FILED
United States Court of Appeals
Tenth Circuit

January 31, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHAEL FARROW,

Plaintiff - Appellant,

v.

TULUPIA, Officer; RAMIREZ, Officer; EDLIN BARRAZA, Officer; DEANGELIS, Officer; SNELLING, Officer; BEHRINGER, Officer; RIVAS, Officer; HULEN, Officer; MARTINEZ, Officer; OTT, Officer; WELT, Officer; POLAMIREZ, Officer; GOMEZ, Officer; HOUSTON, Officer; COSTA, Officer; KIM HURT, Nurse; LOPEZ, Nurse; DURMOLA, Nurse; GEORGE BRAUCHLER; FIELDS, Deputy Director, Arapahoe County District Attorney,

Defendants - Appellees.

No. 21-1027
(D.C. No. 1:19-CV-02533-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

Before **McHUGH**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

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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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

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Michael Farrow, a pro se Colorado prisoner, appeals from a district court order denying reconsideration of its order dismissing his civil-rights complaint. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.[1]

BACKGROUND

In September 2019, Farrow sued detention officers, nurses, and district attorneys for conduct that occurred in 2015 while he was incarcerated in the Aurora, Colorado Municipal Detention Center. A magistrate judge screened the complaint, noted various pleading defects, and directed Farrow, who was then incarcerated at the Sterling Correctional Facility, to file an amended complaint. In February 2020, Farrow filed a notice of address change indicating he had been transferred to the Buena Vista Correctional Complex (BVCC) in Buena Vista, Colorado. But he did not file an amended complaint.

On March 24, 2020, a magistrate judge recommended dismissing the complaint without prejudice because it lacked a short and plain statement showing Farrow's

[1] Farrow did not file a notice of appeal from the district court's order denying reconsideration within thirty days of the order's entry. *See* Fed. R. App. P. 4(a)(1)(A) (providing that a notice of appeal in a civil case must be filed within thirty days of the order or judgment's entry). But he subsequently filed a motion to reopen the time to appeal along with a notice of appeal, and he asked the district court to process the notice once it had addressed his motion. The district court granted the motion and reopened the time to appeal. *See id.* 4(a)(6) (allowing the district court to reopen the time to appeal for 14 days if, among other things, the motion to reopen is filed within 180 days after the order or judgment is entered). Farrow's notice of appeal then became effective, conferring jurisdiction on this court. *See N. Am. Specialty Ins. Co. v. Corr. Med. Servs., Inc.*, 527 F.3d 1033, 1039-40 (10th Cir. 2008) (holding that a district court's grant of a Rule 4(a)(5) motion to extend the appeal period validated a previously filed notice of appeal).

entitlement to relief. *See* Fed. R. Civ. P. 8(a)(2). Specifically, the complaint provided only conclusory allegations, failed to identify the defendants' personal participation in alleged constitutional violations, appeared barred by the statute of limitations and the doctrine of prosecutorial immunity, and identified no basis for municipal liability. The district court mailed the recommendation to Farrow at the Buena Vista Correctional Facility (BVCF), which is one of three facilities at BVCC and has the same address.

The next day, on March 25, Farrow filed a motion seeking appointed counsel. Also, he indicated he had been transferred on March 17 to the Centennial Correctional Facility for mental-health treatment and he needed a stay of the proceedings.

Because Farrow was no longer at BVCF, the postal service returned the magistrate judge's recommendation to the court as undeliverable. On May 4, the district court denied Farrow's request for a stay and appointment of counsel but gave him an additional thirty days to object to the recommendation. The court mailed both the order extending time and the magistrate judge's recommendation to BVCF, as the Colorado Department of Corrections' inmate-locator website indicated he had returned there.

Farrow next filed a motion requesting a summary of the court's actions, stating he had not received any court document since January 2020. He also provided a notice-of-address change, dated May 7, confirming his return to BVCF. On May 14, the district court granted Farrow's request and mailed a copy of the docket to his BVCF address.

On June 16, the district court noted that Farrow had not filed an objection to the magistrate judge's recommendation. The district court then adopted the recommendation and dismissed Farrow's complaint for failure to comply with Rule 8.

On August 7, Farrow filed a "Motion to Alter Judgement [sic]," seeking reconsideration of the order adopting the magistrate judge's recommendation and dismissing his complaint. R. at 120. He stated in an accompanying affidavit that he had not received the recommendation and that the last document he received was a February 2020 notification that the court had filed his notice of address change.

The district court construed Farrow's motion as seeking relief under Fed. R. Civ. P. 60(b),[2] and it denied the motion for two reasons. First, the court ruled that Farrow's allegations in his affidavit were conclusory and insufficient to rebut the presumption that he had received the magistrate judge's March 2020 recommendation. The court explained that although the recommendation had initially been returned as undeliverable, it was resent to his BVCF address on May 4 along with the order extending the response time, and those documents were not returned by the postal service. Nor were any other court documents returned as undeliverable. Second, the court noted that Farrow failed to challenge any of the recommendation's findings or conclusions. Thus, the district court determined that Farrow presented no extraordinary circumstance to warrant vacating its order dismissing his complaint.

[2] "A litigant seeking reconsideration must file a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e), or a motion seeking relief from judgment under Fed. R. Civ. P. 60(b)." *Ysais v. Richardson*, 603 F.3d 1175, 1178 n.2 (10th Cir. 2010). Rule 60(b) is the appropriate vehicle for reconsideration if the motion was filed more than 28 days after the judgment's entry. *Id.* at 1178 nn.2 & 3.

DISCUSSION

We review the district court's denial of a Rule 60(b) motion for an abuse of discretion. *See Lebahn v. Owens*, 813 F.3d 1300, 1306 (10th Cir. 2016). "We will not reverse the district court's decision on a Rule 60(b) motion unless that decision is arbitrary, capricious, whimsical, or manifestly unreasonable." *Id.* (internal quotation marks omitted). "Rule 60(b) relief is extraordinary and may only be granted in exceptional circumstances." *Id.* (internal quotation marks omitted). Because Farrow is pro se, "we construe his pleadings liberally, but we do not act as his advocate." *Ford v. Pryor*, 552 F.3d 1174, 1178 (10th Cir. 2008).

Farrow argues the district court erred by concluding he failed to show non-receipt of the magistrate judge's recommendation. He contends that his affidavit, by itself, established non-receipt. We disagree.

"A rebuttable presumption of receipt . . . arise[s] on evidence that a properly addressed piece of mail is placed in the care of the postal service." *Witt v. Roadway Express*, 136 F.3d 1424, 1429-30 (10th Cir. 1998). Farrow does not argue that the district court mailed the recommendation to the wrong address on May 4. Indeed, the district court mailed the recommendation to his BVCF address after checking the inmate-locator website, and Farrow prepared a notice of address change reflecting BVCF as his address only a few days later. Unlike the initial mailing of the recommendation in March 2020, the recommendation and extension order were not returned by the postal service.

Nevertheless, Farrow alleges that the district court "pretended to send [him] orders that they never actually mailed or intentionally addressed the mail incorrectly so [he]

would not receive them." Aplt. Br. at H. But he cites no evidence supporting this allegation. And although he acknowledged in his affidavit that he could ask the prison's mailroom to "provide [him] a copy of all the Legal mail for the 2020 calendar year," R. at 126, he did not do so to support his motion for reconsideration. We agree with the district court that Farrow did not rebut the presumption that he received the recommendation and extension order that were mailed to him in May 2020.

As for the district court's observation that Farrow did not address in his motion any of the magistrate judge's findings or conclusions, Farrow contends that "it was not appropriate" to raise objections in his motion. Aplt. Br. at F. But one of the functions of Rule 60(b) is to relieve a party from a judgment entered due to mistake or inadvertence. *See* Fed. R. Civ. P. 60(b)(1). Because Farrow did not attempt to show that the magistrate judge's recommendation to dismiss his complaint was incorrect, he was not entitled to relief. *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (stating that a "motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law").

We conclude the district court did not abuse its discretion in denying Farrow's motion for reconsideration.[3]

[3] To the extent Farrow challenges the district court's rulings on matters other than its denial of reconsideration, such as its denial of court-appointed counsel and a stay of the proceedings, we lack jurisdiction. *See LaFleur v. Teen Help*, 342 F.3d 1145, 1153-54 (10th Cir. 2003) (stating that review of the District Court's "decision on the post-judgment motion does not include [challenges to] the underlying judgment or prejudgment orders").

CONCLUSION

We affirm the district court's judgment. We grant Farrow's motion to proceed on appeal in forma pauperis.

