste M. Dunn (P61819)
Attorneys for Plaintiff

Dated:_____

Gregory Grant (P68808)
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JOHN ROBERTS,

Plaintiff,

v

DELTA COUNTY PROSECUTOR'S OFFICE, TROOPER BOLOGNA, PROSECUTOR LAUREN WICKMAN and MICHIGAN STATE POLICE,

Defendants.

HON. GORDON J. QUIST
U.S. DISTRICT COURT JUDGE

FILE NO. 2:19-cv-00023-GJQ-TPG

_____/

Lisa C. Walinske (P62136)
REDETROIT EAST COMMUNITY LAW CENTER, PLLC
Attorneys for Plaintiff
30600 N. River Road
Harrison Twp., MI 48045
(313) 461-8440
www.redetroiteast.com
lwalinske@redetroiteast.com

Gregory R. Grant (P68808)
CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.
Attorneys for Defs. DELTA COUNTY PROSECUTOR'S OFFICE and WICKMAN
310 W. Front Street, Ste. 221
Traverse City, MI 49684
(231) 922-1888/(231) 922-9888 Fax
ggrant@cmda-law.com

John G. Fedynsky (P65232)
MICHIGAN DEPT. OF ATTORNEY GENERAL
Civil Litigation, Employment & Elections
525 Ottawa Street
P.O. Box 30736
Lansing, MI 48909
(517) 335-3055/(517) 335-7157 Fax
fedynskyj@michigan.gov

_____/

DEFENDANTS DELTA COUNTY PROSECUTOR'S OFFICE AND LAUREN WICKMAN'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO FILE FIRST AMENDED COMPLAINT AS TO PROSECUTOR DEFENDANTS

I. INTRODUCTION.

Plaintiff's proposed First Amended Complaint brings the same causes of action against Defendant Lauren Wickman and adds new claims. Plaintiff has also removed the Delta County Prosecutor's Office as a Defendant, and supplemented "Jon Doe Delta County Prosecutor." The original claims against Ms. Wickman should be dismissed for the reasons set forth in Defendants' Motion to Dismiss (ECF No. 14). To that end, Plaintiff's attempt to amend the original Complaint would be futile. Regarding the remaining claims Plaintiff alleges in the proposed First Amended Complaint, those claims are also futile for the reasons stated below. As such, Plaintiff's Motion to File First Amended Complaint as to Prosecutor Defendants should be denied.

II. STANDARD OF REVIEW.

Ordinarily, Rule 15(a) mandates that leave to amend "shall be given when justice so requires." The decision to grant leave to amend is within the sole discretion of the district court. *Id.* Unless the district court finds that the amendment causes undue delay, is made in bad faith or dilatory motive on the part of the movant, is preceded by repeated failure to cure deficiencies by previous amendments, will result in undue prejudice by virtue of allowance of the amendment or that the amendment is futile, leave to amend should be freely given. *Id.* *Foman v. Davis,* 371 U.S. 178, 182 (1962) makes clear there are certain situations in which it is appropriate to deny leave to amend. One such circumstance that is particularly relevant in this case is when the amendment would be "futil[e]." *Foman,* 371 U.S. at 182; *see also, Moss v. United States,* 323 F.3d 445, 476 (6th Cir.2003). In such a case, therefore, the proposed amended complaint is futile

under Rule 15(a) not only if it would fail to survive a motion to dismiss for failure to state a claim, but also if the amended pleading could not survive a motion for summary judgment. *See Bauchman v. West High Sch.,* 132 F.3d 542, 56162 (10th Cir.1997); *Wilson v. American Trans Air, Inc.,* 874 F.2d 386, 392 (7th Cir.1989).

III. LEGAL ARGUMENT.

A. There is no *Respondeat Superior* Liability of an Elected Prosecutor.

The proposed claims against the elected Jon Doe Delta County Prosecutor are groundless. There is no supervisory or *respondeat superior* liability of an elected prosecutor over assistant prosecutors. Section 1983 liability cannot be premised on a theory of *respondeat superior* or the right to control employees. *Hays v. Jefferson Cnty., Ky.*, 668 F.2d 869, 872 (6th Cir. 1982). Plaintiff's effort to sue the County Prosecutor under *respondeat superior* is improper absent allegations of personal involvement on the County Prosecutor's part. *See Monell v. Dep't of Soc. Svcs.*, 436 U.S. 658, 694 (1978); *Petty v. County of Franklin, Ohio*, 478 F.3d 341, 349 (6th Cir. 2007) (In order for a supervisor to be liable under § 1983, there "must be a showing that [he] encouraged the specific incident of misconduct or in some other way directly participated in it.") (quoting *Taylor v. Michigan Dep't of Corrs.*, 69 F.3d 76, 81 (6th Cir. 1995)). Plaintiff's proposed claims against Jon Doe Delta County Prosecutor are clearly futile.

B. State Law Claims Against Jon Doe Delta County Prosecutor are Barred by M.C.L. 691.1407(5).

All state law claims against elected Jon Doe Delta County Prosecutor are barred by governmental immunity as the elected county prosecutor is the highest elective official of the Delta County Prosecutor's Office under M.C.L. 691.1407(5). *See Bischoff v. Calhoun Co. Prosecutor,* 173 Mich. App. 802, 806, 434 N.W.2d 249 (1988).

C. State Law Claims Against Ms. Wickman are Barred by M.C.L. 691.1407.

The proposed state law claims against Ms. Wickman are also barred by governmental immunity. M.C.L. 691.1407 provides in relevant part:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency…is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment…if all of the following are met:
>
> > (a) The officer, employee, member…is acting or reasonably believes he or she is acting within the scope of his or her authority.
> > (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
> > (c) The officer's, employee's, member's…conduct does not amount to gross negligence that is the proximate cause of the injury or damage. M.C.L. 691.1407(2).

In other words, a defendant is immune from tort liability while engaged in the exercise or discharge of a governmental function unless her conduct amounts to gross negligence. M.C.L. 691.1407(7)(a) defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *See Stanton v. Battle Creek*, 466 Mich. 611, 619; 647 N.W.2d 508 (2002). In enacting M.C.L. 691.1407, "the Legislature intended to immunize government agents from liability from ordinary negligence." *Jennings v. Southwood*, 446 Mich. 125, 136; 521 N.W.2d 230, 235 (1994).

In this case, Plaintiff has alleged that Ms. Wickman was a prosecuting attorney for Delta County. There can be no dispute Ms. Wickman was acting in the scope of her authority as an officer of a governmental agency and that the agency was engaged in the exercise or discharge of a

governmental function. Plaintiff must establish that Ms. Wickman was grossly negligent in order to overcome governmental immunity. To the contrary, Plaintiff has not alleged that Ms. Wickman was grossly negligent and there is no allegation in the Complaint that would suggest gross negligence. Therefore, Plaintiff's state law claims against Ms. Wickman are barred by governmental immunity and amendment to the Complaint would be futile.

D. Plaintiff's PWDCRA Cause of Action Fails to State a Claim.

Plaintiff's proposed claim of violation of the Michigan Persons with Disabilities Civil Rights Act (PWDCRA) is also without merit. Plaintiff alleges that his rights were violated pursuant to M.C.L. 37.1402. However, MCL 37.1402 applies only to "educational institutions." *Id.* Clearly, in this case, no educations institutions were involved. As such, Plaintiff's proposed Count 9 is futile. Even if Count 9 states a claim against the Prosecutor Defendants, they are still entitled to governmental immunity as stated above.

E. Prosecutor Defendants are Entitled to Immunity.

As to all of the additional, new federal claims contained in the proposed First Amended Complaint, the Prosecutor Defendants are entitled to eleventh amendment immunity, absolute prosecutorial immunity and qualified immunity.

1. Eleventh Amendment Immunity.

When a county prosecutor makes the decisions related to the issuance of state criminal charges against the plaintiff and the prosecution of the plaintiff, he is acting as an agent of the state rather than of the county. *Cady v. Arenac Cty.*, 574 F.3d 334, 345 (6th Cir. 2009). As a consequence, a county prosecutor is entitled to eleventh amendment immunity. Thus, the federal claims against the Prosecutor Defendants are futile and Plaintiff's Motion should be denied.

2. Absolute Prosecutorial Immunity.

"State prosecutors are absolutely immune from civil liability when acting within the scope of their prosecutorial duties." *Howell v. Sanders*, 668 F.3d 344, 349 (6th Cir. 2012) (citing *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976)). This is true even when the allegations involve "unquestionably illegal or improper conduct," as long as the general nature of the action in question is part of a prosecutor's normal duties. *Cady v. Arenac Cnty.*, 574 F.3d 334, 340 (6th Cir. 2009) (citing *Imbler*, 424 U.S. at 413). Although absolute immunity may leave a genuinely-wronged defendant without civil redress against a prosecutor whose malicious or dishonest actions deprives him of liberty, "the broader public interest would be disserved if defendants could retaliate against prosecutors who were doing their duties." *Adams v. Hanson*, 656 F.3d 397, 401-02 (6th Cir. 2011) (citing *Imbler*, 424 U.S. at 427).

