UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7201

JULIO A. HUNSBERGER,

Plaintiff - Appellant,

v.

RANDY BOBBY DURAN, sued in individual capacity official capacity; MARVIN ENGLISH, sued in individual capacity official capacity; ROGER LOWE, sued in individual capacity official capacity; RICK HUBBARD, sued in individual capacity official capacity; ALTON EARGLE, sued in individual capacity official capacity; ERVIN MAYE, sued in individual capacity official capacity; FRANK YOUNG, sued in individual capacity official capacity; DONALD MYERS, sued in individual capacity official capacity; ALAN WILSON, sued in individual capacity official capacity; JOHN MCINTOSH, sued in individual capacity official capacity; DONALD ZELENKA, sued in individual capacity official capacity; MELODY JANE BROWN, sued in individual capacity official capacity,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Anderson. Timothy M. Cain, District Judge. (8:18-cv-01813-TMC)

Submitted: November 19, 2019 Decided: November 22, 2019

Before WILKINSON and RICHARDSON, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Appendix A

Julio A. Hunsberger, Appellant Pro Se. Russell W. Harter, Jr., CHAPMAN, HARTER & HARTER, PA, Greenville, South Carolina; Michael Stephen Pauley, PAULEY LAW FIRM, LLC, Lexington, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Julio A. Hunsberger appeals the district court's order adopting the recommendation of the magistrate judge and granting Defendants' motions for judgment on the pleadings and summary judgment in his 42 U.S.C. § 1983 (2012) civil action. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Hunsberger v. Duran*, No. 8:18-cv-01813-TMC (D.S.C. July 23, 2019). We deny Hunsberger's motion to appoint counsel and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: November 22, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7201
(8:18-cv-01813-TMC)

JULIO A. HUNSBERGER

Plaintiff - Appellant

v.

RANDY BOBBY DURAN, sued in individual capacity official capacity; MARVIN ENGLISH, sued in individual capacity official capacity; ROGER LOWE, sued in individual capacity official capacity; RICK HUBBARD, sued in individual capacity official capacity; ALTON EARGLE, sued in individual capacity official capacity; ERVIN MAYE, sued in individual capacity official capacity; FRANK YOUNG, sued in individual capacity official capacity; DONALD MYERS, sued in individual capacity official capacity; ALAN WILSON, sued in individual capacity official capacity; JOHN MCINTOSH, sued in individual capacity official capacity; DONALD ZELENKA, sued in individual capacity official capacity; MELODY JANE BROWN, sued in individual capacity official capacity

Defendants - Appellees

J U D G M E N T

In accordance with the decision of this court, the judgment of the district

court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Julio A. Hunsberger, #959417, Plaintiff, v. Randy Bobby Duran, Marvin English, Roger Lowe, Rick Hubbard, Alton Eargle, Ervin Maye, Frank Young, Donald Myers, Alan Wilson, John McIntosh, Donald Zelenka, and Melody Jane Brown, Defendants.	Civil Action No. 8:18-cv-1813-TMC **ORDER**

Plaintiff Julio A. Hunsberger, a state prisoner proceeding *pro se*, filed this action pursuant to 42 U.S.C. § 1983, seeking an award of money damages against each Defendant for the denial of his Sixth Amendment right to a speedy trial. (ECF No. 1 at 5, 10). Defendants Rick Hubbard, Alton Eargle, Ervin Maye, Frank Young, Donald Myers, Alan Wilson, John McIntosh, Donald Zelenka and Melody Jane Brown (the "Prosecutor Defendants") filed a motion for judgment on the pleadings (ECF No. 24), and Defendants Randy Bobby Duran, Marvin English and Roger Lowe (the "Sheriff's Department Defendants") filed a motion for summary judgment (ECF No. 54). Plaintiff filed a response opposing both motions. (ECF Nos. 57, 68). In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02 (B)(2)(c), D.S.C., this matter was referred to a magistrate judge for pretrial handling. The magistrate judge issued a Report and Recommendation ("Report") recommending that both motions be granted. (ECF No. 70 at 13). Plaintiff timely filed objections to the Report. (ECF No. 72).

