UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 19-1625

Sean Donahue v. Superior Court of Pennsylvania, et al

(U.S. District Court No.: 3-18-cv-01531)

ORDER

Pursuant to Fed. R. App. P. 3(a) and 3rd Cir. Misc. LAR 107.2(b), it is

ORDERED that the above-captioned case is hereby dismissed for failure to timely prosecute insofar as appellant failed to file a brief and appendix as directed. It is

FURTHER ORDERED that a certified copy of this order be issued in lieu of a formal mandate.

For the Court,

s/ Patricia S. Dodszuweit
Clerk

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

Dated: September 05, 2019
SLC/cc: Sean M. Donahue
Martha Gale, Esq.

APPENDIX A IMG_20191126_0001

IN THE US COURT OF APPEALS FOR THE THIRD CIRCUIT

Sean M. Donahue

v.

Superior Court of Pennsylvania, et. al.

19-1625

REQUEST FOR EXTENSION OF TIME TO FILE APPELLANT BRIEF

REQUEST TO PARTICIPATE IN ORAL ARGUMENT

REQUEST FOR DE NOVO REVIEW

TO THE US THIRD CIRCUIT COURT:

The Petitioner RESPECTFULLY REQUEST an extension of time to file his Appellant Brief at the above captioned Docket.

The Appellant has become overwhelmed with *pro se* briefs and other related filings due in numerous courts and mistook 8/19/19 to be 9/18/19. The Petitioner has had briefings and other filings due in the US Supreme Court at Docket No. 19-5808; the PA Superior Court at Dockets: 920 MDA 2019, 1876 MDA 2018, 1179 MDA 2019, 1168 MDA

2018, 364 MDA 2019; the PA Supreme Court at Dockets; 36 MM 2019; US District Court at Docket: 3:14-cv-01351; numerous *pro se* filings at PA Luzerne County Docket CP-40-CR-3501-2012; numerous *pro se* filings at PA Dauphin County Docket CP-22-CR-3716-2015; AND numerous cases in the PA State Civil Service Commission and preparation for the PA Pardon Board.

The matters raised at the above captioned docket 19-1625 are merit worthy matters of federal interest that involve both preemption in foreign policy, extraterritorial jurisdiction of PA courts and uniformity of US First Amendment rights in both the US Third Circuit and The US Second Circuit. The issue of the constitutionality of the courts granting standing to a Hatian foreign national in *Commonwealth v. Descardes, 136 A.3d 493 (Pa. 2016)* continues to arise anew in the numerous state proceedings involving the Petitioner. The case is cited regularly and is inapposite to proceedings involving US citizens simply because Descardes had no standing in US courts. Descardes case was a immigration case in disguise, similar to *UNITED STATES, Petitioner v. Jose MENDOZA-LOPEZ and Angel Landeros-Quinones, 481 U.S.*

828,107 S.Ct. 2148, 95 L.Ed.2d 772, not a state case. Because Descardes did not stand on US soil, he could not be heard. For that same reason, he was was not protected by 42 U.S.C. §1981.

What is more, numerous PA Supreme Court rulings since Descardes, including *Commonwealth v. Delgros, 169 A.3d 538 (Pa. 2017) and Commonwealth v Holmes Commonwealth v. Holmes, 79 A.3d 562 ,*586 (Pa. 2013)* have undermined the reasoning in Descardes and further undermine the reasoning of the US District Court in the instant case. The district court's reliance on Porter sidesteps the fact that *Homes* and *Delgros* essential overruled *Descardes* in the Petitioner's circumstance. The Petitioner is a US citizen who is entitled to review of all merit worthy matters, not a foreign national residing on foring soil who does not share the same rights. Descardes abused a state appellate process in an attempt to beat a federal deportation case. Had Descardes been ordered to appear at a PA PCRA court for hearings, he would have gained entry into the US and likely disappeared into the US population without ever showing up at the PCRA hearings. The Petitioner's circumstance is much different.

What is more, the matter of identical language in the PA harassment statute and the NY being deemed by the US Second Circuit and the Appellate Court of NY to be unconstitutional but deemed by the PA courts to still be constitutional poses a threat of prosecution to the Petitioner and residents of PA at large. This matter must be resolved *(Broadrick v. Oklahoma, 413 U.S. 601 (1973); Brandenburg v. Ohio, 395 U.S. 444, 447-8 (1969); Virginia v. Black, 538 U.S. 343, 359-360 (2003); Thornhill v. Alabama, 310 U.S. 88, 95 (1940); Pennsylvania LABOR ANTI-INJUNCTION ACT of Jun. 2, 1937, P.L. 1198, No. 308; YEAR 2010- 18 Pa C.S. §2709(e) HARASSMENT; People v Golb, 23 N.Y.3d 455, NY Slip Op 3426; 2014 WL 1883943)*

While state trial courts have repeatedly appointed appellate counsel to represent the Petitioner in state matters, several counsel have repeatedly abandoned the Petitioner on merit worthy issues that have made it to state panel review despite Anders Briefs and Finely letters being filed by counsel. *(Ross v. David Varano; PA State Attorney General PA State Attorney General, Appellant, No. 12–2083, 712 F.3d 784 (2013); Commonwealth v. Sheehan 446 Pa. 35,*39-*41 (1971);*

United States Supreme Court in United States v. Morgan, 346 U.S. 502, 505, 98 L. Ed. 248, 253 (1954))

The chronic abandonment of merit worthy arguments has prompted the Luzerne County state trial court to state that the Petitioner is better off representing himself. (*Strickland v. Washington, 466 U.S. 668 (1984); United States v. Cronic, 466 U.S. 648 (1984); Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973, 975 (1987)*) In all of his state cases, the Petitioner has repeatedly had to meet deadlines that appointed counsel have repeatedly planned to let lapes, not for reasons of strategy and not because there is an absence of merit worthy argument but because they believe that one is only entitled to 'so much' representation by an appointed counsel, regardless of the meritworthyness of issues. This circumstance has created a full *pro se* appellate schedule for the Petitioner, including the pressing need to prepare for oral arguments.

The PETITIONER RESPECTFULLY requests that he be allowed to participate in oral argument for the instant case.

The PETITIONER RESPECTFULLY requests an extension to file a proper appellant Brief in the instant case. The Petitioner has a *pro se* state briefing due at 364 MDA 2019 on September 30, 2019 and expects one due at 1179 MDA 2019 soon thereafter. Therefore, the Petitioner requests an extension beyond September 30, 2019 to file his briefing in this case.

The Petitioner avers that the US District Court failed to get to the merits of the matters raised in the instant case and if it had, it would have had no choice but to reverse Descardes and to strike the PA harassment statute, as was done in NY at the urging of numerous US Second Circuit judges.

The Petitioner RESPECTFULLY REQUESTS a *de novo* review in the instant case.

The forgoing is true in both fact and belief and submitted under penalty of perjury.

Respectfully Submitted,

Sep 7, 2019
Date

Sean M. Donahue

APPENDIX A Merged Request 19-1625 Sep 7 2019

IN THE US COURT OF APPEALS FOR THE THIRD CIRCUIT

Sean M. Donahue

v.

Superior Court of Pennsylvania, et. al.

19-1625

Certificate of Service

I verify that one copy is being served to the Clerk of the Court at the below address.

Original Plus One Copy to The Third Circuit Court of Appeals:

(1) Clerk of The Court U.S. Court of Appeals
Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

One Copy to The Following;

(2) Clerk US Middle District of PA
U.S. District Court
Middle District of Pennsylvania
PO Box 1148
235 N. Washington Avenue
Scranton, PA 18501-1148

One Copy to The Following;

(3) Commonwealth of Pennsylvania:
Sean A. Kirkpatrick
Attorney General
PA Ofc of Attorney General
Strawberry Sq Fl 15
Harrisburg, PA 17120-0001

One Copy to The Following;

(4) State Courts of Pennsylvania:
Martha Gale, Esquire
Supreme Court of Pennsylvania
Administrative Office of PA Courts
1515 Market Street, Suite 1414
Philadelphia, PA 19102

Respectfully Submitted,

Sep 7 2019
Date

Sean M. Donahue
Sean M. Donahue

Case Number: 3:18-cv-01531-MEM Document Number: 27 User: EP Printed: 2/25/2019 3:12:50 PM

Sean M Donahue
625 Cleveland Street
Hazleton,PA 18201

APPENDIX A.1 Scan0032

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

SEAN M. DONAHUE,	:	
	:	
Plaintiff	:	**CIVIL ACTION NO. 3:18-1531**
	:	
v.	:	**(JUDGE MANNION)**
SUPERIOR COURT OF PENNSYLVANIA, *et al.*,	:	
Defendants	:	

O R D E R

In light of the memorandum issued this same day, **IT IS HEREBY ORDERED THAT:**

(1) The report and recommendation of Judge Mehalchick, **(Doc. 21)**, is **ADOPTED IN ITS ENTIRETY**;

(2) The plaintiff's motion for leave to proceed *in forma pauperis*, **(Doc. 2)**, is **GRANTED** solely for the purpose of the filing of his complaints;

(3) The plaintiff's proposed second amended complaint, **(Docs. 14-1 & 14-2)**, is **DISMISSED** as improperly filed, and the State Court Defendants' motion to dismiss this proposed pleading, **(Doc. 15)**, is therefore **DENIED AS MOOT**;

(4) The State Court Defendants' motion to dismiss, **(Doc. 12)**, plaintiff's original amended complaint, **(Doc. 11)**, is **GRANTED**, and all claims asserted against the State Court Defendants are

DISMISSED WITH PREJUDICE, as barred by Eleventh Amendment immunity;

(5) The remainder of plaintiff's amended complaint, **(Doc. 11)**, against the remaining defendants, is **DISMISSED IN ITS ENTIRETY**, as specified in the foregoing memorandum, pursuant to 28 U.S.C. §1915(e)(2)(B);

(6) The plaintiff's request for appointment of counsel is **DENIED AS MOOT**;

(7) The plaintiff's objections to Judge Mehalchick report, **(Docs. 24 & 25)**, are **OVERRULED**;

(8) The plaintiff is **DENIED** leave to file a second amended complaint based on futility; and

(9) The clerk of court is directed to **CLOSE** this case.

s/ *Malachy E. Mannion*
MALACHY E. MANNION
United States District Judge

Dated: February 25, 2019

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APPENDIX A.1 Scan0032

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA
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Sean M Donahue
625 Cleveland Street
Hazleton,PA 18201