The Supreme Court has endorsed a "functional approach" to determine whether a prosecutor is entitled to this protection. *Prince v. Hicks*, 198 F.3d 607, 611 (6th Cir. 1999) (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993)). Under this approach, the court looks to "the nature of the function performed, not the identity of the actor who performed it." *Id.* The official seeking absolute immunity has the burden of showing that such immunity is appropriate for the function in question. *Id.* (citing *Burns v. Reed*, 500 U.S. 478, 486 (1991)).

Under a functional analysis, a prosecutor is absolutely immune when performing the traditional functions of an advocate. *Kalina v. Fletcher*, 522 U.S. 118 (1997); *Spurlock v. Thompson*, 330 F.3d 791, 797 (6th Cir. 2003). For instance, a prosecutor is absolutely immune for the initiation and pursuit of a criminal prosecution. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976); *Lomaz v. Hennosy*, 151 F.3d 493, 497 (6th Cir. 1998). Further, preparation of indictments,

informations, and applications for search and arrest warrants to be presented to a court are also subject to absolute immunity. *Kalina,* 522 U.S. at 129, 118 S.Ct. 502. In contrast, a prosecutor is not entitled to immunity for investigatory or administrative functions that are normally performed by a detective or police officer. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 276-78 (1993); *Grant v. Hollenbach*, 870 F.2d at 1135 (6th Cir. 1989).

The absolute immunity afforded prosecutors is so expansive, in fact, that it applies even where a prosecutor allegedly manufactures evidence to obtain an indictment; allegedly elicits perjured testimony; allegedly fails to disclose exculpatory evidence; and allegedly destroys and falsifies evidence. *Imbler*, 424 U.S. at 413; *Jones v. Shankland*, 800 F.2d 77, 80 (6th Cir. 1986); *Heidelberg v. Hammer*, 577 F.2d 429, 432 (7th Cir. 1978). Courts have repeatedly emphasized that the intentions of the prosecutor are irrelevant to the inquiry of whether absolute immunity applies. As the Sixth Circuit articulated, for example, "[a]bsolute prosecutorial immunity is not defeated by showing the prosecutor acted wrongfully or even maliciously, or because the criminal defendant ultimately prevailed . . . ." *Grant*, 870 F.2d at 1138.

In the case at issue, Plaintiff's claims in the proposed First Amended Complaint do not avoid prosecutorial immunity. In fact, all of the actions stated in the Complaint against the Prosecutor Defendants are in direct connection with the traditional functions of an advocate and prosecuting attorney.

3. Qualified Immunity.

Even if the Prosecutor Defendants are not entitled to absolute prosecutorial immunity, they still have qualified immunity on all of the proposed federal claims. Qualified immunity insulates government officials from §1983 liability where they are acting in their official capacities if they

do not violate a plaintiff's clearly established statutory or constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. at 818 (internal citations omitted). Where a prosecutor performs a duty typically carried out by a police official, he is cloaked with the same qualified immunity as the officer would enjoy. *Buckley v. Fitzsimmons,* 509 U.S. at 273-74 ("[w]hen the functions of prosecutors and detectives are the same . . . the immunity that protects them is also the same").

"Once [an] official[ ] raise[s] the qualified immunity defense, the plaintiff bears the burden to 'demonstrate that the official [is] not entitled to qualified immunity.' " *LeFever v. Ferguson*, 645 Fed.Appx. 438, 442 (6th Cir. 2016) (quoting *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006)); *See Hermansen v. Thompson*, 678 Fed. Appx. 321, 325 (6th Cir. 2017).

"A government official sued under section 1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014); *See Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015); *Lane v. Franks*, 134 S. Ct. 2369, 2381 (2014). The first prong of qualified immunity analysis is whether the plaintiff has alleged facts showing that defendant's conduct violated a constitutional or statutory right. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). The second prong is whether the right was "clearly established" at the time of the defendant's alleged misconduct. *Id.* Trial courts are permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

The Supreme Court has repeatedly held that the second prong of the qualified immunity analysis "'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (quoting *Saucier v. Katz*, 533 U.S. at

201); *See White v. Pauly*, 137 S. Ct. 548, 552 (2017). Moreover, courts are "not to define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014) (citations and quotations omitted); *see White v. Pauly*, 137 S. Ct. at 552.

F. Plaintiff's Proposed Complaint Fails to State a Claim.

In addition, Plaintiff's federal claims fail to state a claim upon which relief can be granted. Plaintiff's equal protection claim fails to state a claim. "To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment . . . burdens a fundamental right, targets a suspect class, or has no rational basis." *Ctr. for BioEthical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (citations and internal quotation marks omitted). Plaintiff's proposed First Amended Complaint fails to allege disparate treatment, suspect class, or other threshold requirement for an equal protection claim. As such, this claim would be futile.

Moreover, Plaintiff's proposed claim under the eighth amendment also fails to state a claim. There is no factual basis for any eighth amendment claim for cruel and unusual punishment, deliberate indifference to a serious medical need, or otherwise. Plaintiff was not serving a custodial sentence and therefore would not qualify for any relief under the eighth amendment. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

Finally, Plaintiff's claims contained in Count 13 are futile as well. Though impossible to decipher which Defendant Count 13 is directed to, presumably it does not include Ms. Wickman who was an assistant prosecutor and not a policymaker. In the event this claim pertains to the

elected Jon Doe Delta County Prosecutor, the claim fails. Plaintiff has not alleged any facts that support the assertion that the Prosecutor effected unconstitutional policies, customs, supervision and training. Plaintiff's allegations are purely conclusory in nature. This is simply not enough to satisfy a claim in this regard. Accordingly, Plaintiff's proposed claim is futile.

IV. RELIEF REQUESTED.

In light of the above, Defendants respectfully request that this Honorable Court deny Plaintiff's Motion to File First Amended Complaint as to Prosecutor Defendants.

Dated: June 11, 2019

CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.

/s/ Gregory R. Grant

Gregory R. Grant (P68808)
Attorneys for County Defendants
310 W. Front Street, Ste. 221
Traverse City, MI 49684
(231) 922-1888/(231) 922-9888 Fax
ggrant@cmda-law.com

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KURTIS KOBASIC,

Plaintiff,

vs.

DELTA COUNTY and
LAUREN WICKMAN,

Defendants.

HONORABLE ROBERT J. JONKER
U.S. DISTRICT COURT JUDGE

FILE NO. 2:20-cv-113-RJJ-MV

Celeste M. Dunn (P61819)
CELESTE M. DUNN, PLC
Co-Counsel for Plaintiff
P.O. Box 230
Clarkston, MI 48347
Ph: (248) 701-3467
celestemdunnplc@gmail.com

Gregory R. Grant (P68808)
CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.
Attorneys for Defendants
310 W Front St., Ste. 221
Traverse City, MI 49684
Ph: (231) 922-1888
ggrant@cmda-law.com

Charles E. Dunn
CHARLES E. DUNN, PLC
Co-Counsel for Plaintiff
P.O. Box 230
Clarkston, MI 48347
Ph: (248) 701-3467

DEFENDANTS' MOTION SEEKING SUMMARY JUDGMENT UNDER FED. R. CIV. P. 56

NOW COME Defendants Delta County and Lauren Wickman, by and through their attorneys, CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C., by Gregory R. Grant, and hereby asks this Court for summary judgment under Fed. R. Civ. P. 56 against the remaining claims

of the Plaintiff's "First Amended Complaint" **(ECF No. 5, Pg ID 33-51)** for the reasons set forth in the accompanying brief.

Dated: September 28, 2021

CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.

s/Gregory R. Grant
Gregory R. Grant (P68808)
Attorneys for Defendants
310 W. Front St., Ste. 221
Traverse City, MI 49684
(231) 922-1888/(231) 922-9888 Fax
ggrant@cmda-law.com

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KURTIS KOBASIC,

Plaintiff,

vs.

DELTA COUNTY and
LAUREN WICKMAN,

Defendants.

HONORABLE ROBERT J. JONKER
U.S. DISTRICT COURT JUDGE

FILE NO. 2:20-cv-113-RJJ-MV

Celeste M. Dunn (P61819)
CELESTE M. DUNN, PLC
Co-Counsel for Plaintiff
P.O. Box 230
Clarkston, MI 48347
Ph: (248) 701-3467
celestemdunnplc@gmail.com

Charles E. Dunn
CHARLES E. DUNN, PLC
Co-Counsel for Plaintiff
P.O. Box 230
Clarkston, MI 48347
Ph: (248) 701-3467

Gregory R. Grant (P68808)
CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.
Attorneys for Defendants
310 W Front St., Ste. 221
Traverse City, MI 49684
Ph: (231) 922-1888
ggrant@cmda-law.com

BRIEF IN SUPPORT OF
DEFENDANTS' MOTION SEEKING SUMMARY JUDGMENT
UNDER FED. R. CIV. P. 56

*****ORAL ARGUMENT REQUESTED*****

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

QUESTIONS PRESENTED

I. IS THIS COURT PRECLUDED FROM EXERCISING JURISDICTION OVER THIS CASE, WHEREIN PLAINTIFF KOBASIC'S CLAIMS ARE PREDICATED UPON HIS CONTENTION THAT A 2017 STATE-COURT JUDGMENT IS "VOID" AND UNENFORCEABLE?