The Report has no presumptive weight and the responsibility to make a final determination in this matter remains with this court. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). In

Appendix B

the absence of objections, this court is not required to provide an explanation for adopting the Report. *See Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983). Where there is no "timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note). Furthermore, failure to file specific written objections to the Report results in a party's waiver of the right to appeal the district court's judgment based upon that recommendation. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

I. Background

Plaintiff is currently incarcerated in Smith State Prison in Glennville, Georgia. (ECF No. 1 at 1). In 2002, Plaintiff was arrested for the murder of Samuel Sturrup in South Carolina. *Id.* at 5. He was also charged in connection with the kidnapping, which occurred in Georgia, leading up to the murder. (ECF No. 24-1 at 1-2). In February 2005, Plaintiff was released to Georgia to be tried first on the kidnapping charges, for which he was convicted and sentenced to life imprisonment. *Id.* at 2.

In September 2011, Plaintiff was returned to South Carolina to stand trial on the murder charge. *Id.* at 3. The case was ultimately tried in January 2012, when Plaintiff was convicted for murdering Sturrup. (ECF No. 1 at 5). Between Plaintiff's arrest for murder in 2002 and his trial in 2012, Plaintiff's counsel filed two speedy trial motions, both of which were denied by the trial court. *Id.*

Plaintiff appealed his conviction to the South Carolina Court of Appeals, arguing in part that his constitutional right to a speedy trial was abridged by the ten-year delay between his arrest

and his trial. *State v. Hunsberger*, No. 2012-206608, 2014 WL 5772563, at *3 (S.C. Ct. App. Nov. 5, 2014). The Court of Appeals rejected Plaintiff's speedy trial argument and affirmed his conviction. *Id.* at *5. The South Carolina Supreme Court, however, granted certiorari on the speedy trial issue and reversed Plaintiff's conviction in a 3-2 decision. *State v. Hunsberger*, 794 S.E.2d 368, 377 (S.C. 2016). Subsequently, the State unsuccessfully sought certiorari review in the United States Supreme Court. *South Carolina v. Hunsberger*, 137 S. Ct. 2295 (2017).

On July 2, 2018, Plaintiff filed this action pursuant to § 1983 alleging that Defendants violated his Sixth Amendment right to a speedy trial and seeking money damages. (ECF No. 1 at 5-6, 10). As to the Sheriff's Department Defendants, Plaintiff alleges that they investigated him for Sturrup's murder and then testified for the State at trial and, therefore, "contributed to the prosecution and subsequent conviction of Plaintiff for crimes he did not commit." *Id.* at 2, 5. As to the Prosecutor Defendants, Plaintiff alleges that each of them "contributed to the prosecution and subsequent conviction of Plaintiff for crimes he did not commit" or "contributed to the prolongment of the Plaintiff's imprisonment for a void conviction." *Id.* at 2-4. Specifically, Plaintiff identifies the constitutionally offensive conduct to be as follows: that Defendants Hubbard, Maye, and Young, in their capacity as assistant solicitors, opposed Plaintiff's speedy trial motions prior to trial, *id.* 5-6; and that Defendant Wilson, in his capacity as South Carolina Attorney General; Defendant Myers, in his capacity as Solicitor; and Defendants McIntosh, Zelenka, and Brown, in their capacities as assistant attorneys general, opposed Plaintiff's speedy trial argument during appeal in state court and sought certiorari review in the United States Supreme Court. *Id.* at 6.

The Prosecutor Defendants filed a motion for judgment on the pleadings (ECF No. 24), arguing that the are entitled to absolute, prosecutorial immunity as all the allegations against them

stem from actions within the scope of their official duties (ECF No. 24-1 at 6-11), that they are entitled to immunity under the Eleventh Amendment to the extent they are being sued in their official capacities, *id.* at 11, that they are not "persons" subject to suit under § 1983, *id.* at 11-12, and that, alternatively, they are entitled to qualified immunity in this case, *id.* at 12-16. Plaintiff filed a response in opposition to the motion for judgment on the pleadings (ECF No. 57), and the Prosecutor Defendants filed a reply (ECF No. 65).

The Sheriff's Department Defendants filed a motion for summary judgment (ECF No. 54), arguing that Plaintiff's claims against them are barred by the statute of limitations (ECF No. 54-1 at 3), and that, to the extent Plaintiff's claims are asserted against them in their individual capacities, they are not proper parties under S.C. Code Ann. § 15-78-70, *id.* at 3-4. Plaintiff filed a response in opposition to the motion for summary judgment. (ECF No. 68).

