

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

CHARLES BRANDON PARKS,)	
Plaintiff,)	Civil Action No. 1:09cv00070
)	
v.)	<u>REPORT AND</u>
)	<u>RECOMMENDATION</u>
)	
RANDALL LOWE, et al.,)	By: PAMELA MEADE SARGENT
Defendants.)	UNITED STATES MAGISTRATE JUDGE

The plaintiff in this case, Charles Brandon Parks, proceeding pro se, has brought this action under 42 U.S.C.A. § 1983 against Virginia Circuit Court Judge Randall Lowe, Smyth County Commonwealth’s Attorney Roy F. Evans Jr., the Commonwealth of Virginia, Thomas L. Weaver, who was Parks’s former probation officer, Kimberly Culberton Haugh, who was Parks’s former court-appointed counsel, Smyth County Sheriff David R. Bradley, Wise County Sheriff Ronnie Oaks,¹ Ronald McKinnon, a former Smyth County Deputy, and Greg Neal, a former Smyth County Deputy. This matter is currently before the court on several motions, including motions to dismiss filed on behalf of the Commonwealth of Virginia, Judge Randall Lowe, Thomas L. Weaver, Roy F. Evans Jr., Ronald McKinnon and Greg Neal, (Docket Item Nos. 25, 26, 28, 39, 49 and 58), as well as motions for summary

¹The court recognizes that the plaintiff misspelled the named of defendant “Ronnie Oaks.” The Wise County Sheriff’s last name is actually “Oakes.” Likewise, the plaintiff named “David R. Bradley” as a defendant, but in Bradley’s motion for summary judgment, his name was set out as “R. David Bradley.” For the purposes of this report and recommendation, the court will reference Oakes and Bradley as they were named in the plaintiff’s Complaint.

judgment filed on behalf of Sheriff David R. Bradley and Sheriff Ronnie Oaks.² (Docket Item Nos. 35 and 44.) No motions were filed on behalf of defendant Kimberly Culberton Haugh. These motions are before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). As directed by the order of referral, the undersigned now submits the following report and recommendation.

I. Facts

Parks's Complaint primarily references allegations regarding his conviction and events occurring during his confinement at Smyth County Jail, Southwest Virginia Regional Jail in Abingdon and Wise County Jail, as well as actions by his counsel, Smyth County Commonwealth's Attorney Roy Evans and Judge Lowe.

In the first claim set forth by Parks, he alleges that on September 20, 2002, his liberty, due process and equality under law were violated by Lowe, Evans, Haugh and Weaver when they conspired to "convict [him] for a urine screen that was almost four years old." (Docket Item No. 2, ("Complaint"), at 2-3.) Parks also claims that Weaver "issued violation papers" on or about September 3, 2002, noting that Weaver was not even his probation officer and that his actual probation officer, Gavin Russell, was not present at the time the papers were issued. (Complaint at 2-3.) Parks further

²The motions filed on behalf of the defendants are unopposed. By Orders dated October 29, 2009, November 11, 2009, and November 24, 2009, (Docket Item Nos. 27, 46, 60), the plaintiff was informed and put on notice that he was permitted to respond by filing briefs in opposition to the defendants' motions. In fact, by Order dated November 19, 2009, (Docket Item No. 55), the plaintiff was granted an extension of time to file responses. However, the plaintiff failed to do so; thus, the motions will be treated as unopposed motions.

alleges that his court-appointed counsel, Haugh, erroneously advised him. (Complaint at 3.) According to Parks, on September 20, 2003, the day of his scheduled hearing, he expressed concerns about Haugh's representation and decided he wanted to hire new counsel. (Complaint at 3.) The clerk of court informed him that, despite his disagreements with his counsel, he nevertheless was required to be present at the courthouse for his hearing. (Complaint at 3.) Parks claims that, upon his arrival to the courthouse, Haugh approached him and stated that she had been informed that he was not pleased with her representation, at which time she allegedly told Parks "[t]o tell you the truth[,] I didn't like you the first time I met you." (Complaint at 3.) At the beginning of the hearing, Haugh advised Judge Lowe of Parks's wishes, and Parks contends that Judge Lowe asked Evans for his thoughts. (Complaint at 3.) Parks alleges that Evans indicated that he was trying to "run from it" in an attempt to put off the punishment as long as possible. (Complaint at 3.) Following Evans's comments, Judge Lowe decided to proceed with the case. (Complaint at 3.) Parks claims that he was not permitted to enter a plea or speak and that he was unlawfully placed on probation. (Complaint at 3.) Parks specifically alleges that Judge Lowe is "guilty of Deprivation of Rights and Conspiracy against rights." (Complaint at 3.)

In his second claim, Parks contends that his right to an attorney was violated on September 20, 2002, when Judge Lowe decided to proceed with the hearing, despite Parks's displeasure with his court-appointed attorney and decision to hire new counsel. (Complaint at 2.) He particularly alleges that Haugh lied to him, and he further alleges that when she withdrew as his counsel, which was due to his complaints, she violated his rights because she was "acting under color of state law because she was appointed by [the] state." (Complaint at 2.)

In Parks's third claim, he alleges that his freedom of association was violated because "local law enforcement" had harassed his girlfriend, Michelle Barr, for being in a relationship with him. (Complaint at 2.) Parks alleges that, on September 1, 2002, Evans scheduled an appointment with Barr seeking to speak to her about a case not involving Parks. (Complaint at 2.) However, Parks claims that the meeting was simply an attempt to harass Barr about her relationship with him. (Complaint at 3.) Parks states that the main reason his rights were violated and he was "unconstitutionally imprisoned" was because "'they'" did not want him and Barr to be together. (Complaint at 3.)

