APPENDIX

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: August 20, 2018
Certioriari to Court of Appeals, 2017CA870 District Court, Jefferson County, 2015CV378	
Petitioner: Nathan Daniel Knuth, **v.** **Respondents:** Randall C. Arp, Judge; Rick Raemisch, Executive Director of the Colorado Department of Corrections; Brandon Shaffer; Evangeline Graziano; Kaushiki Chowdhury; State of Colorado; Allison Foley; Steve Jensen; Kate Knowles; County of Jefferson; Jefferson County District Attorney's Office; Peter Wier; Martha Eskesen; James Aber; City of Golden; Colorado Department of Corrections; Colorado State Board of Parole; Division of Adult Parole; Jefferson County Combined Courts; Office of the Colorado Public Defender; and Agency of Alternate Defense.	Supreme Court Case No: 2018SC274
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 20, 2018.

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: March 14, 2018
Jefferson County 2015CV378	
Plaintiff-Appellant: Nathan Daniel Knuth, **v.** **Defendants-Appellees:** Randall C. Arp, Judge; Rick Raemisch; Brandon Shaffer; Evangeline Graziano; Kaushiki Chowdhury; State of Colorado; Allison Foley; Steve Jensen; Kate Knowles; Peter Wier; County of Jefferson; Jefferson County District Attorney's Office; Martha Eskesen; James Aber; City of Golden; Colorado Department of Corrections; Colorado State Board of Parole; Division of Adult Parole; Jefferson County Combined Courts; Office of the Colorado Public Defender; and Agency of Alternate Defense.	Court of Appeals Case Number: 2017CA870
MANDATE	

This proceeding was presented to this Court on appeal from Jefferson County.

Upon consideration thereof, the Court of Appeals hereby ORDERS that the **APPEAL** is **DISMISSED with prejudice.**

POLLY BROCK
CLERK OF THE COURT OF APPEALS

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DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway, Golden, Colorado 80401	DATE FILED: September 1, 2016
Plaintiff: NATHAN DANIEL KNUTH **v.** **Defendants:** JUDGE RANDALL C. ARP; RICK RAEMISCH; BRANDON SHAFFER; EVANGELINE GRAZIANO; ALLISON FOLEY; STEVE JENSEN; KATH KNOWLES; PETER WIER; MARTHA ESKEWEN; KAUSHIKI CHOWDHURY; JAMES ABER; STATE OF COLORADO; COUNTY OF JEFFERSON; CITY OF GOLDEN; COLORADO DEPARTMENT OF CORRECTIONS; COLORADO STATE BOARD OF PAROLE; DIVISION OF ADULT PAROLE; JEFFERSON COUNTY COMBINED COURTS; JEFFERSON COUNTY DISTRICT ATTORNEYS OFFICE; OFFICE OF THE COLORADO STATE PUBLIC DEFENDER; and AGENCY OF ALTERNATE DEFENSE	**▲COURT USE ONLY ▲** Case Number. 2015CV378 Div: 8

ORDER GRANTING STATE DEFENDANTS' MOTION TO DISMISS

THIS MATTER, comes before the Court on STATE DEFENDANTS' MOTION TO DISMISS. The court has considered the Motion, the Response and the Reply, and being otherwise f fully advised makes the following FINDINGS AND ORDER:

I. Statement of the Case

This case arises out of the handling of criminal proceedings against Plaintiff, Nathan Knuth in Jefferson County case 2014CR572. In that case the Plaintiff was originally charged with Second Degree Assault and Felony Menacing, among other criminal charges. At the time of the act giving rise to the charges in 2014CR572, the Plaintiff had previously been charged and convicted of harassment-stalking in 2009. For that conviction, he was sentenced to 8 years in the Colorado Department of Corrections ("DOC") with three years of mandatory parole.

