UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2806

AARON J. BRESSI,
Appellant

v.

JOHN GEMBIC; MICHAEL P. TOOMEY; PETER KAY; VINNY CLAUSI

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(M.D. Pa. Civil No. 4-17-cv-01405)
District Judge: Honorable Matthew W. Brann

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, and NYGAARD,* Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

*Judge Nygaard's vote is limited to panel rehearing only.

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

DATED: April 3, 2019
Sb/cc: Aaron J. Bressi
All Counsel of Record

Additional material from this filing is available in the Clerk's Office.

APPX.

A

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

April 11, 2019

Mr. Peter J. Welsh
United States District Court for the Middle District of Pennsylvania
Herman T. Schneebeli Federal Building
240 West Third Street
Williamsport, PA 17701

RE: Aaron Bressi v. John Gembic, et al
Case Number: 18-2806
District Court Case Number: 4-17-cv-01405

Dear Mr. Welsh,

Enclosed herewith is the certified judgment together with copy of the opinion in the above-captioned case. The certified judgment is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

Counsel are advised of the issuance of the mandate by copy of this letter. The certified judgment is also enclosed showing costs taxed, if any.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: s/ Stephanie/cjg
Case Manager
267-299-4926

Cc: Aaron J. Bressi
Sean P. McDonough
Christine E. Munion

DLD-082

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2806

AARON J. BRESSI,
Appellant

v.

JOHN GEMBIC; MICHAEL P. TOOMEY; PETER KAY; VINNY CLAUSI

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(M.D. Pa. Civil No. 4:17-cv-01405)
District Judge: Honorable Matthew W. Brann

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
January 24, 2019
Before: JORDAN, GREENAWAY, JR. and NYGAARD, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted for possible dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B) and for possible summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 on January 24, 2019. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered July 26, 2018, be and the same hereby is summarily affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/Patricia S. Dodszuweit
Clerk

DATED: February 8, 2019

Certified as a true copy and issued in lieu of a formal mandate on April 11, 2019

Teste: Patricia A. Dodszuweit

Clerk, U.S. Court of Appeals for the Third Circuit

APPX.
B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AARON J. BRESSI, Plaintiff, v. JEFFERY BRENNEN, et al., Defendants.	No. 4:17-CV-01742 (Judge Brann) (Magistrate Judge Saporito)

ORDER

JULY 26, 2018

1. Plaintiff instituted the above-captioned action against Defendants on September 26, 2017.
2. Defendants moved to dismiss Plaintiff's complaint on December 18, 2017.
3. Plaintiff filed motions for summary judgment on February 12, 2018; May 7, 2018; and June 11, 2018.
4. On July 6, 2018, Magistrate Judge Joseph F. Saporito, Jr., issued a Report and Recommendation in which he recommended that this Court dismiss Plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).
5. Plaintiff objected to this Report and Recommendation on July 18, 2018.

6. As a result of Plaintiff's objections, this Court has reviewed the Report and Recommendation *de novo*.[1]

7. Because Plaintiff's objections are meritless, with arguments that have adequately and accurately been addressed by Magistrate Judge Saporito, this Court **ADOPTS** the Report and Recommendation, ECF No. 41, **IN ITS ENTIRETY**.

8. Therefore, **IT IS HEREBY ORDERED** that:

   a. Defendants' Motion to Dismiss, ECF No. 20, is **GRANTED**.

   b. Plaintiff's Complaint, ECF No. 1, is **DISMISSED** under Rule 12(b)(6) for failing to state a claim, as follows:

      i. Plaintiff's excessive force claim relating to his detention at the Coal Township police station is **DISMISSED WITHOUT PREJUDICE**; and

      ii. All other claims are **DISMISSED WITH PREJUDICE**.

   c. Plaintiff's motions for summary judgment, ECF Nos. 27, 37, and 38, are **DENIED AS MOOT**.