Parks's fourth claim alleges that his right to be free from cruel and unusual punishment was violated on October 8, 2003, when Ronald McKinnon and Greg Neal used excessive force to remove him from the shower. (Complaint at 4.) Parks alleges that the incident caused injuries to his neck and back, noting that an MRI following the incident showed nerve damage and a bulging disc. (Complaint at 4.) He states that the injury has diminished his quality of life. (Complaint at 4.)

Parks's fifth claim, which he refers to as "Conspiracy Theory #2," alleges that Smyth County Sheriff David R. Bradley and Wise County Sheriff Ronnie Oaks conspired to transfer him to the Wise County Jail, so that he would be taunted by guards and inmates in retaliation for filing a lawsuit. (Complaint at 4.) Parks claims that Bradley informed Barr that he was transferred because he threatened a fire marshal. (Complaint at 4.) Parks contends that he was "extensively taunted for five days." (Complaint at 4.)

The sixth claim alleges that "[t]wo counts of perjury" were committed against

Parks on or about October 14, 2003, when Ronald McKinnon “swore out two warrants stating [that Parks] assaulted Greg Neal and [McKinnon].” (Complaint at 5.) Parks alleges that he did not assault anyone, noting that, instead, he was “critically injured.” (Complaint at 5.)

The seventh claim, which Parks calls the third conspiracy theory, alleges that on or about June 6, 2004, 10 days before being released following a 22-month sentence, his right to bear arms and right to vote were violated. (Complaint at 5.) He alleges that an inmate was given marijuana from the Smyth County Sheriff’s Office, which was then to be given to Parks. (Complaint at 5.) Parks claims that, after the marijuana was given to him, he was then pulled out of his cell and “forced to strip naked in front of female guards,” which he claims was in violation of his right to privacy. (Complaint at 5.)

Parks’s eighth claim alleges that he has been unconstitutionally imprisoned on two occasions. (Complaint at 5.) In particular, he claims that he was unlawfully jailed on July 21, 2003, when he began serving a 22-month sentence, and states that his incarceration from September 25, 2008, to March 3, 2009, also was unlawful. (Complaint at 5.) In addition, Parks indicates that he has been unlawfully on probation for the past seven years. (Complaint at 5.)

Parks’s ninth claim simply states that he was imprisoned for more than eight months in a side cell from October 2003 to June 2004. (Complaint at 5.) Parks’s tenth claim alleges that he suffered mental abuse from the defendants, claiming that their actions caused him to spend 11 days in a mental hospital where he was diagnosed with schizophrenia and a delusional disorder. (Complaint at 5.) Lastly, in his

eleventh claim, Parks alleges that the actions against him caused him to begin smoking and using intravenous drugs. (Complaint at 6.)

As a result, Parks seeks the following: (1) that the defendants pay all present and future medical bills associated with the allegations; (2) that the defendants be punished for their criminal actions; (3) that all court fines be deleted; (4) that all felonies be expunged from his record; and (5) that he be awarded \$40 million in punitive and compensatory damages. (Complaint at 2.)

II. Analysis

At the outset, I note that this court must construe Parks's Complaint liberally. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (allegations of a pro se complainant are held to less stringent standards than formal pleadings drafted by attorneys). Although the court must liberally construe pro se complaints, the court does not act as an advocate, sua sponte developing statutory and constitutional claims the plaintiff failed to clearly raise on the face of his complaint. *See Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985); *see also Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978) (recognizing that district courts are not expected to assume the role of an advocate for a pro se plaintiff).

Parks asserts his claims against the named defendants pursuant to 42 U.S.C. § 1983. To state a claim under § 1983, one must allege “the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.” *West v. Atkins*, 487 U.S. 42, 48 (1988); *see also* 42 U.S.C.A. § 1983 (West 2003). The

Supreme Court of the United States has stated that, in any § 1983 suit, the first inquiry is the determination of whether the plaintiff has been “deprived of a right ‘secured by the Constitution and laws.’” *Baker v. McCollan*, 443 U.S. 137, 140 (1979) (quoting 42 U.S.C. § 1983); *see also Hutchinson v. Miller*, 797 F.2d 1279, 1282 (4th Cir. 1986). Moreover, § 1983 should be broadly construed, as the statutory language speaks of deprivation of *any* rights, privileges or immunities secured by the Constitution and governing laws. *See Dennis v. Higgins*, 498 U.S. 439, 443 (1991); *see generally Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 105 (1989).

A. Motions To Dismiss

In this case, certain defendants have made motions to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). A motion to dismiss made under Rule 12(b)(1) tests the subject-matter jurisdiction of a complaint. When addressing such a motion, the court must initially determine whether the motion is a facial or factual challenge, as there are two distinct ways to present a motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), each of which trigger different standards of review. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). First, if the Rule 12(b)(1) motion is a facial challenge attacking subject-matter jurisdiction by asserting that “a complaint simply fails to allege facts upon which subject matter jurisdiction can be based[,]” then “the facts alleged in the complaint are assumed to be true and the plaintiff . . . is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration.” *See Adams*, 697 F.2d at 1219. Second, if the 12(b)(1) motion is a factual challenge, refuting the alleged jurisdictional basis of a complaint by asserting that, although facially adequate, the allegations are factually untrue, the district court may then consider

extrinsic information beyond the complaint to determine whether subject-matter jurisdiction exists. *See Thigpen v. United States*, 800 F.2d 393, 401 n. 15 (4th Cir. 1986) (citing *Adams*, 697 F.2d at 1219).