Plaintiff is a prisoner who brings this *pro se* action suing state defendants Judge Randall C. Arp; Rick Raemisch, the Executive Director of the Colorado Department of Corrections; Brandon Schaffer, the Chair of the State Parole Board; Evangeline Graziano, a parole officer; and, Kaushiki Chowdhury, a public defender. In his Complaint the Plaintiff makes numerous

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway, Golden, Colorado 80401	DATE FILED: August 19, 2016
Plaintiff: NATHAN DANIEL KNUTH v. **Defendants:** JUDGE RANDALL C. ARP; RICK RAEMISCH; BRANDON SHAFFER; EVANGELINE GRAZIANO; ALLISON FOLEY; STEVE JENSEN; KATH KNOWLES; PETER WIER; MARTHA ESKEWEN: KAUSHIKI CHOWDHURY; JAMES ABER; STATE OF COLORADO; COUNTY OF JEFFERSON; CITY OF GOLDEN; COLORADO DEPARTMENT OF CORRECTIONS; COLORADO STATE BOARD OF PAROLE; DIVISION OF ADULT PAROLE; JEFFERSON COUNTY COMBINED COURTS; JEFFERSON COUNTY DISTRICT ATTORNEYS OFFICE; OFFICE OF THE COLORADO STATE PUBLIC DEFENDER; and AGENCY OF ALTERNATE DEFENSE	**▲COURT USE ONLY ▲** Case Number. 2015CV378 Div: 8
Attorneys for Defendant County of Jefferson and Jefferson County District Attorney's Office JEFFERSON COUNTY ATTORNEY ELLEN G. WAKEMAN, #12290 Rachel Bender, #46228 Assistant County Attorney Jefferson County Attorney's Office 100 Jefferson County Parkway, #5500 Golden, CO 80419-5500 Phone: 303-271-8900 Fax: (303) 271-8901 Email: rbender@jeffco.us	

ORDER GRANTING DISTRICT ATTORNEY DEFENDANTS' AND THE COUNTY OF JEFFERSON'S MOTION TO DISMISS

THIS MATTER, comes before the Court on DISTRICT ATTORNEY DEFENDANTS' AND THE COUNTY OF JEFFERSON'S MOTION TO DISMISS. The court has considered

the Motion, the Response and the Reply, and being otherwise f fully advised makes the following FINDINGS AND ORDER:

I. Statement of the Case

This case arises out of the handling of criminal proceedings against Plaintiff, Nathan Knuth in Jefferson County case 2014CR572. In that case the Plaintiff was originally charged with Second Degree Assault and Felony Menacing, among other criminal charges. At the time of the act giving rise to the charges in 2014CR572, the Plaintiff had previously been charged and convicted of harassment-stalking in 2009. For that conviction, he was sentenced to 8 years in the Colorado Department of Corrections ("DOC") with three years of mandatory parole.

In his Complaint the Plaintiff makes numerous factual allegations that relate to thirty-two claims for relief against numerous defendants, including District Attorney Defendants Allison Foley, Steve Jensen, Kate Knowles, Peter Wier; the Jefferson County District Attorney's Office; and, the County of Jefferson. The Plaintiff alleges that he was coerced into waiving his preliminary hearing, was denied the plea of his choice, and he was denied equal protection of the law.

II. Standard of Review

This Court initially recognizes that motions to dismiss for failure to state a claim are viewed with disfavor and are rarely granted under the notice pleading standard. *See Davidson v Dill*, 503 P.2d 157 (Colo. 1972). In reviewing a motion to dismiss for failure to state a claim, the Court must accept the facts as stated in the complaint as true, and solely on the basis of such facts, decide whether, under any theory of law, a plaintiff is entitled to relief. *See Schlitters v. State*, 787 P. 2d 656 (Colo. App. 1989). If relief can be granted under such circumstances, then the motion to dismiss must be denied. *Id.* The same is true of counterclaims. *See Colo. Nat'l Bank v. F.E. Biegert Co.*, 438 P.2d 506 (Colo. 1968).