9. Plaintiff is granted leave to amend *only* the excessive force claim that has dismissed without prejudice. If an amended complaint is not filed within 30 days of the date of this Order, however, those claims will be dismissed with prejudice, and the Clerk of Court will be directed to close this case.

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[1] 28 U.S.C. § 636(b)(1).

10. This matter is remanded to Magistrate Judge Saporito for further proceedings.

BY THE COURT:

s/ Matthew W. Brann
Matthew W. Brann
United States District Judge

APPX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

AARON J. BRESSI, Plaintiff, v. JOHN GEMBIC (DJ), et al., Defendants.	CIVIL ACTION NO. 4:17-cv-01405 (BRANN, J.) (SAPORITO, M.J.)

REPORT AND RECOMMENDATION

This is a federal civil rights action in which the *pro se* plaintiff, Aaron J. Bressi, seeks damages and injunctive relief against four defendants whom he claims were responsible for his prosecution and incarceration on allegedly fabricated criminal charges. On August 9, 2017, the Court received and filed the plaintiff's initial complaint against three named defendants, which had been signed and dated by the plaintiff on August 6, 2017. (Doc. 1). At the time, Bressi was incarcerated at SCI Coal Township, located in Northumberland County, Pennsylvania.[1] On

[1] A fire destroyed the Northumberland County Prison in January 2015. Since then, male inmates who would otherwise be housed by the county prison have been incarcerated in a "Northumberland County Prison" division at SCI Coal Township, a state correctional facility. A new county prison is under construction, slated to be opened in August 2018.

September 15, 2017, prior to service of original process on the defendants, the Court received and filed a letter-pleading from the plaintiff by which he sought to add related claims against a fourth defendant. (Doc. 11). Mindful of our obligation to liberally construe *pro se* submissions, particularly when dealing with imprisoned *pro se* litigants, we construe these two documents together as the plaintiff's operative complaint. *See generally Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244–46 (3d Cir. 2013).

On October 16, 2017, the defendants filed a motion to dismiss this action on various grounds, together with a brief in support. (Doc. 19; Doc. 20). On October 31, 2017, Bressi filed his brief in opposition to the motion. (Doc. 24).

For his part, the *pro se* plaintiff has filed three separate, perfunctory motions for summary judgment (Doc. 25; Doc. 34; Doc. 46), none of which was accompanied by a statement of material facts, which is required under the local rules. *See* L.R. 56.1. He has filed a brief in support of only one of these three motions for summary judgment (Doc. 42), despite a local rule requiring all such motions to be supported by a brief in support. *See* L.R. 7.5. The defendants have filed responses and briefs in opposition to each of

these three motions. (Doc. 26; Doc. 26-1; Doc. 35; Doc. 35-1; Doc. 44; Doc. 44-1; Doc. 47; Doc. 47-1). Bressi has filed a reply brief with respect to one of his three motions for summary judgment. (Doc. 45).

These motions are now ripe for disposition.

I. BACKGROUND

Bressi's claims concern a series of criminal proceedings before the same state magisterial district judge. The first was a trio of cases initiated and completed in 2013, in which Bressi was convicted of misdemeanor disorderly conduct on his guilty pleas and sentenced to serve a year on probation. A few months later, probation in each of the three cases was revoked and he was sentenced by a state common pleas judge to serve a term of six to twelve months in jail. Bressi did not appeal in any of these three cases.[2] The second was a case initiated in 2015, in which Bressi was convicted of simple assault and sentenced on September 29, 2016, to serve one year on probation. The Superior Court of Pennsylvania subsequently

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[2] *Commonwealth v. Bressi*, Docket Nos. MJ-08303-CR-0000154-2013, MJ-08303-CR-0000189, MJ-08303-CR-0000193-2013 (Northumberland Cty. Magis. Dist. Ct.); *Commonwealth v. Bressi*, Docket Nos. CP-49-CR-0000770-2013, CP-49-CR-0000771-2013, CP-49-0000795-2013 (Northumberland Cty. C.C.P.).