A motion to dismiss made under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. In considering such a motion, the court should accept as true all well-pleaded allegations and view the complaint in the light most favorable to the plaintiff. *See, e.g., De Sole v. United States*, 947 F.2d 1169, 1171 (4th Cir. 1991) (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969)). “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

For quite some time, this court has cited *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), for the proposition that in order to grant a motion to dismiss, it must appear certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief. *See also Edwards v. City of Goldsboro*, 178 F.3d 231, 243-44 (4th Cir. 1999). However, the Supreme Court recently revisited the proper standard of review for a motion to dismiss and stated that the “no set of facts” language from *Conley* has “earned its retirement” and “is best forgotten” because it is an “incomplete, negative gloss on an accepted pleading standard.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

In *Twombly*, the Supreme Court stated that “a plaintiff’s obligation to provide the ‘grounds’ of [his] ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” 550 U.S. at 555. The “[f]actual allegations must be enough to raise a right to

relief above the speculative level.” *Twombly*, 550 U.S. at 555 (citations omitted). Additionally, the Court established a “plausibility standard” in which the pleadings must allege enough to make it clear that relief is not merely conceivable but plausible. *See Twombly*, 550 U.S. at 555-63.

The Court further explained the *Twombly* standard in *Ashcroft v. Iqbal*, 556 U.S. ____, 129 S.Ct. 1937, 1949-50) (2009);

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. ... Second, only a complaint that states a plausible claim for relief survives a motion to dismiss

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief.

(Internal citations omitted.)

It is readily apparent that the 12(b)(1) motions made on behalf the Commonwealth of Virginia and Judge Lowe are facial challenges to Parks’s Complaint, as the defendants contend that, pursuant to the theories of sovereign and judicial immunity, the Complaint “simply fails to allege facts upon which subject

matter jurisdiction can be based.” *See Adams*, 697 F.2d at 1219. As such, “the facts alleged in the complaint are assumed to be true and the plaintiff . . . is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration.” *See Adams*, 697 F.2d at 1219.

I will first address the Rule 12(b)(1) motion to dismiss filed on behalf of the Commonwealth of Virginia. In its motion, the Commonwealth argues that Parks’s § 1983 action against it should be dismissed by operation of the sovereign immunity provision of the Eleventh Amendment to the United States Constitution. (Docket Item No. 25, (“Commonwealth’s Motion”), at 1-2.) After a review of the Commonwealth’s argument, as well as the relevant law, I agree.

In discussing the application of the Eleventh Amendment, the Supreme Court has stated that “an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.” *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). The Supreme Court has further explained that Congress may abrogate the state’s immunity under the Eleventh Amendment. *See Tennessee v. Lane*, 541 U.S. 509, 517 (2004). In *Lane*, the Court stated that, in order to determine whether Congress has abrogated a state’s immunity, “we ‘must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority.’” 541 U.S. at 517 (quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000)). In this case, the inquiry ends at the first step because Congress has not abrogated this immunity under § 1983. *See Quern v. Jordan*, 440 U.S. 332, 345 (1979). Therefore, as argued by the Commonwealth, I am of the opinion that the action against it should be dismissed, as it is barred by sovereign immunity.

I will now address the motion to dismiss filed on behalf of Judge Lowe. Judge Lowe contends that Parks's action against him should be dismissed pursuant to 12(b)(1) by operation of judicial immunity and pursuant to 12(b)(6) for failure to state a claim upon which relief can be granted. (Docket Item No. 26, ("Judge Lowe's Motion"), at 1-4.) The law has long recognized a broad absolute judicial immunity. *See Mireles v. Waco*, 502 U.S. 9, 11-12 (1991); *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978); *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967); *Bradley v. Fisher*, 80 U.S. 335, 347 (1871). In *Stump*, the Supreme Court said that judges "are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 435 U.S. at 356 (quoting *Bradley*, 80 U.S. at 351). The Court further stated that "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" *Stump*, 435 U.S. at 356-57 (internal citations omitted). "Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages." *Mireles*, 502 U.S. at 11 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). The Supreme Court has ruled that there are only two sets of circumstances that overcome judicial immunity: (1) a judge is not immune from liability for nonjudicial actions; and (2) a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. *See Mireles*, 502 U.S. at 11-12.

In this case, the allegations made by Parks against Lowe, all involve judicial acts. Thus, even if the actions taken by Lowe were erroneous, he is, nonetheless, protected from liability for these acts by the doctrine of judicial immunity. According to the facts alleged by Parks, Lowe simply decided to proceed with a probation

violation case against Parks and found him guilty. These actions are clearly judicial functions well within a Virginia Circuit Court judge's jurisdiction. *See* VA. CODE ANN. § 17.1-513 (setting forth the jurisdiction of a Virginia Circuit Court judge). Furthermore, a judge's protection under judicial immunity is not pierced by allegations that the judge conspired with others to do an allegedly unlawful act, so long as that particular act is within his judicial powers. *See Dennis v. Sparks*, 449 U.S. 24, 27-29 (1980) (the Court affirmed the dismissal of conspiracy claims against a judge based on judicial immunity). Therefore, I recommend that the action against Lowe be dismissed pursuant to Rule 12(b)(1).

Regarding Parks's allegations against Lowe and the other defendants, in which he claims that the defendants caused him to suffer mental abuse and begin smoking and using illegal drugs, these allegations are insufficient to state a claim under § 1983. These general allegations are not enough to show that relief is plausible; instead, they are simply a vague assertions that contain no support or allegations that a specific constitutionally protected right was violated or deprived. *See Twombly*, 550 U.S. at 555-63. Thus, for the reasons stated above, I recommend that the claims against Judge Lowe be dismissed pursuant to operation of the doctrine of judicial immunity, and for Parks's failure to state a claim for which relief can be granted.