APPENDIX A.1 Scan0033

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

SEAN M. DONAHUE,	:	
	:	
Plaintiff	:	**CIVIL ACTION NO. 3:18-1531**
	:	
v.	:	**(JUDGE MANNION)**
SUPERIOR COURT OF PENNSYLVANIA, *et al.*,	:	
Defendants	:	

M E M O R A N D U M

I. BACKGROUND

Pending before the court is the report and recommendation, (Doc. 21), of Judge Karoline Mehalchick recommending that this civil rights action, under 42 U.S.C. §1983, filed by *pro se* plaintiff Sean M. Donahue,[1] be dismissed in its entirety. Specifically, Judge Mehalchick recommends that the court grant plaintiff's motion to proceed *in forma pauperis*, (Doc. 2), for the sole purpose of filing his amended complaint, and thereafter grant the motion to dismiss plaintiff's amended complaint, (Doc. 11), and the State Court Defendants, (Doc. 12), since the claims against these defendants are barred by the Eleventh Amendment. Judge Mehalchick also screened plaintiff's

[1]Donahue repeatedly misidentifies Judge Mehalchick as the "magistrate." The title magistrate no longer exists in the U.S. Courts, having been changed from "magistrate" to "magistrate judge" in 1990. Judicial Improvements Act of 1990, 104 Stat. 5089, Pub. L. No. 101-650, §321 (1990) ("After the enactment of this Act, each United States magistrate . . . shall be known as a United States magistrate judge."). Donahue is reminded to use the correct title, in the future, when referring to Judge Mehalchick.

amended complaint under 28 U.S.C. §1915[2] and found that the remainder of plaintiff's amended complaint, raising various claims related to his criminal proceedings in state court,[3] should also be dismissed.

On February 6, 2019, the court granted plaintiff's request for an extension of time to file his objections. The plaintiff filed his 56-page objections to the report and recommendation on February 7, 2019, with a copy of the transcript from his September 2017 sentencing in Luzerne County Court attached as an exhibit. (Doc. 24). The plaintiff then filed supplemental objections to the report on February 13, 2019. (Doc. 25).

After having reviewed the record, the court will **ADOPT** the report and recommendation. The amended complaint will be **DISMISSED IN ITS ENTIRETY** and, plaintiff's objections will be **OVERRULED**. Further, this case will be **CLOSED**.

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[2]Section 1915 of the United States Code, 28 U.S.C. §1915, requires the court to dismiss a plaintiff's case if, at any time, the court determines that the action is, "frivolous or malicious" or "fails to state a claim on which relief may be granted." §1915(e)(2)(B). *See* McCain v. Episcopal Hosp., 350 Fed.Appx. 602, 604 (3d Cir. 2009) (Section 1915(e)(2) applies to all *in forma pauperis* complaints, and not just to prisoners); Grayson v. Mayview State Hosp., 293 F3d 103, 110 n. 10 (3d Cir. 2002).

[3]Since Judge Mehalchick notes all of the criminal cases filed against plaintiff in her report, the court will not repeat them. The court also notes that the Criminal Dockets for plaintiff can be found at http://ujsportal.pacourts.us. The court can take judicial notice of the plaintiff's Criminal Dockets for purposes of defendants' instant motion as an official state court record and matters of public record. *See* Sands v. McCormick, 502 F.3d 263, 268 (3d Cir. 2007); Buck v. Hampton Twp. Sch. Dist., 452 F.3d 256, 260 (3d Cir. 2006).

II. STANDARD OF REVIEW

When objections are timely filed to the report and recommendation of a magistrate judge, the district court must review *de novo* those portions of the report to which objections are made. 28 U.S.C. §636(b)(1); Brown v. Astrue, 649 F.3d 193, 195 (3d Cir. 2011). Although the standard is *de novo*, the extent of review is committed to the sound discretion of the district judge, and the court may rely on the recommendations of the magistrate judge to the extent it deems proper. Rieder v. Apfel, 115 F.Supp.2d 496, 499 (M.D.Pa. 2000) (citing United States v. Raddatz, 447 U.S. 667, 676 (1980)).

With respect to the portions of a report and recommendation to which no objections are made, the court should, as a matter of good practice, "satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72(b), advisory committee notes; *see also* Univac Dental Co. v. Dentsply Intern., Inc., 702 F.Supp.2d 465, 469 (M.D.Pa. 2010) (citing Henderson v. Carlson, 812 F.2d 874, 878 (3d Cir. 1987) (explaining judges should give some review to every report and recommendation)). Nevertheless, whether timely objections are made or not, the district court may accept, not accept, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. §636(b)(1); Local Rule 72.31.

III. DISCUSSION[4]

Initially, Judge Mehalchick correctly determines that plaintiff's proposed second amended complaint, (Docs. 14-1 & 14-2), should be **DISMISSED** as improperly filed, and hence the State Court Defendants' motion to dismiss this pleading, (Doc. 15), can be **DENIED AS MOOT**. Judge Mehalchick's report will be **ADOPTED** in this regard for the reasons stated therein. As such, plaintiff will be deemed proceeding on his original amended complaint. (Doc. 11).

Plaintiff names 11 defendants in his amended complaint and he raises claims for injunctive and declaratory relief. After a thorough analysis, Judge Mehalchick properly finds that "[plaintiff's] claims for prospective relief against the State Court Defendants, as well as against the Commonwealth of Pennsylvania, are barred by the doctrine of Eleventh Amendment immunity." In his objections to this finding, plaintiff largely repeats his contentions he raised in his brief in opposition to the State Court Defendants' motion to dismiss which were correctly addressed in the report.

Suffice to say that in Green v. Domestic Relations Section Court of Common Pleas Compliance Unit Montgomery County, 649 Fed.Appx. 178, 180 (3d Cir. 2016), the Third Circuit explained:

> [Plaintiff's] claims are precluded by the Eleventh Amendment, which generally immunizes Pennsylvania, its agencies, and its

[4]Judge Mehalchick states the correct standards regarding motions to dismiss under Fed.R.Civ.P. 12(b)(1), (6), and the background and procedurally history of this case, so they will not be repeated.

> employees acting in their official capacities, from suits brought pursuant to 42 U.S.C. §1983 in federal court, *see* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); Laskaris v. Thornburgh, 661 F.2d 23, 25 (3d Cir. 1981). As explained by the District Court, none of the exceptions to Eleventh Amendment immunity applies here because Pennsylvania has not consented to suit in federal court, see 1 Pa. Cons.Stat. Ann. §2310; 42 Pa. Cons.Stat. Ann. §8521(b), and the defendant, [ ], is a sub-unit of Pennsylvania's unified judicial system. All courts in the unified judicial system are part of the Commonwealth and are entitled to Eleventh Amendment immunity. *See* Haybarger v. Lawrence County Adult Probation & Parole, 551 F.3d 193, 198 (3d Cir. 2008). Furthermore, "all components of the judicial branch of the Pennsylvania government are state entities and thus are not persons for section 1983 purposes." Callahan v. City of Philadelphia, 207 F.3d 668, 674 (3d Cir. 2000). *See also* Will v. Michigan Dep't of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) ("[A] State is not a 'person' within the meaning of §1983."

Therefore, all of plaintiff's claims for injunctive and declaratory relief against the State Court Defendants and the Commonwealth of Pennsylvania should be dismissed pursuant to Eleventh Amendment immunity. *See* Naranjo v. City of Philadelphia, 626 Fed.Appx. 353, 355-56 (3d Cir. 2015) (Third Circuit stated that "judges are generally immune from claims under §1983 for injunctive relief.") (citing Azubuko v. Royal, 443 F.3d 302, 304 (3d Cir. 2006)).

Accordingly, State Court Defendants' motion to dismiss, (Doc. 12), plaintiff's amended complaint, (Doc. 11), will be **GRANTED**, and plaintiff's claims against them for declaratory and injunctive relief will be **DISMISSED WITH PREJUDICE**. Further, all of plaintiff's claims against the Commonwealth of Pennsylvania will be **DISMISSED WITH PREJUDICE**

pursuant to 28 U.S.C. §1915(e)(2)(B) (iii).

The court will now address plaintiff's claims for declaratory and injunctive relief against the remaining defendants. Judge Mehalchick has screened plaintiff's amended complaint as to the remaining defendants as required, *see* Naranjo, 626 Fed.Appx. a 355, and she finds that the amended complaint should be dismissed in its entirety as to these defendants.

At the outset, the plaintiff's requests for declaratory relief, regarding the two Pennsylvania criminal statutes under which he was convicted, as well as the Pennsylvania Post Conviction Relief Act ("PCRA"), must be dismissed. Dismissal is warranted regarding plaintiff's requests that his Dauphin County and Luzerne County convictions be declared unconstitutional and overturned based on his contention that the criminal statutes were applied to him in an overly broad manner.

Declaratory judgment is not meant to adjudicate alleged past unlawful activity as plaintiff seeks to do in this case. There is no question that plaintiff can request declaratory relief to remedy alleged ongoing violations of his constitutional rights, but, even though plaintiff was tried under the criminal statutes he challenges in his pleading, "he does not plausibly allege that he might be separately prosecuted under them again." *See* Blakeney v. Marsico, 340 Fed.Appx. 778, 780 (3d Cir. 2009)(Third Circuit held that to satisfy the standing requirement of Article III, a party seeking declaratory relief must allege that there is a substantial likelihood that he will suffer harm in the future)(citations omitted). However, plaintiff is not entitled to declaratory relief

for alleged violations of his rights in the past, as he attempts to allege in this case. *Id.* (citing Brown v. Fauver, 819 F.2d 395, 399-400 (3d Cir. 1987)(Third Circuit directed district court to dismiss plaintiff's §1983 claim for prospective relief where he "has done nothing more than allege past exposure to unconstitutional state action").

The plaintiff's amended complaint is mainly an attempt to challenge his state court criminal convictions and "[d]eclaratory relief is not available to attack a criminal conviction." Willaman v. Ferentino, 173 Fed.Appx. 942 (3d Cir. 2006).[5] Therefore, plaintiff's requests for declaratory judgment regarding alleged past constitutional violations related to his state court criminal convictions and proceedings will be **DISMISSED WITH PREJUDICE.**

Similarly, the *Younger* Abstention doctrine[6] bars plaintiff's requests for declaratory and injunctive relief regarding his ongoing state court appeals, both direct and collateral, including his PCRA proceedings. Under the *Younger* abstention doctrine, this court should not intervene in plaintiff's pending state criminal cases. The United States Supreme Court has recognized "a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable harm to a

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[5]The plaintiff's claims are likely further barred by the *Rooker-Feldman* doctrine.