affirmed Bressi's conviction and sentence on October 25, 2017.[3] The third was a case in which, following a jury trial, Bressi was convicted of felony aggravated assault and related misdemeanor offenses and sentenced to serve an aggregate term of four to eight years in prison. Bressi has filed an appeal, which remains pending before the Superior Court of Pennsylvania.[4]

As liberally construed by this Court, Bressi's complaint claims that these criminal proceedings were conducted in violation of his federal constitutional rights. He alleges that charges in two of the three 2013 cases were based on facts that were entirely fabricated—one of them based on false reports by defendant Vinny Clausi, Bressi's former employer and an active county commissioner at the time. He alleges that he was coerced into pleading guilty to those three charges by defendants John Gembic, the magisterial district judge who presided over the misdemeanor proceedings,

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[3] *Commonwealth v. Bressi*, Docket No. MJ-08303-CR-0000374-2015 (Northumberland Cty. Magis. Dist. Ct.); *Commonwealth v. Bressi*, Docket No. CP-49-CR-0000961-2015 (Northumberland Cty. C.C.P.), *aff'd*, Docket No. 1791 MDA 2016 (Pa. Super. Ct.).

[4] *Commonwealth v. Bressi*, Docket No. MJ-08304CR-0000484-2016 (Northumberland Cty. Magis. Dist. Ct.); *Commonwealth v. Bressi*, Docket No. CP-49-CR-0001513-2016 (Northumberland Cty. C.C.P.), *appeal filed*, Docket No. 1887 MDA 2017 (Pa. Super. Ct.).

and Michael Toomey, the assistant district attorney who prosecuted those charges. His complaint further implies that Gembic and Toomey did so at the behest of or in service to Clausi.

Bressi was haled into court before Judge Gembic again in 2015. He alleges that, on September 29, 2016, he was prepared to plead guilty to harassment, a third-degree misdemeanor, but Toomey surprisingly substituted a new charge of simple assault, a second-degree misdemeanor, and Bressi's public defender, defendant Peter Kay, advised him to silence his objections and accept the newly revised deal to plead guilty to simple assault in exchange for a probation sentence, which Bressi did.

The next day, September 30, 2016, Bressi was involved in a vehicular collision with the mother of his children. He alleges that she backed into his car in "a drug[] induced rage," but instead of her being prosecuted, Bressi was arrested and brought before Judge Gembic yet again. Bressi alleges that police fabricated evidence against him, and that his public defender, Kay, failed to comply with Bressi's directions that he file certain pretrial motions.

On August 6, 2017, Bressi constructively filed this federal civil rights action seeking $1 million in damages from the defendants.

II. LEGAL STANDARDS

A. Rule 12(b)(6) Dismissal Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes a defendant to move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "Under Rule 12(b)(6), a motion to dismiss may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds the plaintiff's claims lack facial plausibility." *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 84 (3d Cir. 2011) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)). Although the Court must accept the fact allegations in the complaint as true, it is not compelled to accept "unsupported conclusions and unwarranted inferences, or a legal conclusion couched as a factual allegation." *Morrow v. Balaski*, 719 F.3d 160, 165 (3d Cir. 2013) (quoting *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007)).

Under Rule 12(b)(6), the defendant has the burden of showing that no claim has been stated. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991); *Johnsrud v. Carter*, 620 F.2d 29, 32–33 (3d Cir. 1980); *Holocheck v. Luzerne County Head Start, Inc.*, 385 F. Supp. 2d 491,

495 (M.D. Pa. 2005). Although a plaintiff is entitled to notice and an opportunity to respond to a motion to dismiss, he has no obligation to do so—he may opt to stand on the pleadings rather than file an opposition. The Court must nevertheless examine the complaint and determine whether it states a claim as a matter of law. *Stackhouse v. Mazurkiewicz*, 951 F.2d 29, 30 (3d Cir. 1991); *Anchorage Assocs. v. Virgin Islands Bd. of Tax Review*, 922 F2d 168, 174 (3d Cir. 1990). In deciding the motion, the Court may consider the facts alleged on the face of the complaint, as well as "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

