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

CHRISTOPHER ALLEN SONES and	:	CIVIL ACTION NO. <b>4:CV-11-1073</b>
LAURA ANN SONES,	:	
	:	(Judge Jones)
Plaintiffs	:	
	:	(Magistrate Judge Blewitt)
v.	:	
	:	
JOHN ANDREW SMAY, et al.,	:	
	:	
Defendants	:	

**REPORT AND RECOMMENDATION**

**I. Background.**

On June 3, 2011, Plaintiffs, Christopher Allen Sones and Laura Ann Sones, *pro se*, filed this civil rights action, seemingly pursuant to 42 U.S.C. § 1983, alleging fraud, identity, theft, extortion, collection of money under false pretenses, terrorizing witnesses, legal malpractice and legal misrepresentation by a court-appointed Executor of an estate. (Doc. 1). Plaintiffs simultaneously filed a Motion for Leave to Proceed *in forma pauperis* which they both executed. (Doc. 2). Plaintiffs did not properly state the basis for this Court's jurisdiction in their Complaint. Plaintiffs indicated that their Complaint was filed under "Title 46A SS [section] 781." (Doc. 1, p. 1). Also, Plaintiffs stated that the basis of their Complaint was legal malpractice and legal misrepresentation. (*Id.*, p. 4).

Plaintiffs named the following three Defendants in their Complaint: John Andrew Smay, Esquire, The Commonwealth of Pennsylvania, and The Court of Common Pleas 44<sup>th</sup> Judicial District Sullivan County Branch. (Doc. 1).

Plaintiffs alleged that "John A. Smay made false accusations of fraud [against them.] The Sullivan County Court of Common Pleas ... and the Commonwealth of PA commit[t]ed the act of identity theft." (*Id.*, p. 1). Plaintiffs further allege as follows in the 6-paragraph attachment to their Complaint:

1. John A. Smay with the allowance of Sullivan County Court Of Common Pleas unlawfully (sic) given the name Christopher Williamson To Christopher Sones to try to Collect Money From Christopher Sones that Mr. Smay sayes (sic) is agenst (sic) my property Located at 221 Pecks Road Sonestown PA, 17758.
2. I Christopher A. Sones and Laura A. Sones respectfully Challenge (sic) the integrity (sic) and and (sic) compatanace (sic) of John A. Smay and his ability to conduct himself in a manner (sic) suitable to conduct his duties (sic) as executix (sic)/administrator due to his involvement in 4 other cases involveing (sic) family members and the involvement of his personal opinion and feelings to plaintiffs and whitnesses (sic).
3. John A Smay filed a case agenst (sic) The estate of Marvin R. Sones after the the (sic) appropreate (sic) time allowed by Law. Marvin R. Sones Died 5/24/2003 John A. Smay Filed his case 12/2007 after the fact the statute of limitations had come into play. Abuseing (sic) the rights of the deceaced (sic) Marvin R. Sones and Christopher A. and Laura A. Sones.
4. John A. Smay and Robin A. Read have made fale (sic) accusations of fraud agenst (sic) Christopher A. Sones and Laura A. Sones on several occasions on official documents and under oath in court proceadings (sic) witch (sic) has (sic) damaged the reputation and sound piece (sic) of mind that sayed (sic) indeividuals (sic) are entitled to and have the right to enjoy. Also affected and disrupeded (sic) the health of Christopher A. Sones physical and emotionaly (sic) due to the stress and abuse set forth.
5. John A. Smay is attempting to extort and collect money from the sayed (sic) estate for bills that have already been payed (sic) by Jenny M. Williamson.
6. John A. Smay is attempting to collect money for David R. Sones after David Sones had taken it upon his self (sic) after he read the will of his father Marvin Richard Sones that his inharitance (sic) is the sum of \$1.00

to sign (sic) a legal (sic) binding contract with Grenoble & Wallis funeral (sic) home to pay one half of Marvin R. Sones funeral (sic) bill on his own free will and greed (sic) and anger that he did not receive (sic) the said (sic) property in question.

(*Id.*, pp. 3-4).

As relief, Plaintiffs request:

John A. Smay be removed as executrix/administrator of said estate, the above named defendants be held criminally (sic) liable for their actions and compensate (sic) the plaintiffs for the damages caused by their negligent (sic) actions.