[6]*Younger* abstention "is premised on the notion of comity, a principle of deference and 'proper respect' for state governmental functions in our federal system." Evans v. Court of Common Pleas, Delaware County, Pa., 959 F.2d 1227, 1234 (3d Cir. 1992).

federal plaintiff." Moore v. Sims, 442 U.S. 415, 423 (1979)(discussing the abstention doctrine articulated by the Supreme Court in Younger v. Harris, 401 U.S. 37 (1971), and determining that it applies to civil, as well as criminal, proceedings). Application of the *Younger* doctrine to §1983 civil rights actions in which the plaintiff is challenging the pending state court criminal charges filed against him and is alleging that the initiation and prosecution in the ongoing underlying state court action "violated and continues to violate his constitutional rights" is appropriate. *See* Smithson v. Rizzo, 2015 WL 1636143, *4; Jaffery v. Atlantic County Prosecutor's Office, 695 Fed.Appx. 38 (3d Cir. 2017).

Thus, *Younger* abstention is appropriate with respect to plaintiff's claims for prospective relief regarding his ongoing state proceedings. *See* Mikhail v. Kahn, 991 F. Supp. 2d 596, 632 (E.D.Pa. 2014) ("The *Younger* doctrine is as applicable to suits for declaratory relief as it is to the those for injunctive relief....") (citation omitted). As such, these claims will be **DISMISSED**.

Finally, Judge Mehalchick discusses plaintiff's challenges to the constitutionality of the Descardes decision.[7] She states that "[plaintiff]

[7] *See* Com. v. Descardes, 635 Pa. 395, 136 A.3d 493 (2016). In Com. v. Porter, 2018 WL 1404542, *1 n. 5 (Pa. Super. 2018), the Superior Court noted that in Descardes, the defendant filed a PCRA petition after he completed his sentence and the Supreme Court "held that the petition 'should have been dismissed because, [the defendant] was no longer incarcerated at the time [the PCRA petition] was filed, he was ineligible for PCRA relief, and thus, ... the PCRA court ... lacked jurisdiction to entertain the petition.'" (citing

requests that the decision be reversed, or otherwise prohibited from being applied to his 'appeals, motions, and [PCRA] petitions' that stem from the Dauphin County and Luzerne County Convictions."

In Porter, 2018 WL 1404542, *2, the Superior Court indicated that the clear language of the PCRA statute, 42 Pa.C.S.A. §9543(a)(1)(i), provides:

> To be eligible for relief [ ], the petitioner must plead and prove by a preponderance of the evidence all of the following: (1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is, at the time relief is granted: (i) currently serving a sentence of imprisonment, probation or parole for the crime; [or] (ii) awaiting execution of a sentence of death for the crime[.]"

Thus, subsection (i) clearly provides that a PCRA petitioner must prove he is "currently serving a sentence of imprisonment, probation or parole for the crime", and that if the petitioner does not meet this requirement he is not eligible for PCRA relief. *See* 42 Pa.C.S.A. §9543(a)(1)(i). Any other "interpretation would violate [PA's] Statutory Construction Act's mandate to give effect to clear and unambiguous words of a statute." Porter, 2018 WL 1404542, *3 (citing 1 Pa.C.S.A. §1921(a)-(b); Com. v. Williams, 84 A.3d 680, 687 (Pa. 2014) (PA Supreme Court stated "When the words of a statute are clear and unambiguous, we must give effect to those words.")). *See also* Com. v. Castellanos, 2017 WL 1655390, *4 (Pa. Super. May 2, 2017) (Supreme Court held in Descardes that "where claim is cognizable under PCRA, PCRA is sole method to obtain collateral review" and since "petitioner

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Descardes, 136 A.3d at 497, 503).

was no longer serving probationary sentence when he filed petition, [ ] he was ineligible for PCRA relief", and "both PCRA court and Superior Court lacked jurisdiction to entertain petition").

To the extent that plaintiff is deemed as seeking this court to issue a writ of mandamus, under 28 U.S.C. §1361, to intervene in his state court proceedings by enjoining or prohibiting the application of the Descardes decision, this court has no authority to direct a state court or officer to perform any action or duty. *See* In re Wallace, 405 Fed.Appx. 580 (3d Cir. 2011) (federal court has no mandamus jurisdiction over a state court to compel it to dismiss criminal charges, or to direct it to perform any action or duty). Plaintiff argues in his supplemental objections that he does not seek mandamus, rather he seeks this court to find that the state courts exceeded their jurisdiction with respect to the Descardes decision since it dealt with immigration law which is preempted by the federal government. Thus, plaintiff contends that this court should enjoin the state courts from applying the Descardes decision to his state criminal cases. Regardless, since plaintiff seeks this court to preclude the state courts from applying the Descardes decision to his state criminal cases, this sounds in mandamus relief.

In order to obtain a writ of mandamus under 28 U.S.C. §1361, plaintiff must demonstrate that he "lack[s] adequate alternative means to obtain the relief he seek[s]" and he "carr[ies] the burden of showing that his right to issuance of the writ is 'clear and indisputable.'" Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296, 309, 109 S.Ct.

1814 (1989). Plaintiff has adequate state remedies available to him and he has failed to show he has a "clear and indisputable" right to the writ. Also, §1361 provides the federal courts with jurisdiction "in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff." Id. None of the defendants are officers or employees of the United States or of a federal agency and, plaintiff does not allege any action or omission by a federal officer, employee or agency.

Therefore, to the extent plaintiff seeks this court to reverse and overturn the Descardes decision based on the void-for-vagueness doctrine, to strike the PCRA statute, and to enjoin the state court from applying this decision and this statute to his current and future state court appeals, his request is without merit. Thus, plaintiff's requests for injunctive and declaratory relief regarding the PCRA statute, and the Descardes decision and its progeny, will be **DISMISSED WITH PREJUDICE** as legally frivolous pursuant to 28 U.S.C. §1915(e)(2)(B) (i).

Additionally, insofar as plaintiff requests the court to appoint him counsel in his objections, (Doc. 24 at 1), his request will be **DENIED AS MOOT** since the court is dismissing his amended complaint in its entirety, as discussed above.

Finally, based on the above, it would be futile to grant plaintiff leave to file a second amended complaint. *See* Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc., 482 F.3d 247, 251 (3d Cir. 2007) ("[I]n civil rights

cases district courts must offer amendment—irrespective of whether it is requested—when dismissing a case for failure to state a claim unless doing so would be inequitable or futile."); Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002).

IV. CONCLUSION

Based on the foregoing, the report and recommendation of Judge Mehalchick, (Doc. 21), is **ADOPTED IN ITS ENTIRETY**, and plaintiff's amended complaint, (Doc. 11), is **DISMISSED IN ITS ENTIRETY**. The objections filed by plaintiff, (Doc. 24), are **OVERRULED**. A separate order shall issue.

s/ *Malachy E. Mannion*
MALACHY E. MANNION
United States District Judge

Date: February 25, 2019

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

SEAN M DONAHUE, Plaintiff v. SUPERIOR COURT OF PENNSYLVANIA, et al., Defendants	CIVIL ACTION NO. 3:18-CV-01531 (MANNION, D.J.) (MEHALCHICK, M.J.)

REPORT AND RECOMMENDATION

This is a *pro se* action for injunctive and declaratory relief, initiated by Plaintiff, Sean M. Donahue ("Donahue"), through the filing of the original complaint and a motion for leave to proceed *in forma pauperis* on August 1, 2018. (Doc. 1; Doc. 2). Donahue filed an amended complaint on November 28, 2018 (Doc. 11), which the following Defendants moved to dismiss on December 3, 2018: the Superior Court of Pennsylvania; the Supreme Court of Pennsylvania; and the Courts of Common Pleas of Dauphin and Luzerne Counties (collectively referred to as the "State Court Defendants"). (Doc. 12). Donahue is a prolific *pro se* litigant who has filed several lawsuits in this district, many of which stem from his arrests and convictions at the state court level. In his latest foray into federal court, Donahue appears to raise direct constitutional challenges to the Pennsylvania criminal statutes under which he was convicted. Donahue further seeks to enjoin the application of certain legal precedent and statutory provisions in his ongoing proceedings before the Pennsylvania state court system.

For the reasons stated herein, it is recommended that Donahue's motion for leave to proceed *in forma pauperis* (Doc. 2) be **GRANTED** for the sole purpose of filing the amended complaint (Doc. 11), which stands as the operative pleading in this matter. The Court further

recommends that the State Court Defendants' motion to dismiss (Doc. 12) be **GRANTED**, and that the remainder of the amended complaint (Doc. 11) be **DISMISSED** pursuant to 28 U.S.C. § 1915(e)(2)(B).

I. BACKGROUND AND PROCEDURAL HISTORY

On August 1, 2018, Donahue filed the original complaint (Doc. 1), along with a motion to proceed *in forma pauperis*. (Doc. 2). On October 9, 2018, the Court received and docketed a filing from Donahue, entitled "Motion to Amend Complaint." (Doc. 7). Therein, Donahue apparently sought to add several new defendants to the action and include additional requests for declaratory relief. (Doc. 7). The Court liberally construed Donahue's filing as an attempt to amend the complaint once as a matter of course. (Doc. 9). As such, in deference to his *pro se* status, the Court Ordered Donahue to file a "simple, concise, and comprehensive" amended complaint that was complete in all respects. (Doc. 9). In response to this Order, Donahue filed a sixty-eight (68) page amended complaint on November 28, 2018.[1] (Doc. 11).

