No. 18-8369

IN THE SUPREME COURT OF THE UNITED STATES

Arthur James Lomax,

Petitioner,

vs.

Christina Ortiz-Marquez; Natasha Kindred; Danny Dennis; Mary Quintana,

Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

Philip J. Weiser
Attorney General

Eric R. Olson*
Solicitor General
Friedrick C. Haines
Assistant Solicitor General
James X. Quinn
Assistant Solicitor General

Ralph L. Carr Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203
eric.olson@coag.gov
(720) 508-6000

Attorneys for Respondents
*Counsel of Record

QUESTION PRESENTED

The Prison Litigation Reform Act, 28 U.S.C. 1915(g), prevents a prisoner from filing or appealing a federal civil action *in forma pauperis* if they have filed three or more prior federal civil actions or appeals that were dismissed because they were frivolous, malicious, or failed to state a claim for relief under applicable law. Courts dismissed without prejudice two prior civil actions of Petitioner under *Heck v. Humphrey,* 512 U.S. 477 (1994), which bars civil suits about convictions unless the convictions have been reversed, expunged, or declared invalid. The question presented is:

1. Are prior *Heck* dismissals without prejudice strikes under 28 U.S.C. 1915(g)?

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The opinions of the court of appeals (Opp. App. 1–9) and of the district court (Opp. App. 11–15) are unreported.

Petitioner's three prior cases, which served as the basis for the denial of *in forma pauperis* status in this case, are unreported. The court dismissed the first, *Lomax v. Hoffman*, on August 15, 2013 (Opp. App. 22–25), the second, *Lomax v. Hoffman*, on January 23, 2014 (Opp. App. 18–21), and the third, *Lomax v. Lander*, on April 21, 2014 (Opp. App. 16–17), adopting the recommendation of the magistrate judge (Opp. App. 26–42).

JURISDICTION

The court of appeals entered its judgment on November 8, 2018. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

28 U.S.C. 1915 states in relevant part:

> (g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

STATEMENT

This case presents the question of whether the dismissal of civil cases brought by prisoners and dismissed without prejudice under *Heck v. Humphrey*, 512 U.S. 477 (1994), meet section 1915(g)'s standard of a case dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted."

This case is Petitioner's fourth federal lawsuit while incarcerated. The district court applied long-standing precedent to find that his prior cases—two of which were *Heck* dismissals—counted as strikes under section 1915(g) and ordered Petitioner to show cause as to why it should not deny *in forma pauperis* status. (Opp. App.12).

In response, Petitioner argued that because the district court dismissed two of his three previous complaints without prejudice, the dismissals do not count as strikes.[1] The district court denied leave to proceed *in forma pauperis* and required Petitioner to pay the filing fee if he sought to pursue his claim. (Opp. App. 13). The court of appeals affirmed. (Opp. App. 8).

[1] Petitioner also argued that if his previous dismissals counted as strikes, he is under imminent physical danger and, therefore, satisfies the only exception to the three strikes rule. However, he does not seek review of the court of appeals' finding that he did not assert sufficient allegations to qualify for the imminent danger exception to section 1915(g).

REASONS FOR DENYING THE PETITION

I. The courts below correctly held that a dismissal without prejudice under Heck constitutes a strike under 28 U.S.C. 1915(g).

28 U.S.C. 1915(g) forbids a prisoner from bringing a civil action or appeal *in forma pauperis* if "the prisoner has, on 3 or more prior occasions . . . brought an action or appeal . . . that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted."

The statute does not differentiate dismissals with prejudice and those without. Rather, it establishes a rule that applies to "an action" that "was dismissed." "A dismissal is a dismissal, and provided that it is on one of the grounds specified in section 1915(g) it counts as a strike." *Paul v. Marberry*, 658 F.3d 702, 704 (7th Cir. 2011) (holding dismissal without prejudice counts as a strike under 1915(g)).

Consistent with this plain statutory language, most circuits conclude that a dismissal made because the action is frivolous, malicious, or fails to state a claim counts as a strike, even if the dismissal was without prejudice. *See Orr v. Clements*, 688 F.3d 463, 465 (8th Cir. 2012); *Paul*, 658 F.3d at 704; *O'Neal v. Price*, 531 F.3d 1146, 1154–55 (9th Cir. 2008); *Day v. Maynard*, 200 F.3d 665, 667 (10th Cir. 1999); *Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998), abrogated on other grounds by *Jones v. Bock*, 549 U.S. 199 (2007); *Patton v. Jefferson Corr. Ctr.*, 136 F.3d 458, 463–64 (5th Cir. 1998). Only the Third and Fourth circuits have adopted a different rule, holding that "a dismissal without prejudice for failure to state a claim does not count

as a strike." *McLean v. U.S.*, 566 F.3d 391, 396–97 (4th Cir. 2009); *accord Millhouse v. Heath*, 866 F.3d 152, 163 (3d Cir. 2017).

This conclusion of all but two of the circuits is consistent with the stated purpose of the Prison Litigation Reform Act to reduce the quantity and increase the quality of prisoner litigation. *Porter v. Nussle,* 534 U.S. 516, 524 (2002). The "three strikes" provision was "designed to filter out the bad claims filed by prisoners and facilitate consideration of the good." *Coleman v. Tollefson,* 135 S. Ct. 1759, 1762 (2015) (quotations omitted). Section 1915(g) does not preclude prisoners with three prior strikes from filing new civil actions; it just requires them to pay the same filing fee that other litigants pay before a federal court may consider their lawsuits and appeals.

Here, the Tenth Circuit correctly held that Petitioner's three prior cases counted as strikes under section 1915(g) and affirmed the denial of *in forma pauperis* status for his fourth case. The first two cases—the only ones at issue here—were civil cases that necessarily challenged the validity of his conviction. (Opp. App. 18–21, 22–25,). Following *Heck,* the district court dismissed these cases because the conviction had not been reversed, expunged, or declared invalid. Those cases meet section 1915(g)'s definition of "action[s]" that were "dismissed."

II. This case is not an appropriate vehicle to resolve the lopsided split because the outcome here would be the same under either standard.

Six courts of appeals, including the court below, hold that *Heck* dismissals count as strikes. Only the Third and Fourth circuits apply a different rule—that

dismissals without prejudice for failure to state a claim do not count as strikes. But even applying that rule here would not alter the outcome for Petitioner.

In the Fourth Circuit, *Heck* dismissals are dismissed because they are frivolous, and not for failure to state a claim for which relief may be granted. *Ewing v. Silvious*, 481 F. App'x 802, 802 (4th Cir. 2012) (affirming finding that claims dismissed under *Heck* were frivolous); *Russell v. Guilford Cty. Municipality*, 599 F. App'x 65, 65 (4th Cir. 2015) (same). The Third Circuit has similarly affirmed lower court findings that claims dismissed under *Heck* are frivolous. *Ruth v. Richard*, 139 F. App'x 470, 471 (3d Cir. 2005).