Plaintiff Kobasic will answer: "No."

Defendants Delta County and Lauren Wickman answer: "Yes."

II. DO RES JUDICATA AND COLLATERAL ESTOPPEL FROM PRIOR STATE-COURT PROCEEDINGS PRECLUDE PLAINTIFF KOBASIC FROM LITIGATING HIS CLAIMS AND THEIR UNDERLYING ELEMENTS IN THIS CASE?

Plaintiff Kobasic will answer: "No."

Defendants Delta County and Lauren Wickman answer: "Yes."

III. ARE PLAINTIFF KOBASIC'S CLAIMS AGAINST THE DEFENDANTS BARRED BY "SOVEREIGN IMMUNITY"?

Plaintiff Kobasic will answer: "No."

Defendants Delta County and Lauren Wickman answer: "Yes."

IV. ARE PLAINTIFF KOBASIC'S CLAIMS AGAINST DEFENDANT WICKMAN ALSO DEFEATED BY BOTH "ABSOLUTE" AND "QUALIFIED" IMMUNITY?

Plaintiff Kobasic will answer: "No."

Defendants Delta County and Lauren Wickman answer: "Yes."

V. ARE PLAINTIFF KOBASIC'S CLAIMS AGAINST DELTA COUNTY DEFEATED BY THE ABSENCE OF ANY CAUSAL CONNECTION BETWEEN A "POLICY" OF DELTA COUNTY AND THE ALLEGED INJURY TO PLAINTIFF KOBASIC?

Plaintiff Kobasic will answer: "No."

Defendants Delta County and Lauren Wickman answer: "Yes."

VI. EVEN APART FROM ANY JURISDICTIONAL BAR, PRECLUSIONS OR IMMUNITIES, DO PLIANTIFF KOBASIC'S CLAIMS FAIL IN THEIR SUBSTANCE?

Plaintiff Kobasic will answer: "No."

Defendants Delta County and Lauren Wickman answer: "Yes."

STATEMENT OF FACTS

Introduction.

Plaintiff, Kurtis Kobasic, claims that he has been denied "due process" (i.e., notice and joinder as a party) in proceedings to euthanize a dog of which he claims to be a co-owner with his mother, Valerie Kobasic. Yet, despite actual notice of (and attendance at) the July 28, 2017, "show cause" hearing that resulted in the court order directing that the dog be euthanized, Plaintiff Kobasic did not move to intervene in the euthanization case until June 12, 2020 - - at which time intervention was "*denied due to its untimeliness and failure to provide satisfactory excuse for the delay in bringing the motion.*" **(Ex L: Order Denying Motion to Intervene).**

Significantly, Plaintiff Kobasic had been present at the original euthanization "show cause" hearing on July 28, 2017, where Valerie Kobasic acknowledged to the state court that *she* was the owner of the dog. Yet Plaintiff Kobasic made no effort to assert his supposed co-ownership until three years later, after Valerie Kobasic had exhausted her appellate options against the euthanization judgment.

Plaintiff Kobasic seeks to have the state court judgment declared "*void*" and "*enjoined.*" Such *de facto* appellate review of the state court judgment is outside the jurisdiction of this Court.

Substantive Facts.

The dog at the center of this case is "Turbo," a "*[r]ed Chinese Chow.*" **(Ex N: Kurtis Kobasic Dep., p. 12).** Plaintiff Kurtis Kobasic has not denied that Turbo killed the dog belonging to a neighbor - - nor has he produced any evidence to do so.

For her part, Valerie Kobasic acknowledged the incident. She testified at the show cause hearing that she "*would undo it if I could.*" **(Ex C: Show Cause Hearing Transcript, pp. 5-6).**

Valerie wrote a letter of apology to Pippin's owners, explaining that "*[i]t broke my heart that this whole thing happened.*" **(Ex M: Valerie Kobasic Dep., p. 21)**.

Plaintiff Kobasic has questioned whether the neighbor's dog was on the neighbor's property at the time of Turbo's fatal attack, so as to bring Turbo within the scope of Michigan's "dangerous animal" statute, M.C.L. 287.322. But again, he offers no evidence. The only evidence in this regard is a set of police photographs introduced at the July 28, 2017, show cause hearing that led to the order for Turbo to be euthanized. **(Ex A: Madelinski Report with Photographs; Ex C: Show Cause Transcript, pp. 20-21)**. These photographs, from a police report by Detective Brian Madelinski, show the deceased dog ("Pippin") still tethered to the front of his owner's home. **(Ex A: Madelinski Report with Photographs, photo pages)**. Det. Madelinski testified to the accuracy of his photographs. **(Ex C: Show Cause Hearing Transcript, p. 21)**.

Plaintiff Kobasic claims not to remember whether Turbo had run at large previously. **(Ex N: Kurtis Kobasic Dep., pp. 33-34, 46)**. But Valerie Kobasic has acknowledged that Turbo had been at large in the neighborhood more than once. **(Ex M: Valerie Kobasic Dep., pp. 12-13)**. Indeed, at the show cause hearing, Valerie Kobasic called her daughter, Kaylee Mary Kobasic, as a witness. Kaylee testified to having "*been one of the people called to go get him [Turbo]*" on at least *five* occasions that Turbo had gotten loose. **(Ex C: Show Cause Hearing Transcript, pp. 71-73)**.

Valerie Kobasic specifically acknowledged that Turbo got loose on the day that Pippen was killed. Valerie returned home from work on the day of the attack to discover Turbo "*across the street*" from her house. **(Ex C: Show Cause Hearing Transcript, p. 79; Ex M: Valerie Kobasic Dep., pp. 19, 23)**. Because Valerie was at work and Kurtis was not home, Valerie has no idea how Turbo got out. **(Ex C: Show Cause Hearing Transcript, p. 81)**. Moreover, Valerie

acknowledges that Turbo was not properly licensed on the date of the incident. His license "*was expired*" and "*six months out of date,*" because Valerie "*didn't go and get it renewed.*" **(Ex C: Show Cause Hearing Transcript, pp. 85, 93)**.

Having retrieved Turbo, Valerie (*who was employed by the City of Escanaba Public Safety Department*), received a telephone call from her supervisor directing her to bring Turbo to the Department because he had killed the neighbor's dog. **(Ex C: Show Cause Hearing Transcript, pp. 78-80)**. She voluntarily walked Turbo to the Department on a leash, where she was directed to take him to the dog pound. **(Ex C: Show Cause Hearing Transcript, p. 81)**.

Investigating the incident that day, Detective Madelinski had been told by a witness, Matthew Bennett, that an orange colored Chow dog had been running loose and had become involved in an altercation with a small black dog - - wherein the Chow ultimately appeared to be eating the smaller dog. **(Ex A: Madelinski Report, p. 2)**. Bennett directed Detective Madelinski to the house where the Chow lived. **(Ex A: Madelinski Report, p. 2)**.

At the show cause hearing, Bennett testified again that the dogs had been involved in a "*tackle*" in which the larger orange dog appeared to attack and then eat the smaller black dog. **(Ex C: Show Cause Hearing Transcript, pp. 10-16)**. Bennett recognized the larger dog as a "*Chow*" and had "*seen it wandering around the town lots of times.*" **(Ex C: Show Cause Hearing Transcript, pp. 10-11)**.

Plaintiff Kobasic has questioned the propriety of Bennett as a child witness. But Bennett's accounts are consistent. Moreover, the judge at the show cause hearing did the standard inquiry regarding Bennett's understanding of truthfulness - - which Valerie Kobasic acknowledged as satisfactory **(Ex C: Show Cause Hearing Transcript, pp. 8-9)**.

More importantly, Valerie Kobasic offered no evidence at the hearing to contradict Bennett's account. Nor has Kurtis Kobasic offered any contrary evidence in the present case.

Plaintiff Kurtis Kobasic's claims are all predicated upon the prosecutor in the euthanization case, Defendant Lauren Wickman, not having sent Plaintiff Kobasic notice of the proceedings. Referencing M.C.L. 287.286a and M.C.L. 287.321 et seq., Plaintiff Kobasic asserts that he is a statutory owner of the dog. **(ECF No. 5, Pg ID 36, Complaint, ¶ 17)**. Kobasic asserts that notice to all such "owners" is statutorily required. Kobasic specifically condemns Defendant Wickman for not having "*investigated the ownership of dog Turbo*" yet having "*attested*" to Valerie Kobasic being Turbo's owner. **(ECF No. 5, Pg ID 36-37, First Amended Complaint, ¶ 18)**.