When a claim under Colorado's Governmental Immunity Act is raised however, the standard is altered. *See Seder v. City of Fort Collins*, 987 P.2d 904 (Colo. Ct. App. 1999). Because a motion to dismiss based on the Act is a challenge to the Court's subject matter jurisdiction, the Court may receive any competent evidence necessary to the motion and may hold an evidentiary hearing to resolve any factual dispute. *See Padilla v. School Dist. No. 1*, 1 P.3d 256 (Colo. Ct. App. 1999). The plaintiff has the burden of proving that governmental immunity under the Act has been waived. *Henderson v. City and Cnty. Of Denver,* 300 P.3d 977, 980 (Colo. App 2012).

Under the Act, public entities are immune from suits that lie in tort or could lie in tort. *See* §§24-10-102 through 106, C.R.S.. Because this immunity is in derogation of the common law, its provisions must be strictly construed. *See Bertrand v. Board of County Commissioners*, 872 P.2d 223 (Colo. 1994). However, in certain instances the Act itself waives this immunity.

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See, e.g., § 24-10-106, C.R.S.. These waiver provisions, unlike the immunity provisions, must be construed with deference to the victim. *See id.*

III. Analysis

For the reasons set forth below, the District Attorney Defendants and the County Defendant are entitled to the relief requested and the matter should be dismissed as to them.

A. Claims against the County of Jefferson

In his Complaint the Plaintiff names "The County of Jefferson" as a Defendant. The Defendant has not properly named an entity that can be sued. CRS § 30-11-105 provides: "the name in which the county shall . . . be sued shall be, 'The board of county commissioners of the County of .....'" There is no other manner in which the county can be sued and an action attempted against a county in any other manner "is a nullity, and no valid judgment can enter in such a case." *Calahan v. Jefferson Cnty.*, 429 P.2d 301, 302 (Colo. 1967).

In his Response, the Plaintiff acknowledges his error and seeks to amend his Complaint. The court would ordinarily allow a Plaintiff to so amend, however, because the Complaint fails against the County in other ways, the amendment would be of no use.

B. Tort Claims against the District Attorney Defendants and the County

As set forth above, the Plaintiff has the burden of establishing that a public entity is not immune under the Colorado Governmental Immunity Act. Failure to do so will result in dismissal of the action for lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1). Further, when ruling on such a motion, the court "need not treat the facts alleged by the non-moving party as true as it would under C.R.C.P. 12(b)(5)." *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). The court may consider evidence outside the pleadings in resolving a jurisdictional challenge. *City of Aspen v. Kinder Morgan, Inc.*, 143 P.3d 1076, 1078 (Colo. App. 2006).

A review of the evidence submitted by the Plaintiff and the Defendants indicates that the Plaintiff's tort claims against the County and the District Attorney Defendants must fail for several reasons. First, the Plaintiff's Response to this Motion to Dismiss includes an appendix containing three Jefferson County Sheriff's Office Detention Services Division Inmate/Detainee Request Forms. Those forms are dated May 20, 2015; June 5, 2015; and, November 24, 2015. Each of the forms are some evidence that notices were sent pursuant to CRS § 24-10-109 *to the Colorado Attorney General*. However, there is no evidence that any notice was sent to the proper party under the act, i.e., the governing body of the District Attorney's Office; the governing body of the County of Jefferson; or, the Jefferson County Attorney, which represents both the DA's Office and the County. The Colorado Attorney General is not a proper entity to which effective notice can be sent under the Act. The failure

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to provide proper notice to these Defendants means the tort claims against them must be dismissed. *See, Armstead v. Memorial Hospital,* 892 P.3d 450, 453 (Colo. App. 1995).

