APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JUSTIN LAMAR JOHNSON,	)	**CASE NO. 1:18 CV 1152**
	)	
Plaintiff,	)	**JUDGE CHRISTOPHER A. BOYKO**
	)	
v.	)	
	)	**ORDER**
JUDGE JOSEPH GIBSON,	)	
	)	
Defendant.	)	

CHRISTOPHER A. BOYKO, J.:

Before the Court are nine post judgment Motions filed by *pro se* Plaintiff Justin Lamar Johnson. He filed this action under 42 U.S.C. § 1983 against retired Judge Joseph Gibson, alleging Judge Gibson deprived him of his right to a jury trial by conducting a bench trial. He asserted this deprived him of due process. This Court dismissed this action on August 13, 2018, stating Judge Gibson was absolutely immune from suits for damages and Plaintiff could not challenge his conviction in a civil rights action. (Doc. No. 3). Plaintiff filed a Motion for Relief from Judgment under Rule 60(b) which he voluntarily withdrew. (Doc. Nos. 7, 11, and 14). He has now filed a Motion for Judicial Review of Constitutional Challenge to Ohio's Statute of Limitations for Legal Malpractice and Malicious Prosecution (Doc. No. 15), a Motion for Judicial Review of Constitutional Challenge of Judicial and Absolute Immunities (Doc. No. 17), a Motion for the Required and Permissive Joinder of Parties as Additional Defendants (Doc. No. 19), a Motion Questioning Constitutionality of Ohio's Carrying Concealed Weapons under

Disabilities Statutes (Doc. No. 21), a Motion for Relief from Judgment Pursuant to Rule 60(b), a Motion for Service by Clerk (Doc. No. 28), a Motion to Amend Complaint (Doc. No. 31), a Motion to Exceed Page Limit (Doc. No. 34) and a Motion for Default Judgment (Doc. No. 35).

As an initial matter, this case is closed. Plaintiff must demonstrate he is entitled to Relief from Judgment and convince this Court to reopen this case before any of his other Motions can be addressed.

Rule 60(b) permits a District Court to grant a Motion for Relief from Judgment for any of the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
> (6) any other reason justifying relief from the operation of the judgment.

Fed.R.Civ.P. 60(b). Rule 60(b) does not permit parties to relitigate the merits of claims, or to raise new claims that could have been raised during the litigation of the case. *In re Abdur'Rahman*, 392 F.3d 174, 179-80 (6th Cir. 2004).

In his Rule 60(b) Motion, Plaintiff argues his case has merit and he should be able to proceed with an action for damages that challenges his conviction against the Judge who presided over his criminal trial. He simply restates the claims he asserted in his Complaint. Nothing in his Motion suggests he is entitled to relief from judgment under any of the six

grounds listed in Rule 60(b).

All of Plaintiff's other pending Motions assume the case has been reopened. It has not. Because the Court denies Plaintiff's Motion for Relief from Judgment under Rule 60(b), all of the other pending Motions are denied as moot.

Up to this point, the Courts in this District have been tolerant of Plaintiff's *pro se* filings; however, there comes a point when we can no longer allow Plaintiff to misuse the judicial system at tax payer expense. The filing of frivolous lawsuits and motions strains an already burdened federal judiciary. As the Supreme Court recognized: "Every paper filed with the Clerk of ... Court, no matter how repetitious or frivolous, requires some portion of the [Court's] limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice." *In re McDonald*, 489 U.S. 180, 184 (1989). Our ability to perform our duties is compromised when we are forced to devote limited resources to the processing of repetitious and frivolous filings. *In re Sindram*, 498 U.S. 177, 179-80 (1991). To this end, the United States Court of Appeals for the Sixth Circuit has approved enjoining vexatious and harassing litigants. *Filipas v. Lemons*, 835 F.2d 1145 (6th Cir. 1987); *Wrenn v. Vanderbilt Univ. Hosp.*, Nos. 94-5453, 94-5593, 1995 WL 111480 (6th Cir. Mar. 15, 1995)(authorizing a court to enjoin harassing litigation under its inherent authority and the All Writs Act, 28 U.S.C. § 1651(a) (citations omitted)). After a careful review of Plaintiff's conduct in this case, it is apparent that it is necessary to impose some restrictions on Plaintiff's ability to continue on in this manner.