It is not disputed that Wickman filed the Complaint identifying Turbo as a dangerous animal and requesting a summons for Valerie Kobasic "*to appear in court and show cause why the animal should not be destroyed.*" **(Ex B: Complaint and Summons Regarding Dangerous Animal)**. But nowhere in the one-page Complaint does Wickman make any attestation regarding ownership. The only statements of "fact" in the Complaint are that "*Turbo was running unaccompanied*" and "*attacked and killed another dog*," i.e., Turbo "*caused serious injury or death to a person or a dog*" in violation of M.C.L. 287.322. **(Ex B: Complaint and Summons Regarding Dangerous Animal)**. *These* are facts that Valerie Kobasic has *conceded* - - and that Kurtis Kobasic has never offered any evidence to dispute.

Rather than state any other "fact," Wickman simply referenced the report of Detective Madelinski, #17-3926, which made clear on its face that Madelinski was the investigator and author. **(Ex B: Complaint and Summons Regarding Dangerous Animal; Ex A: Madelinski Report)**. It is *Madelinski's report*, not the Complaint, that identifies Valerie Kobasic as "*the owner*

of the orange Chow." **(Ex A: Madelinski Report, p. 2)**. The Complaint signed by Wickman never makes such a statement, much less "attests" to it.

Prosecutor Wickman did not even identify Valerie Kobasic as the owner at the show cause hearing. Kobasic herself told the Court at the outset:

> I'd like to tell you that *my dog* got out while I was at work. And my son was on the lake - - and we've have no idea how he got out of the house. And I am so sorry that this happened. And I have apologized and if I could undo it I would do. If I could fix it I would.
>
> **(Ex C: Show Cause Hearing Transcript, pp. 5-6, *emphasis added*)**.

It was the *state district court judge* who finally asked Valerie Kobasic whether she was "*the owner*" of Turbo - - to which Valerie Kobasic responded, "*Yes, I am.*" **(Ex C: Show Cause Hearing Transcript, p. 78)**. Valerie then described that she purchased Turbo in 2015 - - making no mention of Kurtis Kobasic in this regard. **(Ex C: Show Cause Hearing Transcript, p. 78)**.

Valerie did testify that Kurtis was living with her at her residence at the time, such that he would be occupying the same premises as Turbo. **(Ex C: Show Cause Hearing Transcript, p. 82)**. But there is no evidence in the record that Prosecutor Wickman knew of Kurtis or his residency at the time she filed the Complaint or at any time before Valerie Kobasic's testimony at the hearing.

As explained by Wickman, "*I did not do any investigation.*" **(Ex O : Wickman Dep., p. 66)**. In her words, "*[m]y role as a prosecutor is not to investigate*." **(Ex O: Wickman Dep., p. 31)**. "*That is the role of law enforcement*." **(Ex O: Wickman Dep., p. 31)**. Wickman "*do[es] not go out to the scene or interview witnesses*." **(Ex O: Wickman Dep., p. 31)**. She relies "*on the investigating officers to do so*." **(Ex O: Wickman Dep., p. 31)**. This includes any

investigation with regard to any question about "ownership" of a dog. **(Ex O: Wickman Dep., p. 20)**.

Accordingly, Wickman brought the prosecution against Turbo based upon "*the information that was provided . . . to us by the City of Escanaba Department of Public Safety*." **(Ex O: Wickman Dep., p. 5)**. She "*reviewed the police report and relied on the Escanaba Public Safety investigation*." **(Ex O: Wickman Dep., p. 10)**. Seeing the photos taken by Detective Madelinski, she decided that "*the police report itself*" provided "*enough information for me to rely on*." **(Ex O: Wickman Dep., pp. 19, 23)**. She signed the Complaint by express reference to Madelinski's report, #17-3926. **(Ex B: Complaint and Summons Regarding Dangerous Animal)**.

As Wickman also points out, her signature was notarized, but not sworn under oath. **(Ex O: Wickman Dep., p. 6)**. In her mind, "*we did not view it as we were testifying or vouching for the information in that report*" but, rather, "*we were relying on the information provided in the report by the investigating officers*." **(Ex O: Wickman Dep., p. 30)**. Again, there is no statement in the Complaint attesting to Valerie Kobasic being the "owner" of Turbo *or* to Valerie Kobasic being the only "owner" of Turbo.

To the extent that discovery in this case later revealed other incident reports of the Escanaba Public Safety Department suggesting that Kurtis Kobasic had an ownership interest in Turbo, it is the unrebutted testimony of Wickman that she never saw these other reports until after signing the Complaint to initiate the euthanization case. **(Ex O: Wickman Dep., pp. 16, 45-46)**. In Wickman's words, "*[b]ased on the investigation that was provided to me prior to the filing of that Complaint, Valerie Kobasic was the owner*." **(Ex O: Wickman Dep., p. 61)**.

Moreover, Wickman points out that ownership is not determined by what any police report may say. **(Ex O: Wickman Dep., p. 44)**. Rather, it is a legal conclusion that is to be resolved by

the court - - and Wickman still contests Plaintiff Kurtis Kobasic's claim to ownership. **(Ex O: Wickman Dep., pp. 27, 61, 66)**.

Significantly, Plaintiff Kurtis Kobasic was fully aware of the July 28, 2017, show cause hearing, because he was told about it by Valerie Kobasic. **(Ex N: Kurtis Kobasic Dep., pp. 38-39)**. As shown by the transcript and acknowledged by Kurtis, he spoke up from the gallery during Valerie's testimony. **(Ex C: Show Cause Hearing Transcript, p. 90; Ex N: Kurtis Kobasic Dep., p. 44)**. Yet, despite Kurtis being there, Valerie never called him as a witness - - even though she had called her daughter Kaylee. Valerie has acknowledged that "*I could have called anybody.*" **(Ex M: Valerie Kobasic Dep., p. 23)**. But she never called Kurtis as a witness or ever suggested that he had any role in the purchase or ownership of Turbo - - even though she herself specifically testified regarding both.

The state district court issued it's written "*Decision and Order*" on August 11, 2017. Based upon the evidence presented, the state district court judge made the finding that "*Valerie Kobasic owned Turbo*" and that Turbo "*without a license . . . ran at large unaccompanied by its owner*" and "*killed another dog named Pippen*" that was leashed on nearby property. **(Ex D: Decision and Order, p. 1)**. Acknowledging that Valerie Kobasic had presented testimony that Turbo was not aggressive, the judge found that "*Turbo has a history of running at large*" and the judge was "*not comforted by Ms. Kobasic's assurances that Turbo will never run at large again.*" **(Ex D: Decision and Order, p. 2)**. Finding that Turbo had violated both M.C.L. 287.286a (*running at large without his owner and without a license*) and M.C.L. 287.322 ("*caused the death of a dog*"), the judge ordered that Turbo be euthanized. **(Ex D: Decision and Order, p. 3)**.

Valerie Kobasic appealed to the state circuit court, which issued an eleven page decision affirming the state district court order. **(Ex E: Circuit Court Opinion and Order, 7/13/18)**.

Valerie applied for leave to appeal to the Michigan Court of Appeals, which was denied. **(Ex F: COA Order Denying Application, 4/11/19; Ex G: COA Order Denying Reconsideration, 5/28/19)**. She then applied for appeal to the Michigan Supreme Court, which was also denied. **(Ex H: S. Ct. Order Denying Application, 10/29/19; Ex I: S. Ct. Order Denying Reconsideration, 2/4/20)**.

It was not until four months after the final Supreme Court order - - two years and ten months after the district court ordered that Turbo be euthanized - - that Plaintiff Kobasic filed his motion seeking to intervene in the case, by asserting his supposed ownership of Turbo. **(Ex J: Kobasic Motion to Intervene)**. The state district court denied this motion "*due to its untimeliness and failure to provide satisfactory excuse for the delay in bringing the motion.*" **(Ex L: Order Denying Motion to Intervene)**.

As the state district court judge observed, "*the chronology of events is important,*" and "*I find it very concerning that an owner who is present for proceedings that would potentially dispose of his dog, would chose to remain silent during the whole process,*" until "*the 11th hour, after all the appellate remedies are exhausted.*" **(Ex K: Motion to Intervene Transcript, 7/22/20, pp. 18, 22)**. The judge also highlighted the testimony from the show cause hearing in which Valerie Kobasic identified herself as Turbo's owner. **(Ex K: Motion to Intervene Transcript, pp. 23-26)**.

In this Court, Plaintiff Kobasic now belatedly seeks to justify his ordinate delay by claiming that he was not aware "*of his legal rights regarding Turbo*" until December 2019. But even then he never explains why he, as a supposed owner, did not seek to learn his rights earlier or why it still took another six months after he allegedly heard of his "rights" in December 2019 before his attempt to intervene in June 2020.

Earlier in this litigation, Defendants Delta County and Lauren Wickman sought dismissal under Fed. R. Civ. P. 12(b)(1) and (6). **(ECF No. 9, Pg ID 60-92, Motion and Brief Seeking Dismissal)**. By order of November 18, 2020, this Court dismissed Plaintiff Kobasic's "*substantive due process*" claim (Count III) and his state-law claim for "*conversion*" (Count VI). **(ECF No. 28, Pg ID 468, Order, 11/18/20)**. It remains the position of the Defendants that Plaintiff Kobasic's remaining claims for unlawful "*seizure*" under the Fourth Amendment (Count I), "*procedural due process*" under the Fourteenth Amendment (Count II), "*municipal liability*" (Count IV) and *declaratory/injunctive relief* (Count V) are unsustainable.