(*Id.*, p. 2).<sup>1</sup>

A review of Plaintiffs' *in forma pauperis* Motion revealed that it was deficient, since it did not contain sufficient information for this Court to make a proper determination as to their financial status. Specifically, Plaintiffs stated that they own a property located at 221 Pecks Road, Sonestown, Sullivan County, Pennsylvania, with an "assessed value [of] \$29,000" and a 1995 Plymouth Grand Voyager van with a "\$1200 value." Plaintiffs failed to state how much

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<sup>1</sup>The undersigned has been assigned this case for all pre-trial matters pursuant to 28 U.S.C. § 636(b)(1)(A).

We note that Plaintiffs incorrectly requested, in part, that a criminal action be filed against Defendants. (Doc. 1, p. 2). To the extent Plaintiffs claim that Defendants committed criminal violations, such claims are not proper in a federal civil action. This Court cannot grant as relief in the present case the initiation of a criminal prosecution. The Third Circuit has held that a private person could not impose criminal liability on a defendant since he lacked standing to do so. See *Conception v. Resnik*, 2005 WL 1791699, \*2, 143 Fed. Appx. 422, 425-26 (3d Cir. 2005) (Non-Precedential). This Court has no authority to grant Plaintiff relief with respect to alleged criminal conduct in this action. See *Matthews v. Villella*, 2009 WL 311177, \*2 (M.D. Pa.) *aff'd.* in relevant part, C.A. No. 09-1486 (3d Cir. 5-21-10); *Banks v. U.S. Attorney*, 2008 WL 3853307, \*2. Thus, insofar as Plaintiffs are seeking this Court to hold Defendants criminally liable for their alleged illegal behavior, this request is subject to dismissal with prejudice.

equity, if any, they had in their real property and van. Also, Plaintiffs only indicated that they had debts for "mortgages, credit card, student loan, etc." in the amount of \$50.00 per month and "15 credit card." (Doc. 2).

In order for the Court to rule on Plaintiffs' *in forma pauperis* Motion, it was found that Plaintiffs must provide the following information:

- 1) Documentation as to the amount of equity Plaintiffs have in their property located at 221 Pecks Road, Sonestown, Pennsylvania, and in their 1995 Plymouth Grand Voyager van;<sup>2</sup>
- 2) List all accounts Plaintiffs hold, either jointly or individually, and the amounts in each account; and
- 3) Copies of Plaintiffs' 2009 and 2010 Federal Income Tax Returns, if filed.

Accordingly, on June 10, 2011, the Court issued the following Order:

1. Within **ten (10) days** of the date of this Order, Plaintiffs shall file a supplement to their Motion for Leave to Proceed *in forma pauperis* as specified above.
2. Plaintiffs' failure to timely file the supplement to their Motion for Leave to Proceed *in forma pauperis* will result in the issuance of an Order denying their *in forma pauperis* Motion and directing Plaintiffs to pay the required filing fee.

(Doc. 4).

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<sup>2</sup>Plaintiffs merely stated the assessed value of their real property and did not indicate what their property was worth. Plaintiffs were directed to state under penalty of perjury what their property was worth, and they were also directed to provide the Court with the amount of the mortgage balance, if any, on their property along with documentation to support these amounts.

Plaintiffs' failure to timely file the supplement to their Motion for Leave to Proceed *in forma pauperis* resulted in the issuance of an Order on June 27, 2011, in which the Court denied Plaintiffs' Motion for Leave to Proceed *in forma pauperis* and directed Plaintiffs to pay the \$350.00 filing fee within ten (10) days of the date thereof. (Doc. 5).

On July 6, 2011, Plaintiffs filed an 8-sentence response to the Court's Order with attachments. Plaintiffs stated that they have a bankruptcy petition which is pending, that they do not have any equity in their mini van, that they do not have a mortgage on their property located at 221 Pecks Road, Sonestown, Sullivan County, Pennsylvania, that they cannot obtain a loan or borrow against their property due to their bankruptcy, and that they "did not file any income tax for the year 2011." (Doc. 6).