Accordingly, Plaintiff's Motion for Judicial Review of Constitutional Challenge to

Ohio's Statute of Limitations for Legal Malpractice and Malicious Prosecution (Doc. No. 15), Motion for Judicial Review of Constitutional Challenge of Judicial and Absolute Immunities (Doc. No. 17), Motion for the Required and Permissive Joinder of Parties as Additional Defendants (Doc. No. 19), Motion Questioning Constitutionality of Ohio's Carrying Concealed Weapons under Disabilities Statutes (Doc. No. 21), Motion for Relief from Judgment Pursuant to Rule 60(b), Motion for Service by Clerk (Doc. No. 28), Motion to Amend Complaint (Doc. No. 31), Motion to Exceed Page Limit (Doc. No. 34) and Motion for Default Judgment (Doc. No. 35) are denied. Further, Plaintiff is permanently enjoined from filing additional post judgment motions, affidavits, or other documents in this case. The Clerk is directed to return, unfiled, any further documents submitted for filing in this action by Plaintiff.

IT IS SO ORDERED.

DATE: August 23, 2019

/s/Christopher A. Boyko
CHRISTOPHER A. BOYKO
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JUSTIN LAMAR JOHNSON,	)	**CASE NO. 1:19 CV 2300**
	)	
Plaintiff,	)	**JUDGE CHRISTOPHER A. BOYKO**
	)	
v.	)	
	)	**OPINION AND ORDER**
JUDGE JOSEPH GIBSON, *et al.*,	)	
	)	
Defendant.	)	

CHRISTOPHER A. BOYKO, J.:

Pro se Plaintiff Justin Lamar Johnson filed this action under 42 U.S.C. § 1983 against retired Stark County Common Pleas Court Judge Joseph Gibson, Stark County Assistant Prosecutor Chryssa Hartnett, Criminal Defense Attorney Stephen Kandel, Criminal Defense Attorney Mary Warlop, Stark County Assistant Prosecutor Hope Konovsky, Stark County Prosecutor John Ferrero, Stark County Assistant Prosecutor Lewis Guarnierri, the Ohio Attorney General, and the United States Attorney General. In the Complaint, Plaintiff alleges Judge Gibson conducted a bench trial and wrongfully convicted him. He asserts this deprived him of due process. He seeks monetary damages.

BACKGROUND

Plaintiff was indicted in the Stark County Court of Common Pleas on February 2, 2016 on charges of Discharging a Firearm On or Near a Prohibited Premises, Felonious Assault and Having a Weapon under Disability. Plaintiff's attorney asked the Court to bifurcate the trial so

that Counts One and Two would be decided by a jury and Count Three would be tried to the bench. Plaintiff contends he did not sign a jury waiver for Count Three. On March 24, 2016, the jury found Plaintiff not guilty on Counts One and Two. The trial court then proceeded to trial on Count Three and found Plaintiff guilty. The court sentenced Plaintiff on April 22, 2016 to twenty-four months incarceration.

Plaintiff appealed his conviction to the Ohio Fifth District Court of Appeals. Among the assignments of error he asserted, he claimed that the trial court failed to follow Ohio Revised Code § 2945.05 and Ohio Criminal Rule 23(A) by not getting his written consent to a waiver of his right to a jury trial. The Appellate Court sustained that assignment of error, vacated his conviction, and remanded the case to the state court for a new trial on the offense. It appears the trial court elected not to retry Plaintiff. Plaintiff later was able to have his conviction expunged.

Plaintiff contends he is innocent of the charges and therefore was wrongfully convicted. He states he was accused of discharging a firearm at an individual who attacked him. He contends his cousin came to his defense and fired the weapon. The victim lost consciousness and when he awoke, he identified Plaintiff as the shooter. Plaintiff alleges that although his attorney requested the bench trial, he did not sign a waiver of his right to a jury trial. He claims he was denied due process.

Plaintiff acknowledges that this is his second attempt to obtain damages from Judge Gibson. He first filed *Johnson v. Gibson*, No. 1:18 CV 1152 (N.D. Ohio Aug. 13, 2018) on May 18, 2018 alleging that he did not properly waive his right to a jury trial for Count Three of his indictment. This Court dismissed that action on August 13, 2018 stating that Judge Gibson is absolutely immune from suits for damages. Plaintiff has now filed this action once again

eeking to hold Judge Gibson individually liable for his incarceration. He is attempting to obtain a different result by adding Defendants and changing his claim from one of a denial of his right to a jury trial to one of a denial of due process.