It is the most fundamental position of Defendants Delta County and Lauren Wickman that this Court is barred by the ***Rooker-Feldman*** doctrine from exercising jurisdiction over Plaintiff Kobasic's case. Regardless of label, Plaintiff Kobasic's claims are all predicated upon the assertion that the state district court judgment to euthanize Turbo should be reviewed and declared "*void*." **(ECF No. 5, Pg ID 33, 49, First Amended Complaint, ¶¶ 2, 89)**.

Moreover, even if this Court has jurisdiction, the state-court rulings also present both *res judicata* and collateral estoppel bars to Plaintiff Kobasic's claims in the present case.

It is the further position of Delta County and Defendant Wickman that they both have sovereign immunity against Plaintiff Kobasic's claims, with Defendant Wickman being entitled to prosecutorial and qualified immunities as well. The claims presented by Plaintiff Kobasic also fail substantively.

STANDARD OF REVIEW

Summary judgment should be granted "where there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The mere existence of *some* alleged factual dispute between the parties will defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247-8 (1986), *emphasis in original*. While the court must view the facts in the light most favorable to the non-moving party, the court is not obligated to treat "a naked assertion" as establishing any "fact." ***Wysong v. City of Heath***, 260 Fed. Appx. 848, 857 (6th Cir. 2008).

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFF KOBASIC'S CASE.

In their original motion seeking dismissal under Fed. R. Civ. P. 12(b)(1) and (6), Defendants Delta County and Lauren Wickman argued that this Court lacked subject matter jurisdiction by force of the ***Rooker-Feldman*** doctrine. **(ECF No. 9, Pg ID 70-73, Defendants' Rule 12 Brief, pp. 3-5)**. This Court's order of November 18, 2020 denied dismissal on this ground, without explanation. **(ECF No. 28, Pg ID 468, Order, 11/18/20)**. But the ***Rooker-Feldman*** doctrine manifestly applies to bar Plaintiff Kobasic's case.

The ***Rooker-Feldman*** doctrine recognizes that federal district courts do not have appellate jurisdiction over state court judgments. ***RLR Investments, LLC v. City of Pigeon Forge, Tenn.***, 4 F.4th 380, 385 (6th Cir. 2021). The doctrine bars "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the [federal] district court proceedings commenced and inviting district court review and rejection of those judgments." ***Id.***, at 387. The doctrine bars not only named parties to the state-court proceedings from seeking federal review, but also bars such attempts by persons having "privity" with the loser in the prior state-court case. ***McCormick v. Braverman***, 451 F.3d 382, 396 (6th Cir. 2006).

Under Michigan law, "[t]o be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." ***Adair v. Michigan***, 470 Mich. 105, 122, 680 N.W.2d 386, 396 (2004) (discussing *res judicata*), accord ***Au Sable River Trading Post, LLC v. Dovetail Solutions, Inc.***, 874 F.3d 271, 274 (6th Cir. 2017). In particular, privity encompasses "mutual or successive relationships to the same right of property where such an identification of interest of one person with another as to represent the same legal right." ***Sloan v. City of Madison Heights***, 425 Mich. 288, 295, 389 N.W.2d 418, 422 (1986). See

also ***Saylor v. United States***, 315 F.3d 664, 668-9 (6th Cir. 2003) (privity by way of successive interests in property).

The foundational factual predicate for Plaintiff Kurtis Kobasic's claims is his supposed status as a co-owner of Turbo with Valerie Kobasic. Assuming he is such a co-owner, he stands in privity with Valerie Kobasic, because they hold a "mutual" relationship to the same property (i.e., Turbo). Therefore, he is bound by the ***Rooker-Feldman*** doctrine.

All of Plaintiff Kobasic's claims - - those seeking damages, and those seeking declaratory/injunctive relief - - rest upon this proposition that the state district court order to euthanize Turbo is "*void*" as an improper seizure of Plaintiff Kobasic's property interest in Turbo without proper notice. Thus, Plaintiff Kobasic falls within the "narrow" application of ***Rooker-Feldman*** - - i.e, Plaintiff Kobasic is a state-court loser (*by privity with Valerie Kobasic*), who is complaining of injury caused by a state court judgment rendered before he filed the present case and inviting "review and rejection" of the state-court judgment. This is precisely the type of case barred by the ***Rooker-Feldman*** doctrine.

This is exemplified by the Sixth Circuit's decision in ***Hall v. Callahan***, 727 F.3d 450 (6th Cir. 2013). In the ***Hall*** case, the "Plaintiffs sought declaratory relief to void [a state court] judgment and also injunctive relief to prevent Defendants from enforcing [that] judgment." ***Hall***, 727 F.3d at 453. In that circumstance, the Sixth Circuit held the ***Rooker-Feldman*** doctrine to bar the district court from exercising jurisdiction over the case. ***Id.***, at 453-4.

Plaintiff Kobasic seeks the same relief as the plaintiffs in ***Hall***. His case should likewise be dismissed. This Court lacks subject matter jurisdiction over it.

II. RES JUDICATA AND COLLATERAL ESTOPPEL PRECLUDE PLAINTIFF KOBASIC'S CLAIMS.

In federal case law, the label "res judicata" encompasses two distinct preclusion concepts: "issue preclusion" (also known as collateral estoppel) and "claim preclusion." ***Migra v. Warren City School Dist. Bd. of Education***, 465 U.S. 75, 77 (1984) at n. 1, ***Taylor v. Sturgell***, 553 U.S. 880, 892 (2008). "[A] federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." ***Migra***, 465 U.S. at 81.

The state district court litigation regarding Turbo resulted in a final judgment for Turbo's destruction. That judgment was affirmed on appeal. Under the controlling Michigan law, that judgment precludes Plaintiff Kobasic from litigating in this case the claims he presents and the factual assertions upon which those claims are based.

A. Plaintiff Kobasic's claims are barred by res judicata.

Michigan follows "a broad approach to the doctrine of res judicata" which "bars not only claims already litigated but also every claim arising from the same transaction that the parties, exercising reasonable diligence could have raised but did not." ***Adair v. Michigan***, 470 Mich. 105, 121, 680 N.W.2d 386, 396 (2004), ***Ludwig v. Township of Van Buren***, 682 F.3d 457, 460 (6th Cir. 2012). Res judicata "bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was or could have been resolved in the first." ***Adair***, 470 Mich. at 121, 680 N.W.2d at 396.

The state district court case involving Turbo was decided on its merits, resulting in the order that Turbo be euthanized. As described above, Plaintiff Kobasic is in privity with Valerie Kobasic, who litigated the prior case. Thus, both the first and second criteria for application of *res judicata* against Plaintiff Kobasic's claims are satisfied.

The third criteria is satisfied as well. The existence and/or significance of Kurtis Kobasic's supposed "ownership" interest in Turbo could have been raised and resolved in the state-court case.

Plaintiff Kobasic's remaining claims allege unlawful "seizure" under the Fourth Amendment (Count I), denial of "procedural due process" under the Fourteenth Amendment (Count II), municipal liability under federal law (Count IV) and declaratory/injunctive relief against a judgment that is supposedly "void" for failure to join a "necessary party" under the Michigan Court Rules (Count V). It cannot be disputed that Michigan courts hear and resolve such claims. ***Novelties, Inc. v. City of Berkley***, 259 Mich. App. 1, 23-4, 672 N.W.2d 351, 364-5 (2003) (*Fourth Amendment claim for seizure of fireworks*), ***York v. Civil Service Commission***, 263 Mich. App. 694, 702-4, 689 N.W.2d 533, 539-40 (2004) (*procedural due process under the Fourteenth Amendment*), ***Johnson v. Vanderkooi***, 502 Mich. 751, 762-776, 918 N.W.2d 785, 792-9 (2018) (*municipal liability under federal law*), ***Gordon Food Service, Inc. v. Grand Rapids Material Handling Co.***, 183 Mich. App. 241, 454 N.W.2d 137 (1989) (*necessary joinder under Michigan law*).

All of the claims raised by Plaintiff Kobasic could have been raised and resolved in the prior state-court litigation regarding Turbo.[1] Because the claims now asserted by Plaintiff Kobasic could have been asserted by his privy, Valerie Kobasic, in the state-court litigation, Plaintiff Kobasic is precluded by *res judicata* from asserting those claims in this Court.

B. Plaintiff Kobasic's factual assertions are barred by collateral estoppel.

[1] This is also true of Plaintiff Kobasic's already-dismissed claims for "substantive due process" under the Fourteenth Amendment, ***People v. DeJonge***, 179 Mich. App. 225, 238, 449 N.W.2d 899, 905 (1989) and "conversion," ***Aroma Wines & Equipment, Inc. v. Columbian Distribution Services, Inc.***, 497 Mich. 337, 871 N.W.2d 136 (2015).

"Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." ***Leahy v. Orion Township***, 269 Mich. App. 527, 530, 711 N.W.2d 438, 441 (2006). Traditionally, the doctrine also required "mutuality of estoppel," but this has been abolished in the context where collateral estoppel is asserted defensively. ***Monat v. State Farm Ins. Co.***, 469 Mich. 679, 691-2, 677 N.W.2d 843, 850-1 (2004).

Plaintiff Kobasic claims are predicated on his contention that the prior state-court judgment is "void" for denial of due process, such that he should be afforded the opportunity to litigate the underlying issue of Turbo being a dangerous animal. But Plaintiff Kobasic's privy, Valerie Kobasic, already litigated due process arguments and the dangerousness of Turbo in the state district court and on appeal in the state circuit court. **(Ex C: Show Cause Hearing Transcript, e.g., pp. 82-84, 88; Ex E: Circuit Court Appellate Opinion, pp. 2-7 [*due process*] and pp. 8-10 [*dangerousness*])**. Both courts ruled against Valerie on these issues. Such resolution applies against Plaintiff Kobasic as Valerie's privy. He cannot relitigate those issues in this Court.

III. PLAINTIFF KOBASIC'S CLAIMS AGAINST BOTH DEFENDANTS ARE BARRED BY "SOVEREIGN IMMUNITY."

The States retain their pre-Constitution sovereign immunity, except to the extent that such immunity was surrendered under the expressed terms of the Constitution itself. ***Alden v. Maine***, 527 U.S. 706, 713, 715 (1999), ***Idaho v. Coeur d'Alene Tribe of Idaho***, 521 U.S. 261, 267 (1997). The Eleventh Amendment was adopted to confirm this reality. ***Hess v. Port Authority Trans-Hudson Corp.***, 513 U.S. 30, 39-40 (1994). "Unless a State consents to be sued, and enjoys

immunity from private lawsuits seeking damages." ***Ermold v. Davis***, 936 F.3d 429, 433 (6th Cir. 2019).

"[B]ecause lawsuits against state officials in their official capacity equate to lawsuits against the State itself, . . . sovereign immunity shields state officials as well." ***Id.*** Although the doctrine does not extend to counties or county officials *per se*, "when acting on a particular issue or in a particular area, a local government official or entity may serve as an alter ego or arm of the state and, in that capacity, it may receive Eleventh Amendment protection." ***Brent v. Wayne County Department of Human Services***, 901 F.3d 656, 681 (6th Cir. 2018).

The Sixth Circuit has already addressed sovereign immunity with regard to a county prosecutor in Michigan. In ***Cady v. Arenac County***, 574 F.3d 334 (6th Cir. 2009), the court held that Michigan's county prosecutors act as an agent of the State of Michigan when bringing actions to enforce penalties under state statutes. ***Id.***, at 343. The Michigan Court of Appeals has agreed. ***Crawford v. County of St. Clair***, No. 301413, 2012 WL 1060614, at *2 (Mich. Ct. App. March 29, 2012).

There can be no dispute that an action brought by a county prosecutor under M.C.L. 287.286a and M.C.L. 287.322 is brought to enforce Michigan's statutory law as enacted by the State's Legislature. The euthanization proceedings regarding Turbo have *not* been pursued by reference to any *county* ordinance but, rather, only by reference to the State statutes. Therefore, Defendant Wickman was acting as an agent of the State, and both Delta County and Wickman in official capacity have sovereign immunity against Plaintiff Kobasic's claims.

Two further points are critical in this regard.

First, Defendant Wickman has been sued *only* in her "official capacity." Neither the original Complaint filed by Plaintiff Kobasic **(ECF No. 1, Pg ID 1-16, Complaint)** nor the First

Amended Complaint **(ECF No. 5, Pg ID 33-51, First Amended Complaint)** make any reference to Wickman in her "individual" or "personal" capacity.

For decades, the Sixth Circuit enforced a presumption that an official was sued only in their "official capacity," absent expressed notice to the contrary in the Complaint. ***Northcott v. Plunkett***, 42 Fed. Appx. 795, 796 (6th Cir. 2002), citing ***Wells v. Brown***, 891 F.2d 591 (6th Cir. 1989). The blanket presumption has been replaced with a "course of proceedings" analysis. ***Moore v. City of Harriman***, 272 F.3d 789, 773-4 (6th Cir. 2001). But nothing in the "course of proceedings" in the present case has afforded any specific notice that Plaintiff Kobasic is asserting claims against Wickman in "individual" or "personal" capacity. Indeed, failure to make such designation in two successive complaints only confirms that no "individual"/"personal" capacity claim has been asserted. Therefore, sovereign immunity is a complete defense to Wickman in this case, just as it is for Delta County itself.

Second, Plaintiff Kobasic's demand for declaratory/injunctive relief does not escape sovereign immunity. The doctrine of ***Ex parte Young***, 209 U.S. 123 (1908) "allows plaintiffs to bring claims for prospective relief against state officials sued in their official capacity to prevent future federal constitutional or statutory violations," ***Boler v. Early***, 865 F.3d 391, 412 (6th Cir. 2017). But Plaintiff Kobasic's claim falls outside the scope of this doctrine.

Regardless of how a plaintiff's claims are labeled or characterized by a complaint, invocation of ***Ex parte Young*** will be rejected if the relief sought is "in reality" retroactive or monetary in nature. ***Michigan Corrections Organization v. Michigan Department of Corrections***, 774 F.3d 895, 905 (6th Cir. 2014). The ***Ex parte Young*** doctrine does not extend to "retroactive relief." ***Boler***, 865 at 412, ***Green v. Mansour***, 474 U.S. 64, 68 (1985).

Plaintiff Kobasic's demand for declaratory/injunctive relief is manifestly retroactive. Kobasic seeks declaration that the 2017 judgment of the state district court is "*void*" and, on that basis, he demands an injunction against its enforcement. This falls outside the limits of ***Ex parte Young***.

The ***Green*** case is particularly instructive. The ***Green*** plaintiffs were recipients of federal aid to families with dependent children, who claimed that the State of Michigan had wrongly calculated the amount of their benefits. They sought a declaratory judgment that the State's past calculations had been unlawful. The Supreme Court held such declaration to be prohibited by the Eleventh Amendment. As explained by the Court:

> There is a dispute about the lawfulness of the respondent's past actions, but the Eleventh Amendment would prohibit the award of money damages or restitution if that dispute were resolved in favor of the petitioners. . . . [T]he issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment.
>
> ***Green***, 474 U.S. at 73.

Plaintiff Kobasic seeks the declaration that the state district court order for the euthanization of Turbo is "void" and unenforceable as a consequence of *past actions* by Defendant Wickman that allegedly violate of the Fourth and Fourteenth Amendments. This is precisely the sort of retroactive relief that was rejected by the Supreme Court in ***Green***.

In short, the sovereign immunity recognized by the Eleventh Amendment defeats all of Plaintiff Kobasic's claims against Delta County and Defendant Wickman. Therefore, the Defendants are entitled to summary judgment in their favor against Plaintiff Kobasic's claims.

IV. EVEN ASSUMING *ARGUENDO* THAT PLAINTIFF KOBASIC PRESENTS "INDIVIDUAL CAPACITY" CLAIMS

AGAINST DEFENDANT WICKMAN, SHE REMAINS IMMUNE.

A. Defendant Wickman has absolute prosecutor immunity.

A prosecuting attorney has "absolute immunity for the initiation and pursuit of a criminal prosecution." ***Buckley v. Fitzsimmons***, 509 U.S. 259, 269 (1993). In particular, "[a] prosecutor's decision to file a criminal complaint and seek an arrest warrant and the presentation of these materials to a judicial officer falls squarely within the aegis of prosecutorial immunity." ***Ireland v. Tunis***, 113 F.3d 1435, 1446 (6th Cir. 1997).

This immunity is not confined to criminal prosecutions. Prosecutors are also absolutely immune for alleged constitutional violations when pursuing a civil action, "as long as the prosecutors were functioning in an enforcement role and acting as advocates for the state in initiating and prosecuting judicial proceedings." ***Cooper v. Parrish***, 203 F.3d 937, 947 (6th Cir. 2000).

Carried over from the common law, this immunity applies against suits for "malicious prosecution" and "defamation," and extends to "the knowing use of false testimony before a grand jury in trial." ***Burns v. Reed***, 500 U.S. 478, 485 (1991). Even suppression of exculpatory evidence in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963) falls within the scope of this "absolute immunity." ***Koubriti v. Convertino***, 593 F.3d 459, 470 (6th Cir. 2010).

The fact that a plaintiff "ascribes impure and malicious motives to the prosecutor is of no consequence, for the absolute immunity provides complete protection from judicial scrutiny of the motives of the prosecutor's actions." ***Ireland***, 113 F.3d at 1447. A prosecutor retains absolute immunity even if acting in a malicious conspiracy with others to harm the person targeted by the

prosecution. ***Grant v. Hollenbach***, 870 F.3d 1135, 1138 (6th Cir. 1989), ***Lomaz v. Hennosy***, 151 F.3d 493, 498-9 (6th Cir. 1997) at n. 7.