We then obtained copies of the docket sheets for Plaintiffs' Middle District of Pennsylvania Bankruptcy Petitions. Plaintiffs filed a Chapter 7 Bankruptcy Petition on June 4, 2009, Case # 09-bk-4339, M.D. Pa., and it was dismissed on August 28, 2009. Plaintiffs filed a second Chapter 7 Bankruptcy Petition on September 15, 2009, Case # 09-bk-7120, M.D. Pa., and they received a discharge on April 8, 2010. Therefore, we found that Plaintiffs did not have a pending Bankruptcy Petition in the Middle District of Pennsylvania as they indicated they did in their Doc. 6 response.<sup>3</sup>

Thus, Plaintiffs indicated that they own their property located at 221 Pecks Road, Sonestown, Sullivan County, Pennsylvania free and clear of any mortgage. Also, as stated,

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<sup>3</sup>It appeared from Plaintiffs' bankruptcy docket sheets that Plaintiffs were allowed to keep the property located at 221 Pecks Road, Sonestown, Sullivan County, Pennsylvania, under the Homestead Exemption.

Plaintiffs do not have a pending Bankruptcy Petition in the Middle District of Pennsylvania. Plaintiffs failed to provide the Court with the value of their property located at 221 Pecks Road, Sonestown, Sullivan County, Pennsylvania, as previously directed.

Therefore, on July 15, 2011, the Court issued an Order directing Plaintiffs, within ten (10) days of the date of the Order, to submit to the Court the following:

1. The full filing fee or documentation as to the value of Plaintiffs' property located at 221 Pecks Road, Sonestown, Pennsylvania, which Plaintiffs state they own free and clear.

2. Copies of Plaintiffs' 2009 and 2010 Federal Income Tax Returns, if filed.  
(Doc. 7).

Plaintiffs were warned that their failure to timely comply with the Doc. 7 Order would result in the issuance of a Report and Recommendation that their case be dismissed for failure to pay the required filing fee as directed. (Doc. 7).

The time in which Plaintiffs were to have complied with the Doc. 7 Order has expired. The Court, *sua sponte*, gave the *pro se* Plaintiffs an additional sixteen days to comply with the Order. The Plaintiffs have neither complied with the Order nor requested an extension of time in which to do so. In fact, the Court has received no filings from the Plaintiffs since they filed their "Proof of *In Forma Pauperis*" on July 6, 2011. (Doc. 6).

## **II. Discussion.**

Federal Rule of Civil Procedure 41(b) allows for the dismissal of an action for "failure of the plaintiff to *prosecute* or comply with these rules or *order of court*, . . ." (emphasis added). In the instant case, Plaintiffs have failed to both prosecute their action and to comply with the

Order of this Court by their failure to timely file the document required by our July 15, 2011, Doc. 7 Order. We shall recommend that this case be dismissed due to Plaintiffs' failure to prosecute it and due to their failure to comply with this Court's Order. Plaintiffs should be deemed as abandoning their action. See *McCray v. Dauphin Co. Prison*, 2007 WL 431886 (M.D. Pa.); *Nelson v. Berbanier*, 2006 WL 2853968 (M.D. Pa.).

Since we find that Plaintiffs' conduct clearly shows that they intended to abandon their case, we do not find that an analysis of the factors of *Poulis v. State Farm Fire & Cas. Co.*, 747 F.3d 863, 868 (3d Cir. 1984), is required before recommending that this case be dismissed under Rule 41(b). See *Spain v. Galleon*, 26 F.3d 439, 454-55 (3d Cir. 1994); *Gayer v. Beard*, 907 F. 2d 1424 (3d Cir. 1990)(the district court's requirement to perform an analysis under *Poulis* is obviated where Plaintiff's conduct is so egregious as to demonstrate an abandonment of his case).

Our Plaintiffs have taken no action with respect to their case since they filed their "Proof of *in forma pauperis* Status" on July 6, 2011 (Doc. 6), over one month ago. The behavior of Plaintiffs constitutes a wilful failure to prosecute their case, as opposed to a situation in which they have had problems in pursuing their case but made efforts to comply with this Court's July 15, 2011 Order. We find that Plaintiffs' "behavior has been so egregious as to make self-evident the factual findings and analysis [of the *Poulis* factors]." *Williams v. Sort*, 223 Fed. Appx. 95, 103 (3d Cir. 2007). The consequences if Plaintiffs failed to prosecute their case were clearly stated in our July 15, 2011 Order, namely, we would recommend that their case be dismissed. (Doc. 7). See *Leininger v. Twoton, Inc.*, 2009 WL 1363386 (M.D. Pa.).