B. *Sua Sponte* Dismissal Standard

Under 28 U.S.C. § 1915A, the Court is obligated to screen a civil complaint in which a prisoner is seeking redress from a governmental entity or an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a); *James v. Pa. Dep't of Corr.*, 230 Fed. App'x 195, 197 (3d Cir. 2007). The Court must dismiss the complaint if it is "frivolous" or "fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915A(b)(1). The Court has a similar obligation with respect to actions brought *in*

forma pauperis. *See* 28 U.S.C. § 1915(e)(2)(B). *See generally Banks v. Cty. of Allegheny*, 568 F. Supp. 2d 579, 587–89 (W.D. Pa. 2008) (summarizing prisoner litigation screening procedures and standards).

An action is "frivolous where it lacks an arguable basis in either law or fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also Thomas v. Barker*, 371 F. Supp. 2d 636, 639 (M.D. Pa. 2005). To determine whether it is frivolous, a court must assess a complaint "from an objective standpoint in order to determine whether the claim is based on an indisputably meritless legal theory or clearly baseless factual contention." *Deutsch v. United States*, 67 F.3d 1080, 1086 (3d Cir. 1995) (citing *Denton v. Hernandez*, 504 U.S. 25, 34 (1992)); *Thomas*, 371 F. Supp. 2d at 639. Factual allegations are "clearly baseless" if they are "fanciful," "fantastic," or "delusional." *See Denton*, 504 U.S. at 32–33. "[A] finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." *Id.* at 33. A district court is further permitted, in its sound discretion, to dismiss a claim "if it determines that the claim is of little or no weight, value, or importance, not worthy of serious consideration, or trivial." *Deutsch*, 67 F.3d at 1089.

The legal standard for dismissing a complaint for failure to state a claim under § 1915A(b)(1) or § 1915(e)(2)(B)(ii) is the same as that for dismissing a complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Brodzki v. Tribune Co.*, 481 Fed. App'x 705, 706 (3d Cir. 2012) (per curiam); *Mitchell v. Dodrill*, 696 F. Supp. 2d 454, 471 (M.D. Pa. 2010); *Banks*, 568 F. Supp. 2d at 588.

C. Summary Judgment Standard[5]

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment should be granted only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" only if it might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A

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[5] Although we ultimately recommend that the plaintiff's summary judgment motions be denied as moot, we recite the proper summary judgment legal standard here for the benefit of defense counsel, whose boilerplate recital of a proposed summary judgment standard in all four of her briefs appears to be very much overdue for revision. (Doc. 26-1, at 1–2; Doc. 35-1, at 1–2; Doc. 44-1, at 2; Doc. 47-1, at 1–2). We note that throughout these briefs, counsel has referenced "Rule 56I" or "Fed. R. Civ. P. 56I"—we are unaware of any such rule, either in the current federal rules or in any past version. Moreover, the language quoted by counsel in the first sentence of her proposed legal standard, attributed to "Federal Rule of Civil Procedure 56I," appears to be taken from Rule 56(c) as it existed *prior to December 1, 2007*. The rule has been revised several times in the decade since that language was last in effect.

dispute of material fact is "genuine" only if the evidence "is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248. In deciding a summary judgment motion, all inferences "should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." *Pastore v. Bell Tel. Co. of Pa.*, 24 F.3d 508, 512 (3d Cir. 1994).

The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion," and demonstrating the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant makes such a showing, the non-movant must set forth specific facts, supported by the record, demonstrating that "the evidence presents a sufficient disagreement to require submission to the jury." *Anderson*, 477 U.S. at 251–52. Thus, in evaluating a motion for summary judgment, the Court must first determine if the moving party has made a *prima facie* showing that it is entitled to summary judgment. *See* Fed. R. Civ. P. 56(a); *Celotex*, 477 U.S. at 331. Only once that *prima facie* showing has been made does the burden shift to the nonmoving party to demonstrate the existence of a

genuine dispute of material fact. *See* Fed. R. Civ. P. 56(a); *Celotex*, 477 U.S. at 331.

Both parties may cite to "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers or other materials." Fed. R. Civ. P. 56(c)(1)(A). "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). "Although evidence may be considered in a *form* which is inadmissible at trial, the *content* of the evidence must be capable of admission at trial." *Bender v. Norfolk S. Corp.*, 994 F. Supp. 2d 593, 599 (M.D. Pa. 2014); *see also Pamintuan v. Nanticoke Mem'l Hosp.*, 192 F.3d 378, 387 n.13 (3d Cir. 1999) (noting that it is not proper, on summary judgment, to consider evidence that is not admissible at trial).

III. DISCUSSION

Bressi's complaint should be dismissed as legally frivolous and for failure to state a claim upon which relief can be granted.

A. Claims Regarding 2013 Proceedings

Bressi's claims regarding the 2013 criminal proceedings against him are barred by the applicable statute of limitation.

Federal civil rights claims brought pursuant to 42 U.S.C. § 1983 are subject to Pennsylvania's two-year statute of limitations applicable to personal injury actions. *Bougher v. Univ. of Pittsburgh*, 882 F.2d 74, 78–79 (3d Cir. 1989); *see also* 42 Pa. Cons. Stat. Ann. § 5524. Although the running of a statute of limitations is an affirmative defense, which generally must be raised by way of answer to the complaint, *see* Fed. R. Civ. P. 8(c), where that defense is obvious from the face of the complaint and no development of the record is necessary, a court may dismiss a time-barred complaint as frivolous under 28 U.S.C. § 1915(e)(2)(B)(i) and § 1915A(b)(1). *See Muhammad v. Weis*, Civil Action No. 08-3616, 2009 WL 2525454, at *9, *13 (E.D. Pa. Aug. 17, 2009); *Todd v. Grace*, Civil Action No. 1:08-CV-00440, 2008 WL 2552805, at *1 (M.D. Pa. June 24, 2008); *Johnson v. City/County of Philadelphia*, Civ. A. No. 90-7756, 1991 WL 12169, at *1 (E.D. Pa. Jan. 30, 1991), *aff'd sub nom. Johnson v. Buinno*, 945 F.2d 395 (3d Cir. 1991) (table decision).

Here, none of the wrongful conduct alleged to have been committed

by defendants Clausi, Gembic, and Toomey with respect to the 2013 proceedings occurred within the two years prior to the filing of this action in August 2017. The three criminal proceedings were initiated by criminal complaint in April and May 2013. Bressi appeared before Judge Gembic, entered his guilty plea, and was sentenced to probation on July 16, 2013. Bressi did not appeal, and no further activity occurred with respect to these three cases thereafter. This action was filed more than four years later, and there is nothing to suggest any reason why the limitations period should be tolled.

Under the circumstances presented, these claims are clearly based on an indisputably meritless legal theory and thus should be dismissed as legally frivolous and for failure to state a claim. *See Johnstone v. United States*, 980 F. Supp. 148, 154 (E.D. Pa. 1997); *see also Pino v. Ryan*, 49 F.3d 51, 53–54 (2d Cir. 1995); *Myers v. Vogal*, 960 F.2d 750, 750–51 (8th Cir. 1992) (per curiam); *Street v. Vose*, 936 F.2d 38, 39 (1st Cir. 1991) (per curiam); *Clark v. Ga. Pardons & Paroles Bd.*, 915 F.2d 636, 640 n.2 (11th Cir. 1990).

B. Judicial Immunity

Bressi's claims against Judge Gembic are barred by the doctrine of

absolute judicial immunity.

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

litigant may result on occasion, 'it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.'" *Mireles*, 502 U.S. at 12 (quoting *Bradley*, 80 U.S. (13 Wall.) at 347).