On February 22, 2019, the magistrate judge issued the Report recommending that both the motion for judgment on the pleadings and the summary judgment motion be granted. (ECF No. 70 at 13). The magistrate judge concluded that all Defendants are entitled to immunity under the Eleventh Amendment "as to any claims for money damages asserted against them in their official capacities." *Id.* at 11. The magistrate judge further concluded that the Prosecutor Defendants are entitled to absolute immunity because "all of the conduct on which Plaintiff bases his claims . . . were actions these Defendants took in prosecuting a criminal case against Plaintiff." *Id.* at 12. Additionally, the magistrate judge concluded that Plaintiff failed to state a Sixth Amendment claim against the Sheriff's Department Defendants because "Plaintiff neither alleges nor points to any evidence indicating that the Sheriff's Department Defendants played any role in denying him a speedy trial." *Id.* at 13.

Finally, the magistrate judge concluded that neither of the dispositive motions was premature on the basis that the parties had not conducted discovery. *Id.* at 10 n.6. The magistrate judge determined that none of the issues for which Plaintiff sought discovery—whether the actions of the Sheriff's Department Defendants directly contributed to the prosecution and conviction of Plaintiff for crimes he did not commit; whether the actions of all Defendants directly contributed to the "*prolongment* of Plaintiff's conviction for a void conviction"; and whether the statute of limitations for Plaintiff's claims began running upon the denial of certiorari by the United States Supreme Court—are material to Defendants' entitlement to judgment. *Id.* (emphasis added).

Plaintiff filed objections to the Report (ECF No. 72). The Prosecutor Defendants submitted a reply to Plaintiff's objections. (ECF No. 74).

II. Legal Standards

The court decides a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure using "the same standard as a motion to dismiss under Rule 12(b)(6)." *Deutsche Bank Nat'l Trust Co. v. IRS*, 361 F. App'x 527, 529 (4th Cir. 2010). Pursuant to Rule 12(b)(6), a claim should be dismissed when the complaint fails to allege facts upon which relief can be granted. *Killian v. City of Abbeville*, C/A No. 8:14-1078-TMC, 2015 WL 1011339, at *2 (D.S.C. Mar. 6, 2015). Thus, a Rule 12(c) motion tests only the sufficiency of the complaint and does not resolve the merits of the plaintiff's claims or any disputes of fact. *See Butler v. United States*, 702 F.3d 749, 752 (4th Cir. 2012). When considering a motion to dismiss, the court should "accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993).

Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.

R. Civ. P. 56(a). In deciding whether a genuine issue of material fact exists, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. A litigant "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." *Monahan v. Cty. of Chesterfield*, 95 F.3d 1263, 1265 (4th Cir. 1996).

III. Discussion

First, Plaintiff objects to the magistrate judge's conclusion that Defendants' dispositive motions are not premature and that additional time for discovery on the issues identified by Plaintiff will not produce any evidence material to the recommended bases for granting the motions. (ECF No. 72 at 1-2). Plaintiff's objection merely restates his request for discovery on these issues, but it fails to explain why the requested discovery would produce evidence material to the Defendants' Eleventh Amendment immunity, to the Prosecutor Defendant's entitlement to absolute immunity, or to establishing that the Sheriff's Department Defendants played a role in deciding when to bring the case to trial. Accordingly, the court concludes that this objection is without merit.

Second, Plaintiff objects to the magistrate judge's determination that the Prosecutor Defendants are entitled to absolute immunity, arguing that they acted "outside of the scope of their official duties" in a manner "wholly unrelated to the judicial process" but failing to specifically

identify such acts or conduct. (ECF No. 72 at 2). In reply, the Prosecutor Defendants contend that Plaintiff is merely attempting to create a question of fact by making conclusory statements and that there is nothing in the record suggesting the Prosecutor Defendants acted outside the scope of their official duties or acted maliciously or in bad faith. (ECF No. 74 at 1-2).

