APPENDIX

A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LARRY DRAKE HANSEN, Plaintiff - Appellant v. SALT LAKE CITY CORPORATION, Defendant - Appellee	No. 18-4104 (D.C. No. 2:15-cv-00722-JNP) (D.Utah)

ORDER AND JUDGMENT*

Before **BRISCOE, MORITZ,** and **EID,** Circuit Judges March 4, 2019

Larry Drake Hansen, proceeding pro se, appeals the district court's judgment dismissing his civil rights action under Fed. R. Civ. P. 12(b)(6) and its order denying his post-judgment motion under Fed. R. Civ. P. 60(a) and (b). Exercising Jurisdiction under 28 U.S.C. § 1291, we affirm.

Background

In 2012, Hansen was assaulted during a late-night walk down Main Street in Salt Lake City, Utah. He suffered numerous injuries, including bruises, abrasions, a broken nose, and damage to his hamstring ligament. Although other people in the area witnessed the attack, Hansen did not see his assailant and was unable to identify him later in a police line-up. But he believes the police photographed the suspects, and a bystander told him the assailant was wearing a black jacket and

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

a white t-shirt with red stains (possibly blood). No arrests were made, and no criminal charges were filed relating to the assault on Hansen.

In 2015, Hansen filed a civil rights action against the Salt Lake City Police Department ("the Police Department") under 42 U.S.C. § 1983, though the Salt Lake City Corporation was later substituted as the proper defendant. The operative (second amended) complaint asserts state law claims for gross negligence, due process claims under the Fifth and Fourteenth Amendments to the federal and state constitutions, and a violation of Hansen's constitutional right to access the courts. Relevant to this appeal, Hansen alleges that the police failed to adequately, diligently, thoroughly, and timely investigate the assault, such that he was precluded from filing a civil action against his unidentified assailant. He seeks over $5.7 million in compensatory damages and unspecified punitive damages.

The Police Department filed a motion to dismiss under Rule 12(b)(6). The magistrate judge issued a Report and Recommendation, recommending that the motion to dismiss be granted and that the entire action be dismissed with prejudice. Hansen conceded several claims within his objections, leaving only his federal access-to-the-courts claim and his state constitutional claims. The district court limited its analysis accordingly. It adopted the Report and Recommendation in part, dismissing the federal claim with prejudice; however, it declined to exercise supplemental jurisdiction over the state constitutional claims and dismissed them without prejudice. Hansen filed a Rule 60 motion for reconsideration, which was denied. Hansen timely appealed both the dismissal order and the order denying his Rule 60 motion.

Analysis

I. Motion to Dismiss

"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, 678 (2009) (internal quotation marks omitted). A plaintiff must allege specific facts that would support the conclusion that he is entitled to relief. *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) ("[M]ere labels and conclusions...will not suffice.") (internal quotation marks omitted). The district court's dismissal under Rule 12(b)(6) is subject to de novo revies. *SEC v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014).

Because Hansen is proceeding without the assistance of counsel, "we construe his pleadings liberally." *Ledbetter v. City of Topeka*, 318 F.3d 1183, 1187 (10th Cir. 2003). We make some allowances for deficiencies, such as unfamiliarity with pleading requirements [underline supplied by Plaintiff], failure to cite appropriate legal authority, and confusion of legal theories. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). But "the court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Id.* Nor will we "supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997).

We turn first to the access-to-the-courts claim. Hansen asserts that he could not file a state-court civil action against his assailant before the statute of limitations expired because the Police Department did not process crime-scene evidence or identify his assailant. This type of claim is known as a "backward-looking" access claim. *See Christopher v. Harbury*, 536 U.S. 403, 405, 412-15 (2002) (in which the plaintiff alleged government deception prevented her from bringing a lawsuit that might have saved the life of her husband, who was a foreign dissident). The district court traced the history of such a claim back to *Harbury*. R. at 136. It then explained how the circuit courts

recognizing such a claim have done so only where obstructive actions by state actors (such as destruction or concealment of evidence) prevented an individual from pursuing a civil claim. R. at 137-38. It found Hansen's claim to be "qualitatively different" in that he alleged "the city did not try hard enough to assist his civil litigation efforts against an unknown third party." R. at 138. Ultimately, the district court held that his claim fails as a matter of law "[b]ecause the Constitution does not impose a duty on government entities to actively assist the civil litigation efforts of crime victims." R. at 139.

We affirm the dismissal of the access-to-the-courts claim for the reasons set forth in the district court's well-reasoned order. We agree Hansen's theory has no basis in Supreme Court or Tenth Circuit case law. Hansen's claim rests on a purportedly "reckless investigation," see R. at 11, which is not the type of wrongful or intentional police behavior that a backward-looking access claim seeks to redress. Moreover, in attacking the Police Department's due diligence, Hansen effectively asks the judiciary to micromanage how the Police Department performs investigations and allocates its resources. We decline to enter such a morass, and indeed it would be inappropriate for us to do so. *See, e.g., Muehler v. Mena*, 544 U.S. 93, 110 (2005) ("[A] court should not ordinarily question the allocation of police officers or resources[.]").

We also agree with, and therefore affirm, the district court's decision to dismiss the state constitutional claims without prejudice. It is well established that when all federal claims have been dismissed, as is the case here, "the court may, and usually should, decline to exercise [supplemental] jurisdiction over any remaining state claims." *VR Acquisitions, LLC v. Wasatch Cty.*, 853 F.3d 1142, 1150 (10th Cir. 2017) (quoting *Smith v. City of Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1156 (10th Cir. 1998)).

II. Motion for Reconsideration

Hansen moved for reconsideration of the district court's order under Rule 60(a), (b)(1), and (b)(6), alleging mistake and clear error. He reiterated his earlier arguments for his federal access-to-the-courts claim, albeit with a focus on the Police Department's failure to process material evidence, and posited that the district court's ruling will force assault victims around the country to take matters into their own hands to "'settle the score' with their attacker(s)" and "to reap 'justice'" R. at 146. He also asked the district court to examine his state constitutional claims "following certification to, and determination by,...the Utah Supreme Court." R. at 148.

The district court denied the motion. It reasoned that relief was inappropriate under Rule 60(a) because Hansen did not identify "a clerical mistake or a mistake arising from oversight or omission," as required, *see* Fed. R. Civ. P. 60(a), and because "Rule 60(a), may not be used to change something which has been deliberately don," R. at 153-54 (quoting *Sec. Mut. Cas. Co. v. Century Cas. CO.*, 621 F.2d 1062, 1065 (10th Cir. 1980)). It also found relief was unwarranted under Rule 60(b)(1) due to Hansen's failure to identify a mistake of law or fact by the district court or, alternatively, to provide persuasive reasons why the court should adopt his position. Finally, it concluded Hansen was not entitled to relief under Rule 60(b)(6) because his argument was impermissibly duplicative of his Rule 60(b)(1) argument. *See State Bank of S. Utah v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1080 (10th Cir. 1996) ("A court may not premise Rule 60(b)(6) relief...on one of the specific grounds enumerated in clauses (b)(1) through (b)(5).").

We review the district court's denial of Hansen's Rule 60 motion for an abuse of discretion. *See Jones, Waldo, Holbrook & McDonough v. Cade*, 510 F.3d 1277, 1278 (10th Cir. 2007) (Rule 60(a) motion); *Jennings v. Rivers*, 394 F.3d 850, 854 (10th Cir. 2005) (Rule 60(b) motion. We will reverse

the district court's determination "only if we find a complete absence of a reasonable basis and are certain that the decision is wrong." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1232 (10th Cir. 1999) (ellipsis and internal quotation marks omitted). Here, too, we agree with the district court's sound reasoning. Finding no abuse of discretion, we affirm.

Conclusion

We affirm the district court's judgment dismissing this action under Rule 12(b)(6) and its order denying Hansen's motion for reconsideration under Rule 60(a) and (b).

Entered for the Court

Allison H. Eid
Circuit Judge

APPENDIX

B

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LARRY DRAKE HANSEN, Plaintiff - Appellant v. SALT LAKE CITY CORPORATION, Defendant - Appellee	No. 18-4104

ORDER

Before **BRISCOE, MORITZ,** and **EID,** Circuit Judges
April 4, 2019

Appellant's petition for rehearing is denied.

The Petition for rehearing en banc was transmitted to all the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
Elisabeth A. Shumaker, Clerk

APPENDIX

C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

LARRY HANSEN, Plaintiff v. THE POLICE DEPARTMENT OF SALT LAKE CITY CORPORATION, Defendant	**MEMORANDUM DECISION AND ORDER ADOPTING IN PART REPORT AND RECOMMENDATION** Case No. 2:15-cv-00722-JNP-PMW Judge Jill N. Parrish

Defendant Salt Lake City Corporation[1] moved to dismiss plaintiff Larry Hansen's second amended complaint. [Docket 24]. Magistrate Judge Warner issued a Report and Recommendation that this court grant the motion and dismiss the complaint with prejudice. [Docket 33]. Mr. Hansen objected in part to the Report and Recommendation, but conceded that several of his causes of action should be dismissed with prejudice. [Docket 34]. He acknowledged that his first and second claims for gross negligence should be dismissed. He also agreed that his third claim should be dismissed in part, but argued that the portion of this claim that alleged a cause of action for violations of Article 1, Section 7 of the Utah Constitution should not be dismissed. Thus, the counts that remain in dispute in this case are the third claim under Article 1, Section 7 of the Utah Constitution, the fourth claim under Article 1, Section 11 of the Utah Constitution, and the Fifth claim for denial of his right to "access to the courts" under the United States Constitution.

[1] In the caption to his second amended complaint, Mr. Hansen named the defendant as "The Police Department of Salt Lake City Corporation." The court liberally construes the complaint to allege claims against the proper defendant, the Salt Lake City Corporation.

Because Mr. Hansen filed an objection, the court "must determine de novo" whether his objections have merit. Fed R. Civ. P. 72(b)(3) ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to."); *see also United States v. One Parcel of Real Prop.*, 73 F.3d 1057, 1060 (10th Cir. 1996) ("[W]e hold that 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.").

I. OBJECTION TO DISMISSAL OF THE FIFTH CLAIM FOR VIOLATIONS OF MR. HANSEN'S RIGHT TO "ACCESS TO THE COURTS"

The United States Constitution guarantees access to the courts.[2] *Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002). A cause of action to vindicate this constitutional right may fit into one of two categories. A forward-looking claim challenges government actions that effectively bar a plaintiff form litigating a cause of action at the present time. *Id.* at 413. A forward-looking claim seeks the removal of this impediment so that the plaintiff may pursue a remedy in the courts. For example, prisoners may seek the use of a law library or plaintiffs may request the waiver of filing fees that unreasonably impede access to a court of law. *Id.* A backward-looking claim, on the other hand seeks damages caused by

[2] The precise source of this right is somewhat hazy. At different times, the Supreme Court has cited the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, the Fourteenth Amendment Equal Protection Clause, or the Fourteenth Amendment Due Process Clause as the foundation for the right to access to the courts. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002).

government actions that prevented a plaintiff from litigating a cause of action that can no longer be pursued no matter what the government does in the future. *Id.* at 413-14.

Mr. Hansen asserts a backward-looking access to the courts claim. He alleges that the Salt Lake City Police Department failed to properly investigate his assault and identify his assailant. The department's substandard investigation, he argues, prevented him from suing his attacker. Because the statute of limitations has now run on his claim against this unknown individual, Mr. Hansen is now prevented from ever asserting a tort claim in the courts. He contends, therefore, that Salt Lake City violated his constitutional right to access to the courts and that the city should now be held liable for the damages that he would have recovered in a lawsuit against his assailant.

Judge warner recommends that Mr. Hansen's access to the courts claim be dismissed because he does not have a constitutional right to the arrest or criminal prosecution of another person. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 768 (2005) ("[T]he benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations."); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ([A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."). Mr. Hansen objects, arguing that the cases cited in the Report and Recommendation are distinguishable and do not address an access to the courts claim. This court determines that it is not necessary to resolve the specific objection raised by Mr. Hansen. Upon reviewing Mr. Hansen's access to the court claim, the court determines that dismissal of this claim is required for an independent reason: The constitutional right to access to the courts does not require a police department to allocate some constitutional

minimum amount of its resources to identify the perpetrator of a crime so that the victim can sue the perpetrator.

The circuit courts that have recognized a backward-looking access to the courts claim have only done so in cases where "obstructive actions by state actors" has prevented an individual from pursuing a civil claim. *Flagg v. City of Detroit*, 715 F.3d 165, 174 (6th Cir. 2013. The Tenth Circuit, for example, has suggested that where law enforcement officers threatened to revoke a potential plaintiff's probation if he filed a civil rights action based upon his arrest, such conduct may violate the right of access to the courts. *McKay v. Hammock*, 730 F.2d 1367, 1375 (10th Cir. 1984). The Seventh Circuit has held that planting evidence to conceal an unlawful killing committed by police officers unconstitutionally deprived the deceased's family members of an opportunity to vindicate the killing through judicial redress. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984). The Fifth Circuit has also held that "if state officials wrongfully and intentionally conceal information crucial to a person's ability to obtain redress through the courts, and do so for the purpose of frustrating that right, and that concealment and the delay engendered by it substantially reduce the likelihood of one's obtaining the relief to which one is otherwise entitled, they may have committed a constitutional violation." *Crowder v. Sinyard*, 884 F.2d 804, 812 (5th Cir. 1989); *accord Flagg*, 715 F.3d at 173 ("In backward-looking [access to the courts] claims,... the government is accused of barring the courthouse door by concealing or destroying evidence so that the plaintiff is unable to ever obtain an adequate remedy on the underlying claim."); *Vasquez v. Hernandez*, 60 F.3d 25, 328 (7th Cir. 1995) ("[W]hen police officers conceal or obscure important facts about a crime from its victims rendering hollow the right to seek redress, constitutional rights are undoubtedly abridged..").

Mr. Hansen's claim is qualitatively different from the claims made in the cases that have recognized a backward-looking access to the courts cause of action. He does not allege that Salt Lake City actively obstructed his civil suit against his unknown assailant or that the city destroyed or concealed evidence. Mr. Hansen's claim is that the city did not try hard enough to assist his civil litigation efforts against an unknown third party. But, "[t]he constitutional right of access to the civil courts plainly does not encompass a right to receive assistance in gaining access to the civil courts." *Brown v. Brabowski*, 922 F.2d 1097, 1116 (3rd Cir. 1990).

Because the Constitution does not impose a duty on government entities to actively assist the civil litigation efforts of crime victims, Mr. Hansen's federal access to the courts claim fails as a matter of law. This fundamental legal impediment makes amendment of this claim futile. Therefore, Mr. Hansen's fifth cause of action for violations of his right to access to the courts is dismissed with prejudice.

II. OBJECTIONS TO THE DISMISSAL OF THE THIRD CLAIM UNDER ARTICLE 1, SECTION 7 OF THE UTAH CONSTITUTION AND THE FOURTH CLAIM UNDER ARTICLE 1, SECTION 11 OF TH UTAH CONSTITUTION

Judge Warner also recommended that Mr. Hansen's claims under the Utah Constitution be dismissed because lawsuits based upon injuries proximately caused by assault and battery or the violation of civil rights are barred by the Utah Governmental Immunity Act. Utah Code § 63G-7-201(4)(b). Mr. Hansen objected, arguing that "the Utah Governmental Immunity Act does not apply to claims alleging state constitutional violations." *Jensen ex rel. Jensen v. Cunningham*, 250 P.3e 465, 479 (Utah 2011).

The court need not reach the merits of Mr. Hansen's objection because the court dismisses without prejudice his state constitutional claims for an independent reason. As noted above, all of Mr. Hansen's federal claims have been dismissed. "When all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims." *Smith v. City of Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1156 (10th Cir. 1998). Because the only remaining claims arise under the Utah Constitution, and because Mr. Hansen acknowledges that his state constitutional claims raise several novel questions of state law, the court dismisses his constitutional claims under Article 1, Section 7 and Article 1, Section 11 of the Utah Constitution without prejudice. Mr. Hansen may refile his claims in state court if he wishes to pursue them.

CONCLUSION

The court ORDERS as follows:

(1) The Report and Recommendation [Docket 33] is ADOPTED IN PART. The court adopts the portions of the Report and Recommendation that recommend the dismissal with prejudice of the first and second claims for gross negligence and the portion of the third claim that seeks to vindicate Mr. Hansen's right "to substantive and procedural due process of law, and the equal protection thereof" under the United States Constitution.

(2) Salt Lake City's motion to dismiss with prejudice [Docket 24] is GRANTED IN PART AND DENIED IN PART. The court DISMISSES WITH PREJUDICE the first and second claims for gross negligence, the portion of the third claim that seeks to vindicate Mr. Hansen's right "to substantive and procedural due process of law, and the equal protection thereof" under the United States Constitution and the fifth claim under the federal

constitutional guarantee of "access to the courts." The court DISMISSES WITHOUT PREJUDICE the portion of the third claim that seeks redress under Article 1, Section 7 of the Utah Constitution and the fourth claim, which seeks redress under Article 1, Section 11 of the Utah Constitution.

SO ORDERED September 29, 2017.

BY THE COURT:

/s/ Jill N. Parrish
JILL N. PARRISH
United States District Judge