Second, pursuant to CRS § 24-10-106(1), public entities are immune from liability in all claims for injury which lie in tort or could lie in tort. This section of the statute provides for waiver of sovereign immunity by a public entity in certain situations, but none of those waiver provisions apply to the claims made by the Plaintiff in this action. The District Attorney's Office and the County, being public entities, are therefore immune from the claims made in the Complaint that are torts or could have be filed as torts. Similarly, the individual District Attorney Defendants are also protected by governmental immunity against such tort claims. "The purpose of the CGIA is to protect public employees, public entities, and, by extension, taxpayers from unlimited liability. § 24-10-102." *Henisse v. First Transit, Inc.,* 247 P.3d 577, 579 (Colo. 2011). Thus, because of the lack of subject matter jurisdiction, any tort claims or claims that could lie in tort as to these Defendants must be dismissed.

C. Official Capacity Section 1983 Claims

The Eleventh Amendment to the United States Constitution provides that suits for damages against a state are barred ". . . unless the state waives its immunity . . . Eleventh Amendment immunity extends to state agencies that act as arms of the state . . ." *Armbus v. Granite Bd. of Educ.,* 975 F.2d 1555, 1560 (10th Cir. 1992). Further, Eleventh Amendment immunity also extends to claims asserted against state officials sued in their official capacity. "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71 (1989).

The issue, under the Eleventh Amendment, is whether the District Attorney defendants, acting in their official capacity, were acting as an arm of the state. If the District Attorney's Office acted as an arm of the state, the court lacks jurisdiction over the individual Defendants, inasmuch as state officials sued in their official capacity are not "persons" as defined by Section 1983. It is well established that a District Attorney in Colorado, sued in it official capacity is an arm of the state and not a "person" who can be sued for damages under Section 1983. *See, Beacom v. Bd. of County Commissioners,* 657 P.2d 440, 445 (Colo. 1983); *Rosek v. Topolnicki,* 865 F.2d 1154, 1158 (10th Cir., 1989).

Although the Plaintiff does not specify that he is suing the individual District Attorneys in their official capacity, the court concludes that there is no other reasonable interpretation of the allegations in the Complaint. Thus, all §1983 claims against the District Attorney and the individuals acting on behalf of the District Attorney must be dismissed for failure of subject matter jurisdiction.

D. Plaintiff's Individual Capacity Claims Against the District Attorney Defendants Are Barred by Absolute Prosecutorial Immunity

As summarized by these Defendants in their response, the individual District Attorney Defendants enjoy absolute prosecutorial immunity in any suit for damages under 42 U.S.C. §1983. *See, Mink v. Suthers,* 482 F.3d 1244, 1258 (10th Cir. 2007). This rule of absolute immunity applies even it is evident "to the prosecutor that he is acting unconstitutionally and thus beyond his authority." *Lerwill v. Joslin,* 712 F.2d 435, 438 (10th Cir. 1983). Thus, even assuming the Plaintiff's assertions about the conduct of the individual District Attorneys are true, they are nonetheless entitled to absolute prosecutorial immunity and the Plaintiff's claims under §1983 must fail.

E. Plaintiff's §1983 Claims Are Barred by *Heck v. Humphrey*

As established and set forth in these Defendants' Reply, the Plaintiff's §1983 claims must fail because of his April 21, 2016 conviction. In *Heck v. Humphrey,* 512 U.S. 477 (1994), the Supreme Court barred "§1983 claims that, if successful, would necessarily imply the invalidity of a previous conviction, unless the conviction has been set aside." *Roberts v. O'Bannon,* 199 Fed. App'x 711, 713 (10th Cir. 2006. *Heck* and its progeny bar constitutional claims where "there exists 'a conviction or sentence that has *not* been invalidated,' that is to say, an 'outstanding criminal judgment.'" *Wallace v. Kato,* 549 U.S. 384, 393 (2007) (internal citations omitted; emphasis in original).

Because all of the Plaintiff's §1983 claims are based on conduct alleged to have occurred in the course of his prosecution in 2014CR572 and because he has now been convicted in that case, his §1983 claims must be dismissed. Failure to dismiss such claims and allowing the Plaintiff to proceed in this case would necessarily imply the invalidity of his previous conviction, something that is prohibited by the ruling in *Heck v. Humphrey, id.*

IV. Order

IT IS THEREFORE ORDERED that all of the Plaintiff's claims against the District Attorney Defendants and the County are hereby DISMISSED.