Thomas L. Weaver, Parks's former probation officer, also filed a 12(b)(6) motion to dismiss. (Docket Item No. 28 ("Weaver's Motion")). In the Complaint, Parks alleges that Weaver conspired with Judge Lowe, Commonwealth's Attorney Evans and Haugh to "convict [him] for a urine screen that was almost four years old." (Complaint at 2-3.) He further alleges that Weaver unlawfully issued violation papers. (Complaint at 2-3.) These allegations are insufficient. At no point in the Complaint

does Parks allege that Weaver deprived or violated a specific right protected and secured by the Constitution and laws of the United States.

In light of the Supreme Court's decisions in *Twombly* and *Iqbal*, this court is not permitted to step in and make the necessary leaps to make certain that a plaintiff has properly plead his cause of action, even when that plaintiff is proceeding pro se and the Complaint is to be construed liberally. The court cannot act as the plaintiff's advocate and allow the plaintiff to proceed on claims that were not properly set forth. *See Brock v Carroll*, 107 F.3d 241, 243 (4th Cir. 1997) (Luttig, J., concurring). Even when a complaint is liberally construed, the complaint, including the exhibits attached to the complaint, *see Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991), "must [nonetheless] contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at _____, (citing *Twombly*, 550 U.S. at 570)). Moreover, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Here, Parks failed to state any factual allegations in the Complaint as to Weaver that would raise this particular right to relief above the speculative level, thereby failing to make it clear that relief was plausible. *See Twombly*, 550 U.S. at 555-63. Accordingly, because Parks made vague and general allegations against Weaver, none of which alleged deprivation of a constitutionally protected right, and because the allegations failed to show that relief was plausible, I recommend that the claims against Weaver be dismissed pursuant to Rule 12(b)(6).

Commonwealth's Attorney Evans also moves for dismissal of the claims against him pursuant to Rule 12(b)(6), as he contends that Parks's Complaint fails to state a claim against him. (Docket Item No. 40, ("Evans's Motion") at 1-5.) The court notes

that, on the face of the Complaint, Parks has not made it clear whether he has sued each of the defendants in their official capacities or in their individual capacities. In such circumstances, “the court must examine the nature of the plaintiff’s claims, the relief sought, and the course of proceedings to determine whether a state official is being sued in a personal capacity.” *Biggs v. Meadows*, 66 F.3d 56, 61 (4th Cir. 1995). Parks has not asserted that the defendants acted in accordance with any policy or custom, and he is seeking monetary damages, which indicates he is suing the defendants in their individual capacities. *See Biggs*, 66 F.3d at 61 (plaintiff’s failure to allege that the defendant acted in accordance with a governmental policy or custom or the lack of indicia of such a policy or custom on the face of the complaint indicated that a state actor has been sued in his individual capacity). However, since we are dealing with a pro se plaintiff, I will address Parks’s claims as if he intended to sue the defendants in both capacities.

I will now address the applicable immunity arguments asserted by Evans. First, Evans argues that the claims against him are barred by the Eleventh Amendment and should be dismissed. (Evans’s Motion at 2-3.) After a review of the Complaint and the arguments asserted in Evans’s Motion, I agree. As stated above, the Supreme Court has held that the Eleventh Amendment is applicable to § 1983 claims against states and state entities because, when Congress enacted such claims, it did not intend to abrogate the states’ Eleventh Amendment immunity. *See Quern*, 440 U.S. at 342. That said, the Eleventh Amendment bars the award of § 1983 damages in federal court against a state, state agency or state official that is sued in his official capacity. *See Edelman*, 415 U.S. at 663 (when state is real party in interest because damages are sought from it, state entitled to protection from award by sovereign immunity). State

officers sued in their official capacities “assume the identity of the government that employs them,” and, thus, are not “persons” under the meaning of § 1983. *Hafer v. Melo*, 502 U.S. 21, 27 (1991). Therefore, if Parks intended to sue Evans in his official capacity, then, I am of the opinion that that claim should fail because of Evans’s protection under the Eleventh Amendment.

Evans also claims that he is entitled to absolute prosecutorial immunity. (Evans’s Motion at 3-4.) “[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question.” *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (quoting *Burns v. Reed*, 500 U.S. 478, 486 (1991)). Prosecutors are entitled to absolute immunity from civil liability when acting as an advocate for the state participating in conduct “intimately associated with the judicial phase of the criminal process.” *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). In *Buckley*, the Court held that “acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.” 509 U.S. at 273. However, prosecutors are not entitled to absolute immunity for administrative duties or investigatory functions that do not relate to the initiation or preparation for a prosecution or judicial proceeding. *See Buckley*, 509 U.S. at 273.

Parks alleges that Evans violated his rights when Evans conspired with others to “convict [him] for a urine screen that was almost four years old” and when Evans harassed Parks’s girlfriend, Michelle Barr, during an interview associated with the prosecution of Parks’s case. (Complaint at 2-3.) These alleged actions were not administrative duties or investigatory functions unrelated to the initiation or

preparation for a prosecution or judicial proceeding. Instead, they were functions performed by Evans in his role as an advocate for the Commonwealth of Virginia. Parks alleges that Evans interviewed Barr on September 1, 2002, prior to his September 20, 2002, court date before Judge Lowe. (Complaint at 2-3.) Interviews such as the one allegedly conducted by Evans, which was undoubtedly part of his preparation for the judicial proceeding before Judge Lowe and necessary to determine whether or not Barr would be called as a witness, are actions that fall directly within a prosecutor's duties as an advocate for the state. *See generally Imbler*, 424 U.S. at 431 n. 33. Similarly, any allegations by Parks against Evans regarding his eventual imprisonment also would be protected by prosecutorial immunity, as such acts would be necessary results of prosecuting a case for the Commonwealth of Virginia. Therefore, for the reasons stated, I find Evans is protected from Parks's claims by prosecutorial immunity because the alleged acts were undertaken in his role as Commonwealth's Attorney and were "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430.