Based on the allegations of the complaint, viewed in the light most favorable to the plaintiff, Bressi's claims *exclusively* concern judicial acts taken by Judge Gembic in his role as the presiding trial judge in Bressi's criminal proceedings, and none of the alleged acts were taken in the complete absence of all jurisdiction. *See Mireles*, 502 U.S. at 12–13; *Gallas*, 211 F.3d at 768–69; *Mikhail*, 991 F. Supp. 2d at 660. Thus, Bressi's claims for damages must be dismissed on immunity grounds. Any claims for injunctive relief similarly must be dismissed. *See* 42 U.S.C. § 1983 (generally prohibiting injunctive relief against judicial officers); *Ball v. Butts*, 445 Fed. App'x 457, 458 (3d Cir. 2011) (per curiam) (holding that a request for injunctive relief "was subject to dismissal [for failure to state a claim] because such relief is not available against 'a judicial officer for an act . . . taken in such officer's judicial capacity'"); *Azubuko*, 443 F.3d at 303–04 ("In 1996, Congress amended 42 U.S.C. § 1983 to provide that

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

Under the circumstances presented, these claims are clearly based on an indisputably meritless legal theory and thus should be dismissed as legally frivolous and for failure to state a claim. *See Neitzke*, 490 U.S. at 327 (noting that claims against defendants who are clearly immune from suit are "based upon an indisputably meritless legal theory"); *Ball*, 445 Fed. App'x at 458 (dismissing appeal as frivolous based on judicial immunity).

C. Prosecutorial Immunity

Bressi has asserted the same claims against the assistant district attorney who prosecuted the criminal case against him, Michael Toomey. To the extent Bressi seeks an award of damages from Toomey, his claims are barred by absolute prosecutorial immunity. *See Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Walker v. City of Philadelphia*, 436 Fed. App'x 61, 62 (3d Cir. 2011) (per curiam); *Kulwicki v. Dawson*, 969 F.2d 1454, 1463–64 (3d Cir. 1992).

Under the circumstances presented, these claims are clearly based on an indisputably meritless legal theory and thus should be dismissed as legally frivolous and for failure to state a claim. *See Newton v. City of Wilmington*, 206 F. Supp. 3d 947, 954 (D. Del. 2016) (dismissing damages claims against prosecutors as frivolous); *Figueroa v. Clark*, 810 F. Supp. 613, 615 (E.D. Pa. 1992) (same); *Clark v. Zimmerman*, 394 F. Supp. 1166, 1175–76 (M.D. Pa. 1975) (same).

D. Public Defender

Bressi has asserted the same claims against his public defender, Peter Kay, but such claims against a criminal defendant's own counsel are non-cognizable under 42 U.S.C. § 1983 and thus frivolous.

The "under color of state law" element of § 1983 excludes from its reach "merely private conduct, no matter how discriminatory or wrongful." *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982). A county public defender, the public defender's office, and the assistant public defenders employed by it are not state actors for purposes of § 1983. *See Polk Cty. v. Dodson*, 454 U.S. 312, 325 (1981) ("[A] public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding."); *Gannaway v. Prime Care Med., Inc.*,

652 Fed. App'x 91, 95 (3d Cir. 2016) (per curiam) (county public defender's office and its employees); *Pelier v. Kalinowski*, Civil Action No. 3:16-CV-02095, 2017 WL 2643422, at *3–*4 (M.D. Pa. May 15, 2017) (assistant public defender and county public defender's office), *report and recommendation adopted by* 2017 WL 2643260 (M.D. Pa. June 19, 2017).

Under the circumstances presented, these claims are clearly based on an indisputably meritless legal theory and thus should be dismissed as legally frivolous and for failure to state a claim. *See Dorn v. Aguilar*, 645 Fed. App'x 114, 115 (3d Cir. 2016) (per curiam) (dismissing appeal concerning § 1983 claims against public defender as frivolous); *Cardone v. Ryan*, 215 Fed. App'x 153, 154 (3d Cir. 2007) (per curiam) (same); *Winters v. Devecka*, 130 Fed. App'x 612, 613 (3d Cir. 2005) (per curiam) (same); *Newton*, 206 F. Supp. 3d at 954–55 (dismissing § 1983 claims against public defender as frivolous).