When liberally construed, the facts that form the basis of Donahue's amended complaint arise from his criminal proceedings in state court. Upon review of Donahue's

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[1] The amended complaint identifies the following individuals and entities as Defendants to this action: the Superior Court of Pennsylvania; the Supreme Court of Pennsylvania, the Dauphin County Court of Common Pleas; the Luzerne County Court of Common Pleas; the Commonwealth of Pennsylvania; Pennsylvania Governor, Tom Wolf; Pennsylvania Attorney General, Josh Shapiro; Pennsylvania Deputy Attorney General, Bernard Ashley Anderson; Dauphin County District Attorney, Francis T. Chardo; Dauphin County District Attorney's Officer Ryan Hunter Lysaght; and Dauphin County Assistant Deputy District Attorney Katie Lynn Adam. (Doc. 11, at 1-2).

publicly available state court criminal dockets,[2] Donahue was charged in 2012 under 18 Pa. C.S. § 2709 (the "Harassment Statute") and 18 Pa. C.S. § 2706 (the "Terroristic Threats Statute") for allegedly sending threatening mails to a Luzerne County District Attorney.[3] *Commonwealth v. Donahue*, CP-40-CR-0003501-2012 (Luzerne Cnty. C.C.P.); *Com. v. Donahue*, No. 2184 MDA 2013, 2015 WL 7281897, at *1 (Pa. Super. Ct. May 19, 2015). After a lengthy procedural history, a jury found Donahue guilty under the Terroristic Threats Statute on July 10, 2017. *Commonwealth v. Donahue*, CP-40-CR-0003501-2012 (Luzerne Cnty. C.C.P.). On September 18, 2018, the trial court judge sentenced Donahue to one hundred and twenty (120) days to twenty-three (23) months in jail, with two hundred and eighty (280) days credit (the "Luzerne County Conviction").[4] *Commonwealth v. Donahue*, CP-40-CR-0003501-2012 (Luzerne Cnty. C.C.P.); *Commonwealth v. Donahue*, No. 1949 MDA 2017, 2018

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[2] In addition to the amended complaint in this matter, the Court takes judicial notice of certain publicly-available docket sheets, opinions, and orders entered in state and federal proceedings involving Donahue. *See e.g. Commonwealth v. Donahue*, Docket No. CP-40-CR-0003501-2012 (Luzerne Cnty. C.C.P.); *Commonwealth v. Donahue*, Docket No. CP-22-CR-0003716-2015 (Dauphin Cnty. C.C.P.); *Commonwealth v. Donahue*, No. 1168 MDA 2018 (Pa. Sup. Ct.); *Commonwealth v. Donahue*, No. 39 MDM 2018 (Pa. Sup. Ct.); *Commonwealth v. Donahue*, No. 40 MDM 2018 (Pa. Sup. Ct.); *Commonwealth v. Donahue*, No. 1329 MDA 2018 (Pa. Sup. Ct.); *Commonwealth v. Donahue*, No. 1417 MDA 2018 (Pa. Sup. Ct.); *Commonwealth v. Donahue*, No. 1623 MDA 2018 (Pa. Sup. Ct.); *Com. v. Donahue*, No. 2184 MDA 2013, 2015 WL 7281897, at *1 (Pa. Super. Ct. May 19, 2015); *Commonwealth v. Donahue*, No. 1469 MDA 2016, 2017 WL 2418390, at *1 (Pa. Super. Ct. June 5, 2017). These are all matters of public record of which the Court may properly take judicial notice in ruling on a motion to dismiss. *See Sands v. McCormick*, 502 F.3d 263, 268 (3d Cir. 2007).

[3] The State filed a related criminal information against Donahue on October 22, 2012. *Commonwealth v. Donahue*, CP-40-CR-0003501-2012 (Luzerne Cnty. C.C.P.).

[4] Donahue was immediately released on parole. *Donahue*, 2018 WL 4001623, at *2.

WL 4001623, at *2 (Pa. Super. Ct. Aug. 22, 2018). In 2015, similar litigation commenced against Donahue in the Dauphin County Court of Common Pleas. *Commonwealth v. Donahue*, Docket No. CP-22-CR-0003716-2015 (Dauphin Cnty. C.C.P.). Again, Donahue was charged under the Harassment and Terroristic Threats Statutes when he allegedly sent threatening emails to numerous Commonwealth employees.[5] *Commonwealth v. Donahue*, Docket No. CP-22-CR-0003716-2015 (Dauphin Cnty. C.C.P.); *Commonwealth v. Donahue*, No. 1469 MDA 2016, 2017 WL 2418390, at *1 (Pa. Super. Ct. June 5, 2017). After a jury found Donahue guilty of two counts under the Harassment Statute, the trial court judge sentenced Donahue to two consecutive terms of one (1) year probation on April 19, 2016 (the "Dauphin County Conviction"). *Commonwealth v. Donahue*, Docket No. CP-22-CR-0003716-2015 (Dauphin Cnty. C.C.P.); *Donahue*, 2017 WL 2418390, at *1. Donahue has filed numerous appeals in connection with the Luzerne County Conviction and the Dauphin County Conviction, several of which remain pending before the Pennsylvania state court system. *See Commonwealth v. Donahue*, No. 1168 MDA 2018 (Pa. Sup. Ct.); *Commonwealth v. Donahue*, No. 1329 MDA 2018 (Pa. Sup. Ct.); *Commonwealth v. Donahue*, No. 1417 MDA 2018 (Pa. Sup. Ct.); *Commonwealth v. Donahue*, No. 1623 MDA 2018 (Pa. Sup. Ct.); *Commonwealth v. Donahue*, No. 1876 MDA 2018; *Commonwealth v. Donahue*, No. 753 MAL 2018 (Pa.).

The amended complaint generally alleges that certain state court decisions violate the Supremacy Clause of the United States Constitution, the Logan Act, and "the principles of

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[5] The State filed a related criminal information against Donahue on September 23, 2015. *Commonwealth v. Donahue*, Docket No. CP-22-CR-0003716-2015 (Dauphin Cnty. C.C.P.).

both federalism and comity." (Doc. 11, at 3). Specifically, Donahue denounces the state court system's disposition of a third-party's case, *Commonwealth v. Descardes*, 136 A.3d 493 (2016) (the "Descardes Decision") and advances various arguments as to why he believes the matter is incorrect or constitutionally infirm. (Doc. 11, at 16-32). Donahue also raises a constitutional challenge to the Post Conviction Relief Act ("PCRA"), upon which the Descardes Decision was based, and argues it is "overbroad, vague, and sweeping." (Doc. 11, at 7). Further, Donahue contests the Descardes Decision's judicial construction of the PCRA, as he alleges it impermissibly "create[d] new law." (Doc. 11, at 4, 8-9). Finally, Donahue argues certain provisions of the PCRA "systematically deny relief," and asserts that the Act effectively chills the First Amendment right to petition the government. (Doc. 11, at 30, 54-62). As for relief, Donahue seeks the following declaratory and injunctive measures: that the Descardes Decision be reversed and "struck from the Pennsylvania judicial record," based on the various grounds articulated by Donahue; that the Pennsylvania State Courts be enjoined from applying the Descardes Decision, and its progeny, to any state or federal appeals related to his convictions; that the PCRA be struck, either in part or in its entirety, as overbroad, vague, and sweeping; and that the state court system be enjoined from applying certain provisions of the PCRA to his litigation and collateral appeals.[6] (Doc. 11, at 3-9).

The second amended complaint also challenges the constitutional validity of the Harassment Statute and the Terroristic Threats Statute, which led to his state court

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[6] As best can be gleaned from the amended complaint, Donahue essentially seeks to prevent the PCRA Courts from denying relief based on statutory time bars or "because a petitioner is no longer serving a sentence." (Doc. 11, at 8-9).

conviction. (Doc. 11, at 4-6, 9-10). When liberally construed, Donahue seemingly raises both facial and as-applied constitutional challenges to these provisions, and avers they are "overbroad, vague, and sweeping." (Doc. 11, at 4-6). In support of this assertion, Donahue cites to a New York state court decision, *People v. Golb*, 23 N.Y.3d 455 (2014), that considered a similarly worded harassment statute[7] and declared it unconstitutional. (Doc. 11, at 8-11). Donahue further states that the Terroristic Threats Statute contains similar language to the Harassment Statute, and is thus equally overbroad, vague, and sweeping. (Doc. 11, at 5). As for relief, Donahue requests: that the Harassment and Terroristic Threats Statutes, in their entirety, be struck as facially overbroad, vague, and sweeping; that the portions of the Harassment and Terroristic Threats Statutes, as applied to Donahue during his state court criminal proceedings, be struck as overbroad, vague, and sweeping; that Donahue's state court convictions under the challenged statutes be "quashed, vacated, and expunged" from the Pennsylvania judicial record; that the Pennsylvania state courts be enjoined *nunc pro tunc* from prosecuting Donahue under the Harassment or Terroristic Threats Statutes; and that his related criminal cases be struck from the record *nunc pro tunc*. (Doc. 11, at 5-6, 9-10).

Prior to this Court conducting its statutorily mandated screening function under 28 U.S.C. § 1915(e), the State Court Defendants filed a motion to dismiss the amended complaint, along with a brief in support thereof, on December 3, 2018. (Doc. 12; Doc. 13). Donahue subsequently filed a document on December 20, 2018, which contained both a

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[7] The State Court in *Golb* considered New York Penal Law § 240.30(1), which has since been amended. *Barboza v. D'Agata*, 676 F. App'x 9, 14 n. 5 (2d Cir. 2017).

"response" to the State Court Defendants' motion and a "[Second] Amendment of Complaint in Response." (Doc. 14). Donahue also appended what purported to be a second amended complaint to his document,[8] which totaled ninety-eight (98) pages in length and included one-hundred (100) additional pages of evidentiary material. (Doc. 14-1; Doc. 14-2). On January 9, 2019, the State Court Defendants filed a responsive motion to dismiss Donahue's amended pleading, along with a supporting brief. (Doc. 15; Doc. 16).

This matter is now before the Court pursuant to its statutory obligation under 28 U.S.C § 1915(e)(2) to screen the amended complaint and dismiss it if it fails to state a claim upon which relief can be granted. Further, as the time for filing responsive briefs has passed, the State Court Defendants' motion to dismiss (Doc. 12) is now ripe for disposition.

II. DISCUSSION

A. STANDARD

Under 28 U.S.C. § 1915(e)(2), the Court is obligated, prior to service of process, to screen a civil complaint brought *in forma pauperis*. The Court must dismiss the complaint if it is frivolous or malicious, or fails to state a claim upon which relief can be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(i)-(ii). In performing this mandatory screening function, a district court applies the same standard applied to motions to dismiss under Rule 12(b)(6) of the Federal

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[8] As discussed *infra*, insofar as Donahue intended to amend his complaint a second time, he failed to comply with Rule 15 of the FEDERAL RULES OF CIVIL PROCEDURE. Accordingly, for the purposes of the instant Report and Recommendation, the amended complaint filed on November 28, 2018 (Doc. 11) stands as the operative pleading, and the Court liberally construes Donahue's "Response" as a brief in opposition to the State Court Defendants' motion to dismiss. (Doc. 14, at 3-21).