Evans also contends that Parks's allegations that he was wrongfully convicted and unconstitutionally imprisoned fails to state a claim upon which relief can be granted. (Evans's Motion at 5.) Evans correctly points out that Parks's Complaint seeks damages based on his alleged wrongful conviction and unconstitutional imprisonment. Because the state court conviction has not been set aside, Parks's § 1983 claims arising from that state conviction cannot proceed. *See Michau v. Charleston County*, 434 F.3d 725, 728 (4th Cir. 2006) (citing *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994) (holding that "in order to recover damages for allegedly unconstitutional conviction or imprisonment . . . a § 1983 plaintiff must prove that the

conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus"). Parks has not alleged that his conviction or sentence at issue in this case was ever set aside. Accordingly, I am of the opinion that Parks's claims that he was wrongfully convicted and unconstitutionally imprisoned must fail.

Next, Evans argues that Parks's claims that Evans conspired with others to "convict [him] of a urine screen that was almost four years old" and that Evans harassed Barr during an interview are barred by the statute of limitations. (Evans's Motion at 5.) It should be noted that there is no federal statute of limitations on § 1983 claims. When courts are faced with actions involving the Civil Rights Act, 42 U.S.C. § 1988 authorizes them to borrow statute of limitations provisions under state law if the application of such statute is consistent with federal law. *See* 42 U.S.C.A. § 1988(a) (West 2003). The Supreme Court determined that "§ 1988 requires courts to borrow and apply to all § 1983 claims the most analogous state statute of limitations." *Owens v. Okure*, 488 U.S. 235, 239-40 (1989) (citing *Wilson v. Garcia*, 471 U.S. 261, 275 (1985)). Furthermore, in *Wilson*, the Court indicated that "§ 1983 claims are best characterized as personal injury actions" and, for that reason, a state's statute of limitations for personal injury should be applied to all § 1983 claims. 471 U.S. at 280. In Virginia, personal injury actions are governed by a two-year statute of limitations. *See* VA. CODE ANN. § 8.01-243 (Repl. Vol. 2007). Therefore, claims brought pursuant to § 1983 must be filed within two years of the event causing the alleged constitutional violation. *See Cramer v. Crutchfield*, 648 F.2d 943, 945 (1981). In this case, the alleged actions by Evans, particularly the conspiracy allegation and the allegations of

harassment during the interview of Barr, occurred in September of 2002, which means that the suits should have been filed by September of 2004. However, Parks did not file this particular action until June 3, 2009. Therefore, based on the statute of limitations applicable to § 1983 claims, I find that Parks's claims against Evans are time-barred.

Lastly, Evans claims that Parks has failed to sufficiently set forth facts showing that Evans violated a constitutionally protected right. (Evans's Motion at 5.) After a thorough review of the allegations contained in Parks's Complaint, I agree. Parks simply makes vague allegations that Evans conspired with others to violate his rights and that Evans violated his right and freedom to associate. (Complaint at 2-3.) These allegations, even when set forth by a pro se plaintiff, are insufficient. Here, Parks failed to state any factual allegations in the Complaint as to Evans that would raise his right to relief above the speculative level, thereby failing to make it clear that relief was plausible. *Twombly*, 550 U.S. at 555-63. Moreover, the general allegations made against all defendants, such as Parks's claims that his rights were violated because he was confined in a side cell for more than eight months and that he was mentally abused by the defendants, which forced him to smoke and use illegal drugs, are all insufficient and fail to set forth a proper claim. Such allegations fail to assert a particular constitutionally protected right and are merely speculative, falling short of establishing plausible claims. Thus, for the reasons stated in the above paragraphs, I am of the opinion that all claims against Evans should be dismissed.

Ronald McKinnon and Greg Neal, both former deputies with the Smyth County Sheriff's Office, also have filed 12(b)(6) motions. (Docket Item Nos. 49 and 58.) In

the Complaint, Parks alleges that his “[f]reedom from [c]ruel and [u]nusual [p]unishment was violated [on October 8, 2003,] when Ronald McKinnon and Greg Neal used excessive force to remove [him] from the shower.” (Complaint at 4.) According to Parks, the excessive force resulted in injuries such as nerve damage and a bulging disc, and he claims that the injuries have caused pain that has diminished his quality of life. (Complaint at 4.) Parks also alleges that McKinnon committed “two counts of perjury” against him on October 14, 2003, when McKinnon “swore out two warrants” claiming that Parks assaulted him and Neal. (Complaint at 5.) Parks further claims that his rights to bear arms and vote were “infringed when an inmate was given Smyth County Sheriff Office’s marijuana to give to [him].” (Complaint at 5.) He claims that after the other inmate gave him the marijuana, he was taken from his cell and forced to “strip naked in front of female guards” thereby violating his right to privacy. (Complaint at 5.) Parks alleges that this incident caused him to be charged with felony possession of marijuana by an inmate. (Complaint at 5.)

As discussed earlier, since Parks failed to specify whether he intended to sue the defendants in their official or individual capacities, I will address Parks’s claims in each capacity, analyzing the applicable immunity arguments asserted by the defendants. Defendants McKinnon and Neal argue that they are entitled to Eleventh Amendment immunity and that any claims against them in their official capacities must be dismissed. (Docket Item Nos. 50 and 59.) I agree that Parks’s claims against McKinnon and Neal in their official capacities, as well as the general allegations against the Smyth County Sheriff’s Office, are barred by the Eleventh Amendment. It is well-settled that, in Virginia, suits against a sheriff or his deputies in their official capacities, as well as suits against a Sheriff’s Office, are considered to be suits against

the Commonwealth. *See Harris v. Hayter*, 970 F. Supp. 500, 502 (W.D. Va. 1997); *see also Blankenship v. Warren County*, 931 F. Supp. 447, 449 (W.D. Va. 1996). Thus, because McKinnon and Neal were employees of the Smyth County Sheriff's Office, which is an arm of the Commonwealth of Virginia, any suit against them in their official capacities would be a suit against the state. As discussed previously, the Eleventh Amendment bars actions for monetary damages against a state by its own citizens, unless Congress has validly abrogated that immunity or the state has consented to suit. *See Edelman*, 415 U.S. at 662-63. In this case, since there is no indication of any abrogation or consent to suit, I find that, in their official capacities, McKinnon and Neal are protected by the Eleventh Amendment.