Both *McLean*, from the Fourth Circuit, and *Millhouse* adopting that approach in the Third Circuit, involved cases that were all dismissed for failure to state a claim for which relief may be granted. *McLean* noted the similarity in language relating to dismissal for failure to state a claim in Federal Rule of Civil Procedure 12(b)(6) and the language of section 1915(g). 566 F.3d at 396 (holding the provisions "closely track" each other). The court then noted that because Rule 12(b)(6) dismissals are presumed to be with prejudice, only with-prejudice dismissals satisfy section 1915(g)), even though no such limiting language appears in section 1915(g). *Id.*

Of course, Rule 12(b) has no equivalent "frivolous" provision. There is no statutory basis to import the presumption that dismissals under Rule 12 are with prejudice to determine whether a dismissal because a claim is frivolous counts as a strike. Rather, the plain language of section 1915 compels the conclusion that "an

action" that "was dismissed" because it was "frivolous" counts as a strike regardless of whether it was with, or without, prejudice.

Here, Petitioner's two *Heck* dismissals would count as strikes in the Third and Fourth circuits because they were frivolous, and in the Tenth Circuit because they were dismissals for failure to state a claim. Petitioner would have *in forma pauperis* status properly denied under both rules. This case does not provide a proper vehicle for the Court to resolve this lopsided conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP J. WEISER
Attorney General

s/ Eric R. Olson
Eric R. Olson*
Solicitor General
Friedrick C. Haines
Assistant Solicitor General
James X. Quinn
Assistant Solicitor General

Ralph L. Carr Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203
eric.olson@coag.gov
(720) 508-6000

Opposition Appendix

FILED
United States Court of Appeals
Tenth Circuit

November 8, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ARTHUR J. LOMAX, a/k/a Arthur James Lomax,

Plaintiff - Appellant,

v.

CHRISTINA ORTIZ-MARQUEZ; MATASHA KINDRED; DANNY DENNIS; MARY QUINTANA,

Defendants - Appellees.

No. 18-1250
(D.C. No. 1:18-CV-00321-GPG-LTB)
(D. Colorado)

ORDER AND JUDGMENT*

Before **LUCERO**, **HARTZ**, and **McHUGH**, Circuit Judges.

Arthur J. Lomax appeals the district court's order denying him leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. The district court denied Mr. Lomax's motion as barred by the three-strikes provision, 28 U.S.C. § 1915(g). Because Mr. Lomax has accumulated three strikes prior to commencing this action,

* After examining Mr. Lomax's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

and because he has not alleged sufficient imminent danger, we affirm the judgment of the district court.

I. BACKGROUND

Mr. Lomax is a Colorado prisoner at the Limon Correctional Facility. Mr. Lomax was previously incarcerated at the Centennial Correctional Facility and filed a complaint naming, as defendants, five Centennial Correctional Facility employees and a member of the Central Classification Committee at Offender Services. Mr. Lomax also filed a motion for leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. Upon direction of the district court, Mr. Lomax amended his complaint. Through his amended complaint, Mr. Lomax alleged Fifth, Eighth, Ninth, and Fourteenth Amendment violations stemming from his expulsion from the Sex Offender Treatment and Monitoring Program at Centennial Correctional Facility.

The same district court dismissed three of Mr. Lomax's previous actions on the grounds that they failed to state a claim. In *Lomax v. Hoffman*, No. 13-02131-BNB, 2013 U.S. Dist. LEXIS 115589, at *4–5 (D. Colo. Aug. 15, 2013), the district court dismissed the action as barred by *Heck v. Humphrey*, 512 U.S. 477 (1994) (holding that a litigant cannot bring a § 1983 claim challenging a conviction's legitimacy until that conviction has been dismissed). The district court dismissed Mr. Lomax's second action, *Lomax v. Hoffman*, No. 13-cv-03296-BNB, 2014 U.S. Dist. LEXIS 8230, at *3 (D. Colo. Jan. 23, 2014), also based on the action being barred by *Heck*. Mr. Lomax brought a third action, *Lomax v. Lander*, No.

13-cv-00707-WJM-KMT, 2014 U.S. Dist. LEXIS 55056 (D. Colo. Apr. 21, 2014) (adopting the magistrate judge's recommendation in *Lomax v. Lander*, No. 13-cv-00707-WJM-KMT, 2014 U.S. Dist. LEXIS 55058 at *9–22 (D. Colo. Mar. 18, 2014)), which the district court dismissed for lack of subject matter jurisdiction and failure to state a claim.[1] The district court that screened Mr. Lomax's present complaint concluded that all three dismissals qualified as strikes for purposes of § 1915(g).

Because of the previous strikes, the district court ordered Mr. Lomax to show cause before proceeding *in forma pauperis*. In response to the show cause order, Mr. Lomax advanced two arguments. First, Mr. Lomax argued that because the district court dismissed his previous complaints without prejudice, the dismissals do not count as strikes. Second, Mr. Lomax argued that if his previous dismissals counted as strikes, he is under imminent physical danger and, therefore, satisfies the only exception to the three strikes rule. In his response to the show cause order, Mr. Lomax alleged his presence at the Limon Correctional Facility places him in imminent physical danger due to how the guards there have treated him in the past. Specifically, Mr. Lomax alleges that a Lt. Wilson physically assaulted him the last time he was housed at Limon Correctional Facility. And, in an early filing before the district court, Mr. Lomax reported that a Limon Correctional Facility guard

[1] The district court dismissed two of Mr. Lomax's claims for lack of subject matter jurisdiction and the others for failure to state a claim. *See Lander*, 2014 U.S. Dist. LEXIS 55058 at *9–22.

commented that he thought Mr. Lomax was dead by now and that, in general, the guards do not like sex offenders, have shown bias against sex offenders, and say all sex offenders should be dead.

The trial court rejected Mr. Lomax's arguments to proceed *in forma pauperis* and required him to pay the $400 filing fee if he wished to pursue his claims. Mr. Lomax appeals from the district court's denial of leave to proceed *in forma pauperis*. We exercise jurisdiction under 28 U.S.C. § 1291. *See Roberts v. U. S. Dist. Court for the N. Dist. of Cal.*, 339 U.S. 844, 845 (1950) (per curiam) (relying on *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), and § 1291 to conclude "[t]he denial by a District Judge of a motion to proceed in forma pauperis is an appealable order"); *see also Lister v. Dep't of Treasury*, 408 F.3d 1309, 1310 (10th Cir. 2005) (applying *Roberts* when taking jurisdiction over appeal from denial of motion to proceed *in forma pauperis*).

II. DISCUSSION

Mr. Lomax proceeds without representation; thus we will "liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013). Accepting as true the facts laid out in the complaint, we review the district court's determination that Mr. Lomax had three strikes de novo. *Smith v. Veterans Admin.*, 636 F.3d 1306, 1309 (10th Cir. 2011).

A. *Motions Denied Without Prejudice Count as Strikes*

The statute governing when a prisoner is precluded from proceeding *in forma pauperis* states:

> In no event shall a prisoner bring a civil action or appeal a judgment in civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). Mr. Lomax alleges "a dismissal without prejudice for failure to state a claim does not count as a strike." ROA at 37 (citing *Mendez v. Elliot*, 45 F.3d 75, 78 (4th Cir. 1995)). Under Mr. Lomax's argument, the dismissals without prejudice of two of his prior actions as barred by *Heck* would not count as strikes.

A "dismissal for failure to state a claim under Rule 12(b)(6) satisfies the plain text of § 1915(g) and therefore will count as a strike." *Childs v. Miller*, 713 F.3d 1262, 1266 (10th Cir. 2013). Further, "[i]n this circuit, it is immaterial to the strikes analysis [whether] the dismissal was without prejudice," as opposed to with prejudice. *Id.* Finally, "[o]ur precedent holds that the dismissal of a civil rights suit for damages based on prematurity under *Heck* is for failure to state a claim." *Smith*, 636 F.3d at 1312.

The previous claims Mr. Lomax filed while incarcerated were dismissed as barred by *Heck* or for failure to state a claim. And, contrary to Mr. Lomax's argument, the fact that two of the dismissals were without prejudice is immaterial. Thus, the district court correctly concluded the two *Hoffman* dismissals and the *Lander* dismissal all count as strikes.[2]

[2] The *Lander* dismissal does not state whether it was dismissed with or without prejudice. Unless otherwise stated, dismissals under Rule 12(b)(6) are with prejudice.

B. *Imminent Danger of Serious Physical Injury*

The exception to the prohibition on a prisoner with three strikes proceeding *in forma pauperis* is for prisoners "under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). Before the district court, Mr. Lomax, in an effort to satisfy the imminent danger exception, alleged a Limon Correctional Facility guard attacked him in the past, other guards at the facility do not like sex offenders, and he fears for his life.

In evaluating Mr. Lomax's imminent danger allegations, we adopt the Second Circuit's position that an inmate seeking the imminent danger exception must show "a nexus between the imminent danger a three-strikes prisoner alleges to obtain [*in forma pauperis*] status and the legal claims asserted in his complaint." *Pettus v. Morgenthau*, 554 F.3d 293, 297 (2d Cir. 2009). To determine whether a nexus exists, a court should consider "(1) whether the imminent danger of serious physical injury that a three-strikes litigant alleges is *fairly traceable* to unlawful conduct asserted in the complaint and (2) whether a favorable judicial outcome would *redress* that injury." *Id.* at 298–99.

See Slocum v. Corp. Express U.S. Inc., 446 F. App'x. 957, 960 (10th Cir. 2011) ("Rule 12(b)(6) dismissals, unless otherwise indicated, constitute a dismissal *with* prejudice."); *see also Orr v. Clements*, 688 F.3d 463, 465 (8th Cir. 2012) ("Although there is a presumption that a dismissal under Rule 12(b)(6) is a judgment on the merits made with prejudice, such a dismissal can be rendered without prejudice if the court so specifies." (citation omitted)); *Stern v. Gen. Elec. Co.*, 924 F.2d 472, 477 n.7 (2d Cir. 1991); *Carter v. Norfolk Cmty. Hosp. Ass'n, Inc.*, 761 F.2d 970, 974 (4th Cir. 1985).

Applying this framework, we conclude a nexus is lacking. Mr. Lomax's complaint raises claims relative to his removal from a sex offender treatment program while he was housed at the *Centennial Correctional Facility*. And the complaint alleges that five employees at the Centennial Correctional Facility, as well as a member of the Central Classification Committee at Offender Services, were responsible for his removal from the sex offender treatment program. But, Mr. Lomax's allegations regarding imminent danger involved his fears of mistreatment by guards at the *Limon Correctional Facility*. This fear is not fairly traceable to the Fifth, Eighth, Ninth, and Fourteenth Amendment violations Mr. Lomax sought to advance through his complaint. And a favorable judicial outcome will not redress any mistreatment at the hands of guards at the Limon Correctional Facility as, according to Mr. Lomax, "the only benefit that a victory in this case will provide . . . is a ticket to get in the door of the parole board." ROA at 10 (alterations in original) (quoting *Leamer v. Fauver*, 288 F.3d 532, 543 (3d Cir. 2002)). Thus, Mr. Lomax has not advanced sufficient allegations to qualify for the imminent danger exception to § 1915(g)'s prohibition on a three-strikes litigant proceeding *in forma pauperis*.

Even in the absence of the nexus requirement, Mr. Lomax has not alleged sufficient imminent physical danger as that term is understood. To qualify for the exception, a plaintiff must advance allegations that "identify at least the general nature of the serious physical injury he asserts is imminent" and that "[v]ague and utterly conclusory assertions are insufficient." *Hafed v. Fed. Bureau of Prisons*, 635

F.3d 1172, 1180 (10th Cir. 2011) (internal quotation marks omitted); *see Martin v. Shelton*, 319 F.3d 1048, 1050 (8th Cir. 2003) (holding general assertions are insufficient "absent specific fact allegations of ongoing serious physical injury, or of a pattern of misconduct evidencing the likelihood of imminent physical injury"); *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 315 n.1 (3d Cir. 2001) (finding multiple generalized allegations of harassment by prison guards insufficient to establish "a pattern of threats of serious physical injury that [is] ongoing."). Finally, the allegation of imminent danger must be present "at the time [the prisoner] filed his complaint." *Hafed*, 635 F.3d at 1179.

Mr. Lomax's assertions of imminent physical danger are insufficient under this standard. Simply stating a guard attacked him in the past and still works at the prison does not indicate any type of pattern of serious and ongoing physical harm or otherwise evidence the likelihood of *imminent* danger. Accordingly, even if the nexus requirement did not apply, Mr. Lomax has not sufficiently alleged imminent physical danger and does not qualify for the exception as stated in 28 U.S.C. § 1915(g).

III. CONCLUSION

Mr. Lomax's challenge on appeal fails due to his previous dismissals counting as strikes and his insufficient pleading of imminent physical danger. We **AFFIRM** the district court's judgment. We also **DENY** Mr. Lomax's motion to proceed

without prepayment of costs and fees, and Mr. Lomax is directed to pay the appellate filing fee in full. *See Childs*, 713 F.3d at 1267; *Smith*, 636 F.3d at 1315.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

Chris Wolpert
Chief Deputy Clerk

November 08, 2018

Mr. Arthur J. Lomax
P.O. Box 10000
Limon, CO 80826
#134416

RE: 18-1250, Lomax v. Raemisch, et al
Dist/Ag docket: 1:18-CV-00321-GPG-LTB

Dear Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker
Clerk of the Court

EAS/lg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-00321-GPG

ARTHUR J. LOMAX, aka ARTHUR JAMES LOMAX,

Plaintiff,

v.

CHRITINA ORTIZ-MARQUEZ,
MATASHA KINDRED,
DANNY DENNIS, and
MARY QUINTANA,

Defendants.

ORDER DENYING LEAVE TO PROCEED PURSUANT TO 28 U.S.C. § 1915

Plaintiff Arthur Lomax, aka Arthur James Lomax, is in the custody of the Colorado Department of Corrections and currently is incarcerated at the Limon Correctional Facility in Limon, Colorado. On February 8, 2018, Plaintiff initiated this action by filing *pro se* a Prisoner Complaint and a Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915. Magistrate Judge Gordon P. Gallagher reviewed the filings, found the Complaint was not submitted on a current Court-approved form, and directed Plaintiff to cure the deficiency, which Plaintiff did on February 27, 2018.

On March 18, 2018, Magistrate Judge Gallagher granted Plaintiff leave to proceed pursuant to 28 U.S.C. § 1918. Also, on March 19, 2018, Magistrate Judge Gallagher directed Plaintiff to amend the Complaint, which he did on April 20, 2018. Subsequently, on April 24, 2018, Magistrate Judge Gallagher entered an order that vacated the March

18, 2018 Order, because he had determined that Plaintiff on three or more occasions had brought an action that was dismissed on the grounds that it failed to state a claim. See ECF No. 13 at 1. The April 24, 2018 Order to Show Cause reads in part as follows:

> It has been brought to the Court's attention that Plaintiff, on three or more occasions, has brought an action that was dismissed on the grounds that it fails to state a claim. *See Lomax v. Hoffman, et al.*, No. 13-cv-03296-LTB (D. Colo. Jan. 23, 2014) (dismissed as barred by *Heck*); *Lomax v. Hoffman, et al.*, No. 13-02131-LTB (D. Colo. Aug. 15, 2013) (dismissed as barred by *Heck*); *Lomax v. Trani, et al.*, No. 13-cv-00707-WJM-KMT(dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6)).
>
> In relevant part, § 1915 provides:
>
> > In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.
>
> 28 U.S.C. § 1915(g).

Each dismissal for failure to state a claim, which are noted above, qualifies as a "strike" under 28 U.S.C. § 1915(g). *See Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1176-77 (10th Cir. 2011). As a result, the Court finds that Plaintiff is subject to the filing restriction in § 1915(g).

"There is only one exception to the prepayment requirement in § 1915(g)." *Id.* at 1179. A prisoner litigant with three or more strikes who seeks to fall within that exception must "make specific, credible allegations of imminent danger of serious physical harm." *Id.* at 1179-80. Vague and conclusory assertions of harm will not satisfy the imminent danger requirement of § 1915(g). *See White v. Colorado*, 157 F.3d 1226, 1231-32 (10th Cir. 1998). Allegations of past injury or harm also are not sufficient. *See Fuller v. Wilcox*, 288 F. App'x 509, 511 (10th Cir. 2008). "Every circuit to have decided the issue so far has concluded that the statute's use of the present tense shows that a prisoner must have alleged an imminent danger at the time he filed his complaint." *Hafed*, 635 F.3d at 1179-80 (collecting cases).

Plaintiff does not assert that Defendants' actions are the cause of any current imminent danger of serious physical injury. Plaintiff's response to the question, on Page

Two of the Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 form, if he is in imminent danger of serious physical injury, is vague and refers to a past alleged attack. ECF No. 2 at 7. Therefore, the Court finds that Plaintiff has initiated three or more actions that count as strikes pursuant to § 1915(g) and that he is not under imminent danger of serious physical injury based on Defendants' actions. Pursuant to § 1915(g) he is precluded from bringing the instant action in forma pauperis. Plaintiff will be ordered to show cause why he should not be denied leave to proceed pursuant to 28 U.S.C. § 1915(g).

ECF No. 13 at 1-3.

On March 23, 2017, Plaintiff responded to the Order to Show Cause. ECF No. 14. Relying on the findings in *McLean v. United* States, 566 F.3d 391 (4th Cir.), Plaintiff argues that he should not be denied leave to proceed pursuant to 28 U.S.C. § 1915 because even though each of the three actions were dismissed for failure to state a claim, they were dismissed without prejudice and do not count as strikes. *Id.* at 2. Plaintiff further contends on Page Two of the Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 that he stated he is in imminent danger of serious physical injury at the Limon Correctional Facility because Lieutenant Wilson is still employed at Limon and he had assaulted Plaintiff in the past.

"Under the PLRA, prisoners obtain a 'strike' against them for purposes of future ifp eligibility when their action or appeal in a court of the United States . . . was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." *Hafed*, 635 F.3d at 1176 (quoting § 1915(g)) (internal quotation marks omitted). The Tenth Circuit also has found that "a dismissal without prejudice counts as a strike, so long as the dismissal is made because the action is frivolous, malicious, or fails to state a claim." *Day v. Maynard*, 200 F.3d 665, 667 (10th Cir. 1999) (per curiam). An action dismissed pursuant to *Heck* is dismissed for failure to state a claim. *Hafed*, 635 F.3d at 1178 (citing *Davis v. Kan. Dep't of Corr.*, 507 F.3d 1246, 1249 (10th Cir.

2007)). The Court, therefore, finds that Plaintiff's arguments lack merit and he is subject to the three-strike provision under 28 U.S.C. § 1915(g).

In the Order to Show Cause, Plaintiff was instructed that he must "make specific, credible allegations of imminent danger of serious physical harm." *Hafed,* 635 F.3d at 1179-80. Plaintiff's claim that because Lieutenant Wilson assaulted him previously, and he still works at the Limon Facility, he is subject to imminent danger of serious physical harm, does not state a specific credible allegation of imminent danger.

Because Plaintiff fails to establish that he is under imminent danger of serious physical injury, and because he has on three or more occasions, while incarcerated or detained in any facility, brought an action in a court of the United States that was dismissed on the grounds that it failed to state a claim, the Court will deny Plaintiff leave to proceed pursuant to 28 U.S.C. § 1915.

If Plaintiff wishes to pursue the claims raised in this action he must pay the $400.00 filing fee ($350 filing fee, plus a required $50 administrative fee) pursuant to 28 U.S.C. § 1914(a). Plaintiff is reminded that, even if he pays the filing fee in full, a review of the merits of the claims is subject to 28 U.S.C. § 1915(e)(2), and the claims may be dismissed notwithstanding any filing fee if the claims are found to be frivolous or malicious, lacking in merit, or asserted against a defendant who is immune from suit. Accordingly, it is

ORDERED that the Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915, ECF No. 3, is denied. It is

FURTHER ORDERED that Plaintiff shall have **thirty days from the date of this Order** to pay the entire $400.00 filing fee if he wishes to pursue his claims in this action. It is

FURTHER ORDERED that if Plaintiff fails to pay the entire $400.00 filing fee within the time allowed the Complaint and the action will be dismissed without further notice. It is

FURTHER ORDERED that the only proper filing at this time is the payment of the $400.00 filing fee. No other filings will be considered. It is

FURTHER ORDERED that the Motion to Show Cause Order, ECF No. 14, is construed as a Response to the Order to Show Cause.

DATED June 4, 2018 at Denver, Colorado.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 13-cv-0707-WJM-KMT

ARTHUR JAMES LOMAX,

Plaintiff,

v.

JAMES LANDER (FCF),
NATHAN WIGGIN (FCF),
M. SCHNELL (FCF),
IVETTE RUIZ (AVCF),
PENNY SPEARING (AVCF),
MS. PRIESTLY (AVCF),
MS. APODACA (AVCF), and
MR. MCGILL (AVCF),

Defendants.

ORDER ADOPTING MARCH 18, 2014 RECOMMENDATION OF MAGISTRATE JUDGE AND GRANTING DEFENDANTS' MOTION TO DISMISS

This matter is before the Court on the March 18, 2014 Recommendation of United States Magistrate Judge Kathleen M. Tafoya (the "Recommendation") (ECF No. 42) that Defendants' Motion to Dismiss (ECF No. 39) be granted. The Recommendation is incorporated herein by reference. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b).

The Recommendation advised the parties that specific written objections were due within fourteen days after being served with a copy of the Recommendation. (ECF No. 42, at 15-16.) Despite this advisement, no objections to the Magistrate Judge's Recommendation have to date been received.

The Court concludes that the Magistrate Judge's analysis was thorough and sound, and that there is no clear error on the face of the record. *See* Fed. R. Civ. P.

72(b) advisory committee's note ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation."); *see also Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991) ("In the absence of timely objection, the district court may review a magistrate's report under any standard it deems appropriate.").

In accordance with the foregoing, the Court ORDERS as follows:

(1) The Magistrate Judge's Recommendation (ECF No. 42) is ADOPTED in its entirety;

(2) Defendants' Motion to Dismiss (ECF No. 39) is GRANTED; and

(3) Plaintiff's Second Amended Complaint (ECF No. 14) is hereby DISMISSED.

Dated this 21st day of April, 2014.

BY THE COURT:

William J. Martínez
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-03296-BNB

ARTHUR JAMES LOMAX,

Plaintiff,

v.

MORRIS B. HOFFMAN, the People, and
RICK RAEMISCH, Executive Director of DOC,

Defendants.

ORDER OF DISMISSAL

Plaintiff, Arthur James Lomax, is a prisoner in the custody of the Colorado Department of Corrections (DOC) at the Centennial Correctional Facility in Cañon City, Colorado. Mr. Lomax has filed *pro se* a Prisoner Complaint (ECF No. 1) pursuant to 42 U.S.C. § 1983 claiming that his rights under the United States Constitution have been violated.

The Court must construe the Prisoner Complaint liberally because Mr. Lomax is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). If the Prisoner Complaint reasonably can be read "to state a valid claim on which the plaintiff could prevail, [the Court] should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Hall*, 935 F.2d at 1110. However, the Court should not be an advocate for a *pro se* litigant. *See id*. For the reasons stated below,

the Court will dismiss the action.

Mr. Lomax contends in the Prisoner Complaint that he was sentenced illegally in the Denver District Court in December 2006 to an indeterminate term of six years to life in prison and ten years to life on parole. Mr. Lomax specifically contends that the state court sentencing judge abused his discretion and went beyond his authority under Colorado law by imposing a sentence that is excessive, void, and disproportionate to the nature of his crime. According to Mr. Lomax, the maximum prison term to which he could have been sentenced under Colorado law is six years and he should have been released in December 2012. The named Defendants in the Prisoner Complaint are the sentencing judge and the executive director of the DOC. As relief Mr. Lomax asks that his sentence be vacated, that he be released from prison immediately, and that he be awarded damages.

Mr. Lomax may not pursue his claims in this action pursuant to 42 U.S.C. § 1983 to have his sentence vacated or to be released from prison because his sole federal remedy is a writ of habeas corpus. *See Preiser v. Rodriguez*, 411 U.S. 475, 504 (1973) (holding that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus"). Mr. Lomax previously filed a habeas corpus action in the District of Colorado challenging the validity of his state court criminal conviction that was dismissed as untimely. *See Lomax v. Davis*, No. 11-cv-03034-LTB (D. Colo.), *appeal dismissed*, 484 F. App'x 206 (10th Cir.), *cert. denied*, 133 S. Ct. 480 (2012). Therefore, the Court lacks jurisdiction to consider the merits of any claims seeking

habeas corpus relief. *See In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam) (noting that district courts lack jurisdiction to consider the merits of claims asserted in a second or successive § 2254 application absent prior authorization from the appropriate court of appeals pursuant to 28 U.S.C. § 2244(b)(3)).

Mr. Lomax's claims for damages, which may be asserted in a § 1983 action, will be dismissed because those claims are barred by the rule in *Heck v. Humphrey*, 512 U.S. 477 (1994). Pursuant to *Heck*, if a judgment for damages necessarily would imply the invalidity of a criminal conviction or sentence, the action does not arise until the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by an authorized state tribunal, or called into question by the issuance of a federal habeas writ. *See Heck*, 512 U.S. at 486-87. In short, a civil rights action filed by a state prisoner "is barred (absent prior invalidation) – no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) – if success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005).

It is apparent that Mr. Lomax's claims in the Prisoner Complaint implicate the validity of the sentence he is serving. It also is apparent that Mr. Lomax has not invalidated the validity of that sentence. Therefore, the Court finds that Mr. Lomax's claims for damages are barred by the rule in *Heck* and must be dismissed. The dismissal will be without prejudice. *See Fottler v. United States*, 73 F.3d 1064, 1065 (10th Cir. 1996).

Furthermore, the Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any

appeal from this order would not be taken in good faith and therefore *in forma pauperis* status will be denied for the purpose of appeal. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Plaintiff files a notice of appeal he also must pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24. Accordingly, it is

ORDERED that the Prisoner Complaint and the action are dismissed without prejudice because the habeas corpus claims may not be raised in this action pursuant to 42 U.S.C. § 1983 and the claims for damages are barred by the rule in *Heck*. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit.

DATED at Denver, Colorado, this 23rd day of January, 2014.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-02131-BNB

ARTHUR JAMES LOMAX,

Plaintiff,

v.

MORRIS B. HOFFMAN,
MICHAEL ANTHONY MARTINEZ,
ANNE MARIE MANSFIELD,
DOUG JACKSON,
KENNETH PLOTZ,
ROBERT L. McGAHEY, and
ALFREDO HERNANDEZ,

Defendants.

ORDER OF DISMISSAL

Plaintiff, Arthur James Lomax, is a prisoner in the custody of the Colorado Department of Corrections at the Centennial Correctional Facility in Cañon City, Colorado. Mr. Lomax has filed *pro se* a Prisoner Complaint (ECF No. 1) pursuant to 42 U.S.C. § 1983 claiming that his rights under the United States Constitution have been violated.

The Court must construe the Prisoner Complaint liberally because Mr. Lomax is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). If the Prisoner Complaint reasonably can be read "to state a valid claim on which the plaintiff could prevail, [the Court] should do so despite the plaintiff's failure to cite proper legal authority, his

confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Hall*, 935 F.2d at 1110. However, the Court should not be an advocate for a *pro se* litigant. *See id*. For the reasons stated below, the Court will dismiss the action.

Mr. Lomax asserts claims in the Prisoner Complaint that challenge the validity of his state court criminal conviction and sentence. Mr. Lomax claims that his right to a speedy trial was violated, he was subjected to excessive bail, he was prevented from filing an appeal, his sentence is illegal, and he was denied a fair trial as a result of prosecutorial misconduct during closing arguments. The named Defendants are five state court judges and two prosecutors who were involved in various proceedings in Mr. Lomax's criminal case. As relief Mr. Lomax seeks damages and either to be released from custody or a new trial.

Mr. Lomax may not pursue his claims to be released from custody or a new trial in this 42 U.S.C. § 1983 action because his sole federal remedy is a writ of habeas corpus. *See Preiser v. Rodriguez*, 411 U.S. 475, 504 (1973) (holding that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus"). Mr. Lomax previously filed a habeas corpus action in the District of Colorado challenging the validity of his state court criminal conviction that was dismissed as untimely. *See Lomax v. Davis*, No. 11-cv-03034-LTB (D. Colo.), *appeal dismissed*, 484 F. App'x 206 (10th Cir.), *cert. denied*, 133 S. Ct. 480 (2012).

Mr. Lomax's claims for damages, which may be asserted in a § 1983 action, will

be dismissed because they are barred by the rule in *Heck v. Humphrey*, 512 U.S. 477 (1994). Pursuant to *Heck*, if a judgment for damages necessarily would imply the invalidity of a criminal conviction or sentence, the action does not arise until the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by an authorized state tribunal, or called into question by the issuance of a federal habeas writ. *See Heck*, 512 U.S. at 486-87. In short, a civil rights action filed by a state prisoner "is barred (absent prior invalidation) – no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) – if success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005).

It is apparent that Mr. Lomax's claims in the Prisoner Complaint implicate the validity of his criminal conviction and sentence. It also is apparent that Mr. Lomax has not invalidated the criminal conviction and sentence he is challenging in this action. Therefore, the Court finds that Mr. Lomax's claims for damages are barred by the rule in *Heck* and must be dismissed. The dismissal will be without prejudice. *See Fottler v. United States*, 73 F.3d 1064, 1065 (10th Cir. 1996).

Furthermore, the Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status will be denied for the purpose of appeal. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Plaintiff files a notice of appeal he also must pay the full $455 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App.

P. 24. Accordingly, it is

ORDERED that the Prisoner Complaint and the action are dismissed without prejudice because the habeas corpus claims may not be raised in this action pursuant to 42 U.S.C. § 1983 and the claims for damages are barred by the rule in *Heck*. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit.

DATED at Denver, Colorado, this 15th day of August, 2013.

BY THE COURT:

s/ Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13–cv–00707–WJM–KMT

ARTHUR JAMES LOMAX,

Plaintiff,

v.

JAMES LANDER (FCF),
NATHAN WIGGIN (FCF),
M. SCHNELL (FCF),
IVETTE RUIZ (AVCF),
PENNY SPEARING (AVCF),
MS. PRIESTLY (AVCF),
MS. APODACA (AVCF), and
MR. MCGILL (AVCF),

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Kathleen M. Tafoya

This matter is before the court on Defendants' "Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and (6)" (Doc. No. 39 [Mot.], filed September 9, 2013), to which Plaintiff filed his response on October 8, 2013 (Doc. No. 41 [Resp.])[1]. Defendants did not file a reply. The motion is ripe for recommendation and order.

[1]Plaintiff's response is titled "Motion of Objections." (Resp. at 1.) Plaintiff does not respond to the substance of Defendants' Motion. Rather, Plaintiff explains that he is unschooled in the law and requests the court to allow a jury to decide his case. (*Id.*)

STATEMENT OF THE CASE

In his Complaint, Plaintiff, who now is incarcerated at the Centennial Correctional Facility ("CCF") in the Colorado Department of Corrections ("CDOC") (*see* Doc. No. 14 ["Compl."] at 3), alleges he was denied participation in the Sex Offender Treatment and Monitoring Program ("SOTMP") when he previously was an inmate at the Fremont Correctional Facility ("FCF") from December 2006 to March 2008 and at the Arkansas Valley Correctional Facility ("AVCF") from September 2011 through November 2011 (*id.* at 6). Plaintiff's Claim One is directed at Defendants Lander, Wiggin, and Schnell, who Plaintiff alleges denied his participation in the SOTMP at FCF. (*See id.* at 7–8.) Plaintiff's Claim Two is directed at Defendants Ruiz, Spearing, Priestly, Apodaca, and McGill, who Plaintiff alleges denied his participation in the SOTMP at AVCF. (*See id.* at 12–15.) Plaintiff, who asserts jurisdiction under 42 U.S.C. § 1983, alleges the defendants violated his Fifth, Ninth, and Tenth Amendment Rights and also violated CDOC policy and a Colorado statute. (*Id.* at 6, 7, 12.) Plaintiff seeks compensatory and punitive damages and injunctive relief. (*Id.* at 21.)

Defendants move to dismiss Plaintiff's Complaint on the grounds that (1) Plaintiff's claims for monetary damages against the defendants in their official capacities are barred; (2) Plaintiff's claims against the FCF defendants are barred by the statute of limitations; (3) Plaintiff fails to state a claim upon which relief can be granted; and (4) the defendants are entitled to qualified immunity. (Mot. at 3–15.)

STANDARD OF REVIEW

1. Pro Se *Plaintiff*

Plaintiff is proceeding *pro se*. The court, therefore, "review[s] his pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted). *See also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (holding allegations of a *pro se* complaint "to less stringent standards than formal pleadings drafted by lawyers"). However, a *pro se* litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir. 1991). A court may not assume that a plaintiff can prove facts that have not been alleged, or that a defendant has violated laws in ways that a plaintiff has not alleged. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). *See also Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997) (court may not "supply additional factual allegations to round out a plaintiff's complaint"); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991) (the court may not "construct arguments or theories for the plaintiff in the absence of any discussion of those issues"). The plaintiff's *pro se* status does not entitle him to application of different rules. *See Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002).

2. Lack of Subject Matter Jurisdiction

Federal Rule of Civil Procedure 12(b)(1) empowers a court to dismiss a complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case. Rather, it calls for a determination that the

court lacks authority to adjudicate the matter, attacking the existence of jurisdiction rather than the allegations of the complaint. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). A court lacking jurisdiction "must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *See Basso*, 495 F.2d at 909. The dismissal is without prejudice. *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006); *see also Frederiksen v. City of Lockport*, 384 F.3d 437, 438 (7th Cir. 2004) (noting that dismissals for lack of jurisdiction should be without prejudice because a dismissal with prejudice is a disposition on the merits which a court lacking jurisdiction may not render).

A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere conclusionary allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). When considering a Rule 12(b)(1) motion, however, the Court may consider matters outside the pleadings without transforming the motion into one for summary judgment. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Where a party challenges the facts upon which subject matter jurisdiction depends, a district court may not presume the truthfulness of the complaint's "factual allegations . . . [and] has wide discretion to allow affidavits, other documents, and [may even hold] a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id*.

3. Failure to State a Claim Upon Which Relief Can Be Granted

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6) (2007). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (citations and quotation marks omitted).

"A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff." *Hall v. Bellmon*, 935 F.2d 1106, 1198 (10th Cir. 1991). "To survive a motion to dismiss, 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, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pleaded facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. The *Iqbal* evaluation requires two prongs of analysis. First, the court identifies "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusion, bare assertions, or merely conclusory. *Id*. at 1949–51. Second, the Court considers the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id*. at 1951. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id*. at 1950.

Notwithstanding, the court need not accept conclusory allegations without supporting factual averments. *Southern Disposal, Inc., v. Texas Waste*, 161 F.3d 1259, 1262 (10th Cir. 1998). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1940. Moreover, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does the complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Id.* at 1949 (citation omitted). "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.' " *Iqbal*,129 S. Ct. at 1949 (citation omitted).

ANALYSIS

1. Eleventh Amendment Immunity

The CDOC Defendants argue that they, in their official capacities, are immune from Plaintiff's § 1983 claims to the extent Plaintiff seeks monetary damages.[2] (Mot. at 3–4.) The Eleventh Amendment to the United States Constitution states: "The Judicial power of the United

[2]It is unclear whether Plaintiff asserts claims against the defendants in their individual or official capacities. Because Plaintiff is *pro se*, the court should broadly construe the Complaint to allege claims in both capacities. *See Hull v. State of N.M. Taxation and Revenue Dep't's Motor Vehicle Div.*, 179 F. App'x 445, 447 (10th Cir. Apr. 25, 2006) (holding that when a *pro se* litigant in a Section 1983 case had failed to specify whether she was suing the defendant in her official or individual capacity, the court would "give [the plaintiff] the benefit of [the] doubt" and construe the claim to involve both capacities).

States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. It has been interpreted to bar a suit by a citizen against the citizen's own state in federal court. *Johns v. Stewart*, 57 F.3d 1544, 1552 (10th Cir. 1995). Suits against state officials in their official capacity should be treated as suits against the state. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). This is because a suit against a state official in his or her official capacity is a suit against the official's office and therefore is no different from a suit against the state itself. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). The Eleventh Amendment thus shields state officials, acting in their official capacities, from claims for monetary relief. *See Hill v. Kemp*, 478 F.3d 1236, 1255-56 (10th Cir. 2007). Moreover, a § 1983 action may only be brought against a person. *See* 42 U.S.C. § 1983. Neither states nor state officers sued in their official capacity for monetary damages are persons within the meaning of § 1983. *Will*, 491 U.S. at 70-71.

Plaintiff's claims for monetary relief against the CDOC Defendants in their official capacities constitute claims against the Colorado Department of Corrections. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) ("a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office"). Therefore, Plaintiff's official-capacity claims for monetary relief against the CDOC Defendants are barred by the Eleventh Amendment and should be dismissed for lack of subject matter jurisdiction. *See id.*

2. Claims for Injunctive Relief Are Moot

Plaintiff also seeks injunctive relief from the CDOC Defendants. Official capacity defendants are persons for § 1983 purposes. *Will*, 491 U.S. at 71, n.10 ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State." ') (quoting *Kentucky v. Graham*, 473 U.S. 159, 167, n.14 (1985)). Likewise, injunctive relief claims against official capacity defendants seeking to end constitutional violations are not barred by the Eleventh Amendment. *See Green v. Mansour*, 474 U.S. 64, 68; *Ex parte Young*, 209 U.S. 123, 155–156 (1908).

Nevertheless, Plaintiff is no longer incarcerated at either the FCF or the AVCF, where the defendants from whom he seeks injunctive relief are employed and where alleged violations occurred. Plaintiff's transfer to another facility renders his claims for injunctive relief moot. *See Green v. Branson*, 108 F.3d 1296, 1300 (10th Cir. 1997) (prisoner's transfer mooted his claim for injunctive relief as a judgment in the prisoner's favor "would amount to nothing more than a declaration that he was wronged, and would have no effect on the defendants' behavior towards him"). Therefore, Plaintiff's claims for injunctive relief should be dismissed on the basis of mootness for lack of subject matter jurisdiction.[3]

[3]Although Defendants fail to argue that Plaintiff's claims for injunctive relief are moot, the court may address the issue *sua sponte*. *See State Farm Mut. Auto. Ins. Co. v. Narvaez*, 149 F.3d 1269, 1270–71 (10th Cir. 1998) ("[I]t has long been recognized that a federal court must, sua sponte, satisfy itself of its power to adjudicate in every case and at every stage of the proceedings.").

3. Statute of Limitations

Defendants argue that Plaintiff's Claim One related to alleged violations while he was housed at FCF from 2006 through 2008 are barred by the statute of limitations. (Mot. at 4–5.)

Statute of limitations periods in § 1983 suits are determined by reference to the personal-injury statute of the state in which the federal district court sits. *Mondragon v. Thompson*, 519 F.3d 1078, 1082 (10th Cir. 2008). Federal law, however, determines the date on which the claim accrues and the limitations period starts to run. *Id.* In Colorado, the general statute of limitations for personal injury claims provides that such a claim must be brought within two years after the action accrues. *See* C.R.S. § 13–80–102. For the purpose of the statute of limitations, a § 1983 claim accrues "when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Johnson v. Johnson County Com'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991).

It is clear from the Complaint that the alleged acts or omissions forming the basis of Plaintiff's Claim One against Defendants Lander, Wiggin, and Schnell occurred between December 2006 to March 2008, when the defendants denied him access to the SOTMP. (*See* Compl. at 6–8.) This court finds that the plaintiff's claims accrued, at the latest, at the end March 2008, as that is the date "when the plaintiff [knew] or [had] reason to know of the injury which is the basis of his action." *Johnson*, 925 F.2d at 1301. Therefore, Plaintiff had to file his lawsuit on his Claim One no later than March 31, 2010. Plaintiff filed the operative Complaint on June 11, 2013, over three years after the statute of limitations expired on the claim.

Accordingly, Plaintiff's Claim One properly is dismissed with prejudice[4], and Defendants Lander, Wiggin, and Schnell should be dismissed as defendants.

4. Failure to State Claims upon Which Relief Can Be Granted

A. Fifth Amendment Claim

In his Second Claim, Plaintiff alleges he was prevented, despite Plaintiff's and the defendants' acknowledging that he would benefit from the treatment, from attending the SOTMP while he was at AVCF because he refused to admit that he committed the sexual assault for which he had been convicted in 2006. (*See* Compl. at 12–16.) As a consequence of his failing to complete SOTMP, Plaintiff alleges he has been subjected to certain restrictions, he cannot be assigned to a less than a medium security prison, he cannot live in preferred quarters, he is ineligible for study or work release programs, he is unable to accumulate additional good time credits, and he is ineligible for early release or parole. (*Id.* at 17–18.)

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The right against self-incrimination not only applies to a criminal prosecution, but "any other proceeding, civil or criminal . . . where the answers might incriminate [Plaintiff] in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). In addition, the state cannot impose "substantial penalties" against a person for exercising his Fifth Amendment right. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977).

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[4]*See Mercer–Smith v N.M. Children, Youth and Families Dep't*, 416 F. App'x 704, 709–13 (10th Cir. 2011) (affirming dismissal with prejudice of Section 1983 claims and state law claim which were barred by the statute of limitations); *Gee v. Pacheco*, 627 F.3d 1178, 1181 (10th Cir.2010) (affirming dismissal with prejudice of claims as barred by statute of limitations).

The denial of certain privileges as a result of failure to comply with a sex offender treatment program does not implicate Fifth Amendment self-incrimination concerns "if the adverse consequences an inmate faces for not participating are related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life." *McKune v. Lile*, 536 U.S. 24, 37–38 (2002). Requiring an inmate to agree to certain conditions before receiving the benefits of a sex offender treatment program does not constitute impermissible compulsion under the Fifth Amendment. *Wirsching v. Colorado*, 360 F.3d 1191, 1203–04 (10th Cir. 2004); *see also Searcy v. Simmons*, 299 F.3d 1220, 1226–27 (10th Cir. 2002) (holding that self-incrimination privilege not violated even though refusal to make admissions required for participation in sex offender program caused inmate to lose good-time credits). As the *Searcy* Court noted, the inmate's inability to accrue good-time credits at a faster pace upon admission to a sex offender program "does not so much describe compulsion as it does display the consequences of [the inmate's] own individual choice." *Searcy*, 299 F.3d at 1226. The choice was either "take advantage of the benefit [that the state was under no obligation to provide] . . . or turn down that benefit in order to avoid what [the inmate] feared, perhaps legitimately, would be self-incriminating statements." *Id.*

Plaintiff has made no allegations that he will incriminate himself in any ongoing or future criminal proceeding by discussing his 2006 conviction. Plaintiff also has not made any allegation that the defendants imposed any additional penalties for his failure to discuss the 2006 conviction. Plaintiff's refusal to comply with the SOTMP's requirement that he admit past sexual offenses represents a similar choice and comes along with inevitable consequences. The

consequences alleged by Plaintiff do not rise to the level of compulsion required to state a claim for a violation of Plaintiff's right against self-incrimination.

Accordingly, the motion to dismiss Plaintiff's Fifth Amendment claim should be granted.[5]

B. Ninth and Tenth Amendment Claims

Plaintiff alleges the defendants violated his Ninth and Tenth Amendment rights but does not allege any facts in support of the allegation. (*See* Compl. at 12–19.)

The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." It is well established that the Ninth Amendment is not an independent source of individual rights, but a rule of construction to be applied in certain cases. *See United States v. Bifield*, 702 F.2d 342. 349 (2nd Cir. 1983). The Tenth Circuit Court of Appeals has held that because other amendments, such as the Eighth Amendment, specifically address the mistreatment of prisoners, Ninth Amendment claims are indisputably meritless. *Parnisi v. Colo. State Hosp.*, No. 92-1368, 1993 WL 118860, at *1 (10th Cir. Apr. 15, 1993).

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[5]Defendants also move to dismiss any Fourteenth Amendment due process claim, to the extent Plaintiff's asserts such a claim. (Mot. at 10–11.) The court does not find that interpreting the claim beyond its four corners is warranted here. In Claim Two's heading, Plaintiff specifically did not list the Fourteenth Amendment as one of the amendments violated by the defendants. (*See* Compl. at 12.) Moreover, Plaintiff does not make any reference to any Fourteenth Amendment due process violation anywhere in his Complaint. (*See id.*) While Plaintiff's pleadings are entitled to liberal pleading interpretation, the court is not Plaintiff's advocate and is not at liberty to construct claims on his behalf. *Whitney v. State of N.M.*, 113 F.3d 1170, 1173–74 (10th Cir. 1997). Therefore, the court does not analyze Claims Two in relation to any alleged Fourteenth Amendment violation.

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The purpose of the Tenth Amendment is to protect states from encroachment by the federal government. *See Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118 (1939). As the Tenth Amendment protects state rights, private citizens lack standing to raise a Tenth Amendment claim. *See id.*; *United States v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004) ("[P]rivate plaintiffs do not have standing to bring Tenth Amendment claims when their interests are not aligned with the state's interests.").

Accordingly, Plaintiff's Ninth and Tenth Amendment claims properly are dismissed.

C. Failure to Follow CDOC Policy

Plaintiff also alleges the defendants did not follow "CDOC policy," but again Plaintiff does not allege any facts in support of the allegation. (*See* Compl. at 12–19.)

Regardless, an agency's failure to follow its own regulations does not rise to the level of a constitutional violation unless the regulations themselves are compelled by the Constitution. *See Gibson v. Fed. Bureau of Prisons*, 121 F. App'x 549, 551 (5th Cir.2004) (finding that violation of BOP regulation in itself is not a constitutional violation). Prison regulations are "primarily designed to guide correctional officials in the administration of a prison. [They are] not designed to confer rights on inmates." *Sandin v. Conner*, 515 U.S. 472, 481-82 (1995). Thus, even if prison officials did not strictly follow the prison's internal regulations, such failure would not constitute a violation of Plaintiff's right to due process. *See Malik v. Kindt*, No. 95-6057, 1996 WL 41828, at *2 (10th Cir. Feb. 2, 1996) ("a failure to adhere to administrative

regulations does not equate to a constitutional violation")(quoting *Hovater v. Robinson*, 1 F.3d 1063, 1068 n.4 (10th Cir. 1993)).

Plaintiff's claim based on alleged violations of prison regulations should be dismissed.

D. Violation of Colorado Statute

Finally, in the header for Claim Two, Plaintiff alleges the defendants violated "18-1.3-1001."[6] (Compl. at 12.) In Claim Two, Plaintiff also quotes a portion of the Colorado Sex Offender Lifetime Supervision Act, Colo. Rev. Stat. § 18–1.3–1001. (*Id.* at 16.) However, Plaintiff's Complaint is devoid of any facts to support Plaintiff's claim that the defendants violated the Colorado statute.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Iqbal*, 129 S. Ct. at 1949. Plausibility, in the context of a motion to dismiss, means that the plaintiff pleaded facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*.

Here, because Plaintiff has pleaded no facts in support of the claim, the claim properly is dismissed.

5. Qualified Immunity

Defendants, in their individual capacities, raise the defense of qualified immunity to Plaintiff's claims. Whether a defendant is entitled to qualified immunity is a legal question.

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[6]Although Defendants failed to analyze the sufficiency of Plaintiff's Complaint in relation to this allegation, the court may do so pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

Wilder v. Turner, 490 F.3d 810, 813 (10th Cir. 2007). To overcome the defendants' claim of qualified immunity, the plaintiff must establish that the defendants' actions violated a constitutional or statutory right of the plaintiff's and that the right at issue was clearly established at the time of the defendants' alleged unlawful conduct. *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995). "[C]ourts have discretion to decide which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* "Qualified immunity is applicable unless" the plaintiff can satisfy both prongs of the inquiry. *Herrera v. City of Albuquerque*, 589 F.3d 1064, 1070 (10th Cir. 2009) (internal quotation marks and citations omitted).

The plaintiff has not established that the defendants violated Plaintiff's constitutional or statutory rights. Therefore, the defendants are entitled to qualified immunity as to Plaintiff's claims against them.

WHEREFORE, for the foregoing reasons, the court respectfully

RECOMMENDS that the "Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and (6)" (Doc. No. 30) be **GRANTED** and that Plaintiff's claims against all of the defendants be dismissed.

ADVISEMENT TO THE PARTIES

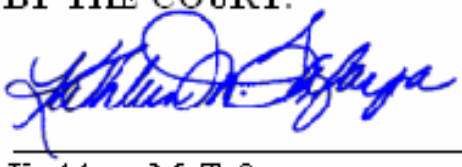
Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A

general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. One Parcel of Real Prop. Known As 2121 East 30th Street, Tulsa, Okla.*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (a district court's decision to review a magistrate judge's recommendation *de novo* despite the lack of an objection does not preclude application of the "firm waiver rule"); *One Parcel of Real Prop.*, 73 F.3d at 1059-60 (a party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Ref. Sys., Inc*., 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the magistrate judge's order, cross-claimant had waived its right to appeal those portions of the ruling); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (by their failure to file objections, plaintiffs waived their right to appeal

the magistrate judge's ruling); *but see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).

Dated this 18th day of March, 2014.

BY THE COURT:



Kathleen M. Tafoya
United States Magistrate Judge