Rules of Civil Procedure. *Mitchell v. Dodrill*, 696 F. Supp. 2d 454, 471 (M.D. Pa. 2010). Further, "[t]he court's obligation to dismiss a complaint under the PLRA screening provisions is not excused even after defendants have filed a motion to dismiss." *Banks v. Cty. of Allegheny*, 568 F. Supp. 2d 579, 589 (W.D. Pa. 2008) (citing *Lopez v. Smith*, 203 F.3d 1122, 1126 n. 6 (9th Cir. 2000)). As such, if a defendant does not rely upon certain grounds for dismissal, the Court may rest its dismissal on such grounds *sua sponte* pursuant to the PLRA. *Banks*, 568 F. Supp. 2d at 589.

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). The United States Court of Appeals for the Third Circuit has noted the evolving standards governing pleading practice in federal court, stating that:

> Standards of pleading have been in the forefront of jurisprudence in recent years. Beginning with the Supreme Court's opinion in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), continuing with our opinion in *Phillips* [*v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008)] and culminating recently with the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss.
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> *Fowler v. UPMC Shadyside*, 578 F.3d 203, 209–10 (3d Cir. 2009).

In considering whether a complaint fails to state a claim upon which relief may be granted, the court must accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom are to be construed in the light most favorable to the plaintiff. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). However, a court "need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir.

1997). Additionally, a court need not assume that a plaintiff can prove facts that the plaintiff has not alleged. *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). As the Supreme Court of the United States held in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), in order to state a valid cause of action a plaintiff must provide some factual grounds for relief which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. .

In keeping with the principles of *Twombly*, the Supreme Court has underscored that a trial court must assess whether a complaint states facts upon which relief can be granted when ruling on a motion to dismiss. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court held that, when considering a motion to dismiss, a court should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. According to the Supreme Court, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Further, in deciding a Rule 12(b)(6) motion, a 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). Thus, a *pro se* plaintiff's well-pleaded complaint must recite factual allegations which are sufficient to raise the plaintiff's claimed right to relief beyond the level of mere speculation, set forth in a "short and plain" statement of a cause of action. Indeed, Fed. R. Civ. P. 8(a) also requires a "showing that 'the pleader is entitled to relief, in order to give the defendant fair notice of what the...claim is and the

grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007); *Phillips*, 515 F.3d at 233 (citing *Twombly*, 550 U.S. at 545).

Further, a motion under Rule 12(b)(1) of the FEDERAL RULES OF CIVIL PROCEDURE may be treated as either a facial or factual challenge to the court's subject matter jurisdiction. *Gould Elecs. Inc. v. United States*, 220 F. 3d 169, 176 (3d Cir. 2000). A defendant asserts a facial challenge "by arguing that the complaint, on its face, does not allege sufficient grounds to establish subject matter jurisdiction." *D.G. v. Somerset Hills Sch. Dist.*, 559 F. Supp. 2d 484, 491 (D.N.J. 2008). In a factual attack under Rule 12(b)(1), "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). "Rule 12(b)(1) motions may be filed at any time and repeatedly, if the movants assert new arguments warranting [the court's] attention." *Fahnsestock v. Reeder*, 223 F. Supp. 2d 618, 621 (E.D. Pa. 2002). Furthermore, "[w]hen a motion under Rule 12 is based on more than one ground, the court should consider the 12(b)(1) challenge first because if it must dismiss the complaint for lack of subject matter jurisdiction, all other defenses and objections become moot." *In re Corestates Trust Fee Litig.*, 837 F. Supp. 104, 105 (E.D. Pa. 1993), *aff'd* 39 F.3d 61 (3d Cir. 1994).

With the aforementioned standards in mind, a document filed *pro se* is "to be liberally construed." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Indeed, a *pro se* complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972). In deciding a Rule 12(b)(6) motion, the court may also 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). Similarly, in evaluating a factual challenge under Rule 12(b)(1), a court may consider "evidence outside the pleadings to determine if it has jurisdiction," *Gould Elecs. Inc.*, 220 F.3d at 178, and, in evaluating a facial challenge, "must consider the allegations of the complaint as true." *Mortensen*, 549 F.2d at 891. The Third Circuit has further 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).

B. DONAHUE'S SECOND AMENDED COMPLAINT

At the outset, the Court considers the propriety of the second amended complaint filed by Donahue on December 20, 2018. (Doc. 14-1; Doc. 14-2). Notably, Donahue invoked Rule 15(a)(1)(B) of the FEDERAL RULES OF CIVIL PROCEDURE and submitted his pleading before the State Court Defendants' motion to dismiss (Doc. 12) was ruled upon. (Doc. 14-1, at 6). Donahue's second amended complaint brings claims against a plethora of new defendants,[9]

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[9] In addition to the State Court Defendants, the caption of the second amended complaint identifies the following individuals and entities as Defendants: Appellate Counsels James Jude Karl and Matthew P. Kelly; Defense Counsels Frank C. Sluzis, Ryan Paddick, and George Matangos; the Court of Common Pleas of Montgomery County; the Honorable Joseph A. Smyth; the Pennsylvania Supreme Court Justices, Chief Justice Thomas G. Saylor, Justice Max Baer, Justice Debra Todd, Justice Christine Donohue, Justice Kevin M. Dougherty, Justice David N. Wecht, Justice Sallie Updyke Mundy, and Unknown Supreme Court Justices; Pennsylvania Superior Court Judges, the Honorable Jacqueline O. Shogan, the Honorable Jack A. Panella, the Honorable James J. Fitzgerald, the Honorable Correale F. Stevens, the Honorable John L. Musmanno, the Honorable Mary Jane Bowes, the

and seeks additional forms of injunctive and declaratory relief. Specifically, Donahue requests that the PCRA be stricken on the grounds that it is susceptible to overbroad judicial construction, as evidenced by the Descardes Decision he challenges. (Doc. 14-1, at 18-26). Donahue alternatively requests that, if the Descardes Decision stands, the Defendants involved in the lawsuit, and its furtherance in the state court system, be criminally tried in the International Criminal Court ("ICC"). (Doc. 14-1, at 26-30).

To the extent Donahue desired to amend or supplement his pleading, he failed to comply with Rule 15(a) of the FEDERAL RULES OF CIVIL PROCEDURE. Rule 15(a) provides:

> (1) *Amending as a Matter of Course* - A party may amend its pleading once as a matter of course within:
>
> (A) 21 days after serving it, or
>
> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), ... whichever is earlier.
>
> (2) *Other Amendments* - In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.
>
> Fed. R. Civ. P. 15 (emphasis added).

Here, Donahue relied on Rule 15(a)(1)(B) to file a second amended complaint in response to the arguments raised in the State Court Defendants' motion. (Doc. 14-1, at 6). However, the Court already construed one of Donahue's prior motions (Doc. 7) as filing an amended complaint once as a matter of course. (Doc. 9). Thus, Davis was not entitled to amend his

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Honorable Victor P. Stabile, the Honorable Mary P. Murray, the Honorable Geoffrey Moulton Jr., and unknown Superior Court Judges. (Doc. 14-1, at 1-4).

complaint under Rule 15(a)(1)(B) a second time, and any additional amendment required the Defendants' written consent or the Court's leave. *See* Fed. R. Civ. P. 15(a)(2). In the instant case, Donahue obtained either.

Thus, the Court recommends that Donahue's second amended complaint be **DISMISSED** as improperly filed. It is further recommended that the State Court Defendants' motion to dismiss, filed on January 9, 2019 (Doc. 15; Doc. 16), be **DENIED** as **MOOT**.

C. ELEVENTH AMENDMENT IMMUNITY[10]

Turning to their first basis for dismissal, the State Court Defendants argue that Eleventh Amendment immunity precludes Donahue's claims for injunctive and declaratory relief.[11] (Doc. 14, at 2-3). The Eleventh Amendment of the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to

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[10] Although the State Court Defendants do not specify the legal standard upon which they rely, "[a] motion to dismiss pursuant to the Eleventh Amendment is properly brought under Federal Rule of Civil Procedure 12(b)(1)." *Urella v. Pennsylvania State Troopers Ass'n*, 628 F. Supp. 2d 600, 604 (E.D. Pa. 2008) (citing *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 693 n. 2 (3d Cir. 1996) (noting that the "Eleventh Amendment is a jurisdictional bar which deprives federal courts of subject matter jurisdiction.")). As such, the Court considers the State Court Defendants' Eleventh Amendment argument as asserting a facial challenge under Rule 12(b)(1). *See Blanciak,* 77 F.3d at 693 n. 2; *D.G. v. Somerset Hills Sch. Dist.*, 559 F. Supp. 2d 484, 491 (D.N.J. 2008).

[11] Donahue asserts that, by invoking Eleventh Amendment immunity, the State Court Defendants' are attempting to "evade judicial scrutin[y]," or otherwise refrain from addressing the merits of his constitutional challenges. (Doc. 14, at 3, 10). However, "[i]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (quoting *Escambia County v. McMillan,* 466 U.S. 48, 51 (1984) (*per curiam*)). Thus, the Court finds Donahue's contention unavailing.

any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subject of any Foreign State." U.S. CONST. AMEND. XI. As further described by the Court of Appeals for the Third Circuit, "[t]he Eleventh Amendment renders unconsenting States immune from suits brought in federal courts by private parties." *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 551 F.3d 193, 197 (3d Cir. 2008). Thus, "[u]nless a State has waived its Eleventh Amendment immunity or Congress has overridden it ... a State cannot be sued directly in its own name regardless of the relief sought." *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985) (citing *Alabama v. Pugh*, 438 U.S. 781 (1978)).