LAW AND ANALYSIS

Although *pro se* pleadings are liberally construed, *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520 (1972), the Court is required to dismiss an *in forma pauperis* action under 28 U.S.C. §1915(e) if it fails to state a claim upon which relief can be granted, or if it lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319 (1989); *Lawler v. Marshall*, 898 F.2d 1196 (6th Cir. 1990); *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996). An action has no arguable basis in law when the Defendant is immune from suit or when the Plaintiff claims a violation of a legal interest which clearly does not exist. *Neitzke*, 490 U.S. at 327. An action has no arguable factual basis when the allegations are delusional or rise to the level of the irrational or "wholly incredible." *Denton v. Hernandez*, 504 U.S. 25, 32 (1992); *Lawler*, 898 F.2d at 1199.

A cause of action fails to state a claim upon which relief may be granted when it lacks "plausibility in the Complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 (2007). A pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). The factual allegations in the pleading must be sufficient to raise the right to relief above the speculative level on the assumption that all the allegations in the Complaint are true. *Bell Atl. Corp.*, 550 U.S. at 555. The Plaintiff is not required to include detailed factual allegations, but must provide more than "an unadorned, the-Defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. A

pleading that offers legal conclusions or a simple recitation of the elements of a cause of action will not meet this pleading standard. *Id.* In reviewing a Complaint, the Court must construe the pleading in the light most favorable to the Plaintiff. *Bibbo v. Dean Witter Reynolds, Inc.*, 151 F.3d 559, 561 (6th Cir. 1998).

As an initial matter, this case is barred by the doctrine of *res judicata*. The doctrine of *res judicata* dictates that a final judgment on the merits of a claim precludes a party from bringing a subsequent lawsuit on the same claim or from raising a new defense to defeat the prior judgment. *Gargallo v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 918 F.2d 658, 660 (6th Cir. 1990). It bars relitigation of every issue actually brought before the Court and every issue or defense that should have been raised in the previous action. *Id.* The purpose of this doctrine is to promote the finality of judgments and thereby increase certainty, discourage multiple litigation, and conserve judicial resources. *Westwood Chemical Co. v. Kulick*, 656 F.2d 1224, 1229 (6th Cir. 1981). A subsequent action will be subject to a *res judicata* bar only if there is an identity of the facts creating the right of action and of the evidence necessary to sustain each action. Both of these requirements are met in this case.

This is the second case Plaintiff filed against Judge Gibson for unlawful conviction. This Court already found that Judge Gibson is absolutely immune from suits for damages in connection with decision he made while presiding over Plaintiff's criminal trial. Plaintiff now seeks to assert a different claim based on the same facts pertaining to the same incident. He is barred from doing so by the doctrine of *res judicata*.

The Court is aware that *res judicata* is an affirmative defense that generally is raised by

the Defendant. FED. R. CIV. P. 8. However, the Supreme Court as well as the Sixth Circuit have indicated that a Court may take the initiative to assert the *res judicata* defense *sua sponte* in "special circumstances." *Arizona v. California*, 530 U.S. 392, 412, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000); *Hutcherson v. Lauderdale County, Tennessee*, 326 F.3d 747, 757 (6th Cir.2003). A "special circumstance" is present when "a Court is on notice that it has previously decided the issue presented." *Arizona*, 530 U.S. at 412. This Court decided the very same issue that is again brought the Plaintiff. Plaintiff cannot proceed to relitigate an issue already decided by this Court.

Furthermore, the same reasoning applies in this case to dismiss the claims against Judge Gibson. Judges are absolutely immune from civil suits for money damages for decisions they made while presiding over a case. *Mireles v. Waco*, 502 U.S. 9, 9 (1991); *Barnes v. Winchell*, 105 F.3d 1111, 1115 (6th Cir. 1997). Judges are accorded absolute immunity to ensure that the independent and impartial exercise of their judgment in a case is not impaired by the exposure to damages by dissatisfied litigants. *Barnes*, 105 F.3d at 1115. Absolute immunity is overcome only in two situations: (1) when the conduct alleged is performed at a time when the Defendant is not acting as a judge; or (2) when the conduct alleged, although judicial in nature, is taken in complete absence of all subject matter jurisdiction of the court over which he or she presides. *Mireles*, 502 U.S. at 11-12; *Barnes*, 105 F.3d at 1116. *Stump*, 435 U.S. at 356-57. A judge will be not deprived of immunity even if the action he or she took was performed in error, done maliciously, or was in excess of his or her authority. *Mireles*, 502 U.S. at 11-12. Neither of the exceptions apply in this case. Judge Gibson is absolutely immune from suits for damages.