E. Favorable Termination Rule

Notwithstanding any of the foregoing, this action is barred pursuant to the favorable termination rule articulated by the Supreme Court of the United States in *Heck v. Humphrey*, 512 U.S. 477 (1994).

In *Heck*, the Supreme Court held that, where judgment in favor of a

plaintiff in a § 1983 action for damages would necessarily imply the invalidity of the plaintiff's criminal conviction or sentence, the plaintiff must first demonstrate "that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus [under] 28 U.S.C. § 2254." *Id.* at 486–87. In *Wilkinson v. Dotson*, 544 U.S. 74 (2005), the Supreme Court reaffirmed this rule and broadened it to encompass equitable remedies as well, holding that "a state prisoner's § 1983 action is barred (absent prior invalidation)—no matter what the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson*, 544 U.S. at 81–82.

Bressi has failed to demonstrate that any of his convictions or sentences has been invalidated. Accordingly, under *Heck*, Bressi's federal civil rights claims against these defendants are not cognizable under 42 U.S.C. § 1983. *See Ashton v. City of Uniontown*, 459 Fed. App'x 185, 188–89 (3d Cir. 2012) (per curiam) (*Heck* barred claims that criminal charges,

for which the plaintiffs were convicted, were initiated by the defendants in retaliation for the plaintiffs' exercise of free speech rights); *Gilles v. Davis*, 427 F.3d 197, 209–12 (3d Cir. 2005) (same); *Taylor*, 690 F. Supp. 2d at 376–77 (same). As such, these claims lack any arguable basis in law and should be dismissed as legally frivolous and for failure to state a claim. *Saunders v. Bright*, 281 Fed. App'x 83, 85 (3d Cir. 2008) (per curiam); *Ruth v. Richard*, 139 Fed. App'x 470, 471 (3d Cir. 2005) (per curiam); *Boykin v. Siena House Gaudenzia Program*, 464 F. Supp. 2d 416, 424 (M.D. Pa. 2006).

F. Leave to Amend

The Third Circuit has instructed that if a complaint is vulnerable to dismissal for failure to state a claim, the district court must permit a curative amendment, unless an amendment would be inequitable or futile. *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002). In this case, Bressi's claims clearly and universally lack merit and are legally frivolous. Dismissal without further leave to amend is recommended, as allowing Bressi leave to amend his pleadings would be futile.

IV. PLRA "THREE STRIKES" WARNING

The plaintiff is hereby notified that a prisoner may not bring a civil

action or appeal a civil judgment under 28 U.S.C. § 1915,

> if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

If this recommended disposition is adopted by the presiding United States District Judge, the dismissal of this action for failure to state a claim will constitute a "strike" under 28 U.S.C. § 1915(g), and the accumulation of additional strikes may bar the plaintiff from proceeding *in forma pauperis* in later cases absent a showing of imminent danger. *See generally Byrd v. Shannon*,715 F.3d 117, 126 (3d Cir. 2013) (articulating Third Circuit standard for application of § 1915(g) "three strikes" rule).

V. RECOMMENDATION

Based on the foregoing, it is recommended that:

1. The plaintiff's complaint (Doc. 1; Doc. 11) be **DISMISSED** as legally frivolous and for failure to state a claim, pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), § 1915(e)(2)(B)(ii), and § 1915A(B)(1);

2. The defendant's motion to dismiss for failure to state a claim

(Doc. 19) be **DENIED as MOOT**;

3. The plaintiff's motions for summary judgment (Doc. 25; Doc. 34; Doc. 46) be **DENIED as MOOT**; and

4. The Clerk be directed to **CLOSE** this case.

Dated: July 2, 2018

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

Additional material from this filing is available in the Clerk's Office.