Here, as a part of Pennsylvania's unified judicial system, the State Court Defendants are entitled to the same Eleventh Amendment Immunity as the Commonwealth itself. *See* 42 Pa. C.S.A. § 102 (defining "courts and other officers of agencies of the unified judicial system" as part of the "Commonwealth government"); *Benn v. First Judicial Dist. of Pa.*, 426 F.3d 233, 241 (3d Cir. 2005) (finding that judicial defendants enjoyed the same Eleventh Amendment immunity as the Commonwealth of Pennsylvania); *Callahan v. City of Phila.*, 207 F.3d 668, 672 (3d Cir. 2000) (finding that "[a]ll courts and agencies of the unified judicial system ... are part of 'Commonwealth government' and thus are state rather than local agencies"). Further, no exceptions to Eleventh Amendment immunity apply, as the Commonwealth of Pennsylvania has neither consented to suit nor had its immunity abrogated by statute. *See* 1 Pa. C. S.A. § 2310 (stating that it is "the intent to the General Assembly that the Commonwealth ... shall continue to enjoy sovereign immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity"); 42 Pa. C. S. A. § 8521(b) (ensuring that "[n]othing contained in this subchapter

shall be construed to waive the immunity of the Commonwealth from suit in Federal courts"); *Friends and Residents of St. Thomas Twp., Inc. v. St. Thomas Dev., Inc.*, 176 F. App'x 219, 226-27 (3d Cir. 2006) (affirming that the Commonwealth of Pennsylvania has not consented to suit in § 1983 actions). However, Donahue argues that his suit may proceed because he only seeks injunctive and declaratory relief from the State Court Defendants. (Doc. 14, at 14). Nonetheless, "[t]he Eleventh Amendment to the United States Constitution protects an unconsenting state or state agency from a suit brought in federal court, *regardless of the relief sought*." *Capogrosso v. The Supreme Court of New Jersey*, 588 F.3d 180, 185 (3d Cir. 2009) (emphasis added) (citing *MCI Telecomm. Corp. v. Bell Atl. Pennsylvania*, 271 F.3d 491, 503 (3d Cir. 2001); *McGriff v. State Civil Serv. Comm'n*, 650 F. App'x 95, 97 (3d Cir. 2016) ("It is well established that the Eleventh Amendment generally bars a civil rights suit in federal court that names the state as a defendant, even a claim seeking injunctive relief."). Moreover, even if the Court liberally construed Donahue's argument as relying upon the exception enumerated in *Ex Parte Young*, he still cannot overcome the fact that the named State Court Defendants are a part of the unified judicial system, and not individual officers thereof.[12] *See Ex*

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[12] Donahue's brief in opposition alleges that the State Court Defendants "control the use and application" of the Terroristic Threats Statute, the Harassment Statute, and the PCRA. (Doc. 14, at 7). However, even if the Court liberally construed Donahue's constitutional challenges as being brought against state court judges, instead of the state court system, they would still fail. Indeed, it is well established that "[w]here judges act as adjudicators, as here, they are not the proper defendants in a § 1983 suit challenging the constitutionality of a statute." *Mikhail v. Kahn*, 991 F. Supp. 2d 596, 620 (E.D. Pa.), *aff'd*, 572 F. App'x 68 (3d Cir. 2014) (citing *Brandon E. ex rel. Listenbee v. Reynolds*, 201 F.3d 194, 198-200 (3d Cir. 2000)); *c.f. Allen v. DeBello*, 861 F.3d 433, 440 (3d Cir. 2017) ("[A] judge who acts as an enforcer or administrator of a statute can be sued under Section 1983 for declaratory or

Parte Young, 209 U.S. 123 (1908) (finding that the Eleventh Amendment does not preclude a plaintiff from seeking prospective relief in federal court against a *state official* for continuing violations of federal law); *Law Offices of Christopher S. Lucas & Assocs. v. Disciplinary Bd. of Supreme Court of Pennsylvania*, 320 F. Supp. 2d 291, 295 (M.D. Pa. 2004), ***aff'd sub nom.*** *Law Offices of Lucas ex rel. Lucas v. Disciplinary Bd. of Supreme Court of PA*, 128 F. App'x 235 (3d Cir. 2005) (holding that the doctrine enumerated in *Ex Parte Young* did not apply to an action seeking declaratory relief from a part of the unified judicial system itself); *Burns v. Alexander*, 776 F. Supp. 2d 57, 73 (W.D. Pa. 2011) (noting that seeking injunctive or declaratory relief, as opposed to monetary relief, may matter when a plaintiff brings an official-capacity action against a *state official*). Accordingly, it is evident that Donahue's claims for prospective relief against the State Court Defendants, as well as against the Commonwealth of Pennsylvania, are barred by the doctrine of Eleventh Amendment immunity.

(if declaratory relief is unavailable) injunctive relief.") (citing Georgevich v. Strauss, 772 F.2d 1078 (3d Cir. 1985) (en banc)). Here, Donahue's allegations do not plausibly establish that any state court judges acted as enforcers or administrators of the challenged legislation. Rather, Donahue's complaints relate to decisions made by judges acting as "neutral and impartial arbiter[s] of a statute" during his state court proceedings. *See Allen*, 861 F.3d at 440; *Boyce v. Dembe*, No. CIV.A. 00-CV-6572, 2001 WL 34371706, at *5 n. 9 (E.D. Pa. Oct. 30, 2001), *aff'd*, 47 F. App'x 155 (3d Cir. 2002) ("The judges have no stake in upholding the procedures against [a] constitutional challenge; they are analogous to postal carriers who deliver a newspaper containing a libelous message, but would not be held liable if they were sued for libel."). Thus, because the Court cannot reasonably infer from Donahue's filings that any state court judges acted in their enforcement capacity, as opposed to their adjudicatory capacity, they would not be proper defendants to his § 1983 action seeking declaratory and injunctive relief in connection with the Terroristic Threats Statute, the Harassment Statute, and the PCRA.

As such, the Court respectfully recommends that the State Court Defendants' motion to dismiss (Doc. 12) be **GRANTED**, and that Donahue's claims for declaratory and injunctive relief be **DISMISSED WITH PREJUDICE** under Rule 12(b)(1) of the FEDERAL RULES OF CIVIL PROCEDURE.[13] The Court further recommends that all claims asserted against the Commonwealth of Pennsylvania be **DISMISSED WITH PREJUDICE** pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii).

D. DONAHUE'S CLAIMS FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF SHOULD BE DISMISSED AGAINST THE REMAINING DEFENDANTS

Pursuant to its statutory screening obligation, the Court also considers the propriety of Donahue's claims for equitable relief against the remaining Defendants identified in the amended complaint.[14] *See Banks v. Cty. of Allegheny*, 568 F. Supp. 2d 579, 589 (W.D. Pa. 2008). For the following reasons, the Court respectfully recommends that the amended complaint be dismissed in its entirety.

1. Donahue's requests for declaratory relief are improper.

In the amended complaint, Donahue seeks declaratory judgments that the Terroristic Threat Statute, the Harassment Statute, and the PCRA be declared overly broad, vague, and

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[13] As the Court finds the issue of Eleventh Amendment immunity to be dispositive, it declines to address the remaining grounds for dismissal raised by the State Court Defendants. (Doc. 12).

[14] The remaining Defendants are as follows: Pennsylvania Governor, Tom Wolf; Pennsylvania Attorney General, Josh Shapiro; Pennsylvania Deputy Attorney General, Bernard Ashley Anderson; Dauphin County District Attorney, Francis T. Chardo; Dauphin County District Attorney's Officer Ryan Hunter Lysaght; and Dauphin County Assistant Deputy District Attorney Katie Lynn Adam.

sweeping, or that the portions of the statutes applied to his state court proceedings be struck. (Doc. 11, at 5-7). Donahue further seeks declaratory judgments that these statutes were applied to him in an overly broad manner, and requests that his Dauphin County and Luzerne County Convictions also be struck. (Doc. 11, at 6, 57).

Whether to grant declaratory relief[15] in "an appropriate case" falls within the Court's sound discretion. *Ridge v. Campbell*, 984 F. Supp. 2d 364, 373–74 (M.D. Pa. 2013). "In determining the appropriateness of declaratory relief, the court must consider whether such relief will resolve an uncertainty giving rise to a controversy, the convenience of the parties, the public interest, and the availability of other remedies." *Ridge*, 984 F. Supp. 2d at 373–74 (citing *Iseley v. Bucks Cnty.*, 549 F.Supp. 160, 166 (E.D. Pa. 1982)). However, it is well established that "[d]eclaratory judgment is inappropriate solely to adjudicate past conduct." *Corliss v. O'Brien*, 200 F. App'x 80, 84–85 (3d Cir. 2006); *see also Khodara Envtl., Inc. v. Blakey*, 376 F.3d 187, 196 (3d Cir. 2004) ("[D]eclaratory judgments are typically sought before a completed injury has occurred.") (quoting *Pic–A–State Pa. Inc. v. Reno,* 76 F.3d 1294, 1298 (3d Cir. 1996)); *Blakeney v. Marsico*, 340 F. App'x 778, 780 (3d Cir. 2009) ("[E]ven if defendants violated [plaintiff's] rights in the past as he alleges, [plaintiff] is not entitled to a declaration to

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[15] The Declaratory Judgment Act states, in relevant part:

> In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201.

that effect."). Further, "even if a declaratory judgment would clarify the parties' legal rights, it should ordinarily not be granted unless 'the parties' plans of actions are likely to be affected by a declaratory judgment.'" *Armstrong World Indus., Inc. by Wolfson v. Adams*, 961 F.2d 405, 412 (3d Cir. 1992).