Similarly, the Assistant County Prosecutors and the County Prosecutor are immune from

suits for damages for initiating a prosecution and in presenting the state's case. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976); *Pusey v. Youngstown*, 11 F.3d 652, 658 (6th Cir. 1993). A prosecutor must exercise his or her best professional judgment both in deciding which suits to bring and in conducting them in court. *Skinner v. Govorchin*, 463 F.3d 518, 525 (6th Cir. 2006). This duty could not be properly performed if the prosecutor is constrained in making every decision by the potential consequences of personal liability in a suit for damages. *Id.* Absolute immunity is therefore extended to prosecuting attorneys when the actions in question are those of an advocate. *Spurlock v. Thompson*, 330 F.3d 791, 798 (6th Cir.2003). Immunity is granted not only for actions directly related to initiating a prosecution and presenting the state's case, but also to activities undertaken "in connection with [the] duties in functioning as a prosecutor." *Imbler*, 424 U.S. at 431; *Higgason v. Stephens*, 288 F.3d 868, 877 (6th Cir. 2002). Plaintiff's claims against Guarnieri, Fererro and Kovonsky are based on their decisions and actions in connection with presenting the state's case against him. These Defendants are also entitled to absolute immunity in this case.

Plaintiff's defense attorneys Kandel and Warlop are not subject to suit in a civil rights action. To establish a prima facie case under 42 U.S.C. § 1983, Plaintiff must assert that a person acting under color of state law deprived him of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). Generally to be considered to have acted "under color of state law," the person must be a state or local government official or employee. Public defenders and private defense attorneys are not state actors against whom claims can be asserted under § 1983. *See Polk County v. Dodson*, 454 U.S. 312, 318 (1981); *Powers v. Hamilton County Public Defender Com'n* 501 F.3d 592

(6th Cir. 2007).

Finally, Plaintiff fails to state a claim for relief against either the Ohio Attorney General or the United States Attorney General. To the extent both are named in their official capacities, they are immune. A claim against a state official in his official capacity is a claim against the state itself. *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989). The Eleventh Amendment is an absolute bar to the imposition of liability upon states, state agencies, and state officials sued in their official capacities. *Latham v. Office of Atty. Gen. of State of Ohio*, 395 F.3d 261, 270 (6th Cir. 2005). Similarly, a claim against a federal officer in his official capacity is a claim against the United States. The United States, as a sovereign, is immune from suit unless it explicitly waives its immunity, and it has not waived immunity for civil rights actions. *See Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 484-86 (1994); *Okoro v. Scibana*, No. 02-1439, 2003 WL 1795860 at * 1 (6th Cir. April 1, 2003)(stating that a federal prisoner can not bring a *Bivens* action against the Bureau of Prisons). To the extent both Defendants are named in their individual capacities, he fails to allege they were personally involved in the decision to conduct a bench trial on Count Three of his indictment. Plaintiff cannot hold any Defendant liable in his individual capacity absent a clear showing that the Defendant was personally involved in the activities which form the basis of the alleged unconstitutional behavior. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976); *Mullins v. Hainesworth*, No. 95-3186, 1995 WL 559381 (6th Cir. Sept. 20, 1995).

III. CONCLUSION

Accordingly, Plaintiff's Motion to Proceed *In Forma Pauperis* (ECF No. 2) is granted and this action is dismissed pursuant to 28 U.S.C. §1915(e). Plaintiff's remaining Motions

(ECF Nos. 6, 7 ,8, 9, 10, 12) are denied. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.[1]

IT IS SO ORDERED.

DATE: 2/10/2020

s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
SENIOR UNITED STATES DISTRICT JUDGE

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[1] 28 U.S.C. § 1915(a)(3) provides:

> An appeal may not be taken *in forma pauperis* if the trial court certifies that it is not taken in good faith.

NOT RECOMMENDED FOR PUBLICATION

No. 20-3280

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUSTIN LAMAR JOHNSON,	)	
	)	
Plaintiff-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE NORTHERN DISTRICT OF
JUDGE JOSEPH GIBSON, et al.,	)	OHIO
	)	
Defendants-Appellees.	)	

ORDER

Before: NORRIS, GRIFFIN, and LARSEN, Circuit Judges.

