NOT FOR PUBLICATION

FILED

MAY 28 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENT GLEN WILLIAMS, Plaintiff-Appellant, v. BROOKS, Guard; et al., Defendants-Appellees.	No. 18-35587 D.C. No. 1:17-cv-00223-DCN MEMORANDUM*

Appeal from the United States District Court
for the District of Idaho
David C. Nye, District Judge, Presiding

Submitted May 21, 2019**

Before: THOMAS, Chief Judge, FRIEDLAND and BENNETT, Circuit Judges.

Idaho state prisoner Kent Glen Williams appeals pro se from the district court's judgment in his 42 U.S.C. § 1983 action alleging First Amendment claims arising from his pretrial detention at Ada County Jail. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion. *Pagtalunan v. Galaza*,

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

291 F.3d 639, 640 (9th Cir. 2002) (dismissal for failure to comply with a court order); *Valley Eng'rs Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1052 (9th Cir. 1998) (dismissal under Federal Rule of Civil Procedure 37). We affirm.

The district court did not abuse its discretion by dismissing Williams's action as a discovery sanction because Williams was warned that if he chose not to undergo the prison's required medical screening, thereby impeding his in-person deposition, the action would be dismissed, and Williams nevertheless refused to undergo the required medical screening without providing any explanation for his refusal. *See Valley Eng'rs Inc.*, 158 F.3d at 1056-57 (discussing factors to be considered before dismissing under Rule 37(b)).

The district court did not abuse its discretion by denying Williams's motion to amend the complaint because Williams failed to establish "good cause." *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-09 (9th Cir. 1992) (setting forth standard of review and explaining that a plaintiff seeking amendment after the deadline set forth in the scheduling order must demonstrate good cause).

We reject as without merit Williams's contention that the district court erred by failing to accept his proposed amended complaint as a new complaint.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 29 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KENT GLEN WILLIAMS, Plaintiff-Appellant, v. BROOKS, Guard; et al., Defendants-Appellees.	No. 18-35587 D.C. No. 1:17-cv-00223-DCN District of Idaho, Boise ORDER

Before: THOMAS, Chief Judge, FRIEDLAND and BENNETT, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Williams's petition for rehearing en banc (Docket Entry No. 26) is denied.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 06 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KENT GLEN WILLIAMS,

Plaintiff - Appellant,

v.

BROOKS, Guard; et al.,

Defendants - Appellees.

No. 18-35587

D.C. No. 1:17-cv-00223-DCN
U.S. District Court for Idaho, Boise

MANDATE

The judgment of this Court, entered May 28, 2019, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Nixon Antonio Callejas Morales
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

KENT WILLIAMS,

Plaintiff,

v.

GUARD BROOKS; GUARD NETTLETON; GUARD HANSEN; GUARD CULBERTSON; and GUARD JENSEN,

Defendants.

Case No. 1:17-cv-00223-DCN

JUDGMENT

In accordance with the Order filed on this date, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that this case is dismissed with prejudice. Additionally, this case is hereby ordered closed.

DATED: July 2, 2018

David C. Nye
U.S. District Court Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

KENT WILLIAMS,

Plaintiff,

v.

GUARD BROOKS; GUARD NETTLETON; GUARD HANSEN; GUARD CULBERTSON; and GUARD JENSEN,

Defendants.

Case No. 1:17-cv-00223-DCN

ORDER OF DISMISSAL

On May 14, 2018, the Court ordered Plaintiff to notify the Court, within 10 days, whether he intended to comply with the prison's required medical screening and, thereby, cooperate with the taking of his deposition. *See* Dkt. 49. The Court explained why Defendants were entitled to take Plaintiff's deposition and why Defendants' request that Plaintiff comply with the prison's required medical screening prior to that deposition was reasonable. *Id.* The Court also informed Plaintiff that, if he did not timely "notify the Court of his intentions with respect to the medical screening," or if he chose "not to undergo the medical screening (or otherwise obstruct[ed] his deposition), then this entire action [would] be dismissed with prejudice for failure to comply with a Court order or for failure to comply with discovery obligations." *Id.* at 25 (citing Fed. R. Civ. P. 37(b) & (d), 41(b). In addition, the Court denied Plaintiff's motion to amend.

Plaintiff has not complied with the Court's May 14, 2018 Order. In fact, Plaintiff has utterly ignored the Court's instruction to notify it of his intentions with respect to his deposition. Instead, Plaintiff has filed a slew of motions, including a motion for reconsideration of the May 14 Order. *See* Dkts. 50, 51, 52, 54, 55, 56, & 57.

A federal district court has the "inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (internal quotation marks and emphasis omitted). Although courts have authority to reconsider prior orders, they "should be loath to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983)).

"[C]ourts have distilled various grounds for reconsideration of prior rulings into three major grounds for justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence or an expanded factual record; and (3) need to correct a clear error or to prevent manifest injustice." *Gray v. Carlin*, No. 3:11-CV-00275-EJL, 2015 WL 75263, at *2 (D. Idaho Jan. 6, 2015) (internal quotation marks omitted). However, a motion for reconsideration of an interlocutory order should not be used "as a vehicle to identify facts or raise legal arguments which could have been, but were not, raised or adduced during the pendency of the motion of which reconsideration was sought." *Jones v. Casey's Gen. Stores*, 551 F. Supp. 2d 848, 854-55 (S.D. Iowa 2008) (internal quotation marks omitted).

Plaintiff has not met this strict standard for reconsideration of the Court's May 14, 2018 Order. It is clear that Plaintiff disagrees with the Court's legal analysis and conclusions in that Order—indeed, Plaintiff appears to believe that Defendants, the Court, and the state prison are all engaged in a hostile conspiracy against him—but such a disagreement is not a sufficient basis for reconsideration. Plaintiff simply has not established an intervening change in the law, newly-available evidence, clear error, or manifest injustice. Therefore, Plaintiff's Motion to Reconsider will be denied.

ORDER

IT IS ORDERED:

1. Plaintiff's Motion to Reconsider the Court's May 14, 2018 Order (Dkt. 56) is DENIED.
2. Because Plaintiff has refused to comply with the Court's May 14, 2018 Order, this entire action is DISMISSED with prejudice for failure to comply with a Court order and for failure to comply with discovery obligations. *See* Fed. R. Civ. P. 37(b) and (d), 41(b).
3. Because this case has been dismissed, the remaining pending motions (Dkts. 36, 41, 50, 51, 52, 54, 55, and 57) are DENIED as MOOT.

DATED: July 2, 2018

David C. Nye
U.S. District Court Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

KENT WILLIAMS,

Plaintiff,

v.

GUARD BROOKS; GUARD NETTLETON; GUARD HANSEN; GUARD CULBERTSON; and GUARD JENSEN,

Defendants.

Case No. 1:17-cv-00223-DCN

ORDER

Plaintiff is a prisoner in the custody of the Idaho Department of Correction ("IDOC") and is currently incarcerated at Idaho State Correctional Center ("ISCC"). Plaintiff's claims in this civil rights action concern events occurring when Plaintiff was a pretrial detainee in the custody of Ada County and incarcerated at the Ada County Jail. Defendants are Ada County employees, not IDOC employees.

Among the motions pending before the Court are (1) Plaintiff's Motion to Amend the Complaint, (2) Plaintiff's Motion to Extend Discovery, and (3) Defendants' Motion to Compel Plaintiff's Deposition, to Enlarge Time, and for Sanctions, or in the Alternative, to Dismiss Plaintiff's Claims. (Dkt. 26, 29, and 36.) The Court has reviewed the briefs and record and finds that oral argument is unnecessary.[1] *See* D. Idaho Loc. Civ. R. 7.1(d).

[1] Therefore, the portion of Plaintiff's April 20, 2018 motion requesting an evidentiary hearing with respect to the "deposition controversy" addressed in this Order is denied. Dkt. 41 at 1.

For the reasons that follow, Plaintiff's request to amend and to extend all discovery will be denied, and Defendants' Motion will be deferred for decision until a later date. Plaintiff will have 10 days after entry of this Order to notify the Court whether he intends to submit to the prison's required medical screening and, thereafter, to attend a deposition scheduled by Defendants. If Plaintiff does not intend to do so, this action will be dismissed with prejudice as a sanction for Plaintiff's failure to comply with his discovery obligations or for failure to comply with a Court order.

1. Plaintiff's Motion to Amend

Plaintiff filed his Motion to Amend and his proposed amended complaint on March 5, 2018, at the earliest.[2] Dkt. 26. The proposed amended complaint adds multiple new claims and identifies 50 new defendants, in addition to the five current Defendants.

A. Standards of Law

If a motion to amend is filed before the deadline for such motions, the motion is governed by Rule 15 of the Federal Rules of Civil Procedure. That rule states that a court "should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). But Plaintiff's Motion is not governed by Rule 15. All motions to amend or to join parties in this matter were due to be filed no later than January 15, 2018. *See* Scheduling Order, Dkt. 14. Plaintiff did not file his Motion until March 5, 2018. Dkt. 26. Therefore,

[2] *See Houston v. Lack*, 487 U.S. 266, 270-71 (1988) (holding that**Error! Main Document Only.** prisoners who file habeas corpus petitions are usually entitled to the benefit of the "mailbox rule," which provides that a legal document is deemed filed on the date a petitioner delivers it to the prison authorities for filing by mail, rather than the date it is actually filed with the clerk of court); *Douglas v. Noelle*, 567 F.3d 1103, 1107 (9th Cir. 2009) (applying the mailbox rule to civil rights actions).

Plaintiff's request for amendment is governed not by the liberal provisions of Federal Rule of Civil Procedure 15(a), but instead by the more restrictive provisions of Rule 16(b).[3]

Rule 16(b) allows for amendment after the scheduling order deadline only if the moving party establishes good cause. Fed. R. Civ. P. 16(b)(4); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). The good cause standard under Rule 16(b) "primarily considers the diligence of the party seeking the amendment":

> [A] district court may modify the pretrial schedule if it cannot reasonably be met despite the diligence of the party seeking the extension. ... [C]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief. Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification. If that party was not diligent, the inquiry should end.

Id. (internal quotation marks and citations omitted).

B. Diligence of Party Seeking Amendment

Plaintiff's proffered excuse for his filing of an untimely motion to amend is that "[i]t appears that the Defendant[s] deliberately slow walked discovery in order to diminish [Plaintiff's] ability to amend the complain [sic]." Dkt. 26 at 2. There is no

[3] Plaintiff suggests that, if not for Defendants' delay in discovery responses, Plaintiff would have filed his Motion to Amend before the deadline and, therefore, the Motion to Amend "would have been accepted by rule, not having to now be discretionary by the court." Dkt. 26 at 2. Plaintiff is incorrect. Rule 15(a)(2) provides that any amendment other than those that comply with Rule 15(a)(1)—which allows for amendments as a matter of course if filed within 21 days after service of the complaint or 21 days after service of a response pleading or a Rule 12(b) motion—is permitted only with the defendants' consent or by leave of court. And even under the liberal amendment standard of Rule 15(a)(2), a district court's decision on such a motion is within its discretion. *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1530 (9th Cir. 1995).

evidence to support Plaintiff's accusation that Defendants deliberately delayed their discovery responding for purposes of obstructing Plaintiff's opportunity to amend. Moreover, although Defendants' responses to Plaintiff's first set of discovery requests were not provided to Plaintiff within 30 days of service of the requests, Plaintiff agreed to extend the time to respond to those requests, and all responses were provided to Plaintiff by February 7, 2018. Klaas Aff., Dkt. 33-1, at ¶¶ 3-6.

February 7, 2018 fell after the amendment deadline. But Plaintiff has not shown that the information supporting the new allegations in his proposed amended complaint came into his possession only when Defendants responded to his discovery requests. If that were true, good cause would exist for amendment, because it would have been impossible for Plaintiff to include the new allegations in a pleading prior to the amendment deadline.

However, that is plainly not the situation here. The record is clear that the events giving rise to the allegations in the proposed amendment occurred no later than May 1, 2016[4] (*see* Prop. Am. Compl., Dkt. 28, at 41), and Defendants produced to Plaintiff the exhibits he relies on in his proposed amended complaint "in September 2016 as initial disclosures in a companion lawsuit, *Williams v. Fox*, Case No. 1:16-cv-00143-DCN." Dkt. 33 at 4; Dkt. 39; *see also* Exs. to Dkt. 28.

[4] One of the dates identified in the proposed amendment is January 11, 2018. (Dkt. 28 at 20.) However, from the context of the surrounding paragraphs, it appears that this was a typographical error, and the date was actually intended to be identified as January 11, *2016*. *See id.*

That date was long before even the *original filing date of this case*. Plaintiff filed this action on May 22, 2017,[5] more than a year after the last event described in the amendment. Plaintiff has not explained what information he did not have, at any point prior to receiving Defendants' discovery responses in February 2018, that is now included in the proposed amendment. Therefore, Plaintiff has not shown that he was diligent in preparing his amended complaint, and the blame for the untimely motion to amend cannot be placed on Defendants' late responses. Given that Plaintiff had this evidence in September 2016, the Court sees no reason why Plaintiff could not have filed his Motion to Amend before the January 15, 2018 deadline.

C. Futility of Claims in Amendment

Further, good cause does not exist because most of the claims in the proposed amendment are futile. Several of the claims are futile because they would be untimely.

The statute of limitations for civil rights actions arising in Idaho is two years. Idaho Code § 5-219; *see also Wilson v. Garcia*, 471 U.S. 261, 280 (1985) (holding that state statute of limitation for personal injury actions governs § 1983 actions), *abrogated on other grounds by Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004). The proposed amended complaint was filed, at the earliest, on March 5, 2018.

[5] The Clerk of Court received the Complaint on May 22, 2017. Although Plaintiff's Complaint is dated October 28, 2016, Plaintiff is not entitled to this earlier filing date because he did not deliver the Complaint in *this* action to prison authorities for filing on that date. Plaintiff's Complaint is a copy of a complaint in one of Plaintiff's previous actions, which he filed in 2016 and which Plaintiff later voluntarily dismissed. *See Williams v. Brooks*, Case No. 1:16-cv-00478-EJL (D. Idaho, dismissed March 15, 2017). Thus, the date on the Complaint in this case is incorrect, and the mailbox rule does not apply.

In addition to the grievance-related claims Plaintiff asserted in the original Complaint, the proposed amendment asserts due process, deprivation of food claims, excessive force claims, invasion of privacy claims, and claims under the Free Exercise Clause and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Dkt. 28 at 3-43. None of these claims arises "out of the conduct, transaction, or occurrence set out ... in the original pleading"—that is, Defendants' actions with respect to Plaintiff's jail grievances. Fed. R. Civ. P. 15(c)(1)(B).

Plaintiff's due process, deprivation of food, excessive force, free exercise, and RLUIPA claims arose no later than September 11, 2015. Dkt. 28 at 4-15; Ex. to Prop. Am. Complt., Dkt. 28-5, at 00750-00753. Allowing a maximum of 30 days to exhaust the jail grievance procedures, *see Brown v. Valoff*, 422 F.3d 926, 943 (9th Cir. 2005), a lawsuit asserting such claims should have been filed no later than Wednesday, October 11, 2017, nearly five months before Plaintiff submitted his proposed amendment. Because these claims do not arise from the same conduct, transaction, or occurrence as Plaintiff's grievance-related claims described in the original Complaint, the new claims do not relate back to that Complaint. Fed. R. Civ. P. 15(c)(1)(B). Thus, the claims are untimely.

Plaintiff's proffered excuse for failing to include the new, time-barred claims in an earlier filing is that he "did not 'become aware that [his] civil rights were violated'" when the events giving rise to the claims occurred. Dkt. 39 at 9, quoting *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1477 (9th Cir. 1993). But this is demonstrably false. According to the proposed amended complaint, Plaintiff was present when the newly-

identified proposed defendants took the actions described with respect to Plaintiff's due process, deprivation of food, excessive force, free exercise, and RLUIPA claims. Thus, Plaintiff obviously knew of "his injury and its cause" no later than September 11, 2015. *Gibson v. United States*, 781 F.2d 1334, 1344 (9th Cir. 1986).

In the proposed amended complaint, Petitioner has also attempted to name new defendants with respect to his grievance-related claims of violation of his First Amendment right to petition the government for redress, right to free speech, and right to be free from retaliation. In his reply in support of his Motion to Amend, Plaintiff states that he was previously unable to identify "the true culprit" who allegedly returned his grievances and only recently learned that he had initially named the wrong individuals in the Complaint; therefore, asserts Plaintiff, he cannot be blamed for mistakenly naming a current defendant instead of a newly-named or an as yet unidentified defendant. Dkt. 39 at 5. However, a claim in an amended complaint can relate back to the original complaint, as to a party who was misidentified, only in narrow circumstances.

Even where the claim against a newly-named defendant arises out of the same conduct, transaction, or occurrence as a claim in the original pleading against a mistakenly-identified defendant, the amendment will relate back with respect to the new defendant only if—within 90 days after the filing of the original complaint (or, in the case of prisoner cases subject to 28 U.S.C. § 1915A, within 90 days after the entry of the Initial Review Order)—the new defendant "(i) received such notice of the action that [he or she] will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against [him or her], but for a mistake

concerning the proper party's identity." Fed. R. Civ. P. 15(c)(1)(C); *see also* Fed. R. Civ. P. 4(m). Plaintiff has not provided any evidence that the newly-named defendants received such notice or had reason to know of a mistaken identification. Therefore, the claims identified in the original Complaint as being asserted against a current Defendant no longer would be timely if asserted against a new or currently-unidentified potential defendant. Because they are untimely, these claims are also futile.

Finally, Plaintiff claims that the jail violated his right to privacy by mounting a video camera with a view of Plaintiff's cell. However, even if Plaintiff's invasion-of-privacy claims are timely (Plaintiff describes the video camera as recording images from August 2015 to "approximately May, 2016," *see* Dkt. 28 at 42), amendment is futile as to such claims because there is no right to privacy in a jail or prison cell. *See Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984) ("We hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."); *Mitchell v. Dupnik*, 75 F.3d 517, 522 (9th Cir. 1996) ("An inmate ordinarily has no reasonable expectation of privacy as to his jail cell or his possessions within it."); *Al-Kidd v. Gonzales*, No. CV 05-093-EJL-MHW, 2008 WL 553777, at *14 (D. Idaho Feb. 13, 2008), *report and recommendation adopted*, No. CV:05-093-S-EJL-MHW, 2008 WL 2795137 (D. Idaho July 17, 2008) (stating that "prison inmates and pretrial detainees may not expect privacy rights to be equivalent to those outside of prison walls" and that

"prisoners and detainees have no reasonable expectation of privacy from observation in a prison environment") (citation omitted).

D. Prejudice to Defendants

Some of Plaintiff's grievance-related claims against certain newly-named defendants might be timely, because it is alleged that some of the proposed defendants took certain actions within two years and thirty days before March 5, 2018—the date of filing of the proposed amendment. Dkt. 28 at 28-41. However, the current Defendants would suffer prejudice if Plaintiff were allowed to amend to assert his claims against these new defendants in this action. None of the potential new defendants have appeared. Litigation on the new claims against these newly-identified defendants would have to begin anew, and the current Defendants would have to wait an exceedingly long time for the claims against them to be adjudicated. The Court will not require them to do so. And once again, the Court reiterates that Plaintiff has not shown that the information leading to the allegations against these newly proposed defendants was not available to him prior to the deadline for motions to amend.

For the foregoing reasons, Plaintiff has not established good cause for amendment, and his Motion to Amend will be denied.[6]

[6] Even if the Court were reviewing the Motion to Amend under the more liberal pleading standards of Rule 15(a)(2), it would deny the Motion for the same reasons. *See Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004) ("In assessing the propriety of a motion for leave to amend [under Rule 15], we consider five factors: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5) whether the plaintiff has previously amended his complaint. Futility alone can justify the denial of a motion for leave to amend.") (internal citation omitted).

2. Plaintiff's Motion to Extend Discovery

Plaintiff must also show good cause for his request to extend the discovery deadline. *See* Fed. R. Civ. P. 16(b). Plaintiff's cited reason for this request is that, because two Defendants have recently denied certain allegations in the Complaint, "[i]t is now necessary to discovery the identity of a Doe" and "to engage in further discovery to confirm or deny [the] guilt of two Defendants." Dkt. 29 at 2. Plaintiff also claims that Defendants "have given very evasive responses to interrogatories which has necessitated further discovery." (*Id.*)

These vague allegations are insufficient to establish good cause to extend the discovery period as Plaintiff requests. The Court agrees with Defendants that "Plaintiff's repeated accusations that defense counsel attempted to 'slow roll' discovery though 'nefarious conduct' ... so that the limitations period would run on totally unrelated claims, against fifty-some odd individuals not named in the complaint, is an ill-conceived conspiracy theory." Dkt. 37 at 3.

Further, to the extent that Plaintiff has not yet identified the true identity of an individual who engaged in certain actions, it is not Defendants' responsibility to investigate Plaintiff's case for him. Plaintiff has not established that his discovery requests included a request for the identity of any potential Doe defendants, if the current Defendants even had knowledge of such individuals, or that Defendants did not respond honestly to any such request.

For these reasons, Plaintiff's request to extend the discovery deadline "to confirm or deny guilt of two Defendants ... and to potentially identify a Doe" will be denied. Dkt. 29 at 2.

3. Defendants' Motion to Compel Plaintiff's Deposition, to Enlarge Time, and for Sanctions, or in the Alternative, to Dismiss Plaintiff's Claims

Unlike Plaintiff, Defendants do not seek a blanket extension of the discovery period. Rather, Defendants seek a narrow extension for the sole purpose of conducting Plaintiff's deposition, which originally was scheduled during the open discovery period. The Court now considers whether Defendants have shown good cause for such an extension.

A. Background

Pursuant to Federal Rule of Civil Procedure 30 and this Court's Scheduling Order Dkt. 14, Defendants properly noticed Plaintiff's deposition for March 22, 2018. Two attorneys for Defendants, as well as a court reporter, arrived at ISCC for the deposition. Klaas Aff., Dkt. 36-2, at ¶¶ 2-3. The warden informed counsel "that Plaintiff was currently in a segregation unit, and had been for approximately four months." *Id.* at ¶ 4. The warden, concerned about Plaintiff's privacy rights, declined to tell counsel the specific details regarding Plaintiff's segregation but did state that Plaintiff was not in segregation for disciplinary reasons. (*Id.*) Instead, "the reason for segregation was Plaintiff's refusal to cooperate with IDOC policy requiring mandatory medical testing for potential health risks, thus requiring ISCC to keep Plaintiff isolated until he complies with the medical testing." *Id.* The warden warned counsel that he "could not be certain

that counsel and the court reporter would not be exposed to potential health risks should the deposition go forward." *Id.*

Counsel decided to cancel the deposition because of the warden's warning, rather than "place the court reporter and themselves at risk." *Id.* The ISCC warden later confirmed, by email to counsel, that Plaintiff would be kept in segregation until he complied with the medical screening and that the reason for Plaintiff's refusal was "unknown, but we have to consider him a potential health risk." Ex. A to Klaas Aff., Dkt. 36-2.

The next day, Defense counsel sent a letter to Plaintiff explaining what happened the day of the scheduled deposition. Plaintiff has characterized this letter as threatening and inappropriate; however, the Court finds that characterization inaccurate. The body of the entire letter states:

> Re: *Williams v. Brooks et al.*
> Case No. 1:17-cv-00223-DCN
> Meet & Confer re. Plaintiff's Deposition
>
> Mr. Williams:
>
> This letter is in regard to the deposition that was scheduled for March 22, 2018, at the Idaho State Correctional Center ("ISCC") in Kuna, Idaho. A notice of the deposition was sent to you via U.S. Mail on February 26, 2018, in compliance with the reasonable notice provisions of the applicable Federal Rule of Civil Procedure and the Court's Scheduling Order in this case.
>
> Upon arrival at the ISCC, the court reporter, my colleague, and I were informed that you are currently in a segregation unit, and have been for approximately four months. The ISCC staff were unable to share the precise reason for your segregation due to privacy law concerns. However, the ISCC

staff was able to share that the reason for segregation is your refusal to cooperate with IDOC policy requiring mandatory medical testing for potential health risks requires you to remain in isolation. Consequently, ISCC could not be certain that we would not be exposed to potential health risks should the deposition go forward. Based on this information, it was determined not to risk exposure to any potential contagion you may have.

You knew about this situation, but did not inform me about it in advance. If you would have informed me of the situation, my clients would not have incurred the expense for counsel and the court reporter to travel to ISCC and needlessly waste the better part of a morning only to be pulled aside by the warden as we literally walked to the hearing room to be informed you may pose an unknown health risk. You certainly had sufficient time and opportunity to provide such warning. Since I sent notice of the deposition to you on February 26, you have sent me at least 10 packets of court filings and one meet and confer letter. You neglected to mention in any of those documents that you presented a potential health hazard due to your own refusal to undergo testing.

It appears that the ball is in your court, Mr. Williams, on whether your deposition will take place and whether court intervention will be necessary. I have no authority to require you to undergo whatever screening it is that is causing you to be in a segregation unit. I do not think it is appropriate to request the Court to order [you] to undergo any such testing. I hope that you understand the unreasonableness of forcing me and the court reporter (who is a private citizen, not a public employee) to potentially expose ourselves to unknown health risks in order to take your deposition in a case that you have filed. Let me make clear: it is your choice whether to undergo whatever testing/screening is required to get you out of segregation. I am not attempting to coerce you to undergo the testing. Rather, I am simply informing you that I believe that I will need to seek some remedy and/or sanction from the Court because your deposition is an important part of the defense of my clients against the claims you are making against them.

> The deadline for taking depositions is April 13, 2018, so this situation needs a quick resolution. Please provide me a response as soon as possible, but no later than **March 28, 2018**. After that date, I may need to move forward with the Court to seek a resolution to his matter.

Ex. B to Klaas Aff., Dkt. 36-2.

Plaintiff responded to defense counsel with a letter of his own, which begins as follows:

> RE 1:17-cv-00223-DCN
> Requested response to your spastic, harrasing March 23 2018 letter / Discovery Request
>
> Your [sic] an idiot. Dont waste my time or exspense ever again asking me to respond to such idiocy. And watch how you talk to me also. I wont [sic] be harrased or threatened or intimidated by the Prosecutors office or DOC or sheriff!
>
> ~~Fuck you~~,KW
>
> Kent Williams
>
> P.S. Yeah, Please, Please, get court intervention. I'd love the Judge to read that ~~Bitch~~KW letter. you ever talk to me like that again I'll get a protective order against you and show the Judge that pathetically idiotic letter.
>
> Before you visit me or the reporter I demand to review YOUR ~~fucking~~KW medical file and a letter from a doctor before you visit. If you come to visit me with out a letter from a doctor saying your not a danger to me—and whoever you bring with you.
>
> If I do not have advanced documentation I will refuse the visit you ~~fucking~~KW stupid spastic. And you owe me 64 cents for this envelope I had to waste responding. Next time you ever send me such a stupid and insulting request for a response it will be ignored.
>
> Who the f. are you?

And I'm serious. I DEMAND your Yes. You! medical history and a letter from a doctor saying your safe to be around before I go near you. And any one you bring. How did you pass a bar examination? You better have evidence of allegations you make against me and my character. I wont have a little Pissant like you smutting my name up.

and you really need a deposition for this silly little incident? If tax payers werent paying it you wont do one. I know your little game plan—I ain't biting.

If you do not have evidence you have taken all available innoculations and contagious diseases tests I may have to get a court order to force compliance.

The ball is now in your court, dont bother passing it back I will not respond any further but go directly to the court. "lets make it clear: It is your choice whether to undergo whatever testing/screening [I require] you [to visit me]" works both ways, Pal: WTF are you?

what's good for you is good for me. what the ~~fuck~~ hell is wrong with you Dude? Regardless I may still notify the court of this undescribable letter, its simply pathetic and grossly inappropriate. If I do I will give you advanced warning. I may also file another complaint with the bar.

Explain to the Judge why your wasting tax payers money on a deposition for this issue also.

Is the judge going to order you, yours and mine witnesses, jurors, spectators court workers go through testing & provide their medical files befor THEY can go into ~~a~~ his court room? If he does for me he's got to for all. let's go there

You requested a response, it is: Fuck you.

Pull your head out of your ass. If I was contageious 1) its my right; 2) I wouldnt be in segregation Id be in the hospital, Idiot. (let me guess, your going to have IDOC place me in the hospital to help clean up your rumor mongering.)

Seriously, what is wrong with you? Face it. those shit bag cops broke the law. Pay up, Put them in check, and move on. Take Responsibility. This is disgusting. You practice your Religion in Peace I'll practice mine. Dont go after mine, I wont tolerate this or you trying to impied my right to access the courts. Its not DOC policy/practice contingent or contingent on your lack of character.

You got until April 28, 2018 to provide proof you have be innoculated and tested against every communicable disease (and any one you may bring around me. Have you asked for the Judges medical file/history also? Why not his/hers?)

The only thing I can see being a problem. If I am in hand restraints. Pre empt that possibility. All courts recognise they confuse people. I wont go under oath and risk a perjury charge because I was confused and frustrated by hand restraints.

You best provide some evidence to support your allegation partner—This is not acceptable behavior, Pal.

What evidence DO you have to support your claim I am contagious with shit? And what am I supost to be contagious with?

Answer or I get a court order to force an answer.

If your the one with the problem you put on protective gear to come visit me <u>After</u> and <u>only</u> <u>After</u> you provide <u>me</u> with evidence you are not contagious or who ever you bring with you or who ever else comes near me.

If I do not have your (and others) medical file and examination report by the 28th of April I <u>MAY</u> "seek ~~court~~ some remedy and/or sanction from the court ..."

Youve misquoted case law (I'm sure Judge Lodge was real pleased that you embarrassed him on that one) misapplied case law, lied about evidence, put up completely frivolous defenses and now this. Your begging simply conceed & chastise the jail guards for this childish behavior. This is bush league.

> Next time you just go straight to the court with this pathetic shit I dont want to ever have to read—and respond!—to such pathetic garbage. Your what gives your honorable profession such a bad name.
>
> look, you lost it, had a bad day, OK, I get it. Be man enough to simply write me an apology letter & well move on. I'll be adult about it.
>
> I will still need your medical reports I fear and have evidence you got syphilis, your brain is not quite functioning right. You must have some communicable disease to write such an _____ letter. let's get those reports to me by the 28th.

Ex. C to Klaas Aff., Dkt. 36-2 (verbatim, alterations and blank space in original). The letter continues in a similar vein for several more pages and includes an "official discovery request" for Defendants' and defense counsel's medical records. *Id.* Plaintiff also responded to defense counsel's letter by filing a motion for a Court order requiring "counsel and others involved with litigation to go through medical screening," but that motion is not yet ripe. Dkt. 41.

Plaintiff sent Defendants' counsel a second letter asking for specifics of the conversation between counsel and the warden on the day of the scheduled deposition, claiming that the warden may have been retaliating against Plaintiff for Plaintiff's exercise of his constitutional rights. Ex. D to Klaas Aff., Dkt. 36-2. Plaintiff also stated that he would consider filing a restraining order against Defendants' counsel, "advise[d] [Defendants' counsel] to quit slandering me, threatening me or take chilling action against me for exercising my constitutional rights," and called counsel a "fucking idiot." *Id.*

Defendants then filed the instant motion, requesting that the Court "order Plaintiff to submit to ISCC's required medical tests," extend the time to take Plaintiff's deposition, extend the deadline for dispositive motions, and award Defendants attorney fees and costs. Dkt. 36-1 at 4. Alternatively, Defendants ask the Court to dismiss Plaintiff's claims for failure to comply with discovery obligations.

Plaintiff states that he has physical contact with others, including prison staff members, so he cannot be much of a health risk. Plaintiff also states that a deposition is unnecessary, that he is not currently undergoing any medical monitoring or evaluation, and that the warden lied to defense counsel by saying that Plaintiff was in isolation.[7] Dkt. 40 at 4-6; Dkt. 43 at 4. Plaintiff notes that he is not in "isolation," but "segregation," evidently a different type of custody. Dkt. 40 at 6. However, Plaintiff does not dispute that he has refused to submit to the prison's required medical screening. It appears that Plaintiff has religious reasons for his refusal. *See* Dkt. 28 at 4.

B. Discussion

The Court finds that good cause exists to extend the deposition deadline for the narrow purpose of allowing Plaintiff's deposition. Plaintiff filed this civil action against Defendants; therefore, Defendants have a right to take Plaintiff's deposition pursuant to

[7] Plaintiff's response to Defendants' motion is also filled with personal accusations against defense counsel and allegations that counsel has misquoted case law in this Court and otherwise has acted unethically. *See generally* Dkt. 40. The Court specifically rejects such accusations against defense counsel as nothing more than unsubstantiated, ad hominin attacks. There is also no evidence to support Plaintiff's frivolous allegations that "this deposition thing was a ruse" and that defense counsel "scheduled an unnecessary deposition in order to 'get told' [Plaintiff] is in segregation; to fein [sic] fright." Dkt. 40 at 2. And Plaintiff's beliefs about what might have happened if defense counsel had chosen to conduct the deposition on March 22, 2018 are nothing more than speculation. *Id.* at 4.

Federal Rule of Civil Procedure 30. The Court also previously granted Defendants leave to conduct Plaintiff's deposition. Dkt. 14.

Plaintiff objects that Defendants have not explained why written discovery requests were insufficient, but Defendants need not do so. It is irrelevant that Plaintiff believes a deposition is unnecessary because Defendants are entitled to depose him.

However, the Court finds it inappropriate, within the context of this lawsuit regarding First Amendment rights to freedom of expression, to order Plaintiff to submit to medical procedures, screening, or testing to which he does not consent. Thus, Defendants' request for an order compelling Plaintiff to do so will be denied.[8]

But the Court still must strike a balance between Plaintiff's and Defendants' rights in this litigation. Knowing he was confined to segregation as a result of his own decision-making, Plaintiff could have asked the warden whether there were any restrictions or cautions regarding the taking of his deposition. That would have saved Defendants and their counsel the expense and time of a futile endeavor. Defendants and their counsel cancelled the deposition only after the warden informed counsel that Plaintiff was being segregated because he might pose a health risk. Plaintiff is in a prison—an environment in which disease can spread quickly and widely—and counsel has understandable concerns. Whether Plaintiff actually posed (or continues to pose) a health risk is not what matters here—it is that Plaintiff's custodian informed Defendants' counsel that Plaintiff

[8] In declining to issue such an order, the Court does *not* find that the prison's required medical screening is unconstitutional or otherwise improper absent Plaintiff's consent. The Court simply does not believe that an order requiring Plaintiff to undergo such screening is appropriate in this particular litigation.

might pose such a risk. After hearing the warden's warnings, counsel acted reasonably in choosing to avoid the potential risk by cancelling the deposition.

Plaintiff obviously was offended by defense counsel's letter, but that letter was neither threatening nor inappropriate. Though Plaintiff appears to have construed the letter as an accusation that Plaintiff suffers from a communicable disease, that is plainly not what counsel's letter says. Counsel was not accusing Plaintiff of having a disease; counsel's point was that the risk of any such disease was unknown because of Plaintiff's own actions.

It was Plaintiff's responses—laced with unnecessary vulgarity—that were unprofessional, not the letter from defense counsel. Plaintiff notified Defendants' counsel that he would no longer cooperate with defense counsel on discovery issues. However, no matter Plaintiff's wishes, he must comply with his discovery obligations as required by the Court and by the Federal Rules of Civil Procedure.

Based on the foregoing, the balance between the rights of the parties in this matter weighs as follows. As stated previously, the Court will not require Plaintiff to undergo the prison's medical screening, but it also will not require defense counsel or anyone else to depose Plaintiff in an environment where the health risks are unknown as a direct result of Plaintiff's refusal to be screened. Given that Defendants are entitled to depose Plaintiff and that Defendants' request that Plaintiff undergo the required medical screening prior to any deposition is reasonable, it is now up to Plaintiff how this litigation will proceed on this issue.

It was Plaintiff's choice to file this lawsuit. For the following reasons, it is also Plaintiff's choice whether to continue the lawsuit or to have it dismissed.

Failing to comply with discovery obligations, including failing to attend a deposition, is an appropriate basis for dismissal under Federal Rule of Civil Procedure 37. Rule 41(b) also allows for dismissal when a plaintiff fails to comply with a Court order. The Court must consider five factors in determining whether to dismiss a case as a sanction under Rule 37 or Rule 41(b): "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130 (9th Cir. 1987) (internal quotation marks omitted).

Here, if Plaintiff chooses not to submit to the required medical screening, the public interest and the need to manage the Court's docket would weigh in favor of dismissal. Plaintiff's continued refusal would result in the inability of Defendants to safely depose Plaintiff, "impede[] resolution of the case[,] and prevent[]" the Court from adhering to its schedule. *Id.* at 131. The risk of prejudice to the defendants also weighs in favor of dismissal, because if Plaintiff obstructs his deposition, Defendants will be denied the opportunity to depose him and to construct their case accordingly.

The fourth factor—the policy favoring disposition of cases on their merits—weighs against dismissal. But as to the fifth factor, there are no less drastic alternatives available if Plaintiff decides to obstruct his deposition by continuing to refuse to submit

to medical screening—at least, there are none that would place Defendants in the same position as if they conducted a face-to-face deposition.

Rule 31 allows for depositions by written questions, but such depositions are not a true substitute for an oral examination. *See Zito v. Leasecomm Corp.*, 233 F.R.D. 395, 397 (S.D.N.Y. 2006) ("Written questions are rarely an adequate substitute for oral depositions both because it is difficult to pose follow-up questions and because the involvement of counsel in the drafting process prevents the spontaneity of direct interrogation."). And although the Court has considered the possibility of deposition by telephone or videoconference—which would allow an oral deposition to take place without contact between Plaintiff and counsel or the court reporter—the Court will not order non-party prison authorities to accommodate any such deposition. The prison will not be required to provide the equipment and facilities required for such a deposition or the staff necessary to ensure security coverage for an hours-long videoconference or telephone call. Moreover, a telephonic deposition would not allow Defendants' counsel to evaluate Plaintiff's demeanor, and a videoconference deposition would require the videographer to be in close contact with Plaintiff, even if only to set up the equipment—a risk the Court is unwilling to take.[9]

Plaintiff's position on this issue is simply untenable. He will not be allowed to maintain this lawsuit while at the same time refusing to cooperate in the taking of his own

[9] That prison staff members may be exposed to Plaintiff on a daily basis does not, contrary to Plaintiff's implication, justify requiring other people—who are not obligated by their employment to interact with Plaintiff—to expose themselves to the unknown health risks potentially posed by an inmate who refuses to submit to required medical screening.

deposition. He cannot have it both ways. If Plaintiff chooses to undergo the required medical screening—or if he has already done so—then Plaintiff's deposition can be re-noticed and appropriately taken after such screening. If Plaintiff chooses not to undergo the required medical screening, then the Court will dismiss this case with prejudice.

To be clear, the Court does not find that Plaintiff refused to submit to medical screening for the very purpose of obstructing his deposition. However—because the Court has determined that Defendants' request for medical screening prior to Plaintiff's deposition is reasonable and should be accommodated—any *future* refusal will indeed constitute failing to cooperate with that deposition and, therefore, will result in the willful obstruction of his discovery in this matter. Therefore, dismissal would be an appropriate sanction. *See Sigliano v. Mendoza*, 642 F.2d 309, 310 (9th Cir. 1981) ("[The Ninth Circuit] has specifically encouraged dismissal ... where the district court determines 'that counsel or a party has acted willfully or in bad faith in failing to comply with rules of discovery or with court orders enforcing the rules or in flagrant disregard of those rules or orders.'") (quoting *G-K Props. v. Redevel. Agency*, 577 F.2d 645, 647 (9th Cir. 1978)).

ORDER

IT IS ORDERED:

1. Plaintiff's Motion to Amend (Dkt. 26) is DENIED. Plaintiff's request that his proposed amended complaint "be accepted as a new complaint if the court denies him his request to amend" (*id.* at 1) is also DENIED. Plaintiff's concern about replacing the copies of the exhibits submitted with the proposed amendment is misguided, as a complaint in federal court does

not require exhibits. Further, parties are expected to keep copies of their court filings. Plaintiff may file a new complaint himself if he so chooses.

2. Plaintiff's Motion to Extend Discovery (Dkt. 29) is DENIED.

3. Because the Court has already resolved Plaintiff's Motion to Stay Pleadings, *see* Dkt. 45, Plaintiff's Request to Withdraw that motion (Dkt. 38) is MOOT.

4. The Court will defer until a later date its decision on Defendants' Motion to Compel Plaintiff's Deposition, to Enlarge Time, and for Sanctions, or in the Alternative, to Dismiss Plaintiff's Claims, as well as its decision on any other pending motions.

5. Within 10 days after entry of this Order, Plaintiff must notify the Court and Defendants whether he will undergo—or has already undergone—the prison's required medical screening. If Plaintiff has not yet undergone the screening but chooses to do so, then he must notify the Court and Defendants of the completion of the screening within 30 days after entry of this Order, or he must move for an extension of time if the prison medical providers cannot complete the screening in that time. Plaintiff will not be required to disclose the results of the screening. If Plaintiff chooses to undergo the screening, the deadline for the taking of Plaintiff's deposition will be extended to 30 days after the Plaintiff notifies the Court and Defendants of completion of the screening. Plaintiff must cooperate with the taking of his deposition, including submitting to handcuffs or other

restraints that prison authorities may deem necessary during the deposition. Defendants must notify the Court as soon as reasonably practicable after Plaintiff's deposition takes place.

6. The dispositive motions deadline is stayed pending further order of the Court. Because Defendants filed a Motion for Summary Judgment notwithstanding their request for an extension of the dispositive motion deadline, that Motion for Summary Judgment (Dkt. 47) will be deemed MOOT. Defendants may renew that Motion, or file a different dispositive motion, once the Court institutes a new deadline.

7. If Plaintiff does not notify the Court of his intentions with respect to the medical screening within 10 days after entry of this Order, or if Plaintiff chooses not to undergo the medical screening (or otherwise obstructs his deposition), then this entire action will be dismissed with prejudice for failure to comply with a Court order or for failure to comply with discovery obligations. *See* Fed. R. Civ. P. 37(b) and (d), 41(b).

DATED: May 14, 2018

David C. Nye
U.S. District Court Judge

Additional material from this filing is available in the Clerk's Office.

No. 19A496

IN THE

SUPREME COURT OF THE UNITED STATES

Kent Williams — PETITIONER
(Your Name)

VS.

Brooks, etal — RESPONDENT(S)

PROOF OF SERVICE

I, Kent Williams, do swear or declare that on this date, December 12, 2019, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

sherry A morgan, catherine A freeman, Deputy prosecuting attorneys, 200 west front street Room 3191, Boise Idaho 83702

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

Executed on December 12, 2019

Kent Wil
(Signature)