Dated: August 19, 2016

J. Robert Lowenbach
Senior District Court Judge

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factual allegations that relate to thirty-two claims for relief against numerous defendants, including State Defendants. Additional defendants including a private attorney, the elected District Attorney and deputies as well as the County of Jefferson have previously been dismissed from this action. Plaintiff alleges broadly that all defendants have "engaged in conspiratorial conduct and entered into a widespread policy and custom of falsely imprisoning and oppressing Plaintiff and those similarly situated" in violation of the United States and Colorado Constitutions and laws. *See* Complaint at 3. More specifically, he asserts that the defendants have conspired to keep him incarcerated in the Jefferson County Jail since March 1, 2014 in order to coerce him into "surrendering to their demands" by pleading guilty so he can be sentenced to 5-16 years for crimes he did not commit. *Id.*, at 3-4.

Plaintiff is dissatisfied with the way his criminal case was handled in 2014CR572. He alleges he was coerced into waiving his preliminary hearing, was denied the plea of his choice, and he was denied equal protection of the law. The Plaintiff also alleges his petitions for *habeas corpus* were mishandled in Jefferson County District Court Case Nos. 2014CV205 and 2015CV161. *Id.* at 8. He alleges that he appeared for arraignment on July 7, 2014 but Judge Arp refused to rule on his petition on the merits unless Plaintiff's counsel re-filed it. *Id.* Exactly one year later, the judge denied the petition stating it failed to make a *prima facie* case that Plaintiff was being unlawfully detained. *Id.* Plaintiff argues that this was a "sham" by the judge who acted with corrupt intentions, by intentionally misconstruing the merits of his petition in order to extract a plea of guilt, *id.*, at 9. Plaintiff is seeking declaratory and injunctive relief, damages, and costs. *Id.*, at 27-28.

II. Standard of Review

This Court initially recognizes that motions to dismiss for failure to state a claim are viewed with disfavor and are rarely granted under the notice pleading standard. *See Davidson v Dill*, 503 P.2d 157 (Colo. 1972). In reviewing a motion to dismiss for failure to state a claim, the Court must accept the facts as stated in the complaint as true, and solely on the basis of such facts, decide whether, under any theory of law, a plaintiff is entitled to relief. *See Schlitters v. State*, 787 P. 2d 656 (Colo. App. 1989). If relief can be granted under such circumstances, then the motion to dismiss must be denied. *Id.* The same is true of counterclaims. *See Colo. Nat'l Bank v. F.E. Biegert Co.*, 438 P.2d 506 (Colo. 1968).

III. Analysis

For the reasons set forth below, the State Defendants are entitled to the relief requested and the matter should be dismissed as to them.

A. Claims against Judge Arp under CRS § 13-45-112

CRS § 13-45-101 provides a means for a prisoner to challenge his confinement in a criminal matter. The statute requires the court to which the application is made to act in a "forthwith" manner. The court shall grant the request unless it appears from the petition . . .

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"that the party can neither be discharged nor admitted to bail nor in any other manner relieved." It is clear that Judge Arp did not act on this application in a "forthwith" manner. It was only after a full year and another habeas filing under the statute that the action was disposed of with a finding that no *prima facie* case had been established that would allow for the relief requested.

CRS § 13-45-112 provides a mechanism for relief where a judge *"corruptly* refuses to issue such writ when legally applied for in a case where such writ may lawfully issue, or who, *for the purpose of oppression,* unreasonably delays the issuing of such writ . . ." [Emphasis added]. The issues, therefore, are whether, assuming the allegations in the Complaint are true, the judge corruptly refused to act on a worthy case, and/or, whether any delay in issuance was for the purpose of oppression.