Justin Lamar Johnson, a pro se Ohio resident, appeals a district court judgment dismissing his civil complaint filed under 42 U.S.C. § 1983. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2016, Johnson was indicted in the Stark County Court of Common Pleas for discharging a firearm on or near a prohibited premise, felonious assault, and having a weapon under disability. Johnson's attorney requested that the trial court bifurcate the proceedings and permit the first two charges to be tried by a jury and have the weapon-disability charge tried to the bench. After a jury acquitted Johnson of the first two charges, the trial court found him guilty of the remaining count and sentenced him to twenty-four months of imprisonment. The Ohio Fifth District Court of Appeals vacated Johnson's conviction, concluding in part that the trial court failed to follow Ohio Revised Code section 2945.05 and Ohio Criminal Rule 23(A) by not obtaining his written consent to a waiver of his right to a jury trial. *State v. Johnson*, No. 2016CA00119, 2017 WL 1231733,

at *2-3 (Ohio Ct. App. Mar. 31, 2017). The case was remanded to the trial court, but Johnson was not retried, and his conviction was expunged.

In May 2018, Johnson filed his first complaint against Stark County Common Pleas Court Judge Joseph Gibson, arguing that Judge Gibson violated his right to a jury trial by conducting a bench trial on the charge of having a weapon under disability. The district court dismissed the complaint, concluding that Judge Gibson was entitled to absolute judicial immunity. *Johnson v. Gibson*, No. 1:18-cv-1152 (N.D. Ohio Aug. 13, 2018). Johnson filed numerous post-judgment pleadings, including a motion to amend his complaint and a motion under Federal Rule of Civil Procedure 60(b) for relief from the judgment dismissing his original complaint, challenging in part the doctrine of judicial immunity. The district court denied Johnson's Rule 60(b) motion as being without merit, denied his remaining motions, and enjoined him from filing additional post-judgment motions in that case.

In October 2019, Gibson filed the current complaint against Judge Gibson and also named the following defendants: the Ohio Attorney General; Stark County Prosecutor John Ferrero; Assistant Prosecutors Chryssa Hartnett, Hope Konovsky, and Lewis Guarnierri; criminal defense attorneys Stephen Kandel and Mary Warlop; and the United States Attorney General. Johnson claimed that the defendants violated his due-process rights by conspiring to convict him without obtaining a written waiver of his right to a jury trial as to the charge of having a weapon under disability. He argued that the doctrine of judicial immunity improperly resulted in the dismissal of his first complaint and that his motion seeking relief from that judgment should have been granted. Johnson also acknowledged that the doctrine of res judicata might present an obstacle in his pursuit of his current complaint, but he argued that the equitable doctrine of fraudulent concealment should apply in his case because the defendants took actions to conceal his cause of action.

The district court dismissed the complaint sua sponte, concluding that: (1) Johnson's complaint is barred by res judicata because it is based on the same facts as his previous complaint; and (2) Johnson failed to state a claim upon which relief could be granted because Judge Gibson

and the prosecutors are entitled to immunity, the defense attorneys are not state actors subject to liability under § 1983, and the Ohio and U.S. Attorney Generals are immune and were not personally involved in the decision to conduct a bench trial on the third charge filed against Johnson.

On appeal, Johnson argues that the district court erred when it concluded that his complaint was barred by res judicata, the defendants were entitled to immunity, and the defense attorneys were not subject to suit under § 1983. He also argues that the district court erred by not "relieving the plaintiff from the dismissal of his first complaint." Johnson requests oral argument. He also moves to file a docketing statement and for expedited disposition of his appeal.

Johnson's challenge to the dismissal of his prior lawsuit is not properly before the court because he never appealed from the dismissal of that complaint, and the time for doing so has long since expired. *See* Federal Rule of Appellate Procedure 4(a)(1).

We review de novo a district court's sua sponte dismissal of a complaint under 28 U.S.C. § 1915(e)(2)(B). *Grinter v. Knight*, 532 F.3d 567, 571 (6th Cir. 2008). Under § 1915(e)(2)(B), the district court must screen and dismiss any complaint that is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. To avoid dismissal for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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." *Id.*