"It is well settled that prosecutorial activities that are 'intimately associated with the judicial phase of the criminal process' are absolutely immune from civil suit." *Safar v. Tingle*, 859 F.3d 241, 248 (4th Cir. 2017) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). "[I]nitiating a prosecution" and "presenting the State's case" in court are two quintessential prosecutorial activities. *Imbler*, 424 U.S. at 431. Absolute immunity attaches for activities occurring during or in connection with judicial proceedings such as criminal trials and appeals, bond hearings, bail hearings, grand jury proceedings, and pre-trial motions hearings. *See Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Dababnah v. Keller–Burnside*, 208 F.3d 467 (4th Cir. 2000).

Plaintiff's allegations against the Prosecutor Defendants stem entirely from their roles as state prosecutors and state attorneys presenting the state's case during judicial proceedings. Plaintiff cannot avoid dismissal simply by asserting the conclusion that the defendants acted outside the scope of their official duties. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (stating that "[a] pleading that offers labels and conclusions or . . . tenders naked assertion[s] devoid of further factual enhancement" cannot survive dismissal) (alteration in original) (internal quotation marks omitted). The court is mindful of the South Carolina Supreme Court's conclusion that "on this record it appears the State's delay was not merely negligent but intentional." *Hunsberger*, 794 S.E.2d at 376. "[I]mproper motive or state of mind," however, "is irrelevant to the absolute immunity entitlement." *Keeper v. Davis*, Civ. Action No. 5:08CV143, 2009 WL 2450439, at *6 (N.D.W. Va. Aug. 7, 2009). Accordingly, the court finds this objection to be without merit.

Finally, Plaintiff objects to the magistrate judge's conclusion that there is nothing to indicate that the Sheriff's Department Defendants played any role in the denial of Plaintiff's right to a speedy trial, arguing that, "in offering . . . false and fabricated testimony against Plaintiff at trial, [the Sheriff's Department Defendants] were acting completely outside of their official duties" and the "judicial process." (ECF No. 72 at 2). This objection has no merit. Plaintiff's sole claim for relief in this action is that the defendants deprived him of his right to a speedy trial under the Sixth Amendment. (ECF No. 1 at 5). The trial testimony of the Sheriff's Department Defendants has no bearing on this claim.

After a thorough review of the Report and the record in this case pursuant to the legal standards set forth above, the court adopts the Report (ECF No. 70) and incorporates it herein. Having further concluded, as explained above, that Plaintiff's objections to the Report are without merit, the court **GRANTS** the Prosecutor Defendants' motion for judgment on the pleadings (ECF No. 24) and **GRANTS** the Sheriff's Department Defendants' motion for summary judgment (ECF No. 54).

IT IS SO ORDERED.

s/Timothy M. Cain
United States District Judge

July 23, 2019
Anderson, South Carolina

NOTICE OF RIGHT TO APPEAL

The parties are hereby notified of the right to appeal this order pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Julio A. Hunsberger, Plaintiff, v. Randy Bobby Duran, Marvin English, Roger Lowe, Rick Hubbard, Alton Eargle, Ervin Maye, Frank Young, Donald Myers, Alan Wilson, John McIntosh, Donald Zelenka, Melody Jane Brown, Defendants.	No.: 8:18-cv-01813-TMC-JDA **REPORT AND RECOMMENDATION**

This matter is before the Court on a motion for judgment on the pleadings and a motion for summary judgment filed by Defendants in this civil action. [Docs. 24; 54.] Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2), this magistrate judge is authorized to review all pretrial matters in this case.

Plaintiff brought this action on June 21, 2018, pursuant to 42 U.S.C. § 1983.[1] [Doc. 1.] Proceeding pro se and in forma pauperis, Plaintiff alleges Defendants violated his Sixth Amendment right to a speedy trial. [*Id.*] On September 19, 2018, Defendants Melody Jane Brown, Alton Eargle, Rick Hubbard, Ervin Maye, John McIntosh, Donald Myers, Alan Wilson, Frank Young, and Donald Zelenka (the "Prosecutor Defendants")[2] filed a motion

[1]A prisoner's pleading is considered filed at the moment it is delivered to prison authorities for forwarding to the court. *See Houston v. Lack*, 487 U.S. 266, 270 (1988). In this case, construing the filing date in the light most favorable to Plaintiff, this action was filed on June 21, 2018. [Doc. 1 at 10 (Complaint signature dated June 21, 2018).]