Defendant Wickman initiated the proceedings for the euthanization of Turbo by filing a Complaint under state statutes prescribing penalties for dogs running at large and causing injury or death to another dog. The owner of such a dog is subject to criminal prosecution. M.C.L. 287.286 (*misdemeanor*), M.C.L. 287.323 (*felony*). But even if this Court deems the action specifically seeking the destruction of Turbo to be "civil," prosecutor immunity still applies for the benefit of Defendant Wickman, as just described. ***Cooper***, 203 F.3d at 947.

In response to the Defendant's previous Rule 12 motion, Plaintiff Kobasic argued that Defendant Wickman lost her immunity when she supposedly "*attested to facts*" in the Complaint "*that Turbo was a dangerous animal and that all the owners were identified.*" **(ECF No. 14, Pg ID 344, Plaintiff's Response to Motion, p. 20)**. But review of the Complaint shows that Wickman did *not* attest that Turbo "was a dangerous animal" or that "all the owners were identified." The Complaint states only that Turbo "*attacked and killed another dog*" - - which neither Valerie Kobasic nor Plaintiff Kurtis Kobasic has ever denied or rebutted.

Furthermore, Wickman never made any statement regarding the ownership of Turbo. Rather, she specifically deferred to the report of Officer Madelinski. That report states only that "*Valerie Kobasic . . . is the owner of the orange Chow*," which was Valerie's own testimony to the state district court judge upon his direct questioning. **(Ex C: Show Cause Hearing Transcript, p. 78)**.

Moreover, absolute prosecutor immunity is not lost when a prosecutor files - - even under oath - - a complaint in which the prosecutor does not claim personal knowledge of the factual allegations. ***Drake v. Howland***, 463 Fed. Appx. 523, 526 (6th Cir. 2012). In ***Howland***, the

prosecutor swore to the allegations of a criminal complaint "upon information and belief." ***Id.*** Defendant Wickman did nothing more when she referenced Madelinski's report. Wickman never claimed personal knowledge. Detective Madelinski's report clearly identifies Madelinski as its author.

Even assuming Plaintiff Kobasic's allegations regarding co-ownership of Turbo to be true, failure by Wickman to send notice to "all" of the supposed "owners" of Turbo is simply part of initiating the case. Wickman has absolute immunity for such actions. Therefore, Wickman has immunity against Plaintiff Kobasic's claims.

B. Defendant Wickman has qualified immunity.

"[G]overnmental officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known." ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982). In this context, a right is clearly established only where existing case law precedents demonstrate the existence of the right to be "beyond debate" such that "every reasonable official would have understood that what he is doing violates that right." ***Mullenix v. Luna***, 577 U.S. 7, 11-12 (2015).

It is understood that the Constitution protects against deprivation of property without due process of law under both the Fifth and Fourteenth Amendments. For purposes of qualified immunity analysis, however, the Supreme Court has emphasized that courts must not define "clearly established law" at "a high level of generality" but, rather, must focus on whether the "*particular*" conduct at issue is established to be violative of law. ***Mullenix***, 577 U.S. at 12, ***District of Columbia v. Wesby***, 583 U.S. ___, 138 S. Ct. 577, 590 (2018).

Plaintiff Kobasic emphasizes that the Michigan statutes define "owner" broadly to include persons who merely care for or harbor a dog. M.C.L. 287.261(2)(c) and M.C.L. 287.321(c). But the statutes under which proceedings were pursued against Turbo, M.C.L. 287.286a and M.C.L. 287.322 speak only of a summons to "the owner" in the singular, not to "every" owner or "any and all" owners. M.C.L. 287.286a, M.C.L. 287.322.

Moreover, there is no evidence to rebut the testimony of Wickman that her only knowledge regarding the ownership of Turbo at the time she filed the Complaint was the specific report of Detective Madelinski identifying Valerie Kobasic as the owner. Nothing said at the show cause hearing would alter this understanding. Valerie Kobasic herself repeatedly identified Turbo as "*my dog.*" **(Ex C: Show Cause Hearing Transcript, pp. 5-6, 98-99)**. When asked by the judge if she was "*the owner of a dog - - Turbo[?],*" answered "*Yes, I am.*" **(Ex C: Show Cause Hearing Transcript, pp. 78-79)**.

There is no "clearly established" law that would have told Wickman, that she could not initiate and pursue proceedings to have Turbo euthanized based upon the identification of ownership provided by Detective Madelinski and confirmed by Valerie Kobasic herself. Nothing in Michigan or federal law require any additional investigation by the prosecutor.

In the absence of any clearly established law (or any demonstrable factual knowledge) to warn Defendant Wickman that she would violate the law by commencing proceedings regarding Turbo by reference to Valerie Kobasic alone, Wickman has qualified immunity against Plaintiff Kobasic's claims. Therefore she is entitled to summary judgment.

V. DELTA COUNTY HAS NO LIABILITIY UNDER FEDERAL LAW, BECAUSE NONE OF THE ALLEGEDLY UNLAWFUL ACTIONS RESULTED FROM ANY "POLICY" OF DELTA COUNTY.

In recognizing the potential liability of local government units under 42 U.S.C. §1983, the Supreme Court conditioned liability upon injury having arisen from the adoption of a policy by "that body's officers." ***Monell v. Dept. of Social Services of City of New York***, 436 U.S. 658, 690 (1978). "[M]unicipal liability must rest upon a direct causal connection between the policies or customs of the [municipality] and the constitutional injury to the plaintiff. ***Gray v. City of Detroit***, 399 F.3d 612, 617 (6th Cir. 2005), see also ***City of Canton, Ohio v. Harris***, 489 U.S. 378, 385 (1989). As the Supreme Court has reiterated:

> In short, a municipality can be sued under §1983, but it cannot be held liable unless a *municipal* policy or custom caused the constitutional injury.
>
> ***Leatherman v. Tarrant County Narcotics Intelligence Task Force and Coordination Unit***, 507 U.S. 163, 166 (1993), *emphasis added.*

It is the burden of Plaintiff Kobasic to present evidence to (1) identify the *municipal* policy or custom, (2) to connect that policy *to the municipality* (i.e., Delta county), and (3) to show that Kobasic's particular injury was incurred due to the execution of *that* policy." ***Vereecke v. Huron Valley School Dist.***, 609 F.3d 392, 403 (6th Cir. 2010).

The record confirms that state court proceedings of which Plaintiff Kobasic complains were an enforcement of state statutory law, not of any ordinance of Delta County. The County is not responsible for those statutes.

Likewise, the County is not responsible for Prosecutor Wickman's enforcement of those state statutory provisions. As described above, a prosecutor acts as an agent of the State of Michigan, not his or her county, when pursuing judicial enforcement of state statutes. Although Michigan counties are obligated to provide funding for prosecutors, the county prosecutor is otherwise a constitutional officer, who is independently elected and not answerable to the county. Mich. Const. art. VII, §4.

Furthermore, governmental entities are not liable for the professional judgments and actions of licensed attorneys. This is exemplified by the Supreme Court decision in ***Connick v. Thompson***, 563 U.S. 51 (2011). In that case, the court refused to hold even the prosecutor's office itself liable for alleged ***Brady*** violations. The court observed that attorneys have specific legal training and professional responsibility obligations upon which the governmental entity employing them can rely. See ***Connick***, 563 U.S. at 64-7.

Even assuming arguendo that Defendant Wickman erred in the legal proceedings involving Turbo (whether in terms of notice or otherwise), it is not the responsibility or even within the authority of Delta County to oversee the professional conduct of Wickman or to control her legal judgments.

Because no policy of Delta County caused the actions that Plaintiff Kobasic alleges to have been unlawful, Delta County cannot be held liable for any claim brought under 42 U.S.C. §1983. The County is entitled to summary judgment against Plaintiff Kobasic's claims.

VI. EVEN APART FROM ANY JURISDICTIONAL BAR, PRECLUSIONS OR IMMUNITIES, PLAINTIFF KOBASIC'S CLAIMS FAIL.

A. The record defeats Plaintiff Kobasic's Fourth Amendment "seizure" claim.

There can be no dispute that the Fourth Amendment protects against unlawful seizure of an animal from its owner without probable cause. ***United Pet Supply, Inc. v. City of Chattanooga, Tenn.***, 768 F.3d 464, 489 (6th Cir. 2014). In the present case, however, no such seizure occurred.

As described above, Valerie Kobasic returned home from work on the day of the incident involving Pippen (June 30, 2017) to find Turbo loose "[a]cross the street" from her house. **(Ex C: Show Cause Hearing Transcript, pp. 78-79)**. She then received a call from her supervisor asking her to bring Turbo to the Escanaba Department of Public Safety **(Ex C: Show Cause Hearing**

Transcript, p. 79). She voluntarily walked Turbo to the department and turned him over to the dog pound. **(Ex : Show Cause Hearing Transcript, pp. 79-81)**.