The district court properly concluded that Johnson's complaint was barred by res judicata. The doctrine of res judicata provides that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in a prior action." *In re Alfes*, 709 F.3d 631, 638 (6th Cir. 2013) (quoting *Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir. 1995)). A subsequent action is barred by the doctrine of res judicata when

there is "(1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action." *Rawe v. Liberty Mut. Fire Ins.*, 462 F.3d 521, 528 (6th Cir. 2006) (quoting *Kane*, 71 F.3d at 560). Here, Johnson previously filed a complaint against Judge Gibson seeking relief based on his claim that his right to a jury trial was violated when he was improperly tried before the bench despite the trial court's failure to obtain a written waiver of his right to a jury trial. That case was dismissed for failure to state a claim. Although Johnson now argues that his due process rights were violated and he has added additional defendants, those claims should have been litigated in the prior proceeding. Finally, there is an identity of the causes of action. *See Browning v. Levy*, 283 F.3d 761, 773-74 (6th Cir. 2002). Identity of causes of action means an "identity of the facts creating the right of action and of the evidence necessary to sustain each action." *Westwood Chem. Co. v. Kulick*, 656 F.2d 1224, 1227 (6th Cir. 1981). Therefore, the district court properly concluded that Johnson's complaint is barred by res judicata.

Although res judicata is an affirmative defense that typically should be raised by a defendant and not sua sponte by a district court, it is appropriate for a court to invoke the defense in special circumstances, such as where it would promote judicial economy. *See Hutcherson v. Lauderdale County*, 326 F.3d 747, 757 (6th Cir. 2003). This objective is met here because Johnson's claims are clearly based on the same operative facts as those he relied on in his previous complaint. Although Johnson argues that the doctrine of fraudulent concealment should apply to prevent his claims from being barred by the doctrine of res judicata, his allegations that the defendants concealed the violation of his rights is belied by the record, and his acknowledgment that counsel ignored his request to object to the district court's decision to proceed with a bench trial on the third charge. Johnson was aware at that time that the judge, the prosecutors, and his attorney had ignored his desire to be tried by a jury.

In any event, even if the doctrine did not apply, the district court properly dismissed the complaint because the defendants are entitled to immunity, are not subject to liability, or were not

personally involved in the alleged constitutional violation. First, the district court properly concluded that Judge Gibson was entitled to absolute judicial immunity. A judge performing his or her judicial functions is absolutely immune from suit seeking monetary damages. *Mireles v. Waco*, 502 U.S. 9, 9-10 (1991) (per curiam). A judge will not be immune from suit where: (1) the judge acts in a non-judicial capacity; or (2) the judge acts in the complete absence of all jurisdiction. *Id.*, at 11-12. Here, Johnson did not allege, and the record does not show, that the defendant judge acted in a non-judicial capacity or in the complete absence of all jurisdiction.

Second, the district court properly concluded that the prosecutors were entitled to immunity. Whether a prosecutor is absolutely immune from liability under § 1983 is a legal question reviewed de novo. *Cady v. Arenac Cty.*, 574 F.3d 334, 339 (6th Cir. 2009). Prosecutors have absolute immunity for actions taken within the scope of their duties. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). They are not immune for administrative or investigative acts. *Holloway v. Brush*, 220 F.3d 767, 774-75 (6th Cir. 2000) (en banc). Johnson's claim that the prosecutors violated his due process rights by trying him to the bench despite his desire for a jury trial challenges actions taken within the scope of their duties. In addition, it bears repeating that Johnson's counsel, not the prosecutors, requested the bench trial. But the defense attorneys are not state actors subject to liability under § 1983. *See Polk Cty. v. Dodson*, 454 U.S. 312, 321-22 (1981). And, while private citizens acting in concert with state officials may be subject to liability under § 1983, *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980), Johnson's complaint contains nothing more than conclusory allegations that his attorneys conspired with Judge Gibson to deny his due-process right to a jury trial.

Finally, the district court properly concluded that Johnson failed to state a claim against the state and federal Attorneys General. Johnson did not assert any allegations that these defendants were personally involved in the decision to try him before the bench. Thus, to the extent he sought to hold these defendants liable in their individual capacities, the complaint failed to state a claim against them. *See Rizzo v. Goode*, 423 U.S. 362, 371 (1976). To the extent that he sued them in their official capacities, his claim against the state attorney general is barred by

the Eleventh Amendment. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Grinter*, 532 F.3d at 572. Likewise, the U.S. Attorney General is entitled to immunity to the extent Johnson sued him in his official capacity. *Toledo v. Jackson*, 485 F.3d 836, 838 (6th Cir. 2007).

Accordingly, we **DENY** the request for oral argument, **AFFIRM** the district court's judgment, and **DENY** the pending motions as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk