APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RONALD E. JOHNSON,

Plaintiff,

v. **CASE NO. 20-3017-SAC**

DEREK SCHMIDT, et al.,

Defendants.

MEMORANDUM AND ORDER

Plaintiff brings this *pro se* civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff is incarcerated at the El Dorado Correctional Facility in El Dorado, Kansas ("EDCF"). The Court granted Plaintiff leave to proceed *in forma pauperis* (Doc. 6). On May 5, 2020, the Court entered a Memorandum and Order and Order to Show Cause (Doc. 9) ("MOSC"), granting Plaintiff until June 5, 2020, in which to show good cause why his Complaint should not be dismissed for the reasons set forth in the MOSC. Plaintiff filed a motion for an extension of time to respond to the MOSC (Doc. 11) and a motion for leave to file an amended complaint (Doc. 12). The Court entered an Order (Doc. 13) granting Plaintiff an extension of time until July 6, 2020, to respond to the MOSC and denying Plaintiff's motion for leave to amend his complaint for failure to attach a proposed amended complaint. This matter is before the Court on Plaintiff motion for leave to amend complaint (Doc. 15), Response (Doc. 16) to the Court's MOSC, and motion to appoint counsel (Doc. 17).

The Court found in the MOSC that Plaintiff's claims relate to his state court criminal case, and he names as defendants eight state court judges, the attorney general, the district attorney and two assistant district attorneys, the Wyandotte County Sheriff, nine employees from the Kansas Department of Corrections ("KDOC"), and legal counsel for the KDOC. The Court

found that Plaintiff's official capacity claims against the state officials for monetary damages are barred by sovereign immunity. Furthermore, state officers acting in their official capacity are not considered "persons" against whom a claim for damages can be brought under § 1983. *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989).

The Court also found in the MOSC that Plaintiff's claims against the state and county prosecutors fail on the ground of prosecutorial immunity, and his claims against the multiple state court judges should be dismissed on the basis of judicial immunity. The court also found that if Plaintiff is relying on the participation by the KDOC defendants in his confinement, he must allege a "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Callaway v. Werholtz*, No. 12-2527-EFM, 2013 WL 2297139, at *3 (D. Kan. May 24, 2013) (defining "acting under color of state law" as required by § 1983). Plaintiff has not alleged a misuse of power by these defendants. Furthermore, "[o]fficials who act pursuant to a 'facially valid court order' enjoy quasi-judicial immunity from suit under § 1983." *Callaway*, 2013 WL 2297139, at *4 (citing *Turney v. O'Toole*, 898 F.2d 1470, 1472 (10th Cir. 1990) (holding that state officials were absolutely immune from § 1983 liability for confining the plaintiff in a state hospital pursuant to a judicial order)). Plaintiff does not allege that these defendants failed to follow court orders.

The Court also found that to the extent Plaintiff challenges the validity of his sentence in his state criminal case, his federal claim must be presented in habeas corpus. "[A] § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, *but not to the fact or length of his custody.*" *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) (emphasis added). When the legality of a confinement is challenged so that the remedy would be release or a speedier release, the case must be filed as a habeas corpus

proceeding rather than under 42 U.S.C. § 1983, and the plaintiff must comply with the exhaustion of state court remedies requirement. *Heck,* 512 U.S. at 482; *see also Montez v. McKinna,* 208 F.3d 862, 866 (10th Cir. 2000) (exhaustion of state court remedies is required by prisoner seeking habeas corpus relief); *see* 28 U.S.C. § 2254(b)(1)(A) (requiring exhaustion of available state court remedies). "Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel,* 526 U.S. 838, 842 (1999); *see Woodford v. Ngo,* 548 U.S. 81, 92 (2006); *Rose v. Lundy,* 455 U.S. 509, 518–19 (1982). Therefore, any claim challenging his state sentence is not cognizable in a § 1983 action.

Likewise, before Plaintiff may proceed in a federal civil action for monetary damages based upon an invalid conviction or sentence, he must show that his conviction or sentence has been overturned, reversed, or otherwise called into question. *Heck v. Humphrey,* 512 U.S. 477 (1994). If Plaintiff has been convicted and a judgment on Plaintiff's claim in this case would necessarily imply the invalidity of that conviction, the claim may be barred by *Heck.* In *Heck v. Humphrey,* the United States Supreme Court held that when a state prisoner seeks damages in a § 1983 action, the district court must consider the following:

> whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

Heck v. Humphrey, 512 U.S. 477, 487 (1994). In *Heck,* the Supreme Court held that a § 1983 damages claim that necessarily implicates the validity of the plaintiff's conviction or sentence is not cognizable unless and until the conviction or sentence is overturned, either on appeal, in a collateral proceeding, or by executive order. *Id.* at 486–87. Plaintiff has not alleged that the

conviction or sentence has been invalidated, and in fact that is the relief he seeks in this civil rights action.

Plaintiff's response to the MOSC and proposed amended complaint fail to cure the deficiencies set forth in the MOSC. Plaintiff's proposed amended complaint continues to seek monetary relief from defendants that are immune from suit. Plaintiff also continues to seek release from incarceration despite the Court advising him that such relief must be sought pursuant to a habeas action.

In his Response, Plaintiff alleges that the state court actors should not enjoy Eleventh Amendment immunity and that the state court judges acted outside of their judicial capacity. However, as noted in the Court's MOSC, a state judge is absolutely immune from § 1983 liability except when the judge acts "in the clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978) (articulating broad immunity rule that a "judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority . . . ."); *Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir. 1994). Only actions taken outside a judge's judicial capacity will deprive the judge of judicial immunity. *Stump*, 435 U.S. at 356–57. Plaintiff alleges no facts whatsoever to suggest that the defendant judges acted outside of their judicial capacity.

Plaintiff alleges that the Defendants were acting in a "Covid Pack" to deprive him of his constitutional rights. If Plaintiff is alleging some type of conspiracy, he has failed to allege any factual support. Bare conspiracy allegations fail to state a claim upon which relief may be granted. To state a claim for conspiracy, a plaintiff must include in his complaint enough factual allegations to suggest that an agreement was made. *Gee v. Pacheco*, 627 F.3d 1178, 1183 (10th Cir. 2010). A bare assertion of conspiracy, absent context implying a meeting of the minds, fails

to raise a right to relief above the speculative level. *Id.* Here, Plaintiff provides no factual information whatsoever to demonstrate any type of agreement was made between anyone. Such a conclusory allegation fails to state a plausible claim for relief.

Plaintiff's claims are based on his argument that the Kansas state courts improperly ruled that the Supreme Court's decision in *Alleyne* did not apply retroactively to provide Plaintiff with relief. *See United States v. Stang*, 561 F. App'x 772, 773 (10th Cir. May 28, 2014) (unpublished) (stating that "[w]e have held that, although the Supreme Court in *Alleyne* did recognize a new rule of constitutional law, the Supreme Court did not hold that the new rule was retroactively applicable to cases on collateral review") (citing *In re Payne*, 733 F.3d 1027, 1029–30 (10th Cir. 2013)); *see also United States v. Rogers*, 599 F. App'x 850, 851 (10th Cir. April 17, 2015) (unpublished) (stating that "[b]ut *Alleyne* wasn't decided until after Mr. Roger's sentencing, we have held that *Alleyne* doesn't apply retroactively on collateral review").

The *Rooker-Feldman* doctrine establishes that a federal district court lacks jurisdiction to review a final state court judgment because only the Supreme Court has jurisdiction to hear appeals from final state court judgments. *See Bear v. Patton*, 451 F.3d 639, 641 (10th Cir. 2006). The doctrine prevents a party who lost in state court proceedings from pursuing "what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. DeGrandy*, 512 U.S. 997, 1005-06 (1994).

Plaintiff has failed to cure the deficiencies set forth in this Court's MOSC and has failed to show good cause why his Complaint should not be dismissed for failure to state a claim.

IT IS THEREFORE ORDERED THAT this matter is **dismissed** for failure to state a claim.

IT IS FURTHER ORDERED THAT Plaintiff's motion for leave to amend (Doc. 14) and motion to appoint counsel (Doc. 16) are **denied.**

IT IS SO ORDERED.

Dated July 24, 2020, in Topeka, Kansas.

s/ Sam A. Crow
Sam A. Crow
U.S. Senior District Judge

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit

November 24, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RONALD E. JOHNSON,

Plaintiff - Appellant,

v.

DEREK SCHMIDT, Attorney General for the State of Kansas; JENNIFER L. MYERS, Judge, Wyandotte County District Court; R. WAYNE LAMPSON, Chief Judge, Wyandotte County District Court; DEXTER BURDETTE, Chief Judge, Wyandotte County District Court; LAWTON NUSS, Chief Justice, Kansas Supreme Court; LEE JOHNSON, Justice, Kansas Supreme Court; STEPHEN D. HILL, Justice, Kansas Court of Appeals; KIM R. SCHROEDER, Justice, Kansas Court of Appeals; GORDON ATCHESON, Justice, Kansas Court of Appeals; JEROME GORMAN, Assistant District Attorney/District Attorney, Wyandotte County District Attorney's Office; DANIEL OBERMIER, Assistant District Attorney, Wyandotte County District Attorney's Office; MARK DUPREE, District Attorney, Wyandotte County District Attorney's Office; DON ASH, Sheriff, Wyandotte County Sheriff's Department; ROGER WERHOLTZ, Secretary of Corrections, Kansas Department of Corrections; RAY ROBERTS, Secretary of Corrections, Kansas Department of Corrections; JOHNNIE GODDARD, Secretary of Corrections, Kansas Department of Corrections; JOE NORWOOD, Secretary of Corrections, Kansas Department of

No. 20-3168
(D.C. No. 5:20-CV-03017-SAC)
(D. Kan.)

Corrections; JEFF ZMUDA, Secretary of Corrections, Kansas Department of Corrections; JEFF COWGER, Chief Legal Counsel, Kansas Department of Corrections; JOHN/JANE DOE (1), Sentence Computation State Employees, Kansas Department of Corrections; S. SCRIBNER, ReEntry Department, Kansas Department of Corrections; JOHN/JANE DOE (2), ReEntry State Employees, Kansas Department of Corrections; JOHN/JANE DOE (3), ReEntry State Employees, Kansas Department of Corrections,

Defendants - Appellees.

ORDER AND JUDGMENT*

Before **BRISCOE**, **BALDOCK**, and **CARSON**, Circuit Judges.

Plaintiff-Appellant Ronald E. Johnson, who is in the custody of the Kansas Department of Corrections, brings this *pro se* civil rights appeal under 42 U.S.C.§ 1983. Johnson appeals the district court's dismissal of his complaint for failure to state a claim, arguing that Kansas state courts' denial of his habeas corpus petition ignored a statutory provision that he believes mandates the adjustment of his

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

"hard 50" sentence. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm the district court's dismissal of the complaint for failure to state a claim.

I

In 2003, Johnson was sentenced to life in prison without the possibility of parole for 50 years (known as a "hard 50" sentence) pursuant to what was then K.S.A. 21-4635 (now K.S.A. 21-6620). After several habeas corpus petitions in Kansas state courts that were denied and affirmed on appeal, Johnson filed this § 1983 claim on January 15, 2020, seeking monetary damages and a modification of his sentence. The complaint named the following defendants: eight state court judges, the state attorney general, the district attorney, two assistant district attorneys, the Wyandotte County Sheriff, nine KDOC employees, and legal counsel for KDOC.

The crux of Johnson's claim before the district court was that the Kansas state courts erred in denying his habeas corpus petition because the courts incorrectly ruled that the Supreme Court's decision in *Alleyne v. United States*, 570 U.S. 99, 103 (2013)—which held "that any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury"—did not apply retroactively to Johnson's sentence, which became final before *Alleyne*. He also invoked K.S.A. 21-6628(c) (formerly K.S.A. 21-4639(c)), a "fail-safe" provision in Kansas sentencing law that mandates courts to re-sentence defendants in the event the statute authorizing the defendant's mandatory sentence is held unconstitutional.

In a May 5, 2020 order, the district court directed Johnson to show cause why his complaint should not be dismissed because Johnson sought monetary relief from

defendants who were immune from suit and because Johnson sought release from incarceration, despite the district court previously advising him that such relief must be sought in a habeas action. Johnson filed a response and a proposed amended complaint.

The district court ultimately dismissed Johnson's complaint for failure to state a claim after determining that his response to the show cause order and proposed amended complaint failed to cure the deficiencies set forth in the court's prior order. Specifically, the district court held that Johnson's challenge to his sentence was not a cognizable § 1983 claim and the defendants were all entitled to either qualified or absolute immunity. The district court additionally concluded that, at any rate, it did not have jurisdiction to hear Johnson's challenge to the Kansas state court rulings. This timely appeal followed.

II

On appeal, Johnson presses the same theory he raised before the district court. He again points to K.S.A. 21-6628(c), which says

> In the event the mandatory term of imprisonment or any provision of chapter 341 of the 1994 Session Laws of Kansas authorizing such mandatory term is held to be unconstitutional by the supreme court of Kansas or the United States supreme court, the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence to require no mandatory term of imprisonment and shall sentence the defendant as otherwise provided by law.

Johnson maintains that this provision mandates the modification of his sentence, since the procedures for the "hard 50" sentence in effect at the time he was sentenced in 2003 allowed a judge, rather than a jury, to find aggravating facts that increased the mandatory minimum sentence. Johnson correctly notes that the Kansas Supreme Court, following the Supreme Court's decision in *Alleyne*, held that this sentencing procedure violated the Sixth Amendment. *State v. Soto*, 322 P.3d 334 (Kan. 2014). But Johnson further contends that the Kansas Supreme Court's decision in *Kirtdoll v. State*, 393 P.3d 1053, 1057 (Kan. 2017), which held that "*Alleyne* cannot be applied retroactively to cases that were final when *Alleyne* was decided," is superseded by the legislative command of K.S.A. 21-6628(c). Before addressing that argument, we identify several reasons why Johnson fails to state a claim.

As a threshold matter, the district court correctly held that it lacked jurisdiction to consider Johnson's challenge to the Kansas state court decisions. Under the *Rooker-Feldman* doctrine, "only the Supreme Court has jurisdiction to hear appeals from final state court judgments. Federal district courts do not have jurisdiction to review state court judgments or claims inextricably intertwined with them." *Bear v. Patton*, 451 F.3d 639, 641 (10th Cir. 2006) (citation omitted).

Next, to the extent Johnson challenges the validity of his sentence, such an action is not cognizable as a § 1983 claim. "[A] § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, *but not to the fact or length of his custody*." *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) (emphasis added). And to the extent Johnson seeks money

damages based on an invalid sentence, his claim is barred unless he first shows that "[his] 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 court's issuance of a writ of habeas corpus." *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). Johnson has not made that required preliminary showing here. Accordingly, "[his] claim for damages . . . is not cognizable under § 1983." *Id.*

At any rate, Johnson cannot overcome the immunity defenses applicable to each named defendant. On appeal, Johnson mainly focuses on the judicial defendants, arguing they improperly ignored K.S.A. 21-6628(c). But "a state judge is absolutely immune from § 1983 liability except when the judge acts 'in the clear absence of all jurisdiction.'" *Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir. 1994) (quoting *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978)). The district court correctly concluded that Johnson alleges no facts suggesting that the defendant judges acted outside of their judicial capacity.

Even if Johnson could overcome those hurdles, his invocation of K.S.A. 21-6628(c) is unavailing. The Kansas Supreme Court has recently foreclosed the application of K.S.A. 21-6628(c) in the manner Johnson urges. While this appeal was pending, the Kansas Supreme Court held that K.S.A. 21-6628(c) "[b]y its clear and unequivocal language . . . applies only when the term of imprisonment or the statute authorizing the term of imprisonment are found to be unconstitutional." *State v. Coleman*, 472 P.3d 85, 92 (Kan. 2020). Neither of those situations are presented here.

Alleyne and *Soto* held only that the "procedural framework by which the enhanced sentence was determined" was unconstitutional. *Id.* Those cases did not cast any doubt on the substantive sentence Johnson received. Indeed, "hard 50 sentences have never been determined to be categorically unconstitutional." *Id.* Accordingly, the "fail-safe" provision of K.S.A. 21-6628(c) requiring sentence modification is not triggered here. *See id.*

III

For those reasons, we AFFIRM the district court's dismissal of Johnson's complaint for failure to state a claim.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

APPENDIX C

FILED
United States Court of Appeals
Tenth Circuit

December 28, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RONALD E. JOHNSON,

Plaintiff - Appellant,

v.

DEREK SCHMIDT, Attorney General for the State of Kansas, et al.,

Defendants - Appellees.

No. 20-3168
(D.C. No. 5:20-CV-03017-SAC)
(D. Kan.)

ORDER

Before **BRISCOE**, **BALDOCK**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of 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

CHRISTOPHER M. WOLPERT, Clerk

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