It has been established by the Sixth Circuit that a dog is not "seized" when an owner voluntarily turns the dog over to government authorities in response to allegations of a legal violation involving the animal. ***Hardrick v. City of Detroit, MI***, 876 F.3d 238, 245-6 (6th Cir. 2017), ***King v. Montgomery County, Tenn.***, 797 Fed. Appx. 949, 956 (6th Cir. 2020). No "seizure" ever occurred for purposes of the Fourth Amendment.

Certainly there was no seizure by Defendant Wickman. There is no evidence that she knew anything about the incident on the day it occurred or when Valerie Kobasic surrendered Turbo. She did not sign the Complaint until July 10, 2017. **(Ex B: Complaint and Summons Regarding Dangerous Animal)**.

Moreover, on the record before the Court, the existence of probable cause for a seizure of Turbo is fully established. An "eyewitness identification" is sufficient to establish probable cause for a seizure, absent an "apparent reason" for the officer to think the eyewitness was lying or mistaken. ***Ahlers v. Schebil***, 188 F.3d 365, 370 (6th Cir. 1999). Matthew Bennett identified Turbo as the dog responsible for killing Pippen, and there was no reason for Detective Madelinski to doubt Bennett's account. Valerie Kobasic did not dispute or rebut Bennett's account at the show cause hearing. Plaintiff Kobasic fails to offer any rebutting evidence now.

It is also significant to remember that the Fourth Amendment does not preclude all seizures of property. In precludes "only unreasonable ones." ***Williams v. Maurer***, 9 F.4th 416, 432 (6th Cir. 2021). "Exigent circumstances" can justify an immediate interference with property rights. ***Id.*** A dog posing risk of harm to others is among such exigent circumstances. ***Hardrick***, 876 F.3d at 245 (*a "menacing" dog moving "in and out of the yard at will"*). Valerie Kobasic has conceded

that Turbo was loose at the time of injury to Pippen and had a history of escaping the Kobasic's yard. Therefore, exigent circumstances existed to justify an immediate seizure.

In the circumstances of the present case, Delta County, and particularly Defendant Wickman, cannot be deemed to have ever "seized" Turbo at all. But even if they did so, such seizure was not unlawful. Therefore, Plaintiff Kobasic cannot sustain his Fourth Amendment seizure claim against the Defendants, and the Defendants are entitled to summary judgment in their favor.

B. The record defeats Plaintiff Kobasic's Fourteenth Amendment "procedural due process" claim.

The Fourteenth Amendment protects against deprivations of property by governmental authorities "without due process of law." This invokes a two part inquiry. First, the court must determine whether the plaintiff has a property interest that entitles the plaintiff to do process protection. ***Leary v. Daeschner***, 228 F.3d 729, 741 (6th Cir. 2000). Second, if a plaintiff has such an interest, the court "must then determine 'what process is due.'" ***Id.***, at 742.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." ***Mathews v. Eldridge***, 424 U.S. 319, 333 (1976). But due process is "flexible and contextual in nature, calling for such procedural protections as the particular situation demands." ***Sickles v. Campbell County, Ky.***, 501 F.3d 726, 730 (6th Cir. 2007). As aptly stated by the First Circuit, due process "is not a fixed or rigid concept, but, rather, is a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of the deprivation." ***Gorman v. University of Rhode Island***, 837 F.2d 7, 12 (1988).

Even assuming Plaintiff Kurtis Kobasic is a co-owner of Turbo, his interest is no different than that of Valerie Kobasic, who emphatically argued against Turbo's destruction at the show

cause hearing - - including the presentation of multiple witnesses (and even an expert, Dave Johnson, through whom Valerie obtained experimental testing of Turbo's behavior). **(Ex C: Show Cause Hearing Transcript, pp. 42-94)**. It is entirely speculative that Plaintiff Kobasic could have done better or that an attorney he might have hired would have had more success.

Moreover, despite being present at the hearing, Plaintiff Kobasic took no formal steps to intervene in the matter until almost three years later, having delayed such attempt by six additional months after supposedly being told for the first time about his rights in the matter.

Particularly given (1) the unrebutted evidence regarding the threat posed by Turbo, (2) Valerie Kobasic having identified herself as Turbo's owner and having rigorously advocated against his destruction, and (3) Plaintiff Kobasic having done nothing for nearly three years, it cannot be said that Plaintiff Kobasic was afforded any less "process" than was "due." Therefore, Plaintiff Kobasic's procedural due process claim fails, and summary judgment should be granted in favor of the Defendants against that claim.

C. The record defeats Plaintiff Kobasic's "policy and custom liability" claim.

As described above, there is no basis for Plaintiff Kobasic's "policy and custom liability" claim (Count IV) against Delta County. Turbo was not "seized" by the County but, rather, voluntarily surrendered by Valerie Kobasic on the basis of a violation of State law. The actual proceedings against Turbo were conducted by the Prosecutor's Office, through Assistant Prosecutor Wickman, as an agent of the State.

Nothing about which Plaintiff Kobasic complains - - either the supposed "seizure" of Turbo or the proceedings to have him euthanized - - resulted from any "policy or custom" of Delta County. Absent such basis for liability, Delta County is entitled to summary judgment in its favor against Plaintiff Kobasic's "policy and custom liability" claim. ***Vereecke***, 609 F.3d at 403.

D. The record defeats Plaintiff Kobasic's declaratory/injunctive relief claim.

Plaintiff Kobasic asserts as a separate "count" of his Complaint his demand for "declaratory and injunctive relief." But these are not substantive theories of liability or causes of action in their own right. Rather, they are "forms of relief." ***OverDrive, Inc. v. Open E-Book Forum***, 986 F.3d 954, 956 (6th Cir. 2021), ***Callahan v. Federal Bureau of Prisons***, 965 F.3d 5120, 525 (6th Cir. 2020), ***Weiner v. Clais and Co., Inc.***, 108 F.3d 86, 92 (6th Cir. 1997).

For the reasons described above, Plaintiff Kobasic is not entitled to any relief at all. In particular, this Court has no jurisdiction either to declare the prior state court judgment "void" or to enjoin enforcement of the euthanization order. ***Hall***, 727 F.3d at 453-4. Therefore, the Defendants are entitled to summary judgment against the declaratory/injunctive count of Plaintiff Kobasic's First Amended Complaint.

CONCLUSION AND RELIEF REQUESTED

For the reasons described above, Defendants Delta County and Lauren Wickman ask this Court for summary disposition in their favor under Fed. R. Civ. P. 56 against all of Plaintiff Kurtis Kobasic's claims in their entirety and with prejudice.

Dated: September 28, 2021

CUMMINGS, MCCLOREY, DAVIS & ACHO, P.L.C.

/s/ Gregory R. Grant
Gregory R. Grant (P68808)
Attorneys for Defendants
310 W. Front St., Ste. 221
Traverse City, MI 49684
(231) 922-1888/(231) 922-9888 Fax
ggrant@cmda-law.com

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KURTIS KOBASIC,

Plaintiff,

v

DELTA COUNTY and LAUREN WICKMAN,

Defendants.
_____/

HONORABLE ROBERT J. JONKER
U.S. DISTRICT COURT JUDGE

FILE NO. 2:20-cv-113-RJJ-MV

Celeste M. Dunn (P61819)
CELESTE M. DUNN, PLC
Co-Counsel for Plaintiff
P.O. Box 230
Clarkston, MI 48347
(248) 701-3467
celestemdunnplc@gmail.com

Charles E. Dunn
CHARLES E. DUNN, PLC
Co-Counsel for Plaintiff
P.O. Box 230
Clarkston, MI 48347
(248) 701-3467

Gregory R. Grant (P68808)
CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.
Attorneys for Defendants
310 W. Front Street, Ste. 221
Traverse City, MI 49684
(231) 922-1888/(231) 922-9888 Fax
ggrant@cmda-law.com

_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF GRAND TRAVERSE)

Laurie Robbins, being duly sworn, deposes and says that she served **DEFENDANTS' MOTION SEEKING SUMMARY JUDGMENT UNDER FED.R. CIV. P. 56; BRIEF IN SUPPORT OF DEFENDANTS' MOTION SEEKING SUMMARY JUDGMENT UNDER FED. R. CIV. P. 56 – ORAL ARGUMENT REQUESTED; EXHIBITS A-O;**

DEFENDANTS' CERTIFICATE OF NON-CONCURRENCE; DEFENDANTS' CERTIFICATE OF COMPLIANCE WITH W.D. MICH. L. CIV. R. 7.2(b)(ii) and PROOF OF SERVICE, on **September 28, 2021,** by the following methods:

VIA ECF FILING ONLY TO:

Celeste M. Dunn – ***celestemdunnplc@gmail.com***
Charles E. Dunn
CELESTE M. DUNN, PLC

Clerk of the Court
U.S. WESTERN DISTRICT COURT

VIA FIRST CLASS MAIL ONLY TO:

Honorable Robert J. Jonker
U.S. WESTERN DISTRICT COURT JUDGE
699 Ford Federal Building
110 Michigan, N.W.
Grand Rapids, MI 49503

Laurie Robbins

Laurie Robbins