Here, it is evident that Donahue does not seek "declaratory relief in the true legal sense." *See Corliss*, 200 F. App'x at 84. Rather, his claims do "nothing more than allege past exposure to [an] unconstitutional state action." *See Brown v. Fauver,* 819 F.2d 395, 399-400 (3d Cir. 1987). This is further evidenced by Donahue's effort to obtain a *nunc pro tunc* injunction that "prevent[s] [the challenged] statutes from being applied to [him]." (Doc. 11, at 63-67; Doc. 14, at 5). Indeed, Donahue petitions this Court to retroactively avoid the initiation of his criminal proceedings in state court, and ultimately seeks a declaration that his rights were violated by the application of the Terroristic Threats and Harassment Statues. Further, with respect to his attempts to obtain collateral review of his conviction, Donahue alleges that, at some point previously, his "appointed counsels and the state trial courts applied the [PCRA] in an overly broad manner." [16] (Doc. 11, at 57). Nonetheless, the relief Donahue endeavors

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[16] Notably, these claims for relief may also be barred under the *Rooker-Feldman* doctrine. "[C]ourts have repeatedly found that a claim is not an independent constitutional challenge when the claim seeks a declaratory judgment that a state court construed and applied a state statute to the facts of the case in an unconstitutional manner." *Shawe v. Pincus*, 265 F. Supp. 3d 480, 488 (D. Del. 2017). Here, several of Donahue's claims for relief seek a declaration or *nunc pro tunc* injunction to that effect. (Doc. 11, at 6, 10, 51, 57; Doc. 14, at 12). Accordingly, to the extent that Donahue challenges the constitutionality of his state court convictions, or related post-conviction rulings, under these statutes, the Court lacks jurisdiction to consider his claims. *See Mikhail v. Kahn*, 991 F. Supp. 2d 596, 619–20 (E.D. Pa.), *aff'd*, 572 F. App'x 68 (3d Cir. 2014) ("[Plaintiff] is really only asking for an as-applied ruling, and that is a request that *Rooker-Feldman* forbids the Court from even considering.").

to obtain is inappropriate for the purposes of the Declaratory Judgment Act. *See Corliss*, 200 F. App'x at 84; *Witasick v. Heaphy*, 425 F. App'x 137, 139 (3d Cir. 2011) ("Plaintiff does not seek declaratory relief for the purpose it is intended. His complaint is an attempt to challenge his criminal conviction."); *Willaman v. Ferentino*, 173 F. App'x 942, 943 (3d Cir. 2006) ("Declaratory relief is not available to attack a criminal conviction.") (citing *Johnson v. Onion*, 761 F.2d 224 (5th Cir.1985); *Shannon v. Sequeechi*, 365 F.2d 827, 829 (10th Cir.1966) ("The [Declaratory Judgment] Act does not provide a means whereby previous judgments by state or federal courts may be reexamined, nor is it a substitute for appeal or post conviction remedies.")); *Ridge*, 984 F. Supp. 2d at 373 ("[T]he court should deny the request for declaratory relief where the plaintiff is not seeking declaratory relief in the true legal sense."); *Parrish v. Corr. Emergency Response Team*, No. 18-CV-4871, 2018 WL 6725383, at *2 (E.D. Pa. Dec. 21, 2018) (dismissing action as legally baseless under 28 U.S.C. § 1915(e)(2)(B)(i), when plaintiff improperly sought declaratory relief to establish that his rights were violated in the past).[17]

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[17] Insofar as Donahue seeks to enjoin the enforcement of the Terroristic Threats and Harassment Statutes to him "in the future," this request is also improper. To obtain injunctive and declaratory relief, a plaintiff must "allege facts from which it appear[s] substantially likely that he would suffer *future* injury." *See O'Callaghan v. Hon. X*, 661 F. App'x 179, 182 (3d Cir. 2016). Here, even though Donahue alleges he was tried under these criminal statutes in the past, he does not plausibly allege that he might be separately prosecuted under them again. Donahue's claims for prospective relief are thus "purely speculative and do[] not present a 'case or controversy' under Article III." *See Blakeney v. Marsico*, 340 F. App'x 778, 780 (3d Cir. 2009) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-110 (1983) ("The plaintiff must show that he 'has sustained or *is immediately in danger of sustaining some direct injury'* as the result of the challenged official conduct and the injury or *threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'*")). Accordingly, such abstract allegations do not confer

Accordingly, the Court respectfully recommends that Donahue's requests for declaratory judgment, in connection with alleged past constitutional violations, be **DISMISSED WITH PREJUDICE** under 28 U.S.C. § 1915(e)(2)(B)(i).

2. *Younger* Abstention

To the extent Donahue may properly seek declaratory or injunctive relief in connection with his ongoing state court appeals and PCRA proceedings, the dictates of *Younger v. Harris*, 401 U.S. 37 (1971) bar his claims. The doctrine of *Younger* abstention is inspired by basic considerations comity that are fundamental to our federal system of government. Notably, "[i]n *Younger*, the Supreme Court held that a federal court could not enjoin state criminal proceedings enforcing state law on the ground that the underlying state law was unconstitutional." *Smolow v. Hafer*, 353 F. Supp. 2d 561, 571 (E.D. Pa. 2005); *see also Samuels v. Mackell*, 401 U.S. 66 (1971) (extending the doctrine in *Younger* to actions for declaratory judgment that involve state statutes being enforced in ongoing state criminal proceedings). Thus, "*Younger* abstention is a legal doctrine granting federal courts discretion to abstain from exercising jurisdiction over a claim when resolution of that claim would

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standing to seek injunctive or declaratory relief. *See Telepo v. Martin*, No. 3:08CV2132, 2009 WL 2476498, at *8–9 (M.D. Pa. Aug. 12, 2009), *aff'd*, 359 F. App'x 278 (3d Cir. 2009); *see also Blakeney*, 340 F. App'x at 780 (finding that to establish Article III standing, a plaintiff seeking declaratory relief must allege that there is a substantial likelihood that he will suffer harm in the future)). Further, when liberally construed, it appears that Donahue argues certain provisions of the PCRA, and the Descardes Decision that upholds and interprets them, will defeat his prospective petitions for collateral review. Nonetheless, Donahue has not plausibly alleged the threat of such injury is "real or immediate." *See City of Los Angeles*, 461 U.S. at 101-110 (1983).

interfere with an ongoing state proceeding."[18] *Kendall v. Russell*, 572 F.3d 126, 130 (3d Cir. 2009) (citing *Younger*, 401 U.S. at 41).

As described by the United States Court of Appeals for the Third Circuit, a district court's discretion to abstain under *Younger* can properly be exercised only when (1) there are ongoing state proceedings that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise federal claims. *Matusow v. Trans-County Title Agency, LLC*, 545 F.3d 241, 248 (3d Cir. 2008). Once these three legal requirements for *Younger* abstention are met, the decision to abstain rests in the sound discretion of the district court and will not be disturbed absent an abuse of that discretion. *Lui v. Commission on Adult Entertainment Establishments*, 369 F.3d 319, 325 (3d Cir. 2004). Further, "[a] necessary concomitant of *Younger* is that a party [wishing to contest in federal court the judgment of a state judicial tribunal] must exhaust his state appellate remedies before seeking relief in the District Court." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 369 (1989) (*quoting Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975); *Hicks v. Miranda*, 422 U.S. 332, 350 n. 18 (1975) (noting that *Younger* abstention applies during an action's progression through the state court appellate system); *see also Ridge v. Campbell*, 984 F. Supp. 2d 364, 374–75 (M.D. Pa. 2013) (abstaining under *Younger* when plaintiff's PCRA petitions remained pending in the state court). As such, upon applying these

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[18] Under *Younger*, federal courts will abstain from, and therefore dismiss, claims otherwise within the scope of federal jurisdiction when "exceptional circumstances ... justify a federal court's refusal to decide a case in deference to the States." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013).

standards, federal courts frequently abstain from hearing matters which necessarily interfere with state criminal cases. *Lui v. Commission on Adult Entertainment Establishments*, 369 F.3d 319 (3d Cir. 2004); *Zahl v. Harper*, 282 F.3d 204 (3d Cir. 2002).

Here, Donahue asks this Court to enjoin the application of the PCRA, either "in whole or in part," as well as the Descardes Decision and its progeny, during his "current and future petitions for collateral relief from his two state convictions." (Doc. 14, at 6). Donahue further alleges that he "faces immediate harm in [his] ongoing state proceedings," and claims that the Pennsylvania Superior Court recently dismissed two of his state appeals for "lack of jurisdiction over collateral matters." (Doc. 14, at 10). Donahue also seeks a *nunc pro tunc* injunction that refrains the Defendants from criminally prosecuting him under the Terroristic Threats and Harassment Statutes. (Doc. 11, at 10). However, even when liberally construed in the light most favorable to Donahue, it is evident that the relief he seeks runs afoul of the abstention principles enumerated in *Younger* and *Samuels*.

Upon careful review of the amended complaint, all legal prerequisites for *Younger* abstention exist. First, Donahue has several ongoing proceedings before the Superior and Supreme Courts of Pennsylvania that stem from his convictions under the challenged criminal statutes. *See Commonwealth v. Donahue*, No. 1168 MDA 2018 (Pa. Sup. Ct.); *Commonwealth v. Donahue*, No. 1329 MDA 2018 (Pa. Sup. Ct.); *Commonwealth v. Donahue*, No. 1417 MDA 2018 (Pa. Sup. Ct.); *Commonwealth v. Donahue*, No. 1623 MDA 2018 (Pa. Sup. Ct.); *Commonwealth v. Donahue*, No. 1876 MDA 2018; *Commonwealth v. Donahue*, No. 753 MAL 2018 (Pa.). Second, it is clear that Donahue's state court proceedings implicate important state interests, since these matters involve state criminal law enforcement, an issue of paramount importance to the state. *See Lui v. Commission on Adult Entertainment Establishments*,

369 F.3d 319 (3d Cir. 2004); *Zahl v. Harper*, 282 F.3d 204 (3d Cir. 2002). Finally, it is apparent that these proceedings afford Donahue a full and fair opportunity to litigate the issues raised in this lawsuit in his state court case. *See Sullivan v. Linebaugh*, 362 F. App'x 248, 249-50 (3d Cir. 2010).

Since the legal requirements for *Younger* abstention are fully met here, the decision to abstain rests in the sound discretion of this Court. *Lui*, 369 F.3d at 325. In the present case, the amended complaint invites this Court to intervene in Donahue's pending state court cases, and issue a declaratory judgment that would set aside his criminal convictions under the Terroristic Threats and Harassment Statutes. Given that Donahue's claims principally arise from his prosecution in state court, the Commonwealth has an important state interest in enforcing its criminal laws, and the state courts are prepared to fully address the merits of these matters in Donahue's pending parallel actions, the Court finds that the proper exercise of this discretion weighs in favor of abstention and dismissal of this federal case at the present time. *See Lui*, 369 F.3d 319; *Zahl*, 282 F.3d 204.

Accordingly, the Court respectfully recommends that Donahue's claims for declaratory and injunctive relief be **DISMISSED WITHOUT PREJUDICE** pursuant to the doctrine of *Younger* abstention.