In his complaint, Plaintiff fails to plead with specificity any factual allegations that, when taken as true, would entitle him to any relief under C.R.S. § 13-45-112. Instead, his allegations as to corruption and purpose are mere legal conclusions. Here, Plaintiff's conclusions are wholly lacking in specifics, and thus fail to offer any factual averments for the Court to take as true in support of his claim. While a court "...must take all the factual allegations in the complaint as true, [it is] not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Wenz v. National Westminster Bank, PLC*, 91 P.3d 467, 469 (Colo. App. 2004) ("Courts are not bound to accept legal conclusions couched as factual allegations"). Based on the foregoing, the court concludes that to withstand a C.R.C.P. 12(b)(5) motion, factual allegations in a complaint asserting C.R.S. § 13-45-112 violations must be pled with specificity. Because Plaintiff has failed to do so his assertions must fail.

In addition, Plaintiff cannot show that he was entitled to relief in either of his *habeas corpus* applications. Judge Arp denied each of the writs on May 28, 2015. Thereafter, the Plaintiff sought relief in the Supreme Court. On August 14, 2015 the Supreme Court denied each of the writs. These Orders constituted a final ruling of the Petitions. Following the August 14, 2015 Supreme Court Order the Plaintiff sought further relief from the Supreme Court. On November 10, 2015 the Supreme Court found that the Plaintiff's subsequent filings were untimely and the appeals were finally dismissed. Thus, the issue of whether Plaintiff was entitled to relief is settled as a matter of law – he was not. The Plaintiff's claim against Judge Arp must fail.

B. The court has no authority to review or overturn his conviction in 2014CR372

The Plaintiff concedes that the court has no authority to review and overturn his prior criminal case. *See* Response at p. 3. Any claims for relief must be made through a direct appeal of that conviction and sentence.

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C. The remaining claims against Judge Arp are barred by judicial immunity

In his Complaint he Plaintiff asserted other claims for relief against Judge Arp. In his Response the Plaintiff concedes that Judge Arp is entitled to such immunity except as it relates to the claim under CRS § 13-45-112. Since the court has disposed of the remaining claim as set forth above, Judge Arp should be dismissed from the Complaint.

D. Plaintiff's individual capacity claims against Defendants Raemisch, Schaffer, Chowdhury and Graziano are barred by qualified immunity

It appears that the Plaintiff is suing some of the State Defendants in their individual capacities as government officials. Under the doctrine of qualified immunity, his claims are barred. The doctrine of qualified immunity shields government officials performing discretionary functions not only from liability for civil damages, but also from suits arising from § 1983 claims brought against them in their individual capacities. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

When a qualified immunity defense has been raised, the plaintiff is held to a heightened standard of pleading and must include all the factual allegations necessary to sustain a conclusion that the defendant violated clearly established law. *Sawyer v. County of Creek*, 908 F.2d 663, 667 (10th Cir.1990). To defeat State Defendants' assertion of qualified immunity here, Plaintiff must adequately allege which defendant violated which clearly established law and plead facts which, if true, show that any reasonable official would have understood that what he or she was doing violated Plaintiff's rights under that law; i.e., that an objectively reasonable official would have known that his or her conduct was unlawful. *Lawrence v. Reed*, 406 F.3d 1224, 1230 (10th Cir.2005).

In the Complaint and in his Response the Plaintiff asserts that Defendants Rick Raemisch, Brandon Shaffer . . . and Evangeline Graziano have failed to provide notice of his rights under the Uniform Mandatory Disposition of Detainers Act regarding the timely resolution of his criminal proceedings or parole hearing. *See,* Complaint at 7, 16-17. He alleges that he went to parole revocation hearings at the Jefferson County Courthouse on seven occasions between March 26, 2014 and June 24, 2015. *Id.* at 6. It appears that none of these hearings resulted in the presentation of evidence of violation of his parole. Further, the Plaintiff does not allege that there were any technical violations charged beyond the pending criminal charges.

The Plaintiff alleges that Defendants Raemisch, Shaffer . . . and Graziano are agents of an entity that has a policy or custom of intentionally not informing Plaintiff and others of their rights under the UMDDA (CRS § 16-14-102). It appears, however, that a requirement to so inform the Plaintiff of his rights under the Act does not apply in the Plaintiff's case.