Defendants McKinnon and Neal also argue that they are protected by qualified immunity. (Docket Item Nos. 50 and 59.) The theory of qualified immunity states that “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.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In determining whether the defendants' actions were immunized, the court must identify the constitutional right that was allegedly violated, decide whether that right was clearly established at the time of the violation, and, if so, determine whether a reasonable person would have known their actions violated the right. *See Smith v. Reddy*, 101 F.3d 351, 355 (4th Cir. 1996) (citing *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992)). The inquiry of whether the defendants violated clearly established constitutional rights is to be undertaken in the specific context of this case, not as a general proposition. *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (overruled

on alternate grounds)). If it is determined that a constitutional right has not been violated and/or that the right was not clearly established, the defendant shall be immune. *See Henry v. Purnell*, 501 F.3d 374, 377 (4th Cir. 2007).

As for the general claims made against all named defendants, namely that Parks was confined in a side cell for more than eight months, that he suffered mental abuse from the defendants and that the defendants' actions caused him to smoke cigarettes and use illegal drugs, and the allegation that McKinnon committed perjury against him, Parks has failed to allege that he was deprived of a specific constitutionally protected right. Thus, since Parks failed to allege that a constitutionally protected right has been violated, I am of the opinion that McKinnon and Neal are protected by qualified immunity as to the specific claims mentioned above. *See Henry*, 501 F.3d at 377.

It can be argued that Parks's general allegations of being unconstitutionally imprisoned and that his rights were deprived when he was charged with possession of marijuana by an inmate, as well as his claim that McKinnon lied and caused him to be convicted of assault, would be enough to defeat the defense of qualified immunity. However, as argued by McKinnon and Neal, each of these allegations call into question the legitimacy of his convictions. For the same reasons stated in the previous analysis of the claims against Evans, I again points out that because the state court convictions of Parks have not been set aside, his § 1983 claims arising from those state convictions cannot proceed. *See Michau*, 434 F.3d at 728 (citing *Heck*, 512 U.S. at 486-87.) As such, I recommend that these claims be dismissed against McKinnon, Neal and all other named defendants.

I also note that Parks's claim that his "[f]reedom from [c]ruel and [u]nusual [p]unishment was violated [on October 8, 2003,] when Ronald McKinnon and Greg Neal used excessive force to remove [him] from the shower" must fail. (Complaint at 4.) The conduct that violates the Cruel and Unusual Punishment Clause is characterized by actions of obduracy and wantonness, not inadvertence or errors in good faith. *See Whitley v. Albers*, 475 U.S. 312, 319 (1986). Pain inflicted during the course of a prison security measure does not necessarily amount to cruel and unusual punishment. *See* 475 U.S. at 319. In this case, Parks did not allege that McKinnon and Neal exhibited any wantonness or malice. Therefore, I do not believe he has properly pled his claim.

Nonetheless, McKinnon and Neal further argue that the statute of limitations bars Parks's allegations of excessive force against them, as well as the allegation of perjury against McKinnon. (Docket Item No. 50 and 59.) As mentioned when discussing the claims against Evans, in Virginia, actions pursuant to § 1983 are governed by a two-year statute of limitations, meaning that suits must be filed within two years of the event causing the alleged constitutional violation. The alleged actions committed by McKinnon and Neal occurred in October of 2003; however, Parks did not file this suit until June 3, 2009. Therefore, I find that these particular claims against McKinnon and Neal are barred by the applicable statute of limitations.

Lastly, McKinnon and Neal claim that Parks's claims against them are barred by res judicata. (Docket Item Nos. 50 and 59.) "Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of

action.” *Young-Henderson v. Spartanburg Area Mental Health Ctr.*, 945 F.2d 770, 773 (4th Cir. 1991) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). The bar of res judicata may be invoked if there is: (1) a final judgment on the merits in the prior action; (2) an identity of the cause of action in both proceedings; and (3) an identity of their privies. *See Meekins v. United Transp. Union*, 946 F.2d 1054, 1057 (4th Cir. 1991).

In this case, Parks alleges that McKinnon and Neal used excessive force that resulted in injuries. These same allegations and claims were brought against both McKinnon and Neal in a previous suit filed in this court. *See Parks v. Comm. of Va.*, Civil Action No. 7:03cv00767. By final order dated September 17, 2004, United States District Judge Samuel G. Wilson dismissed all claims against McKinnon and Neal and all other named defendants.³ In that case, in a Memorandum Opinion entered by United States Magistrate Judge Michael F. Urbanski, he specifically addressed allegations of excessive force and malicious wounding, but concluded that Parks had not properly set forth such claims in his complaint. Thus, I am of the opinion that res judicata applies to the claims against McKinnon and Neal, as the previous case involved the same parties, the same allegations and claims and resulted in a final judgment on the merits against Parks.

³As noted by McKinnon and Neal, the court is permitted to consider the record of Parks’s prior case in this court without converting the 12(b)(6) motion to a motion for summary judgment. *See Papason v. Allain*, 478 U.S. 265, 268 n. 1 (1986) (where the Court stated “[a]lthough this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record...”) Thus, because the prior decision by this court is a matter of public record, the court may consider the record of the prior case without having to convert the 12(b)(6) motion to a motion for summary judgment.

