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

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_____/

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:_____

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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.

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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

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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

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_____/

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:_____

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Dated: January 26, 2019

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

_____/

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_____/

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

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