The Plaintiff was the prisoner of Jefferson County throughout his stay at the Jefferson County Detention Center. As a result of the criminal charges in 2014CR572, a complaint to

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revoke the Plaintiff's parole was filed. CRS § 16-14-102(1) provides that a person in the custody of the department of corrections has the right to request final disposition of any untried information or criminal complaint pending against him. Subsection (2) of this section imposes a duty on the superintendent of the institution where the prisoner is confined to inform prisoners of their rights under the Act. Here, because the Plaintiff was the prisoner of Jefferson County, there was no need to inform the Plaintiff of his rights because the commencement of 2014CR572 was the primary action and the revocation complaint was filed only as a response to the new criminal charges.

The Plaintiff complains that he was not provided a prompt hearing as required by CRS § 17-2-103 *et seq. Id.* at 7. Subsection (7) provides that a hearing shall be held within a reasonable time, not to exceed 30 days . . . However, because the Plaintiff was charged with a felony in 2014CR572, CRS § 17-2-103.5(c) applies. That section provides that where a board member is advised of pending criminal charges, the hearing "*shall be delayed until a disposition concerning the criminal charge is reached.*" [Emphasis added] Because the criminal charges were not resolved during the pendency of his parole, the Parole Board was *required* to delay the disposition of the pending complaint. Plaintiff cites *Miller v. Madison,* 85 P.3d 542 (Colo. 2004) for the proposition that he was entitled to an earlier hearing. The facts of that case are distinguished inasmuch as the defendant in that case was not charged with a felony and was not otherwise covered by the provisions of CRS § 17-2-103.5

E. Plaintiff's §1983 Claims Are Barred by *Heck v. Humphrey*

As set forth in the District Attorney Defendants Reply, the Plaintiff's §1983 claims must also fail as to these State Defendants because of his April 21, 2016 conviction. In *Heck v. Humphrey,* 512 U.S. 477 (1994), the Supreme Court barred "§1983 claims that, if successful, would necessarily imply the invalidity of a previous conviction, unless the conviction has been set aside." *Roberts v. O'Bannon,* 199 Fed. App'x 711, 713 (10th Cir. 2006. *Heck* and its progeny bar constitutional claims where "there exists 'a conviction or sentence that has *not* been invalidated,' that is to say, an 'outstanding criminal judgment.'" *Wallace v. Kato*, 549 U.S. 384, 393 (2007) (internal citations omitted; emphasis in original).

Because all of the Plaintiff's §1983 claims are based on conduct alleged to have occurred in the course of his prosecution in 2014CR572 and because he has now been convicted in that case, his §1983 claims must be dismissed. Failure to dismiss such claims and allowing the Plaintiff to proceed in this case would necessarily imply the invalidity of his previous conviction, something that is prohibited by the ruling in *Heck v. Humphrey, id.*

F. Plaintiff's Conspiracy Claim

As to Plaintiff's claim for conspiracy, proof is required that "(1) two or more persons; (2) [agreed on] an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) an unlawful overt act; and (5) damages as to the proximate result." *Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995). In order to prevail, Plaintiff must show

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each of these elements is present. Plaintiff's Complaint is conclusory and contains no facts other that the fact that his attorney and the Deputy District Attorney conversed in whispering tones. *People v. Jones*, 907 P.2d 667, 669 (Colo. App. 1995) (lay opinion regarding motivation or intent "that is speculative or not based on personal knowledge is not admissible"); *Suncor Energy (USA), Inc.*, 178 P.3d at 1269. The allegations in the complaint are legally insufficient to establish a claim that the state defendants intended to conspire to violate the Plaintiff's constitutional rights. *See Wise v. Bravo*, 666 F.2d 1328, 1333 (10th Cir. 1981) ("Constitutional rights allegedly invaded, warranting an award of damages, must be specifically identified. Conclusory allegations will not suffice.") Consequently, Plaintiff's conspiracy claim fails as a matter of law.