No motion has been filed on behalf of Haugh, who, according to Parks, was his court-appointed counsel. Nonetheless, the court may dismiss Parks's claims against Haugh sua sponte upon a finding that the Complaint fails to state a claim upon which relief may be granted. *See* 28 U.S.C.A. § 1915(e)(2)(B)(ii) (West 2006). With regards to Haugh, Parks claims that she conspired with Lowe, Evans and Weaver to "convict [him] for a urine screen that was almost four years old." (Complaint at 2.) Furthermore, Parks contends that Haugh erroneously advised him and also told him "[t]o tell you the truth[,], I didn't like you the first time I met you." (Complaint at 2-3.)

He also particularly alleges that Haugh lied to him, claiming that her actions violated his rights because she was "acting under color of state law because she was appointed by [the] state." (Complaint at 2.) This argument is without merit. Not only has Parks failed to adequately set forth the deprivation of a constitutionally protected right, but his § 1983 claim also fails because a court-appointed attorney does not act under color of state law, which is a jurisdictional prerequisite for any such claim. *See Hall v. Quillen*, 631 F.2d 1154, 1155-56, n. 2-3 (4th Cir. 1980) (stating that court-appointed counsel does not act under the color of state law for § 1983 purposes); *see also Polk County v. Dodson*, 454 U.S. 312, 317-24 (1981) (stating that public defenders representing defendants in criminal proceedings do not act under the color of state law for § 1983 purposes). Accordingly, I recommend that any and all claims against Haugh be dismissed.

B. Motions For Summary Judgment

I will now address the motions for summary judgment filed on behalf of Smyth

County Sheriff David R. Bradley and Wise County Sheriff Ronnie Oaks. With regard to a motion for summary judgment, the standard for review is well-settled. The court should grant summary judgment only when the pleadings, responses to discovery and the record reveal that “there is no genuine issue as to any material fact and . . . the movant is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986). A genuine issue of fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. In considering a motion for summary judgment, the court must view the facts and the reasonable inferences to be drawn from the facts in the light most favorable to the party opposing the motion. *See Anderson*, 477 U.S. at 255; *Matsushita*, 475 U.S. at 587. Thus, the court will view the facts and inferences in the light most favorable to Park’s on the motions for summary judgment filed by Bradley and Oaks.

In the Complaint, Parks alleges that Bradley and Oaks “conspired to transfer [him] to [the] Wise [County] Jail to be taunted by guards and inmates” in retaliation for “expressing [his] right to file a lawsuit.” (Complaint at 4.) Bradley and Oaks claim that they are immune from suit pursuant to application of the Eleventh Amendment and qualified immunity. (Docket Item Nos. 36 and 45.) As stated earlier in this report and recommendation, the Eleventh Amendment bars the award of § 1983 damages in federal court against a state, state agency or state official that is sued in his official capacity. *See Edelman*, 415 U.S. at 663. Thus, in an effort to avoid a repetitive analysis of these arguments, which have been asserted by other defendants, I find that

the Eleventh Amendment protects Bradley and Oaks from any claims against them for money damages in their official capacities. Turning to Bradley's and Oak's contention that they are also protected by application of the theory of qualified immunity, I find that Parks has failed to identify a constitutional right that has been violated. In his Complaint, Parks simply alleges that there was a conspiracy between Bradley and Oaks to have him transferred. Therefore, because Parks failed to identify a constitutionally protected right that has been violated, Bradley and Oaks are immune from liability for the alleged activity. Thus, I recommend that summary judgment be granted in each sheriff's favor based upon application of the Eleventh Amendment and the theory of qualified immunity.

Bradley and Oaks also contend that Parks's claims against them are barred by the applicable statute of limitations. I agree. As previously stated, in Virginia, actions pursuant to § 1983 are governed by a two-year statute of limitations. The record shows that Parks was confined in the Smyth County Jail from September 16, 2003, through June 15, 2004, indicating that the alleged conspiracy by Bradley and Oaks would have had to occur during this time period. However, Parks did not initiate this particular claim until June 3, 2009. Similarly, the general allegation made against all defendants that he was wrongfully held in a side cell for more than eight months from October 2003 to June 2004 is also barred by the statute of limitations. Accordingly, I recommend that the motions for summary judgment be granted in favor of Bradley and Oaks as to these particular claims, as they are barred by the applicable statute of limitations.

As to any allegations that could possibly be directed toward Bradley or Oaks with regard to allegations that led to Parks's conviction for possession of marijuana by an inmate and that he was unconstitutionally imprisoned, these type of claims call into question the legitimacy of Parks's prior convictions. Therefore, because Parks has not obtained post-conviction relief, he cannot proceed and state a cognizable claim under § 1983. *See Michau*, 434 F.3d at 728 (citing *Humphrey*, 512 U.S. at 486-87.)