[2]The Prosecutor Defendants are all employees or former employees of the Eleventh Circuit Solicitor's Office or of the South Carolina Attorney General. [Doc. 24 at 1.] In South Carolina, regional prosecutors are called Solicitors and Assistant Solicitors. *See* S.C. CONST Art. V, § 24; S.C. Code § 1–7–310.

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for judgment on the pleadings. [Doc. 24.] On September 24, 2018, the Court issued an Order in accordance with *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), advising Plaintiff of the summary judgment/dismissal procedure and of the possible consequences if he failed to adequately respond to the motion. [Doc. 32.] On November 26, 2018, the Clerk docketed a response from Plaintiff in opposition to the motion for judgment on the pleadings. [Doc. 57.] On November 30, 2018, the Prosecutor Defendants filed a reply. [Doc. 65.] Their motion for judgment on the pleadings is ripe for review.

On November 19, 2018, Defendants Randy Bobby Duran, Marvin English, and Roger Lowe (the "Sheriff's Department Defendants")[3] filed a motion for summary judgment. [Doc. 54.] On November 27, 2018, this Court issued another *Roseboro* Order. [Doc. 55.] On December 26, 2018, the Clerk docketed a response from Plaintiff in opposition to the Sheriff's Department Defendants' summary judgment motion. [Doc. 68.] This summary judgment motion is also ripe for review.

BACKGROUND[4]

Plaintiff is a state prisoner incarcerated at Smith State Prison in Glennville, Georgia. [Doc. 1 at 1.] In 2002, he was arrested for the 2001 murder of Samuel Sturrup in Edgefield County, South Carolina, and held without bond. [Doc. 1 at 5.] His trial was not held until 2012, and he was convicted. [*Id.*] Twice during the years between his arrest and trial

[3]The Sheriff's Department Defendants, at the time of the events in question, were all employed by the Edgefield County Sheriff's Department. [Doc. 1 at 2, 5.]

[4]The facts included in this Background section are taken directly from the Complaint. [Doc. 1.]

Plaintiff had filed motions for a speedy trial (the "two speedy trial motions"), both of which were denied. [*Id.*]

Plaintiff appealed his conviction on the basis that his right to a speedy trial was violated. [*Id.* at 5–6.] The Supreme Court of South Carolina reversed his conviction on that basis in a decision that issued on October 12, 2016.[5] [*Id.* at 6.] The State petitioned the United States Supreme Court for a writ of certiorari, but the petition was denied. [*Id.*]

In the present action, Plaintiff seeks money damages for the violation of his Sixth Amendment right to a speedy trial. [*Id.* at 5, 10.] He alleges that the Sheriff's Department Defendants and Assistant Solicitors Maye and Young "contributed to the prosecution and subsequent conviction of Plaintiff for crimes he did not commit." [*Id.* at 2–3.] He specifically alleges that the Sheriff's Department Defendants conducted "joint and conclusory investigations" of the murder and later at trial "offered incriminating testimony and evidence against Plaintiff," resulting in his conviction; and that Assistant Solicitors Maye and Young argued successfully against the two speedy trial motions. [*Id.* at 5.]

Plaintiff alleges that the remaining Prosecutor Defendants "directly contributed to the prolongment of the plaintiff's imprisonment for a void conviction" [*Id.* at 2–4]. He alleges that "Defendants Hubbard and Eargle both argued against and opposed the claim of error raised in Plaintiff's appeal" of his conviction; and that Defendants Wilson, McIntosh, Zelenka, Brown, and Myers "all filed challenges to the validity of the South Carolina

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[5]The South Carolina Court of Appeals affirmed Plaintiff's conviction. *State v. Hunsberger*, No. 2014-UP-382, 2014 WL 5772757 (S.C. Ct. App. Nov. 5, 2014). However, the Supreme Court of South Carolina granted certiorari and reversed. *State v. Hunsberger*, No. 2015-000085, 2016 WL 5930130 (S.C. Oct. 12, 2016), *cert. denied*, 137 S. Ct. 2295 (2017); *but see id.* at *1–4 (Toal, J., dissenting). These decisions thoroughly describe the facts relating to the speedy trial issue.

Supreme Court's reversal of Plaintiff's murder conviction on the speedy trial issue through their filing of post-appeal pleadings, including a writ of certiorari to the U.S. Supreme Court." [*Id.* at 6.]