In *Jackson v. Johnson*, 2006 WL 2136218, \*1 (M.D. Pa.), the Court stated that “Fed. R. Civ. P. 41(b) allows for the dismissal of an action where the Plaintiff fails to prosecute or fails to comply with rules or orders of the court.”

The *Jackson* Court also stated:

the factors set forth in *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 868 (3d Cir.1984) [are analyzed] to determine whether dismissal of the action is appropriate in this case. The *Poulis* factors the Court should consider are: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense. *Poulis*, 747 F.2d at 868.

We agree with the Magistrate Judge's determination that the Plaintiff's dilatoriness outweighs any of the other considerations set forth in *Poulis*, and that Plaintiff's failure to comply with the Order of May 30, 2006 indicates that the Plaintiff has abandoned this lawsuit. Her inaction points to no other logical conclusion.

*Id.*

Thus, out of an abundance of caution, we also analyze the *Poulis* factors. We find that Plaintiffs' stated conduct in delaying their case to be attributable to them personally. Plaintiffs were required to have filed the document set forth in our July 15, 2011 Order by July 25, 2011. As mentioned, we *sua sponte* afforded Plaintiffs additional time within which to comply with the July 15, 2011 Order. Plaintiffs have filed nothing in response to the stated Order, and they have not notified the Court that they intend to pursue their action.

We find that Plaintiffs have caused prejudice to Defendants since they have been named in a federal lawsuit and no action, including service of a proper pleading, has been



made on them to date. While Plaintiffs do not yet have a significant history of dilatoriness in this case, their present conduct in failing to prosecute their June 2011 case is nonetheless evidence of dilatoriness, especially since this case cannot proceed without their compliance with the July 15, 2011 Order.

Based on our discussion above, we find that the conduct of Plaintiffs is wilful, especially since they have filed nothing with the Court in more than a month, since they have failed to respond to the July 15, 2011 Order, and since they have not contacted the Court to explain why they have failed to comply with the Order.

Plaintiffs have been forewarned that their failure to comply with the July 15, 2011 Order would result in a recommendation that their case be dismissed. As stated, this case cannot proceed without Plaintiffs' compliance with the July 15, 2011 Order. Since we will recommend that Plaintiffs' case be dismissed without prejudice, and since Plaintiffs have not paid the filing fee, we find that other sanctions would not be effective in this case.

Thus, we find that the *Poulis* factors weigh in favor of dismissing this case without prejudice and that Plaintiffs' failure to comply with the Court's July 15, 2011 Order demonstrates they have abandoned their case.

Moreover, if the Court vacated our June 27, 2011 Order and granted Plaintiffs' *in forma pauperis* motion, it would be obliged to screen their Complaint.<sup>4</sup> See *Dunbar v. Dunbar*,

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<sup>4</sup>As stated, we denied Plaintiffs' *in forma pauperis* Motion on June 27, 2011 (Doc. 5). However, it appears from Plaintiffs' July 6, 2011 filing (Doc. 6-2) that the real estate located at 221 Peck Road, Sullivan County, Pennsylvania, is an asset of the Estate of Marvin R. Sones and not owned by Plaintiffs. Thus, our June 27, 2011 Order denying Plaintiff's *in forma pauperis* Motion could be vacated, and the Court could grant Plaintiffs' *in forma pauperis* Motion. Then

Civil No. 11-0135, M.D. Pa. On February 11, 2011, the Court in *Dunbar* issued an Order and granted Plaintiff's *in forma pauperis* motion (Doc. 3, *Dunbar*). The *Dunbar* Court then stated:

The proper procedure after a district court grants *in forma pauperis* status is to file the complaint and then "screen it" before service pursuant to 28 U.S.C. § 1915(e)(2)(B). *Fisher v. Miller*, 373 Fed. App'x 148, 148 (3d Cir. 2010) (citing *Oates v. Sobolevitch*, 914 F.2d 428, 429 n.1 (3d Cir. 1990)). 'The District Court may dismiss the complaint if, *inter alia*, it fails to state a claim upon which relief can be granted." See 28 U.S.C. § 1915(e)(2)(B)(ii); *Fisher*, Fed App'x at 148. If the Court finds that the Complaint fails to state a claim upon which relief can be granted, the Court must grant Plaintiff leave to amend the Complaint unless "amendment would be inequitable or futile." *Grayson v. May view State Hosp.*, 293 F.3d 103, 106 (3d Cir. 2002) (citing *Shane v. Fauver*, 213 F.3d 113, 116-17 (3d Cir. 2000)); see also *Fisher*, 373 Fed. App'x at 149-50.

(Doc. 3, pp. 1-2, *Dunbar*).

Plaintiffs aver that the Sullivan County Court of Common Pleas appointed Defendant Attorney Smay as the executor/administrator of the Estate of Marvin R. Sones and that Smay improperly tried to collect money from them. Plaintiffs' attachment to their Doc. 6 filing is a copy of an Order of the Sullivan County Court dated February 3, 2009, appointing attorney Smay as the Executor of the Estate of Marvin R. Sones and directing the Register of Wills to issue Smay letters of administration. (Doc. 6-2, p. 5). Plaintiffs also attached a copy of a Landlord/Tenant Complaint Defendant Smay filed, on behalf of the Estate of Marvin R. Sones, against them in Sullivan County Court on April 8, 2011, in which he alleged that the Estate had the right to possession of the property where Plaintiffs resided at 221 Pecks Road, Sonestown, Sullivan County, Pennsylvania, and that the Estate had the right to sell the real estate as an asset

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the Court could screen Plaintiffs' Complaint.

of the estate pursuant to two county court orders. (Doc. 6-2, pp. 1-4). Defendant Smay also alleged that Plaintiffs owed the Estate rent in the amount of \$360.

In their present Complaint (Doc. 1), Plaintiffs allege that Defendant Smay filed an untimely action “agenst (sic) the estate of Marvin R. Sones” “abuseing (sic) the rights of the deceased Marvin R. Sones and [Plaintiffs].” (*Id.*, p. 3). Plaintiffs also allege that Defendant Smay made false accusations of fraud against them numerous times on official documents and under oath in court proceedings. Plaintiffs aver that Defendant Smay is trying to extort and collect money for the Estate of Marvin R. Sones for bills which have already been paid, and that Smay is trying to collect money for David R. Sones even though David only inherited \$1.00 from the Estate of Marvin R. Sones. (*Id.*).

Plaintiffs conclude that Defendant Smay committed legal malpractice and misrepresentation. (*Id.*, p. 4).

Initially, Plaintiffs’ claims against Defendant Commonwealth of Pennsylvania and Defendant Court of Common Pleas 44<sup>th</sup> District of Sullivan County are barred under the Eleventh Amendment. We find that Plaintiffs cannot proceed with respect to their claims against Defendant Commonwealth of Pennsylvania and Defendant Court of Common Pleas 44<sup>th</sup> District of Sullivan County since they are barred under the Eleventh Amendment. Based on *MCI Telecom. Corp. v. Bell Atl. Pa.*, 271 F.3d 491, 502 (3d Cir. 2001), because Defendant Commonwealth of Pennsylvania is the State and Defendant Court of Common Pleas 44<sup>th</sup> District of Sullivan County is an agency of the Commonwealth of Pennsylvania, this Court’s

jurisdiction over these Defendants is barred by the Eleventh Amendment of the United States Constitution, and all claims against them are subject to dismissal.

In *Democracy Rising PA v. Celluci*, 603 F. Supp. 2d 780, 795 (M.D. Pa. 2009), this Court held that:

The Eleventh Amendment precludes private federal litigation against a state and its agencies. n16 *Hans v. Louisiana*, 134 U.S. 1, 15-16, 10 S. Ct. 504, 33 L. Ed. 842 (1890); see also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72-73, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000); *Lombardo v. Pennsylvania*, 540 F.3d 190, 194-95 (3d Cir. 2008). This is a jurisdictional bar subject to only two exceptions: (1) Congress may specifically abrogate a state's sovereign immunity by exercising its enforcement power under the Fourteenth Amendment, or (2) a state may waive its sovereign immunity by consenting to suit. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999); *Koslow v. Pennsylvania*, 302 F.3d 161, 168 (3d Cir. 2002). It is well settled that Congress had no intention to abrogate the states' sovereign immunity by enacting § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). [\*\*41] Furthermore, Pennsylvania has unequivocally withheld its consent to such suits. See 42 PA. CONS. STAT. § 8521(b); see also *Lombardo*, 540 F.3d at 196 n.3; *Laskaris v. Thornburgh*, 661 F.2d 23, 25 (3d Cir. 1981).

