NOT FOR PUBLICATION

FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GLEN JONES WARD, Plaintiff-Appellant, v. STATE OF IDAHO; et al., Defendants-Appellees.	No. 19-35279 D.C. No. 1:18-cv-00325-DCN MEMORANDUM*

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

Submitted May 6, 2020**

Before: BERZON, N.R. SMITH, and MILLER, Circuit Judges.

Idaho state prisoner Glen Jones Ward appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging Eighth Amendment failure-to-protect claims and related state law claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Watison v. Carter*, 668 F.3d 1108, 1112

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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).

(9th Cir. 2012) (dismissal for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B)(ii)); *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000) (dismissal for failure to state a claim under 28 U.S.C. § 1915A). We affirm.

The district court properly dismissed Ward's Eighth Amendment failure-to-protect claim because Ward failed to allege facts sufficient to demonstrate that the individual defendants' actions, including vocalizing "Charge Check" over the prison's radio in connection with Ward's request for protective custody, posed a substantial risk of harm. *See Lemire v. Cal. Dep't of Corrs. & Rehab.*, 726 F.3d 1062, 1074 (9th Cir. 2013) (setting forth elements of a failure-to-protect claim).

The district court properly dismissed Ward's claims against the State of Idaho, the Idaho Department of Corrections, and the Idaho State Correctional Center as barred by Eleventh Amendment immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (the Eleventh Amendment bars suits against states or its agencies or departments absent their consent to be sued); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (state agencies such as the Department of Prisons are immune from suit under the Eleventh Amendment).

The district court properly dismissed Ward's state law claims because Ward failed to allege facts sufficient to state a plausible claim. *See Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010) (although pro se pleadings are construed liberally, plaintiff must present factual allegations sufficient to state a plausible claim for

relief); *see also Yoakum v. Hartford Fire Ins. Co.*, 923 P.2d 416, 421 (Idaho 1996) (finding no private right of action in state criminal statutes).

The district court did not abuse its discretion in denying Ward's requests for appointment of counsel because Ward failed to demonstrate "exceptional circumstances" warranting the appointment of counsel. *See Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (setting forth standard of review and "exceptional circumstances" standard for appointment of counsel).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

We do not consider facts or documents that were not raised before the district court. *See United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990).

All pending motions and requests are denied.

AFFIRMED.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

GLEN JONES WARD,

Plaintiff,

v.

STATE OF IDAHO; IDAHO DEPARTMENT OF CORRECTION; IDAHO STATE CORRECTIONAL CENTER; JOHN ROBERT; ALEXANDER NESHIKOFF; ROBBINS; PROCTOR; COX; FLANNERY; BLADES; ROJAS; TOCKER; MATTHEWSON; CRUZ; WARD; HARANAC; and GRAHAM,

Defendants.

Case No. 1:18-cv-00325-DCN

SUCCESSIVE REVIEW ORDER BY SCREENING JUDGE

Plaintiff Glen Jones Ward is a prisoner proceeding pro se and in forma pauperis in this civil rights action. The Court previously reviewed Plaintiff's complaint pursuant to 28 U.S.C. §§ 1915 and 1915A, determined that it failed to state a claim upon which relief could be granted, and allowed Plaintiff an opportunity to amend. *See Initial Review Order, Dkt. 9.*

Plaintiff has now filed an amended complaint, along with numerous other filings, exhibits, and supplements. *See Dkt. 10, 11, 14, 15, 16, & 17.* Plaintiff was previously warned that "any amended complaint must contain all of Plaintiff's allegations in a single pleading and cannot rely upon, attach, or incorporate by reference other pleadings or documents." *Dkt. 9* at 11. Therefore, in determining whether Plaintiff has stated a claim

an unwilling attorney to represent an indigent litigant in a civil case"); *Veenstra v. Idaho State Bd. of Corr.*, Case No. 1:15-cv-00270-EJL (D. Idaho May 4, 2017) ("[The Court] does not have inherent authority to compel an attorney to represent Plaintiffs pro bono."). The Court has no funds to pay for attorneys' fees in civil matters such as this one.

The legal issues in this matter are not complex. And although Plaintiff appears to have struggled to articulate his allegations in a coherent manner, a litigant is not entitled to pro bono counsel merely to explore whether he may have a colorable claim and to draft a pleading asserting any such claim. Also, as the Court concludes below, the amended complaint fails to state a claim upon which relief may be granted; therefore, Plaintiff does not have any likelihood of success on the merits. Accordingly, the Court will deny Plaintiff's request for counsel.

2. Screening Requirement

As explained in the Initial Review Order, the Court must dismiss a prisoner or in forma pauperis complaint—or any portion thereof—that states a frivolous or malicious claim, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915(d)(2) & 1915A(b).

3. Pleading Standard

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint fails to state a claim for relief under Rule 8 if the factual assertions in the complaint, taken as true, are insufficient for the reviewing court plausibly "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678

the Idaho Code, which is Idaho's criminal code. And the undersigned recognized that the initial complaint included numerous Idaho statutory citations when it screened a complaint in another of Plaintiff's cases. *See Ward v. IDOC*, 1:18-cv-00508-DCN (D. Idaho Jan. 22, 2019) (Dkt. 9) ("Like Plaintiff's many other cases in this Court, the Complaint in this case cites a multitude of federal and state statutes.") (citing *Ward v. Idaho*, 1:18-cv-00325-DCN). The Court simply made a mistake in neglecting to include the word "*cognizable*" in the phrase quoted above.

Plaintiff's claims based on Idaho criminal statutes are, in fact, not cognizable—which means that they cannot be heard. This is because (1) the Court has no authority to hear state criminal matters, (2) an individual person like Plaintiff, as opposed to the United States itself through the Department of Justice, has no power to initiate a criminal action in federal court, *see Dkt. 9* at 9-10, and (3) none of the state criminal statutes cited by Plaintiff give rise to civil liability, *see Yoakum v. Hartford Fire Ins. Co.,* 923 P.2d 416, 421 (Idaho 1996) (finding no private right of action from penal statute and stating, "In the absence of strong indicia of a contrary legislative intent, [the Court] ... conclude[s] that the legislature provided precisely the remedies it considered appropriate.") (relying on *Middlesex County Sewerage Auth. v. National Sea Clammers*, 453 U.S. 1, 15 (1981)). Plaintiff's state law claims, as identified in the initial complaint, were not cognizable. Thus, the Court's *intended* statement, that Plaintiff did not identify any *cognizable* state law claims, would have been correct. Though the Court tries its best to eliminate typographical errors from its decisions, it is impossible to catch them all.

believed overheard and recorded <radio & camera>; increasing safety risk."[3] Another defendant allegedly engaged in "antics" that "led to further, subsequent harassment (officer and offender alike); & increased animosity. Fueling harm culminating with aggravated assaults & battery incidents," as well as disciplinary sanctions. *Dkt. 11* at 4 (capitalization regularized). These are the only factual allegations contained in the facts section of the amended complaint.

Pages 2 and 3 and 5 through 7 of the amended complaint contain a list of named defendants, but they also include various allegations as to these defendants' actions. These allegations are quite generalized and do not convey any of the surrounding circumstances. For example, Plaintiff identifies (1) John Roberts as the "main assailing correctional staff" who "confiscated & destroyed" a protective custody request and who, along with an officer Cox, pressured Plaintiff to sign a "safe in general population statement"; (2) case manager Carr as someone who was "made aware of officer & offender conflict"; (3) case manager Lane as having been involved in "offender & officer issues"; (4) clinician Garay as engaging in "improper (risky 'go away; go bug someone else') techniques to apply to assert, and divert – hostile – inmate harassment, resulting in even hightened [sic] aggression"; (5) Sergeant Higgens as the move coordinator who "unnecessarily diverted staff caution about impending harm; only to ignore it"; (6) Corporal Flannery as a supervisor who was "indifferent" and placed inmates in "wreckless [sic] endangerment"; and (7) case manager Hungerford as someone who was

[3] For ease of reading, the Court has normalized the capitalization in all its quotations from the amended complaint.

Plaintiff also has not stated a plausible state or federal claim simply by citing numerous titles of the United States and the Idaho Codes. *See Dkt. 11* at 1 ("U.S. Code; Titles: 1, 4→10, 15, 18, 22, 28→29, 42 & 45 <more at 1 U.S.C. §§ 1 et. seq.; §§ 101 et. seq....> and, Idaho Code; Titles: 15; 18→20 & 74") (ellipsis and brackets in original); *see also id.* at 4 ("Idaho Code; Title(s) 5, 6, 15, 18, & 20" and "U.S. Code: Title(s) 18, 28, & 42") (parentheses in original).

Finally, other than 42 U.S.C. § 1983, the remaining federal statutes cited in the amended complaint also are not implicated by that amendment. Section 1997 of Title 42, *see Dkt. 11* at 1, is simply a definitional section with respect to civil rights of incarcerated persons. And 28 U.S.C. § 2254, *see id.*, governs petitions for writs of habeas corpus—not traditional civil actions like this one.

Section 2254 habeas petitions challenge a criminal conviction for which a prisoner is in custody. However, such claims generally may not be asserted in a § 1983 action. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). In *Heck*, the United States Supreme Court held that a civil rights claim "is not cognizable under § 1983" if the plaintiff's success would "render a conviction or sentence invalid." *Id.* Thus, if a favorable verdict in a civil rights action "would necessarily imply the invalidity" of the plaintiff's conviction, the plaintiff must first show that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal

i. Eighth Amendment Claims

To state a claim under the Eighth Amendment, Plaintiff must plausibly allege that he was "incarcerated under conditions posing a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted). He must also plausibly allege that Defendants were deliberately indifferent to that risk, meaning that the Defendants (1) were aware of the risk to Plaintiff's safety, yet (2) deliberately disregarded that risk. *Id.* at 837.

Plaintiff has not done so. He offers nothing from which a factfinder could reasonably conclude that Plaintiff was at a *substantial* risk of harm simply because a few inmates overheard that Plaintiff had requested protective custody. In addition, there are no allegations in the amended complaint giving rise to a reasonable inference that Defendant Baker knew that Plaintiff was in such substantial danger and yet deliberately disregarded the risk by choosing to call for a "charge check" where other inmates could overhear. As for the supervisory defendants, the amended complaint does not plausibly allege a sufficient causal connection between these defendants' actions and the attack on Plaintiff by other inmates. *See Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011).

ii. Due Process Claims

Plaintiff's statement that Defendants' actions resulted in disciplinary sanctions indicates that he might be attempting to assert a procedural due process claim. The Due Process Clause of the Fourteenth Amendment prohibits state action that deprives a person of life, liberty, or property without due process of law. Because liberty interests are "generally limited to freedom from restraint," the Supreme Court has held that a prisoner

the government function involved as well as of the private interest that has been affected by governmental action.") (internal quotation marks and alteration omitted). The Due Process Clause requires that an inmate receive notice of the charges against him and an opportunity to respond. *See Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

Plaintiff asserts only that he was subjected to discipline. He has not plausibly alleged that he had a liberty interest in avoiding that discipline or that—if he did have such a liberty interest—he did not receive all the process to which he was due. Thus, to the extent Plaintiff asserts a due process claim, it is implausible.

6. Conclusion

Although pro se pleadings must be liberally construed, "a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled." *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Because Plaintiff has already been given the opportunity to amend and still has failed to state a plausible claim for relief, the Court will dismiss the amended complaint with prejudice and without further leave to amend. *See Knapp v. Hogan*, 738 F.3d 1106, 1110 (9th Cir. 2013) ("When a litigant knowingly and repeatedly refuses to conform his pleadings to the requirements of the Federal Rules, it is reasonable to conclude that the litigant simply *cannot* state a claim.").

ORDER

IT IS ORDERED:

1. Plaintiff's Motion to Amend Complaint (Dkt. 10) is GRANTED IN PART, to the extent that the Court has screened Plaintiff's amended complaint

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