APPLICABLE LAW

Liberal Construction of Pro Se Complaint

Plaintiff brought this action pro se, which requires the Court to liberally construe his pleadings. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Loe v. Armistead*, 582 F.2d 1291, 1295 (4th Cir. 1978); *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). Pro se pleadings are held to a less stringent standard than those drafted by attorneys. *Haines*, 404 U.S. at 520. The mandated liberal construction means only that if the Court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so. *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999). A court may not construct the plaintiff's legal arguments for him. *Small v. Endicott*, 998 F.2d 411, 417–18 (7th Cir. 1993). Nor should a court "conjure up questions never squarely presented." *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985).

Requirements for a Cause of Action Under § 1983

This action is filed pursuant to 42 U.S.C. § 1983, which provides a private cause of action for constitutional violations by persons acting under color of state law. Section 1983 "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). Accordingly, a civil action under § 1983

allows "a party who has been deprived of a federal right under the color of state law to seek relief." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707 (1999).

Section 1983 provides, in relevant part,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 1983. To establish a claim under § 1983, a plaintiff must prove two elements: (1) that the defendant "deprived [the plaintiff] of a right secured by the Constitution and laws of the United States" and (2) that the defendant "deprived [the plaintiff] of this constitutional right under color of [State] statute, ordinance, regulation, custom, or usage." *Mentavlos v. Anderson*, 249 F.3d 301, 310 (4th Cir. 2001) (third alteration in original) (citation and internal quotation marks omitted).

The under-color-of-state-law element, which is equivalent to the "state action" requirement under the Fourteenth Amendment,

> reflects judicial recognition of the fact that most rights secured by the Constitution are protected only against infringement by governments. This fundamental limitation on the scope of constitutional guarantees preserves an area of individual freedom by limiting the reach of federal law and avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.

Id. (quoting *Dowe v. Total Action Against Poverty in Roanoke Valley,* 145 F.3d 653, 658 (4th Cir. 1998)) (internal citations and quotation marks omitted). Nevertheless, "the deed of an ostensibly private organization or individual" may at times be treated "as if a State has caused it to be performed." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531

U.S. 288, 295 (2001). Specifically, "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Id.* (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). State action requires both an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State . . . or by a person for whom the State is responsible" and that "the party charged with the deprivation [is] a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). A determination of whether a private party's allegedly unconstitutional conduct is fairly attributable to the State requires the court to "begin[ ] by identifying 'the specific conduct of which the plaintiff complains.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982)).

Judgment on the Pleadings Standard

Rule 12(c) permits a party to move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial. . . . " Fed. R. Civ. P. 12(c). Where a Rule 12(b)(6) defense is raised by a Rule 12(c) motion for judgment on the pleadings, the motion under Rule 12(c) is reviewed under the same standards as a motion under Rule 12(b)(6). *Rodriguez v. Finan*, No. 2:15-cv-2317-BHH, 2016 WL 1258314, at *7 n.2 (D.S.C. Mar. 31, 2016) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999); *Burbach Broad. Co. of Delaware v. Elkins Radio Corp.*, 278 F.3d 401, 405–06 (4th Cir. 2002)).

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a claim should be dismissed if it fails to state a claim upon which relief can be granted. When considering a

motion to dismiss, the court should "accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). However, the court "need not accept the legal conclusions drawn from the facts" nor "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). Further, for purposes of a Rule 12(b)(6) motion, a court may rely on only the complaint's allegations and those documents attached as exhibits or incorporated by reference. *See Simons v. Montgomery Cty. Police Officers*, 762 F.2d 30, 31 (4th Cir. 1985). If matters outside the pleadings are presented to and not excluded by the court, the motion is treated as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(d).

With respect to well-pleaded allegations, the United States Supreme Court explained the interplay between Rule 8(a) and Rule 12(b)(6) in *Bell Atlantic Corp. v. Twombly*:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim 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." While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

550 U.S. 544, 555 (2007) (footnote and citations omitted); *see also* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1216, at 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than a bare averment that the pleader wants

compensation and is entitled to it or a statement of facts that merely creates a suspicion that the pleader might have a legally cognizable right of action.").