See also *Urella v. PA State Troopers Ass'n*, 2008 WL 1944069, \*3.

In *Beattie v. DOC SCI-Mahanoy*, 2009 WL 533051, \*6 (M.D. Pa. 3-3-09), the Court stated:

As to Defendants DOC, SCI-Mahanoy, FN5 and Pennsylvania State Police, the court does not find these defendants to be suitable entities for a § 1983 claim. Section 1983 creates a cause of action against every "person" who under color of state law deprives an individual of a right secured by the Constitution or federal statute. See 42 U.S.C. § 1983. Furthermore, the United States Supreme Court maintains that state agencies are not subject to liability under § 1983 actions brought in federal court. FN6 See *Howlett v. Rose*, 496 U.S. 356, 365, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990) ( "*Will* [v.

*Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) ] establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal or state court.”). The Pennsylvania Department of Corrections and the Pennsylvania State Police are state agencies, not persons. However, even if it could be determined that the Department of Corrections or the State Police is a “person” within the meaning of § 1983, Beattie has only requested monetary damages from each one. A request for monetary damages from a state agency is barred by the state's sovereign immunity under the Eleventh Amendment. See *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363-64, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (explaining private parties cannot sue states in federal court for monetary damages). Therefore, the complaint must be dismissed as to Defendants Department of Corrections and Pennsylvania State Police.

(Footnote omitted).

Thus, we find that this Court’s jurisdiction over Defendant Commonwealth of Pennsylvania and Defendant Court of Common Pleas 44<sup>th</sup> District of Sullivan County is barred by the Eleventh Amendment. See *Democracy Rising PA v. Celluci*, *supra*; *Beattie v. DOC SCI-Mahanoy*, *supra*.

We also find that Plaintiffs cannot proceed in this Court with their state law claims of legal malpractice and legal misrepresentation against Defendant Smay. As relief, as mentioned, Plaintiffs request this Court to remove Defendant Smay as executor/administrator of the Estate of Marvin R. Sones. As stated, Defendant Smay is an attorney appointed by the Sullivan County Court as the executor/administrator of said estate. Defendant Smay has recently filed a civil action in Sullivan County Court on behalf of the Estate of Marvin R. Sones seeking possession of the real property located at 221 Pecks Road, Sonestown, Sullivan County, Pennsylvania, and stating that the Estate had the right to sell the real estate as an asset of the estate pursuant to two county court orders. (Doc. 6-2, pp. 1-4). Plaintiffs’ instant action seeking this Court to

intervene in the Sullivan County Court proceedings is barred by the *Rooker-Feldman* doctrine.

Insofar as Plaintiffs' claims challenge the orders of the Sullivan County Court regarding the handling of the Estate of Marvin R. Sones, and the appointment of Defendant Smay as the Executor, we find that any relief Plaintiffs are seeking is clearly barred by the *Rooker-Feldman* Doctrine. See *Hansford v. Bank of America*, 2008 WL 4078460,\* 5 (E. D. Pa.) (any claim that would "effectively undo" the state court's foreclosure judgment and its finding that a valid mortgage existed is "inextricably intertwined" with a prior state court judgment, and the Court lacks jurisdiction over such claim under the *Rooker-Feldman* doctrine); *Mason v. Stroyan*, Civil No. 10-1953 (M.D. Pa.), 2010 WL 6560738 (M.D. Pa. 10-29-10).

The Sullivan County Court, in dealing with the Estate of Marvin R. Sones, had to have determined that Defendant Smay should be appointed Executor of the Estate and that Smay should be allowed possess and to sell the real property where Plaintiffs reside. Thus, the Sullivan County Court necessarily must have found that the real property was an asset of the Estate of Marvin R. Sones and that Defendant Smay could sell it. Plaintiffs' instant action necessarily would require a determination that the orders of Sullivan County Court and the permission for Defendant Smay to sell the stated property were void. This Court is precluded by the *Rooker-Feldman* Doctrine from essentially vacating the Sullivan County Court's orders since this would have the effect of undoing the state court administration of the Estate of Marvin R. Sones. *Id.* See also *Johnson v. DeGrandy*, 512 U.S. 997, 1005-1006 (1994)("[A] party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state

judgement itself violates the loser's federal rights."); *Jacobowitz v. M&T Mortgage Corporation*, Civil No. 09-1332, M.D. Pa.; *Mason, supra*.

Thus, Plaintiffs' attempt to set aside the Sullivan County Court's decisions and orders regarding the handling of the Estate of Marvin R. Sones and the sale of the stated real property by Defendant Smay, as well as the Court Order appointing Smay as the Executor of the Estate of Marvin R. Sones, is barred by the *Rooker-Feldman* Doctrine. Under the *Rooker-Feldman* doctrine, this Court is precluded from exercising subject matter jurisdiction over Plaintiffs' stated claims asserted against Defendant Smay.

In *McFall v. Register of Wills for Bucks County, PA*, 352 F. Supp. 2d 544, 547 (E. D. Pa. 2004), the Court stated:

A recent Third Circuit decision describes the *Rooker-Feldman* doctrine:

The *Rooker-Feldman* doctrine, which derives its name from the Supreme Court's decisions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), "preclude[s] lower federal court jurisdiction over claims that were actually litigated or 'inextricably intertwined' with adjudication by a state's courts."

*Desi's Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411, 418 (3d Cir.2003) (quoting *Parkview Assocs. Pshp. v. City of Leb.*, 225 F.3d 321, 325 (3d Cir.2000) (citations omitted)). A claim has not been "actually litigated" for purposes of the *Rooker-Feldman* doctrine if the plaintiff did not present the federal claims in the state court proceeding or if the state court's opinion "contains no discussion of any issues of federal law." *Desi's Pizza, Inc.*, 321 F.3d at 420-21. A claim is not "inextricably intertwined" unless "the federal court must determine that the state court judgment was erroneously entered" in order to grant the federal plaintiff the relief sought or "the federal court must ... take action that would render [the state court's] judgment ineffectual." *Id.* at 421 (citations omitted).

In *Gaynor v. Nelowet*, 2000 WL 427274, \*1 (E.D. Pa. 4-19-00), the Court stated:

The *Rooker-Feldman* doctrine,<sup>FN13</sup> under which federal district courts are not permitted to exercise judicial review over state court proceedings. “District courts lack subject matter jurisdiction once a state court has adjudicated an issue because Congress has conferred only original jurisdiction not appellate jurisdiction on the district courts.” *Guarino v. Larsen*, 11 F.3d 1151, 1156-57 (3d Cir.1993); see also *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 24, 107 S.Ct. 1519, 1533, 95 L.Ed.2d 1 (1987) (Marshall, J., concurring) (“It is a well-settled principle that federal appellate review of judgments rendered by state courts can only occur in this Court, on appeal or by writ of certiorari.”). A federal proceeding is barred under the *Rooker-Feldman* doctrine “when entertaining the federal court claim would be the equivalent of an appellate review of [the state court] order.” *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3d Cir.1996). *Rooker-Feldman* applies to final state court judgments, *Port Authority Police Benevolent Ass'n v. Port Authority*, 973 F.2d 169, 177 (3d Cir.1992), including those of lower state courts. *Id.* (“[F]ederal district courts are certainly ... precluded from reviewing decisions of lower state courts, which are subject to correction and modification within the state court system.”).

FN10. Beth Nelowet is plaintiff's sister and executrix and beneficiary of the estate of their father, and successor trustee of their mother's non-marital trust. Compl. at exs. 4, 11.

FN11. Defendants Trueblood and Amacher are attorneys who represented the estates.

FN12. Defendant McLafferty was the solicitor to the Register of Wills and is now acting Register of Wills of Montgomery County. Compl. at ¶ 10.

FN13. The “*Rooker-Feldman*” doctrine is derived from two U.S. Supreme Court decisions: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n. 16, 103 S.Ct. 1303, 1315 n. 16, 75 L.Ed.2d 206 (1983). See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989) (“The *Rooker-Feldman* doctrine interprets 28 U.S.C. 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in [the



Supreme Court].”).

In the present case, we find that Plaintiffs’ claims are “inextricably intertwined” with adjudication by a state’s court since this Court would have to determine that the Sullivan County Court’s decisions and orders regarding the handling of the Estate of Marvin R. Sones and the sale of said real property by Defendant Smay, as well as the appointment of Smay as estate administrator, were erroneously entered in order to grant Plaintiffs relief with respect to their instant claims. We find that Plaintiffs’ claims are not independent of the merits of the Sullivan County Court’s decisions and orders, especially since their claims largely hinge upon whether they have a legally cognizable interest in the stated real estate. Thus, we find that a decision with respect to Plaintiffs’ present claims by this Court requires a determination that the Sullivan County Court’s decisions and orders were erroneous, and that a decision by this Court would render the Sullivan County Court’s decisions and orders as ineffectual. Indeed, any relief to which Plaintiffs may be entitled in this case with respect to their instant claims would clearly be based on findings that the Sullivan County Court’s decisions and orders were issued in violation of their constitutional rights, including their due process rights. See *Gaynor, supra*; *Mason, supra*.

Thus, we will recommend that Plaintiffs’ claims against Defendant Smay be dismissed based on the *Rooker-Feldman* doctrine since the Court lacks subject matter jurisdiction to review these claims which are inextricably intertwined with the Sullivan County Court’s decisions and orders. See *Roush v. Horner*, 2008 WL 189556, \*5-\*7 (W.D. Pa. 1-18-08).

Additionally, Plaintiffs' remedy with respect to their challenge to the Sullivan County Court's final orders regarding all matters pertaining the administration of the Estate of Marvin R. Sones is to file an appeal with the Pennsylvania appellate courts. See *Gaynor, supra*. See also *In re Estate of Luongo*, 823 A.2d 942 (Pa.Super. 2003); *In re Estate of Britts*, 906 A.2d 601 (Pa. Super. 2006).

### **III. Recommendation.**

Based on the foregoing, it is respectfully recommended that this action be dismissed on the basis of Plaintiffs' failure to comply with the Court's July 15, 2011 Order. It is also recommended that Plaintiffs' case be dismissed on the basis of their failure to prosecute their action.

Alternatively, it is recommended that our June 27, 2011 Order (Doc. 5) denying Plaintiffs' Motion to proceed *in forma pauperis* be vacated, and that Plaintiffs' Motion to

proceed *in forma pauperis* (Doc. 2) be granted solely for the purpose of filing this action.

Further, it is recommend that this entire case be dismissed with prejudice.<sup>5</sup>

s/ Thomas M. Blewitt  
**THOMAS M. BLEWITT**  
**United States Magistrate Judge**

**Dated: August 11, 2011**

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<sup>5</sup>Pursuant to our above discussion, we find futility of any amendment of Plaintiffs' claims against Defendants, and we shall not recommend Plaintiffs be granted leave to amend their pleading with respect to these claims. See *Forman v. Davis*, 371 U.S. 178, 182 (1982); *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000) (The futility exception means that a complaint, as amended, would fail to state a claim upon which relief can be granted); *Alston v. Parker*, 363 F. 3d 229, 235 (3d Cir. 2004); *Conway v. King Pharmaceuticals, Inc.*, 2008 WL 4128088, \*2 (M.D. Pa.).

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

CHRISTOPHER ALLEN SONES and	:	CIVIL ACTION NO. <b>4:CV-11-1073</b>
LAURA ANN SONES,	:	
	:	(Judge Jones)
Plaintiffs	:	
	:	(Magistrate Judge Blewitt)
v.	:	
	:	
JOHN ANDREW SMAY, et al.,	:	
	:	
Defendants	:	

**NOTICE**

**NOTICE IS HEREBY GIVEN** that the undersigned has entered the foregoing **Report and Recommendation** dated **August 11, 2011**.

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.

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**s/ Thomas M. Blewitt**  
**THOMAS M. BLEWITT**  
**United States Magistrate Judge**

**Dated: August 11, 2011**