

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 5 2020

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

JOSH ALBRITTON,

Plaintiff-Appellant,

v.

MARK BRNOVICH, Attorney General; et al.,

Defendants-Appellees.

No. 19-17205

D.C. No. 4:19-cv-00499-RCC-
PSOT

District of Arizona,
Tucson

ORDER

Before: MURGUIA, CHRISTEN, and BADE, Circuit Judges.

The district court certified that this appeal is not taken in good faith. *See* 28 U.S.C. § 1915(a). On November 4, 2019, this court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record and response to the November 4, 2019 order, we conclude this appeal is frivolous. We therefore deny appellant's motions to proceed in forma pauperis (Docket Entry Nos. 2 and 4) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

DISMISSED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 27 2020

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

JOSH ALBRITTON,

Plaintiff - Appellant,

v.

MARK BRNOVICH, Attorney
General; et al.,

Defendants - Appellees.

No. 19-17205

D.C. No. 4:19-cv-00499-RCC-PSOT
U.S. District Court for Arizona,
Tucson

MANDATE

The judgment of this Court, entered March 05, 2020, 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: Rhonda Roberts
Deputy Clerk
Ninth Circuit Rule 27-7

Appendix B

1
2
3
4
5
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

6
7
8
9 Josh Albritton,

No. CV 19-00499-TUC-RCC

10 Plaintiff,

11 v.

ORDER

12
13 Mark Brnovich, et al.,

14 Defendants.

15 Plaintiff Josh Albritton, who is confined in the Arizona State Prison Complex-
16 Tucson, has filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. 1) and
17 an Application to Proceed In Forma Pauperis (Doc. 2). The Court will dismiss this action.

18 **I. Application to Proceed In Forma Pauperis and Filing Fee**

19 The Court will grant Plaintiff's Application to Proceed In Forma Pauperis. 28
20 U.S.C. § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C.
21 § 1915(b)(1). The Court will assess an initial partial filing fee of \$20.00. The remainder
22 of the fee will be collected monthly in payments of 20% of the previous month's income
23 credited to Plaintiff's trust account each time the amount in the account exceeds \$10.00.
24 28 U.S.C. § 1915(b)(2). The Court will enter a separate Order requiring the appropriate
25 government agency to collect and forward the fees according to the statutory formula.

26 **II. Statutory Screening of Prisoner Complaints**

27 The Court is required to screen complaints brought by prisoners seeking relief
28 against a governmental entity or an officer or an employee of a governmental entity. 28

Appendix C

1 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
 2 has raised claims that are legally frivolous or malicious, that fail to state a claim upon which
 3 relief may be granted, or that seek monetary relief from a defendant who is immune from
 4 such relief. 28 U.S.C. § 1915A(b)(1)–(2).

5 A pleading must contain a “short and plain statement of the claim *showing* that the
 6 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does
 7 not demand detailed factual allegations, “it demands more than an unadorned, the-
 8 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 9 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
 10 conclusory statements, do not suffice.” *Id.*

11 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
 12 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
 13 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
 14 that allows the court to draw the reasonable inference that the defendant is liable for the
 15 misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for
 16 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
 17 experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific factual
 18 allegations may be consistent with a constitutional claim, a court must assess whether there
 19 are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

20 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
 21 must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338, 342
 22 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent
 23 standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551
 24 U.S. 89, 94 (2007) (per curiam)).

25 If the Court determines that a pleading could be cured by the allegation of other
 26 facts, a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal
 27 of the action. *See Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (en banc).

28

1 Plaintiff's Complaint will be dismissed for failure to state a claim, without leave to amend
 2 because the defects cannot be corrected.

3 **III. Complaint**

4 Plaintiff was convicted in Cochise County Superior Court, case #CR2011-00236, of
 5 three counts of aggravated assault and eight counts of misconduct involving weapons and
 6 was sentenced to an 80-year term of imprisonment. *See State v. Albritton*, No. 2 CA-CR
 7 2013-0128, 2013 WL 6730756, at *1 (Ariz. Ct. App. Dec. 19, 2013).¹

8 In his three-count Complaint, Plaintiff sues Arizona Attorney General Mark
 9 Brnovich, Cochise County Attorney Brian M. McIntyre and Deputy County Attorney
 10 James Glanville, Sierra Vista Police Department Detectives Nicholas Lamay and Colin
 11 Festa, former United States Attorney John S. Leonardo, an Unknown Psychiatrist at the
 12 Pima County Jail, two Unknown Psychiatrists at the Arizona Department of
 13 Corrections (ADC), the City of Sierra Vista, Cochise County, Pima County, and Cochise
 14 County Superior Court Judge James Conlogue.² Plaintiff asserts claims of violations of his
 15 Second, Fifth, and Sixth Amendment rights with respect to his criminal convictions in
 16 CR2011-00236. Plaintiff seeks \$657,000,000 per year for each year of his incarceration,
 17 totaling \$5,584,500,000 "on the private side."

18 In Count One, Plaintiff alleges that on March 26, 2011, Defendants Lamay and Festa
 19 violated Plaintiff's right against self-incrimination by arresting him for not providing a
 20 name "that was going to be used against [him]." Plaintiff claims Lamay and Festa "acted
 21 in a conspiracy" to hide their theft of \$40,000 in cash and dinars. Plaintiff asserts these
 22 "offenses" were part of a scheme to unjustly enrich Defendants and were "compounded"
 23 by perjury and obstruction of justice. Plaintiff alleges that his wrongful arrest resulted in
 24 his wrongful imprisonment for the past eight years.

25

27 ¹ Plaintiff states throughout the Complaint that he was sentenced to a 90-year term
 28 of imprisonment.

² Defendant Conlogue was the trial judge in Plaintiff's criminal case.

1 In Count Two, Plaintiff alleges that on March 26, 2011, Defendants Leonardo,
 2 Brnovich, Lamay, Conlogue, Glanville, Festa, and Timothy Patterson began a civil
 3 conspiracy to deprive Plaintiff of his Second Amendment right to keep and bear arms.
 4 Plaintiff asserts Defendants committed this civil rights violation to steal “private” guns for
 5 financial gain and unjust enrichment. Plaintiff claims these crimes were compounded by
 6 perjury and obstruction of justice. He alleges he was wrongfully sentenced to 90 years in
 7 prison and has served 8.5 of the 90 years.

8 In Count Three, Plaintiff alleges that Defendants Leonardo, Brnovich, Glanville,
 9 Conlogue, and the Unknown Psychiatrists engaged in a civil conspiracy to forcibly drug
 10 Plaintiff to exclude him from his trial, direct appeal, and post-conviction relief proceeding
 11 and to prevent him from speaking to any attorneys. Plaintiff asserts Defendants have
 12 wrongfully imprisoned him for 8.5 years of a 90-year sentence. He claims he has been
 13 tortured, suffers from post-traumatic stress disorder, has been unable to raise his children,
 14 and has lost all his private property.

15 **IV. Failure to State a Claim**

16 Although pro se pleadings are liberally construed, *Haines v. Kerner*, 404 U.S. 519,
 17 520-21 (1972), conclusory and vague allegations will not support a cause of action. *Ivey*
 18 *v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Further, a
 19 liberal interpretation of a civil rights complaint may not supply essential elements of the
 20 claim that were not initially pled. *Id.*

21 To state a valid claim under § 1983, a plaintiff must allege that he suffered a specific
 22 injury as a result of specific conduct of a defendant and show an affirmative link between
 23 the injury and the conduct of that defendant. *See Rizzo v. Goode*, 423 U.S. 362, 371-72,
 24 377 (1976). “A plaintiff must allege facts, not simply conclusions, that show that an
 25 individual was personally involved in the deprivation of his civil rights.” *Barren v.*
 26 *Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

27 **A. Defendants Cochise County, Pima County, and City of Sierra Vista**

28 A municipality, such as a county or city, may not be sued solely because an injury

1 was inflicted by its employees or agents. *Long v. County of Los Angeles*, 442 F.3d 1178,
2 1185 (9th Cir. 2006). The actions of individuals may support municipal liability only if the
3 employees were acting pursuant to an official policy or custom of the municipality. *Botello*
4 *v. Gammick*, 413 F.3d 971, 978-79 (9th Cir. 2005). A § 1983 claim against a municipal
5 defendant “cannot succeed as a matter of law” unless a plaintiff: (1) contends that the
6 municipal defendant maintains a policy or custom pertinent to the plaintiff’s alleged injury;
7 and (2) explains how such policy or custom caused the plaintiff’s injury. *Sadoski v.*
8 *Mosley*, 435 F.3d 1076, 1080 (9th Cir. 2006) (affirming dismissal of a municipal defendant
9 pursuant to Fed. R. Civ. P. 12(b)(6)).

10 Plaintiff has failed to allege facts to support a conclusion that Defendants Cochise
11 County, Pima County, or City of Sierra Vista maintained a specific policy or custom that
12 resulted in a violation of Plaintiff’s federal constitutional rights and has failed to explain
13 how his injuries were caused by any municipal policy or custom. Thus, the Court will
14 dismiss without prejudice Defendants Cochise County, Pima County, and City of Sierra
15 Vista.

16 **B. Defendant Conlogue**

17 Judges are absolutely immune from damages for all judicial acts performed within
18 their subject-matter jurisdiction, “even when such acts are in excess of their jurisdiction,
19 and are alleged to have been done maliciously or corruptly.” *Stump v. Sparkman*, 435 U.S.
20 349, 356 (1978); *Sadoski v. Mosley*, 435 F.3d 1076, 1079 (9th Cir. 2006); *Harvey v.*
21 *Waldrone*, 210 F.3d 1008, 1012 (9th Cir. 2000). An act is “judicial” when it is a function
22 normally performed by a judge and the parties dealt with the judge in the judge’s judicial
23 capacity. *Stump*, 435 U.S. at 362; *Crooks v. Maynard*, 913 F.2d 699, 700 (9th Cir. 1990).

24 Plaintiff has not made any specific allegations against Defendant Conlogue.
25 Furthermore, Conlogue is absolutely immune from liability for any actions taken in
26 connection with Plaintiff’s criminal proceeding. Therefore, the Court will dismiss
27 Defendant Conlogue.

28

C. Defendants McIntyre and Glanville

2 Prosecutors are absolutely immune from liability under § 1983 for their conduct in
3 “initiating a prosecution and in presenting the State’s case” insofar as that conduct is
4 “intimately associated with the judicial phase of the criminal process.” *Buckley v.*
5 *Fitzsimmons*, 509 U.S. 259, 270 (1993) (citing *Imbler v. Pachtman*, 424 U.S. 409, 430
6 (1976)); *Burns v. Reed*, 500 U.S. 478, 486 (1991); *Ashelman v. Pope*, 793 F.2d 1072, 1076
7 (9th Cir. 1986). Immunity extends to prosecutors for “eliciting false or defamatory
8 testimony from witnesses or for making false or defamatory statements during, and related
9 to judicial proceedings.” *Buckley*, 509 U.S. at 270 (citations omitted); *Broam v. Bogan*,
10 320 F.3d 1023, 1029-30 (9th Cir. 2003) (prosecutor absolutely immune from liability for
11 failing to investigate accusations before filing charges and for knowing use of false
12 testimony at trial).

13 Plaintiff does not make any specific allegations against Defendants McIntyre and
14 Glanville. Furthermore, McIntyre and Glanville are absolutely immune for their conduct
15 in initiating Plaintiff's prosecution and presenting the State's case against him.
16 Accordingly, the Court will dismiss Defendants McIntyre and Glanville.

D. Defendant Leonardo

18 Plaintiff's allegations concern his convictions and sentence in Arizona. Defendant
19 Leonardo was the United States Attorney for the District of Arizona and was not
20 responsible for prosecution of Arizona state criminal cases. Leonardo is therefore not a
21 proper Defendant and will be dismissed.

E. Defendants Brnovich, Lamay, Festa, and Unknown Psychiatrists

23 Plaintiff has simply made vague and conclusory allegations against Defendants
24 Brnovich, Lamay, Festa, Glanville, and Unknown Psychiatrists, without any factual
25 specificity as to what any particular Defendant did or failed to do. This is insufficient. *See*
26 *Marcilis v. Township of Redford*, 693 F.3d 589, 596 (6th Cir. 2012) (upholding dismissal
27 of *Bivens* complaint that referred to all defendants “generally and categorically” because
28 the plaintiff had failed to “allege, with particularity, facts that demonstrate what *each*

1 defendant did to violate the asserted constitutional right.””) (quoting *Lanman v. Hinson*,
 2 529 F.3d 673, 684 (6th Cir. 2008)); *Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir.
 3 2008) (“Given the complaint’s use of either the collective term ‘Defendants’ or a list of the
 4 defendants named individually but with no distinction as to what acts are attributable to
 5 whom, it is impossible for any of these individuals to ascertain what particular
 6 unconstitutional acts they are alleged to have committed.”). Thus, the Court will dismiss
 7 Defendants Brnovich, Lamay, Festa, and Unknown Psychiatrists.

8 **F. Statute of Limitations**

9 Failure to state a claim includes circumstances where a defense is complete and
 10 obvious from the face of the pleadings. *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir.
 11 1984). In the absence of waiver, the Court may raise the defense of statute of limitations
 12 *sua sponte*. *See Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993). *See*
 13 *also Hughes v. Lott*, 350 F.3d 1157, 1163 (11th Cir. 2003) (upholding *sua sponte* dismissal
 14 under 28 U.S.C. § 1915(e)(2)(B)(i) of prisoner’s time-barred complaint); *Nasim v. Warden*,
 15 *Maryland House of Corr.*, 64 F.3d 951, 956 (4th Cir. 1995) (same); *Pino v. Ryan*, 49 F.3d
 16 51, 53-54 (2d Cir. 1995) (same); *Moore v. McDonald*, 30 F.3d 616, 620-21 (5th Cir. 1994)
 17 (same); *Johnson v. Rodriguez*, 943 F.2d 104, 107-108 (1st Cir. 1991) (same).

18 The applicable statute of limitations in an action under 42 U.S.C. § 1983 is the forum
 19 state’s statute of limitations for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261,
 20 276 (1985). The Arizona statute of limitations for personal injury actions is two years. *See*
 21 Ariz. Rev. Stat. § 12-542(1). Accrual of § 1983 claims is governed by federal law. *Wallace*
 22 *v. Kato*, 549 U.S. 384, 388 (2007). Under federal law, a claim accrues when the plaintiff
 23 “knows or has reason to know of the injury that is the basis of the action.” *Pouncil v.*
 24 *Tilton*, 704 F.3d 568, 574 (9th Cir. 2012); *Cabrera v. City of Huntington Park*, 159 F.3d
 25 374, 381 (9th Cir. 1998). Thus, for a claim to be timely, it must have accrued no earlier
 26 than two years before Plaintiff’s Complaint was filed.

27 “[T]he statute of limitations upon a § 1983 claim seeking damages for a false arrest
 28 in violation of the Fourth Amendment, where the arrest is followed by criminal

1 proceedings, begins to run at the time the claimant becomes detained pursuant to legal
 2 process.” *Wallace*, 549 U.S. at 397. Plaintiff’s false arrest claim accrued in 2011.
 3 Therefore, the claim is facially barred by the statute of limitations and will be dismissed.³

4 **G. Claims for Money Damages**

5 Plaintiff’s allegations can be construed as asserting a malicious prosecution claim.
 6 Although malicious prosecution claims can be brought against prosecutors and “other
 7 persons who have wrongfully caused the charges to be filed,” *Awabdy v. City of Adelanto*,
 8 368 F.3d 1062, 1066 (9th Cir. 2004), “[o]ne element that must be alleged and proved in a
 9 malicious prosecution action is termination of the prior criminal proceeding in favor of the
 10 accused.” *Heck v. Humphrey*, 512 U.S. 477, 484 (1994). “A cause of action for malicious
 11 prosecution does not accrue until the criminal proceedings have terminated in the plaintiff’s
 12 favor.” *Id.* at 489.

13 Furthermore, a prisoner’s claim for damages cannot be brought under 42 U.S.C.
 14 § 1983 if “a judgment in favor of the plaintiff would necessarily imply the invalidity of his
 15 conviction or sentence,” unless the prisoner demonstrates that the conviction or sentence
 16 has previously been reversed, expunged, or otherwise invalidated. *Id.* at 486-87. Plaintiff’s
 17 false arrest and malicious prosecution claims necessarily imply the invalidity of his
 18 convictions, and Plaintiff has not shown that the convictions have been reversed, expunged,
 19 or otherwise invalidated. Accordingly, Plaintiff’s claims for money damages have not yet
 20 accrued and will be dismissed.

21 **H. Conspiracy**

22 “Conspiracy is not itself a constitutional tort under § 1983,” and “there must always
 23 be an underlying constitutional violation.” *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 935
 24 (9th Cir. 2012) (en banc). Conclusory allegations of a conspiracy are insufficient to state
 25 a claim. *See Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002) (explaining the

27 ³ In any event, Plaintiff has not stated a false arrest claim because he has not alleged
 28 that there was no probable cause for his arrest, and he was indicted by a grand jury. *See Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998); *Barlow v. Ground*,
 943 F.2d 1132, 113 (9th Cir. 1991); *Kalina v. Fletcher*, 522 U.S. 118 (1997).

1 requirements of a conspiracy claim under § 1983). To state a conspiracy claim, a plaintiff
 2 must show “an agreement or ‘meeting of the minds’ to violate constitutional rights.” *Id.*
 3 (citation omitted). The Court “need not, however, accept as true allegations that are merely
 4 conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v.*
 5 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), *amended on other grounds*, 275 F.3d
 6 1187 (9th Cir. 2001); *see also Woodrum v. Woodward County*, 866 F.2d 1121, 1126 (9th
 7 Cir. 1989) (conclusory allegations of conspiracy did not support a § 1983 claim); *Karim-*
 8 *Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 626 (9th Cir. 1988) (“A mere allegation
 9 of conspiracy without factual specificity is insufficient.”).

10 Plaintiff’s allegations that Defendants engaged in a civil conspiracy to violate his
 11 rights are wholly speculative and unsupported. Accordingly, the Court will dismiss
 12 Plaintiff’s conspiracy claims.

13 **V. Dismissal Without Leave to Amend**

14 Because the defects in the Complaint cannot be corrected, the Court will dismiss the
 15 Complaint without leave to amend.

16 **IT IS ORDERED:**

- 17 (1) Plaintiff’s Application to Proceed In Forma Pauperis (Doc. 2) is **granted**.
- 18 (2) As required by the accompanying Order to the appropriate government
 19 agency, Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee
 20 of \$20.00.
- 21 (3) The Complaint (Doc. 1) is **dismissed** for failure to state a claim pursuant to
 22 28 U.S.C. § 1915A(b)(1), and the Clerk of Court must enter judgment accordingly.
- 23 (4) The Clerk of Court must make an entry on the docket stating that the
 24 dismissal for failure to state a claim may count as a “strike” under 28 U.S.C. § 1915(g).
- 25 (5) The docket shall reflect that the Court, pursuant to 28 U.S.C. § 1915(a)(3)
 26 and Federal Rules of Appellate Procedure 24(a)(3)(A), has considered whether an appeal
 27 of this decision would be taken in good faith and certifies that an appeal would not be taken
 28

1 in good faith for the reasons stated in the Order and because there is no arguable factual or
2 legal basis for an appeal.

3 Dated this 17th day of October, 2019.

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

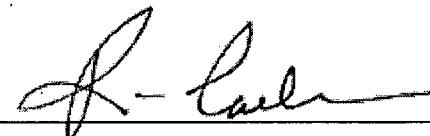
24

25

26

27

28



Honorable Raner C. Collins
Senior United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Josh Albritton,
Plaintiff,
v.
Mark Brnovich, et al.,
Defendant

NO. CV-19-00499-TUC-RCC (P)

JUDGMENT IN A CIVIL CASE

Mark Brnovich, et al.,
Defendants.

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's order filed October 17, 2019, Plaintiff to take nothing, and the complaint and action are dismissed with prejudice for failure to state a claim. This dismissal may count as a "strike" under 28 U.S.C. § 1915(g).

Brian D. Karth
District Court Executive/Clerk of Court

October 17, 2019

By s/ Ortiz
Deputy Clerk

Appendix D

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