G. Claims against Defendant Chowdhury for legal malpractice

Pursuant to CRS § 13-20-602, in any action for damages or indemnity based on professional negligence of a licensed professional, the plaintiff's attorney must file a certificate of review within sixty days after service of the complaint. Further, "the requirements of the certificate of review statute are applicable to civil actions alleging negligence of licensed professionals filed by non-attorney *pro se* plaintiffs." *Yadon v. Southward*, 64 P.3d 909, 912 (Colo. App. 2002)

In addition, a statutorily adequate certificate of review must declare (I) that the attorney has consulted a person who has expertise in the area of the alleged negligent conduct; and (II) that the professional has "reviewed the known facts, including such records, documents, and other materials which the professional has found to be relevant to the allegations of negligent conduct and, based on the review of such facts, has concluded that the filing of the claim, counterclaim, or cross claim does not lack substantial justification within the meaning of section 13-17-102(4)." As used in C.R.S. 13-17-102(4), "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

The statute requires dismissal of the action where the certificate of review is not filed within sixty days of service of the complaint, unless the plaintiff can show good cause for the failure to comply with the time requirements. C.R.S. § 13-20-602(1); *Martinez v. Garcia*, 59 F.Supp.2d 1097, 1099-1100 (D. Colo. 1999) (dismissing complaint where plaintiff filed certificate of review seventy days after service of complaint); see also *Williams v. Boyle*, 72 P.3d 392, 396 (Colo. App. 2003).

The Plaintiff's claims allege professional negligence against licensed professionals. Therefore, CRS § 16-20-602(1)(a) requires the filing of certificate of review. The Plaintiff did not file a certificate of review within the allotted timeframe, or within the extended time ordered by this court. In fact, he has never filed such a certificate. Therefore, his negligence claim against the Defendant Chowdhury must be dismissed.

Regarding the other claims or potential claims against Ms. Chowdhury (i.e. conspiracy, breach of fiduciary duty, fraudulent misrepresentation, outrageous conduct), the court concludes that each of these claims is based on the assertion that the Defendant was negligent in her representation of the Plaintiff. Specifically, it is claimed that Ms. Chowdhury failed to read or endorse the Plaintiff's *pro se Habeas Corpus* petition and refused to honor the Plaintiff's request to enter a Not Guilty by Reason of Insanity plea. These actions are the very same actions that give rise to the Plaintiff's conspiracy, breach of fiduciary duty, fraudulent misrepresentation and outrageous conduct claims.

The Supreme Court has stated very clearly that CRS § 13-20-602 should be read broadly. In *Martinez v. Badis*, the plaintiffs filed a complaint against their attorneys, alleging not only legal malpractice, but also breaches of fiduciary duty and breach of contract. 842 P.2d 245, 247 (Colo. 1992). The Court of Appeals ruled that a certificate of review was required only for the first count, but that the other two could go forward without one. *Id.* at 248-49. The Supreme Court reversed, holding that "[t]he statute applies to all claims 'based upon' alleged professional negligence. It does not apply only to 'negligence claims.'" *Id.* at 251. To hold otherwise, the Court recognized, "would undermine the legislative intent to encourage expeditious resolution of all claims filed against licensed professionals alleging negligent professional conduct in which expert testimony is required." *Id.* at 252.

Finally, the Plaintiff's §1983 claims must fail against Defendant Chowdhury because as his attorney, she was not a state actor. *Polk County v. Dodson*, 454 U.S. 312, 318 and 325 (1981) (defense counsel does not himself act under color of state law within the meaning of § 1983); *Harris v. Champion*, 51 F.3d 901, 909-10 (10th Cir. 1995) (defense counsel is not deemed to have acted under color of state law).

IV. Order

IT IS THEREFORE ORDERED that all of the Plaintiff's claims against the State Defendants are hereby DISMISSED.

Dated: August 31, 2016

J. Robert Lowenbach
Senior District Court Judge