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556). The plausibility standard reflects the threshold requirement of Rule 8(a)(2)—the pleader must plead sufficient facts to show he is entitled to relief, not merely facts consistent with the defendant's liability. *Twombly*, 550 U.S. at 557 (quoting Fed. R. Civ. P. 8(a)(2)); *see also Iqbal*, 556 U.S. at 678 ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" (quoting *Twombly*, 550 U.S. at 557)). Accordingly, the plausibility standard requires a plaintiff to articulate facts that, when accepted as true, demonstrate that the plaintiff has stated a claim that makes it plausible the plaintiff is entitled to relief. *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678).

Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure states, as to a party who has moved for summary judgment:

> The court shall grant summary judgment if the movant shows that 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" if proof of its existence or non-existence would affect disposition of the case under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. When determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings. *Id.* at 324. Rather, the non-moving party must demonstrate specific, material facts exist that give rise to a genuine issue. *Id.* Under this standard, the existence of a mere scintilla of evidence in support of the non-movant's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. Further, Rule 56 provides in pertinent part:

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> > (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored

> information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). Accordingly, when Rule 56(c) has shifted the burden of proof to the non-movant, he must produce existence of a factual dispute on every element essential to his action that he bears the burden of adducing at a trial on the merits.

DISCUSSION

The Prosecutor Defendants and the Sheriff's Department Defendants argue, for several reasons, that their motions should be granted. The Court agrees.[6]

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[6]Pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, Plaintiff maintains that Defendants' motions are premature because the parties have not yet engaged in discovery. [Docs. 57; 68]. For that reason Plaintiff filed a declaration explaining that he needs discovery regarding the following factual issues: (1) "[w]hether the actions of [the Sheriff's Department Defendants and Defendants Maye and Young] directly contributed to the prosecution and subsequent conviction of Plaintiff for crimes Plaintiff did not commit"; (2) "[w]hether the actions of [the remaining Defendants] directly contributed to the prolongment of Plaintiff's conviction for a void conviction"; and (3) "[w]hether the statute of limitations for Plaintiff's instant lawsuit . . . began from the date . . . when the Supreme Court of the United States affirmed the reversal of Plaintiff's South Carolina murder conviction." [Doc. 68 at 2–3.] However, none of these issues are material to Defendants' entitlement to judgment for the reasons that the undersigned will explain; thus, the undersigned recommends that the Court address the merits of Defendants' motions rather than allowing additional time for discovery. *See McClure v. Ports*, 914 F.3d 866 (4th Cir. 2019) (holding that a district court may deny a Rule 56(d) motion for discovery "if 'the information sought would not by itself create a genuine issue of material fact sufficient for the nonmovant to survive summary judgment'") (quoting *Pisano v. Strach*, 743 F.3d 927, 931 (4th Cir. 2014)).

Eleventh Amendment Immunity for Official-Capacity Claims

As employees of the State of South Carolina, Defendants are all entitled to Eleventh Amendment immunity as to any claims for money damages asserted against them in their official capacities. The Eleventh Amendment to the United States Constitution divests this Court of jurisdiction to entertain a suit for damages brought against the State of South Carolina, or its officials in their official capacities, by a citizen of South Carolina or a citizen of another state. *See Alden v. Maine*, 527 U.S. 706, 728–29 (1999); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). As noted in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 n.9 (1984), a state must expressly consent to suit in a federal district court. The State of South Carolina has not consented to suit in a federal court. The South Carolina Tort Claims Act ("SCTCA"), section 15–78–20(e) of the South Carolina Code of Laws, expressly provides that the State of South Carolina does not waive Eleventh Amendment immunity, consents to suit only in a court of the state of South Carolina, and does not consent to suit in a federal court or in a court of another state. *See McCall v. Batson*, 329 S.E.2d 741, 743 (S.C. 1985) (abolishing sovereign immunity in tort "does not abolish the immunity which applies to all legislative, judicial and executive bodies and to public officials who are vested with discretionary authority, for actions taken in their official capacities"), *superseded by statute*, S.C. Code Ann. § 15-78-100(b), as recognized in *Jeter v. S.C. Dep't of Transp.*, 633 S.E.2d 143 (S.C. Ct. App. 2006); *see also Pennhurst*, 465 U.S. at 121 ("[N]either pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment."). Accordingly, because Plaintiff's claims are for money damages only, all Defendants are entitled to dismissal of the claims alleged against them in their official capacities.