Lastly, Bradley argues that *res judicata* bars Parks's claim that he conspired to have Parks transferred to the Wise County Jail. In a previous case before this court, Parks sued the Smyth County Jail, and claimed, among other things, that he was wrongfully transferred to Wise County Jail. *See Parks v. Smyth Co. Jail*, Civil Action No. 7:03cv00645. However, in a report and recommendation entered by United States Magistrate Judge Michael F. Urbanski, and later accepted in a final order entered by United States District Judge Samuel G. Wilson, the court ruled that his allegations of a wrongful transfer failed to provide any basis for a due process claim because he “d[id] not have a liberty interest in being housed in a specific correctional institution.” (Docket Item No. 36, Attachment No. 2 at 5.) Bradley was not specifically named as a defendant in that particular case, but since Smyth County Jail was the named defendant, the court finds that the same parties were involved, as Bradley, the Smyth County Sheriff, was in privity with the Smyth County Jail. *See Brooks v. Arthur*, 611 F.Supp.2d 592, 599 (W.D. Va. 2009) (governmental entities function only through their personnel). It is also readily apparent from the record of the previous claim that a final judgment was entered in favor of Smyth County Jail. The claims asserted in each case, although similar, however, are not identical causes of actions. In fact, in the previous case, Parks asserted a due process violation and, in the current case, he asserts

a civil conspiracy between Bradley and Oaks. Nevertheless, the court finds that res judicata applies to bar Parks's claim. "Not only does res judicata bar claims that were raised and fully litigated, it prevents litigation of all grounds for, ... recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Peugeot Motors of America, Inc. v. Eastern Auto Distributors, Inc.*, 892 F.2d 355, 359 (4th Cir. 1989) (quoting *Brown v. Felsen*, 442 U.S. 127 (1979) (internal quotation marks omitted)).

For the reasons stated above, I am of the opinion that all claims asserts by Parks must fail. Therefore, I recommend that the court grant the motions to dismiss filed on behalf of defendants Lowe, Evans, the Commonwealth of Virginia, Weaver, McKinnon and Neal, (Docket Item Nos. 25, 26, 28, 39, 49, and 58), and also grant the motions for summary judgment filed on behalf of Bradley and Oaks, (Docket Item Nos. 35 and 44). Furthermore, I also recommend that any claims against defendant Haugh should be dismissed.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. Because there is no indication that Congress has abrogated this immunity under § 1983, Parks's claim against the Commonwealth of Virginia should be dismissed, as it is barred by application of the Eleventh Amendment;

2. The actions taken by Lowe, such as denying a motion for new counsel, proceeding with a case against Parks and convicting him, all were judicial acts. As such, Lowe is entitled to absolute judicial immunity for such actions and Parks's claim based on these actions should be dismissed;
3. The remaining allegations against Lowe and the other named defendants, i.e., the allegations that the acts of the defendants caused Parks to suffer mental abuse, and caused him to begin smoking and using illegal drugs, fail to sufficiently state a claim. These general allegations are not enough to show that relief is plausible; instead, they are vague assertions that contain no support or allegations that a specific constitutionally protected right was violated or deprived. Accordingly, such claims must be dismissed against all defendants;
4. Parks's allegations against Weaver, his former probation officer, also fail to state a claim. At no point in the Complaint did Parks allege that Weaver deprived or violated a specific right protected and secured by the Constitution and laws of the United States. The allegations against Weaver are vague and fail to raise a plausible claim, thus, all claims against Weaver should be dismissed;
5. Parks's claims against Evans in his official capacity are barred by the Eleventh Amendment. Moreover, Evans's actions, which are the bases of Parks's claim, were not administrative duties or investigatory functions, but rather related to the initiation or preparation for a prosecution or a judicial proceeding. Thus, Evans's actions are protected from suit by prosecutorial immunity, and Parks's claim based on these actions should be dismissed;
6. When state court convictions have not been set aside, § 1983 claims arising from such convictions cannot proceed. In this case, Parks makes allegations against all defendants questioning the legitimacy of multiple past convictions. Because those convictions have not been set aside, Parks's claims must fail. Thus, any and all claims against any named defendants in which Parks calls into question past convictions must be

dismissed;

7. The claims asserted against Evans, McKinnon, Neal, Bradley and Oaks are all barred by the applicable statute of limitations. The allegations against them are based on events which occurred from September 2002 to June 2004. However, Parks's did not initiate this claim until June 3, 2009. Accordingly, the claims against the Evans, McKinnon, Neal, Bradley and Oakes should be dismissed, as they are barred by the applicable two-year statute of limitations;
8. Any claims against McKinnon and Neal in their official capacities should be dismissed as barred by the Eleventh Amendment;
9. Because the allegations of excessive force against McKinnon and Neal are the same as claims brought against them in a previous suit in this court, involving the same parties and issues, and because there was a final judgment on the merits in that matter, the current claims of excessive force against McKinnon and Neal are barred by the doctrine of res judicata;
10. No motions were filed on behalf of defendant Kimberly Culberton Haugh, who was Parks's former court-appointed counsel. Because court-appointed attorneys do not act under color of state law, Parks's § 1983 claim against Haugh must be dismissed;
11. With regard to the motions for summary judgment filed on behalf of Bradley and Oaks, the undersigned finds that any claims against them in their official capacities are barred by the Eleventh Amendment;
12. Bradley and Oaks are also protected by the theory of qualified immunity, as Parks failed to identify a constitutionally protected right that has been violated. Accordingly, summary judgment should be granted in Bradley and Oaks's favor based qualified immunity; and

13. Although Bradley was not specifically named, he was in privity with a named party in a previous case brought by Parks in this court. In that case, Parks raised similar claims regarding his transfer from the Smyth County Jail. Therefore, Parks's current claim against Bradley is barred by res judicata.

RECOMMENDED DISPOSITION

For the reasons detailed in this Report and Recommendation, I hereby recommend that the court grant each of the defendants' motions to dismiss, (Docket Items Nos. 25, 26, 28, 39, 49 and 58), and motions for summary judgment, (Docket Items Nos. 35 and 44). Furthermore, any claims against defendant Haugh also should be dismissed.

NOTICE TO PARTIES

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C);

Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed finding or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence to recommit the matter to the magistrate judge with instructions.

Failure to file written objection to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14-day period, the Clerk is directed to transmit the record in this matter to the Honorable James P. Jones, Chief United States District Judge.

The Clerk is directed to send a certified copy of this Report and Recommendation to all counsel and unrepresented parties of record.

ENTER: February 12, 2010.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE