FILED
United States Court of Appeals
Tenth Circuit

January 8, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

VINCENT GABRIEL,

Plaintiff - Appellant,

v.

EL PASO COMBINED COURTS; DAVID LEE SHAKES, individually and in his official capacity Judge of El Paso Combined Courts; GWEN PRATOR, individually and as employee of David Shakes; DANIEL MAY, individually and in his official capacity as District Attorney; DAVID GUEST, individually and as an employee; JOHN PARCELL, as an employee; BECCA KINIKIN, as an employee; ADAM BAILEY, individually and as an employee,

Defendants - Appellees.

No. 20-1020
(D.C. No. 1:19-CV-02248-DDD-KMT)
(D. Colo.)

ORDER AND JUDGMENT*

Before **LUCERO**, **HOLMES**, and **EID**, Circuit Judges.

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 This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Vincent Gabriel appeals the district court's dismissal of his 42 U.S.C. § 1983 claim against judicial and prosecutorial officials in El Paso County, Colorado. He argues that the district court erred in dismissing his claim that the defendants wrongfully denied his attempts to expunge his arrest and criminal records. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I

Following a shoplifting incident, Gabriel pled guilty to a single charge of menacing. He was sentenced to complete a Veterans Trauma Court program and he also agreed to an approved aftercare program. He further stipulated that unless he completed both programs, he waived his right to have his arrest and criminal record sealed.

After he completed the Veterans Trauma Court program, but not the approved aftercare program, Gabriel filed motions in state court seeking to expunge or seal the records. The District Attorney objected to expunction or sealing, and Judge David Lee Shakes denied Gabriel's requests because Gabriel failed to complete the required aftercare program.

In his complaint, Gabriel admits that he did not complete the aftercare program. However, he contends that his strong performance during the Veterans Trauma Court program obviated the need to complete the aftercare program. He claims that the prosecutorial defendants' objection to his attempt to expunge or seal the records and the judicial defendants' failure to expunge or seal them violated his constitutional rights and state law.

The prosecutorial defendants filed a motion to dismiss. Gabriel sought a 60-day extension to respond to the motion and to amend an affidavit he had incorporated into his complaint. A magistrate judge granted his motion in part, giving him an additional 21 days to file a response, but she denied all other relief. Gabriel did not file a response during the extended time period. The judicial defendants then filed a motion to dismiss, which was granted before Gabriel responded to it.

In its order granting both motions to dismiss, the district court reasoned that Gabriel was not entitled to have his record expunged because he failed to complete the aftercare program, which was a precondition to which he had agreed in his plea agreement. The district court also determined that the judicial and prosecutorial defendants had absolute immunity from civil liability for the performance of actions taken in their judicial and prosecutorial roles, and the El Paso County Combined Courts lacked the legal capacity to be sued.

Gabriel filed a motion for reconsideration, which was denied. He then filed this timely appeal.

II

"We review de novo a district court's conclusion on the question of absolute immunity." Gagan v. Norton, 35 F.3d 1473, 1475 (10th Cir. 1994). Gabriel's other challenges are reviewed for an abuse of discretion. See Jensen v. W. Jordan City, 968 F.3d 1187, 1201 (10th Cir. 2020) (leave to amend a complaint); Rachel v. Troutt, 820 F.3d 390, 394 (10th Cir. 2016) (extensions of time); Toevs v. Reid, 685 F.3d

903, 916 (10th Cir. 2012) (appointment of counsel in a civil case). "A district court abuses its discretion when it renders a judgment that is arbitrary, capricious, whimsical, or manifestly unreasonable." Carter v. Bigelow, 787 F.3d 1269, 1278 (10th Cir. 2015) (quotation omitted). We construe Gabriel's pro se pleadings liberally but do not serve as his advocate. United States v. Griffith, 928 F.3d 855, 864 n.1 (10th Cir. 2019).

A

The district court correctly determined that the individual defendants were entitled to absolute immunity.[1] "[A]bsolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976). "In determining whether particular actions of government officials fit within . . . absolute immunity . . . we apply a functional approach, which looks to the nature of the function performed . . . ." Benavidez v. Howard, 931 F.3d 1225, 1230 (10th Cir. 2019) (per curiam) (quotation omitted).

[1] Gabriel does not challenge the district court's conclusion that the El Paso County Combined Courts lack capacity to be sued. In his reply brief he characterizes this conclusion as a "non-issue." In addition, although it appears Gabriel intended to sue the defendants in both their individual and official capacities, he does not adequately develop a separate argument in his opening brief concerning the dismissal of the defendants in their official capacities. We therefore decline to address these issues. See Bronson v. Swensen, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief."). For similar reasons, we also decline to address Gabriel's argument that the district court failed to provide him with injunctive relief, a request which was not presented to the district court.

Gabriel's complaint sought damages against Judge Shakes and his clerk because the judge failed to grant his motion to expunge his criminal record. A judge acting in his judicial capacity is immune from suit unless he acts in the clear absence of all jurisdiction or is sued for a non-judicial act. Mireles v. Waco, 502 U.S. 9, 11 (1991). Neither exception applies here. Judge Shakes' actions in denying Gabriel's motion to expunge or seal records were those "normally performed by a judge," and Gabriel "dealt with the judge in his judicial capacity." Stump v. Sparkman, 435 U.S. 349, 362 (1978). Accordingly, Judge Shakes is immune from suit. His clerk is likewise immune for exercising functions related to Gabriel's attempt to obtain expunction or sealing of his criminal record.

Gabriel's claims against the District Attorney and other prosecutorial employees likewise fail because the defendants are entitled to absolute immunity "for activities intimately associated with the judicial process."[2] Gagan, 35 F.3d at 1475 (emphasis, ellipsis, and quotation omitted). The prosecutorial defendants' actions in opposing expunction or sealing in the state-court proceeding were intimately associated with the judicial process. The district court therefore properly granted them absolute immunity.

[2] The complaint also included allegations of "stalking, email attacks, text messages attacks and planted individuals" intended to harass Gabriel, including "threats of home invasion." These generalized allegations fail to state a plausible claim for relief against any defendant. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." (quotation omitted)).

B

Gabriel next argues that the district court erred in dismissing his complaint with prejudice rather than without prejudice. A dismissal with prejudice is appropriate when the defendants are immune from suit and further amendment of the plaintiff's complaint would be futile. See McKinney v. Okla., Dep't of Human Servs., 925 F.2d 363, 365-66 (10th Cir. 1991). Because Gabriel cannot overcome the bar of absolute immunity, these conditions are met here, so the district court did not abuse its discretion in dismissing the complaint with prejudice.

Similar reasoning applies to Gabriel's assertion that the district court dismissed his complaint before he had the opportunity to respond to the motions to dismiss and without having first ruled on his objections to the magistrate judge's denial of his request for additional time. "[A]lthough we disfavor . . . dismissals before the losing party has an opportunity to respond, this court has held that such a dismissal . . . is not reversible error when it is patently obvious that the plaintiff could not prevail on the facts alleged and allowing him an opportunity to amend his complaint would be futile." Knight v. Mooring Cap. Fund, LLC, 749 F.3d 1180, 1190 (10th Cir. 2014) (alterations and quotation omitted). Such a dismissal does not violate due process because "[a] litigant whose complaint has been dismissed with prejudice could file a motion to alter or amend the judgment under Rule 59(e) or for relief from the judgment under Rule 60(b)," and "can also bring an appeal." Curley v. Perry, 246 F.3d 1278, 1284 (10th Cir. 2001).

Finally, Gabriel argues that the district court erred in denying his request for appointed counsel. However, even with counsel, Gabriel cannot overcome the defendants' absolute immunity from suit. Accordingly, the district court did not err in denying his request.

III

We affirm the district court's challenged orders and its judgment. We deny as moot Gabriel's motions to add exhibits and to submit additional attachments to his brief, as the relevant documents are already part of the record on appeal. His motion to strike the appellees' briefs is denied.

Entered for the Court

Carlos F. Lucero
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 1:19-cv-02248-DDD-KMT

VINCENT GABRIEL,

Plaintiff,

v.

EL PASO COMBINED COURTS,
DAVID LEE SHAKES, individually and in his official capacity as Judge of El Paso Combined Courts,
GWEN PRATOR, individually and as employee of David Shakes,
DANIEL MAY, individually and in his official capacity as District Attorney,
DAVID GUEST, individually and as an employee,
JOHN PARCELL, as an employee,
BECCA KINIKIN, as an employee, and
ADAM BAILEY, individually and as an employee,

Defendants.

ORDER DENYING RECONSIDERATION

Plaintiff Vincent Gabriel, proceeding pro se, filed this action under 42 U.S.C. § 1983 seeking damages for alleged violations of his First, Fifth, Eighth, Ninth, and Fourteenth Amendment rights, as well as under several state-law tort theories. On December 17, 2019, the Court dismissed the action with prejudice because Defendants—a state court judge, several prosecutors, and judicial and prosecutorial staff—were all alleged to have improperly failed to expunge Mr. Gabriel's criminal record, acts which were taken in their official capacities, and they were therefore entitled to absolute immunity. (Doc. 37.)

Ten days later, on December 27, 2019, Mr. Gabriel filed this motion to reconsider pursuant to Federal Rule of Civil Procedure 59(e).[1] "Rule 59(e) motions may be granted when 'the court has misapprehended the facts, a party's position, or the controlling law.'" *Nelson v. City of Albuquerque*, 921 F.3d 925, 929 (10th Cir. 2019) (quoting *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)). But "Rule 59(e) motions are 'not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing.'" *Id.* at 929 (quoting *Servants of the Paraclete*, 204 F.3d at 1012).

Mr. Gabriel asserts the Court erred in three ways. First, he argues that the "ORDER'S main focus is that Plaintiff failed to enter and complete an aftercare program." (Doc. 39, at 3.) He now asserts—for the first time—that while it is true that he was required to complete this program, and did not do so, he was not actually *permitted* to participate in an aftercare program. (*Id.*) None of his documents or affidavits bear that out.[2] But more importantly, his completion or noncompletion of the

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[1] Mr. Gabriel cites both Rules 59(e) and 60(b). Because this motion was filed within ten days of judgment, the Court reviews it under Rule 59(e). *See, e.g., Handy v. City of Sheridan*, No. 12-CV-01015-WYD-KMT, 2015 WL 428380, at *1 (D. Colo. Jan. 30, 2015), *aff'd*, 636 F. App'x 728 (10th Cir. 2016) ("Rule 59(e) motions must be filed within 28 days of final judgment. Fed. R. Civ. P. 59(e). Motions filed after 28 days of final judgment should be considered under Rule 60(b).").

[2] For this proposition, the motion cites to "Exhibit D," which appears to be a letter from Mr. Gabriel to the district attorney. (*See* Doc. 39-3.) In relevant part, it merely states: "I finished from the Veteran's Court Program as the number one best performer." (*Id.* at 2.) The following, drawn from one of his affidavits, and filed with this motion, is representative of the consistent position Mr. Gabriel took while this case was still open: "The fact that I did not do an aftercare program was due to the policy(s) of the VTC and not by my choice. The program believes that a strong performer has no need for an 'aftercare.' Usually charges/cases are not dismissed if there is any requirement remaining to be fulfilled." (Doc. 39-4, at 4.)

aftercare program was immaterial to the outcome of this federal lawsuit. The actual ground for the Court's dismissal was absolute immunity: "Therefore, because Defendants cannot be sued for the conduct alleged in the Complaint, the motions to dismiss (Docs. 20, 34) are GRANTED." (Doc. 37, at 7.).

Mr. Gabriel directs his second claim of error to absolute immunity. He agrees that the individuals at issue here have absolute immunity from suit but notes that this immunity does not extend to acts taken "in the clear absence of jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 357 (1978). He also argues that "state officials sued in their individual capacities are 'persons' for purposes of [Section] 1983." *Hafer v. Melo*, 502 U.S. 21, 23 (1991). Mr. Gabriel does not say how any of the complained-of conduct was not judicial or prosecutorial in nature, or how general Section 1983 liability doctrines should operate to prevent application of the immunity doctrine. Instead, the Court understands his belief to be that Defendants made serious errors with respect to his case. That may be, but "immunity applies however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Cleavinger v. Saxner*, 474 U.S. 193, 199–200 (1985). The Court made no clear error.

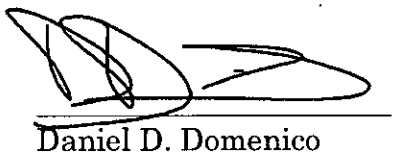
Finally, Mr. Gabriel asserts that the Court made short shrift of his argued entitlement to extensions of deadlines and requests for legal counsel. For example, he says that "contrary to the ORDER, Plaintiff more than timely filed his response to both motions to dismiss!!" (Doc. 39, at 5.) He also states that the Court "admitted" it would appoint him counsel. (*Id.*) These statements are both untrue. But at bottom, these assertions of error—like the arguments made about the aftercare program—are immaterial. No additional argument or assistance of counsel

would assist Mr. Gabriel in piercing the shield of absolute immunity in this case.

CONCLUSION

Mr. Gabriel's motion for reconsideration (Doc. 39) is **DENIED**.

DATED: January 15, 2020. BY THE COURT:



Daniel D. Domenico
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-02248-DDD-KMT

VINCENT GABRIEL,

Plaintiff,

v.

EL PASO COMBINED COURTS,
DAVID LEE SHAKES, individually and in his official capacity as Judge of El Paso Combined Courts,
GWEN PRATOR, individually and as employee of David Shakes,
DANIEL MAY, individually and in his official capacity as District Attorney,
DAVID GUEST, individually and as an employee,
JOHN PARCELL, as an employee,
BECCA KINIKIN, as an employee, and
ADAM BAILEY, individually and as an employee,

Defendants.

FINAL JUDGMENT

In accordance with orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P 58(a) the following Final Judgment is hereby entered.

Pursuant to the Order by Judge Daniel D. Domenico (**Doc. #37)** filed on December 17, 2019, GRANTING the Motions to Dismiss **(Doc. #20, 34)** it is

ORDERED that the case is DISMISSED with prejudice in accordance with Doc. #37.

ORDERED that costs are awarded to the defendants and against the plaintiff upon the filing of a bill of costs within 14 days of entry of judgment, in accordance with the procedures set forth in Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1

The case will be closed.

DATED this 17th day of December, 2019

ENTERED FOR THE COURT:
JEFFREY P. COLWELL, CLERK

s/Patricia Glover
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 1:19-cv-02248-DDD-KMT

VINCENT GABRIEL,

Plaintiff,

v.

EL PASO COMBINED COURTS,
DAVID LEE SHAKES, individually and in his official capacity as Judge of El Paso Combined Courts,
GWEN PRATOR, individually and as employee of David Shakes,
DANIEL MAY, individually and in his official capacity as District Attorney,
DAVID GUEST, individually and as an employee,
JOHN PARCELL, as an employee,
BECCA KINIKIN, as an employee, and
ADAM BAILEY, individually and as an employee,

Defendants.

ORDER DISMISSING CASE

Plaintiff Vincent Gabriel, proceeding pro se, filed this action under 42 U.S.C. § 1983 seeking damages for alleged violations of his First, Fifth, Eighth, Ninth, and Fourteenth Amendment rights, as well as under several state-law tort theories. Before the Court are motions to dismiss by all Defendants (Docs. 20, 34), which are **GRANTED**; his objection to the most recent order by Magistrate Judge Tafoya (Doc. 35), which is **OVERRULED**; and his second motion for Magistrate Judge Tafoya to recuse herself (Doc. 36), which is **DENIED** as moot. The Complaint is **DISMISSED WITH PREJUDICE**.

ALLEGATIONS

The allegations of the Complaint (Doc. 1) are treated as true for purposes of assessing the motion to dismiss. See Wilson v. Montano, 715 F.3d 847, 850 n.1 (10th Cir. 2013).

Before the events of this case, Plaintiff Vincent Gabriel was falsely arrested for shoplifting at a Wal-Mart. On December 16, 2018, he filed a petition in the Colorado District Court for El Paso County to expunge or seal his arrest and criminal records pursuant to Colo. Rev. Stat. § 24-72-702. On February 27, 2019, Defendant District Attorney Daniel H. May objected to the petition, arguing that

> Sealing the record would violate the plea agreement in the underlying criminal case, a part of which plea agreement included [Mr. Gabriel's] express waiver of the right to seal. Paragraph 18 of the Plea Agreement included a waiver of all sealings rights. This waiver would be stricken, however, if the Petitioner completed both the Veterans Trauma Court program as well as the approved aftercare program, pursuant to paragraph 1c of the Stipulation for Deferred Judgment and Sentence. While the Petitioner completed Veterans Trauma Court, the Petitioner did not complete the aftercare program.

(Doc. 1-1, at 8.) On March 1, 2019, Colorado District Court Judge David Lee Shakes denied the petition because it would violate Mr. Gabriel's plea agreement. (Id. at 10.) And in fact, Mr. Gabriel did not complete the aftercare program required by his plea agreement, a fact he has supported by affidavit.[1] Mr. Gabriel believes his arrest, Mr. May's objection

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[1] Mr. Gabriel has always maintained that there was no need for him to complete the aftercare program because of his "strong performance at the veteran's court." (Doc. 1 ¶ 16; see also Doc. 35, at 13 ("corrected affidavit" affirming he did not complete the program.) The Complaint and attached documents make clear he did not complete the program. He further acknowledged, in an affidavit, that completion of that program was a "term of [his] Deferred Prosecution Agreement." (Doc.

to his petition, and Judge Shakes's order were racially motivated. (Doc. 1 ¶¶ 14, 16, 18, 22.)

Mr. Gabriel does not allege any conduct by the remaining Defendants. He simply asserts, on information and belief, that Gwen Prator is Judge Shakes's clerk; and David Guest, John Parcell, Becca Kinkin, and Adam Baily are "employees" of the El Paso County District Attorney's Office and that they "violated the law by barring [Mr. Gabriel], a citizen and veteran from sealing unwarranted records." (Id. ¶¶ 6, 8–11, 25.) He also states that "clearly, the Defendant El Paso District Court has failed in its duty to train its employees." (Id. ¶ 45.)

PROCEDURAL HISTORY

On August 8, 2019, Mr. Gabriel filed this action seeking $5.4 million in damages under 42 U.S.C. § 1983 for alleged violations of his First, Fifth, Eighth, Ninth, and Fourteenth Amendment rights, as well as under several state-law tort theories. He also requests injunctive relief. The case was drawn to the undersigned, who referred it to Magistrate Judge Tafoya for preliminary matters.

On August 8, 2019, Mr. Gabriel also moved for the Court to appoint him pro bono counsel. (Doc. 4.) On September 10, Magistrate Judge Tafoya granted Judge Shakes and the El Paso County Combined Courts a forty-two-day extension to respond to the Complaint. (Docs. 13, 14, 15.) On September 11, without an order from the Court, Mr. Gabriel renewed his motion for counsel. (Doc. 17.) On September 12, Defendants

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24-1 ¶ 10.) He therefore agreed that expunction of his record would depend upon him finishing the aftercare program.

May, Guest, Percell,[2] Kinkin, and Bailey moved to dismiss. (Doc. 20.) On September 16, Magistrate Judge Tafoya denied the motion for counsel, to which Mr. Gabriel objected. (Docs. 23, 24.) He also sought the recusal of Magistrate Judge Tafoya. (Doc. 24.) On October 15, the Court overruled the objection. (Doc. 29.)

On October 17, 2019, after his response deadline had already passed, Mr. Gabriel moved for a sixty-day extension of time to respond to the motion to dismiss. (Doc. 30.) Magistrate Judge Tafoya granted the motion in part, permitting Mr. Gabriel to respond by November 12. On October 24, Defendants El Paso County Combined Courts, Gwen Prator, and Judge Shakes moved to dismiss. (Doc. 34.)

On November 1, Mr. Gabriel filed another objection, in which he again sought the sixty days to respond to the motions to dismiss;[3] again requested counsel and a stay of the proceedings pending the appointment of counsel; and sought permission to amend the pleadings, apparently to revise portions of his affidavit and the Complaint related to the aftercare program. (See Doc. 35.) The same day, he filed a second motion for the recusal of Magistrate Judge Tafoya. (Doc. 36.) More than ninety days have passed since the first motion to dismiss was filed (and thirty days after his ordered deadline), but Mr. Gabriel has not responded to either motion to dismiss.

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[2] Although the Complaint identifies this individual as "John Parcell," Defendants represent, on information and belief, that the correct person is "John Percell." (Doc. 20, at n.1.)

[3] Though it is unclear, the Court construes the request as for additional time to respond to both motions to dismiss.

MOTIONS TO DISMISS

Dismissal is appropriate if the Court lacks subject matter jurisdiction or the complaint fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Under Rule 12(b)(6), at the pleading stage, all allegations of material fact in support of the claims must be accepted as true. Wilson, 715 F.3d at 850. To survive such a motion, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Rule 12(b)(1) motions generally take two forms: facial or factual attacks. Relevant here, "a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." Holt v. United States, 46 F.3d 1000, 1002–03 (10th Cir. 1995).

Courts must also hold pro se litigants' pleadings "to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972). Because Mr. Gabriel is pro se, the Court reads the Complaint broadly for facts sufficient to state a valid claim. Hall v. Bellmon, 935 F.2d 1106, 1110 & n.3 (10th Cir. 1991). If the Court "can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so." Id. This "broad reading of the plaintiff's complaint," however, "does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based. . . . This is so because a pro se plaintiff requires no special legal training to recount the facts surrounding [an] alleged injury." Id.

Much has been made, in this case, about Mr. Gabriel's failure to complete the aftercare program, a precondition necessary to his entitlement to record expunction. Mr. Gabriel does not dispute that completion of that program was a material term of his plea agreement. And even his "corrected affidavit," submitted with what the Court broadly construes as a motion to amend the Complaint, makes clear his continued belief that he "did not need to enter and complete an aftercare program." (Doc. 35, at 3, 13.) Mr. Gabriel's characterization of himself as a "strong performer" does not permit him to ignore the record expunction preconditions to which he agreed. This fact, evident from the Complaint and motion to amend, is reason enough to dismiss this case for failure to state viable claims.

But more compellingly, the individual Defendants are entitled to absolute immunity from suit. Judge Shakes, a state court judge alleged to have been acting in that capacity, is immune from civil liability for the performance of all actions taken in that role. Stump v. Sparkman, 435 U.S. 349, 362–64 (1978); see also Cleavinger v. Saxner, 474 U.S. 193, 199–200 (1985) (Judicial "immunity applies however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff.") (citation omitted); Bradley v. Fisher, 80 U.S. 335, 336 (1871) ("Judges of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly."). Ms. Prator, his clerk, is also immune. Henriksen v. Bentley, 644 F.2d 852, 855 (10th Cir. 1981) ("Immunity which derives from judicial immunity may extend to persons other than a judge where performance of judicial acts or activity as an official aide of the judge is involved.").

Mr. May, a prosecutor and the only other Defendant in this case alleged to have taken any specific action, is also "entitled to absolute immunity against suits brought . . . for activities intimately associated with the judicial process." Gagan v. Norton, 35 F.3d 1473, 1475 (10th Cir. 1994). This immunity extends to Defendants Guest, Percell, Kinkin, and Bailey because the limited allegations concerning them can only be understood as asserting that they were performing prosecutorial functions. See Kalina v. Fletcher, 522 U.S. 118, 127 (1997) (In "determining immunity, we examine the nature of the function performed, not the identity of the actor who performed it." (citation omitted)); see also, e.g., Maqablh v. Heinz, No. 3:16-CV-289-JHM, 2017 WL 1347695, at *3 (W.D. Ky. Apr. 10, 2017) ("The immunity afforded to prosecuting attorneys also applies to members of the prosecutor's staff for acts committed in the course of their duties as staff of a prosecutor of the state." (alterations and citation omitted)).

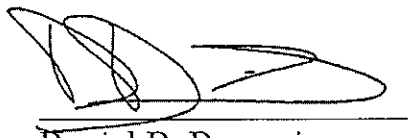
Finally, the El Paso County Combined Courts lack the legal capacity to be sued. See Myers v. Koopman, No. 09-CV-02802-REB-MEH, 2011 WL 650328, at *12 (D. Colo. Feb. 11, 2011) (citing Colo. Const. art. VI, § 10; Colo. Rev. Stat. §§ 13-5-101; State Board of County Com+s of County of Adams v. Colorado Dept. of Public Health and Environment, 218 P.3d 336, 344–45 (Colo. 2009); Davidson v. Sandstrom, 83 P.3d 648, 656 (Colo. 2004); Board of Com+s of Phillips County v. Churning, 35 P. 918, 918 (Colo. App. 1894)).

Therefore, because Defendants cannot be sued for the conduct alleged in the Complaint, the motions to dismiss (Docs. 20, 34) are **GRANTED**. Mr. Gabriel's claims are **DISMISSED** with prejudice. His objection (Doc. 35)—which seeks an additional sixty days to respond to the motions to dismiss; requests pro bono legal counsel; and asks for permission to amend the Complaint—is **OVERRULED**. More than

ninety days have passed since the first motion to dismiss was filed, during which time Mr. Gabriel did not avail himself of the extended response deadline set by Magistrate Judge Tafoya, and he has not shown good cause why the Court should permit this case to linger. Additionally, neither pro bono counsel nor amendment will assist Mr. Gabriel in defeating absolute immunity. Finally, the second motion for Magistrate Judge Tafoya to recuse herself (Doc. 36) is **DENIED** as moot.

DATED: December 17, 2019.

BY THE COURT:



Daniel D. Domenico
United States District Judge