Prosecutorial Immunity for the Prosecutor Defendants

The Prosecutor Defendants contend that they are entitled, as a matter of law, to prosecutorial immunity. [Doc. 24-1 at 6–11.] The Court agrees.

Prosecutors have absolute immunity for activities in or connected with judicial proceedings, such as criminal trials, bond hearings, bail hearings, grand jury proceedings, and pre-trial motions hearings. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 272–73 (1993); *Dababnah v. Keller-Burnside*, 208 F.3d 467, 470–71 (4th Cir. 2000). Any actions taken by a solicitor in preparing a criminal charge and prosecuting the case against Plaintiff are part of the judicial process; therefore, the solicitor has absolute immunity from suit. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (explaining absolute immunity is "*immunity from suit* rather than a mere defense to liability"); *see also Van de Kamp v. Goldstein*, 555 U.S. 335, 340–43 (2009). In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the United States Supreme Court held that prosecutors, when acting within the scope of their duties, have absolute immunity from liability under § 1983 for alleged civil rights violations committed in the course of proceedings that are "intimately associated with the judicial phase of the criminal process." *Id.* at 430. This absolute immunity from suit applies when prosecutors exercise their prosecutorial discretion, such as making the determination to go forward with indictment. *See Springmen v. Williams*, 122 F.3d 211, 212–13 (4th Cir. 1997).

Here, all of the conduct on which Plaintiff bases his claims against the Prosecutor Defendants were actions these Defendants took in prosecuting a criminal case against Plaintiff. Because this alleged conduct is intricately related to the judicial process and to the prosecution of the State's case against Plaintiff, the Prosecutor Defendants have absolute immunity from this suit and their motion for judgment on the pleadings should be

granted.[7] *See Dowdle v. Skinner*, No. 6:12-cv-3253-DCN, 2013 WL 5771199, at *2 (D.S.C. Oct. 24, 2013); *Rodgers v. Riddle*, No. 6:09-cv-1446-PMD, 2009 WL 1953188, at *3 (D.S.C. July 7, 2009); *see also Pressley v. McMaster*, No. 3:14-cv-04025-JMC, 2015 WL 5178505, at *4 (D.S.C. Sept. 4, 2015) ("Representing the state's interest in criminal appeals or otherwise defending the validity of a conviction or sentence on appeal or in post-conviction proceedings is 'intimately associated with the judicial phase of the criminal process,' and thus constitutes an immune function.").

Failure to State a Sixth Amendment Claim as to the Sheriff's Department Defendants

Finally, Plaintiff neither alleges nor points to any evidence indicating that the Sheriff's Department Defendants played any role in denying him a speedy trial. Rather, Plaintiff merely alleges that they offered testimony and evidence against him. [Doc. 1 at 5.]. Accordingly, the Court concludes that they are entitled to summary judgment on this basis.[8]

RECOMMENDATION

Wherefore, based upon the foregoing, the Court recommends that Defendants' motions for judgment on the pleadings [Doc. 24] and for summary judgment [Doc. 54] both be GRANTED.

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[7]Because the Court concludes that the Prosecutor Defendants are entitled to prosecutorial immunity, the Court declines to address their alternative arguments.

[8]The Sheriff's Department Defendants do not specifically raise this ground in support of their summary judgment motion. However, the Court notes that 28 U.S.C. §1915, the in forma pauperis statute, authorizes the Court to dismiss a case if it is satisfied that the action "fails to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B). Because the Court concludes, for the reasons discussed, that the Complaint fails to state a claim as to these Defendants, the Court declines to address the arguments these Defendants raise in support of their summary judgment motion.

IT IS SO RECOMMENDED.

s/Jacquelyn D. Austin

United States Magistrate Judge

February 22, 2019

Greenville, South Carolina

IN THE SUPREME COURT OF THE UNITED STATES

Docket No._____

CERTIFICATE OF COMPLIANCE

Julio Hunsberger,

Petitioner,

v.

Randy Duran, et al.,

Respondents.

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 712 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31 day of January, 2020.

Respectfully submitted,

Julio Hunsberger

PETITIONER