3. Donahue's challenges to the Descardes Decision are subject to dismissal.

As a final matter, the Court considers Donahue's challenges to the constitutionality of the Descardes Decision. In the amended complaint, Donahue provides a rambling legal analysis of the case, which involved a third party, and generally explains why he believes its commencement, disposition, and precedential effect in state court was "incorrect." (Doc. 11, at 21). In furtherance of his position, Donahue alleges in a conclusory fashion that the

Descardes Decision is "overbroad, vague, and sweeping, such that it prevents a large swath of the Pennsylvania population (i.e.: the convicted) from exercising its U.S. First Amendment right to petition the government." (Doc. 11, at 26-27). Donahue also asserts that the reasoning in the Descardes Decisions cannot apply to United States citizens, such as himself, given that "any precedent reached by the [Pennsylvania Courts involving the Descardes Decisions] is ineffective and must be struck on constitutional grounds." (Doc. 11, at 26). Accordingly, Donahue requests that the decision be reversed, or otherwise prohibited from being applied to his "appeals, motions, and petitions" that stem from the Dauphin County and Luzerne County Convictions. (Doc. 11, at 4, 7).

When liberally construed, Donahue seemingly asserts the Descardes Decision's "broad" judicial construction of the PCRA raises void for vagueness concerns—both in relation to the PCRA and the Descardes Decision itself. "[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them [under the law] so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). However, Donahue fails to provide any support for the contention that the void for vagueness doctrine extends to state court decisions in and of themselves, or PCRA caselaw for that matter. *See United States v. Melton*, No. 1:17-CR-69, 2017 WL 6343794, at *4 (E.D. Tenn. Dec. 12, 2017) (noting that there is no "support for the assertion that the void for vagueness doctrine applies to judicial opinions or that a court's statutory interpretation can render the interpreted statute vague."); *Weigel v. Maryland*, 950 F. Supp. 2d 811, 833–35 (D. Md. 2013) ("The Plaintiffs have not identified—and the Court has not found—any controlling authority

that applies the void-for-vagueness doctrine to judicial decisions.") (citing *Swagler v. Neighoff*, 398 F. App'x 872, 879 (4th Cir. 2010) ("[T]he void-for-vagueness doctrine focuses on legislation—not 'policies' and 'actions.'")). Accordingly, Donahue's argument that the Descardes Decision, and the provisions of the PCRA upon which it relies, should be struck as unconstitutionally vague is unavailing.

In addition, while seemingly styled as a direct challenge to the *Descardes* action in its entirety, it is evident that Donahue effectively petitions this Court to dictate the state court's handling of his petitions for post-conviction relief, as well as its use of judicial precedent. However, Donahue's claims effectively sound in mandamus. *See Vurimindi v. Sec'y, Dep't of Homeland Sec.*, No. 2:17CV1425, 2018 WL 3744810, at *4 (W.D. Pa. Aug. 7, 2018) ("To the extent that [plaintiff's] filing could be construed as a petition for writ of mandamus, jurisdiction under the mandamus statute is limited to actions seeking to compel the performance by defendant of a *non-discretionary* duty owed to plaintiff.") (citing *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). "Mandamus is an appropriate remedy in only the most extraordinary of situations and is traditionally used only to 'confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *In re Carroway*, 215 F. App'x 87, 88 (3d Cir. 2007) (quoting *Kerr v. United States Dist. Court*, 426 U.S. 394, 402 (1976) (citations omitted); *see also In re Faison*, 419 F. App'x 171, 172 (3d Cir. 2011) ("A writ is not a substitute for an appeal; only if a direct appeal is unavailable will the court determine whether a writ of mandamus will issue.") (citing *In Re Ford Motor Co.*, 110 F.3d 954, 957 (3d Cir. 1997)). Further, a court may consider a petition for mandamus only if the action involves subject matter that may at some time come within this

Court's appellate jurisdiction. *In re Stitt*, 598 F. App'x 810, 811 (3d Cir. 2015) (citing *United States v. Christian*, 660 F.2d 892, 894–95 (3d Cir.1981)).

Here, Donahue wholly fails to "allege any act or omission by a District Court within this Circuit over which [this Court] might exercise authority by way of mandamus. Nor does he allege any act or omission by a federal officer, employee, or agency that a District Court may have mandamus jurisdiction to address in the first instance." *In re Stitt*, 598 F. App'x at 811 (citing 28 U.S.C. § 1361). Rather, Donahue effectively asks this Court to intervene in the in state court proceedings by enjoining the application of the Descardes Decision, or by prescribing its ruling altogether. (Doc. 11, at 7-8, 32). However, under § 1361, this Court lacks the authority to direct a state agency or officer to perform its duties in accordance with Donahue's wishes. *In re Wolenski*, 324 F.2d 309, 309 (3d Cir. 1963) (per curiam) (explaining that District Court "had no jurisdiction" to "issue a writ of mandamus compelling action by a state official"); *see also In re Woodall*, 578 F. App'x 73, 74 (3d Cir. 2014) (per curiam); *Lucas v. Sinnott*, No. C.A. 09-187 ERIE, 2010 WL 1416753, at *2 (W.D. Pa. Feb. 5, 2010), *report and recommendation adopted*, No. CA 09-187 ERIE, 2010 WL 1375398 (W.D. Pa. Apr. 6, 2010) ("28 U.S.C. § 1361 does not confer upon a district court jurisdiction to reopen and reconsider a finally litigated action, nor does it provide a district court with any authority to compel the court of appeals to reconsider orders and decisions made by it."); *In re Sutcliffe*, 573 F. App'x 89, 91 (3d Cir. 2014) (finding plaintiff lacked standing to seek mandamus relief in connection with a third-party's case, as he was "not a party in the [separate] federal civil rights action, and his allegations in the mandamus petition of injury-in-fact in connection with that action [were] vague."); *see also In re Cook*, 589 F. App'x 44, 46 (3d Cir. 2014) (dismissing mandamus petition as legally frivolous insofar as it attempted to challenge the disposition of a separate

action to which the plaintiff was not a party, noting "[f]ederal district courts are courts of original jurisdiction; they lack subject matter jurisdiction to engage in appellate review of state court or other federal district court decisions."). Thus, insofar as he seeks mandamus review of the Descardes Decision or attempts to dictate the handling of any state court collateral review proceedings, Donahue's requests fail.

For these reasons, the Court respectfully recommends that Donahue's claims for injunctive and declaratory relief surrounding the *Descardes* action and its progeny be **DISMISSED WITH PREJUDICE** pursuant to 28 U.S.C. §1915(e)(2)(B)(i), as they are legally frivolous.[19]

E. MOTION 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). Further, "[a] district court has 'substantial leeway in deciding whether to grant leave to amend.'" *In re Avandia Mktg., Sales Practices & Products Liab. Litig.*, 564 F. App'x 672, 673 (3d Cir. 2014) (not precedential) (quoting *Lake v. Arnold*, 232 F.3d 360, 373 (3d Cir. 2000)). Here,

[19] The Court also notes, without deciding, that Donahue may lack standing to appeal the Descardes Decision, Article III standing to challenge its constitutionality, or, assuming *arguendo* that Article III jurisdiction does exist, the ability to overcome *Younger* abstention considerations. *See Ballard v. Wilson*, 856 F.2d 1568, 1571 (5th Cir. 1988) ("If this Court were to rule that adverse state court precedent requires federal court intervention, we would open the door for federal courts to overrule state court decisions without the avenue of a state appeal. This is precisely what [the plaintiff] seeks, and it is precisely one kind of intervention prohibited by *Younger*.").

the Court finds that further amending Donahue's complaint would be futile. Specifically, Donahue's claims are either barred by the doctrine of Eleventh Amendment Immunity, legally frivolous, or require this Court's abstention while his state court criminal proceedings remain ongoing. Accordingly, it is respectfully recommended that leave to amend the complaint be **DENIED**, and the amended complaint (Doc. 11) be **DISMISSED** in its entirety.

III. RECOMMENDATION

Based on the foregoing, the Court respectfully recommends the following:

1. That Donahue's motion for leave to proceed *in forma pauperis* (Doc. 2) be **GRANTED** for the sole purpose of filing the complaint;

2. That Donahue's second amended complaint (Doc. 14-1) be **DISMISSED** as improperly filed, and that the State Court Defendant's motion to dismiss the second amended complaint (Doc. 15) be **DENIED** as **MOOT**;

3. That the Court **GRANT** the State Court Defendants' Motion to Dismiss the amended complaint (Doc. 12);

    a. That all claims asserted against the State Court Defendants be **DISMISSED WITH PREJUDICE** under Fed. R. Civ. P. 12(b)(1), as barred by the doctrine of Eleventh Amendment Immunity;

4. That the remainder of the amended complaint (Doc. 11) be **DISMISSED** in its entirety, **WITH PREJUDICE** in part and **WITHOUT PREJUDICE** in part, pursuant to 28 U.S.C. § 1915(e)(2)(B);

    a. That Donahue's claims asserted against the Defendant Commonwealth of Pennsylvania be **DISMISSED WITH PREJUDICE** under 28 U.S.C. § 1915(e)(2)(B)(iii), as barred by the doctrine of Eleventh Amendment Immunity;

    b. That Donahue's claims for declaratory judgment be **DISMISSED WITH PREJUDICE** pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), as legally frivolous;

    c. That, to the extent Donahue seeks federal intervention in his underlying state court criminal and collateral review proceedings, his claims be **DISMISSED WITHOUT PREJUDICE** on the basis that the doctrine enumerated in *Younger* requires abstention;

d. That Donahue's claims for declaratory and injunctive relief, in connection with the state court's disposition and precedential application of the Descardes Decision, as well as the PCRA provisions upon which it relies and interprets, be **DISMISSED WITH PREJUDICE** under 28 U.S.C. § 1915(e)(2)(B)(i) as legally frivolous;

5. That the Court **DENY** leave to amend as futile; and

6. That the Clerk of Court be directed to **CLOSE** this case.

Dated: January 24, 2019

s/ Karoline Mehalchick
KAROLINE MEHALCHICK
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

SEAN M DONAHUE, Plaintiff v. SUPERIOR COURT OF PENNSYLVANIA, et al., Defendants	CIVIL ACTION NO. 3:18-CV-01531 (MANNION, D.J.) (MEHALCHICK, M.J.)

NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing **Report and Recommendation** dated **January 24, 2019**. Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3, which provides:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Dated: January 24, 2019

s/ Karoline Mehalchick
KAROLINE MEHALCHICK
United States Magistrate Judge

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