Entered for the Court

Nancy L. Moritz
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-02533-LTB-GPG

MICHAEL FARROW,

Plaintiff,

v.

TULUPIA, Officer,
RAMIREZ, Officer,
EDLIN BARRAZA, Officer,
DEANGELIS, Officer,
SNELLING, Officer,
BEHRINGER, Officer,
RIVAS, Officer,
HULEN, Officer,
MARTINEZ, Officer,
OTT, Officer;
WELT, Officer,
POLAMIREZ, Officer,
GOMEZ, Officer,
HOUSTON, Officer,
COSTA, Officer,
KIM HURT, Nurse,
LOPEZ, Nurse,
DURMOLA, Nurse,
GEORGE BRAUCHLER,
FIELDS, Arapahoe County District Attorney,

Defendants.

ORDER GRANTING MOTION TO ALTER JUDGMENT

This matter is before the Court on Plaintiff's "Motion to Alter Judgment" filed on March 12, 2021. (ECF No. 43). In the Motion, Plaintiff requests that the Court reconsider and alter its February 10, 2021 Order (ECF No. 40), which denied his Motion to Reopen the Time to File an Appeal (ECF No. 32), where he sought to reopen the

time to file an appeal challenging the Court's August 28, 2020 Order denying his Motion to Alter Judgment.

The Court must construe Plaintiff's submitted documents liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110.

I. Background

This action has a lengthy background. The Court dismissed this action without prejudice on June 16, 2020 for failure to comply with Rule 8 of the Federal Rules of Civil Procedure. (ECF No. 24). Following the dismissal, Plaintiff filed a Motion to Alter Judgment (ECF No. 26) on August 7, 2020, which was denied by the Court on August 28, 2020 (ECF No. 27).

Plaintiff then filed a notice of appeal on October 16, 2020 (ECF Nos. 28-30), challenging the June 16, 2020 dismissal. The Tenth Circuit dismissed the appeal on December 16, 2020 (ECF No. 31), for lack of jurisdiction because the notice of appeal was untimely.

On December 31, 2020, Plaintiff filed a "Motion for Order to Reopen the Time to File an Appeal and Notice of Change of Address" ("Motion to Reopen the Time to File an Appeal") (ECF No. 32), seeking to reopen the time to file an appeal challenging the Court's August 28, 2020 Order (ECF No. 27) denying his Motion to Alter Judgment. Additionally, on January 22, 2021, he filed a "Notice of Appeal" (ECF No. 36), challenging the Court's August 28, 2020 Order denying his motion for reconsideration. He also filed a "Motion to Suspend Notice of Appeal" (ECF No. 35), requesting the

Court to not process his Notice of Appeal until a decision was made regarding his Motion to Reopen the Time to File an Appeal.

On January 28, 2021, the Tenth Circuit abated the January 22, 2021 Notice of Appeal pending the District Court's disposition of Plaintiff's "Motion to Reopen the Time to File an Appeal" (ECF No. 32) and "Motion to Suspend Notice of Appeal" (ECF No. 35). (*See* ECF No. 39). On February 10, 2021, this Court denied Plaintiff's Motion to Reopen the Time to File an Appeal (ECF No. 32), and denied his Motion to Suspend Notice of Appeal (ECF No. 35) as moot. (*See* ECF No. 40).

On February 12, 2021, the Tenth Circuit lifted the abatement of the appeal and ordered Plaintiff to file – by February 26, 2021 -- a memorandum brief as to whether he could establish timely filing of his notice of appeal. (*See* ECF No. 45 at 1 (discussing procedural history)). On March 11, 2021, the Tenth Circuit dismissed the appeal for lack of prosecution because Plaintiff never filed the memorandum brief as directed. (ECF No. 41). The mandate issued the same day. (ECF No. 42).

Following the mandate from the Tenth Circuit, Plaintiff filed a motion to Reinstate the Appeal with the Tenth Circuit, arguing that he never received the Tenth Circuit's February 12, 2021 Order. (*See* ECF No. 45 at 2). The Tenth Circuit granted Plaintiff's motion. (ECF No. 45). Thus, the Tenth Circuit recalled the March 11, 2021 mandate and reinstated the appeal. (*Id.*). The Tenth Circuit ordered Plaintiff to file a memorandum brief as directed in the February 12, 2021 Order by April 29, 2021. (*Id.*).

Plaintiff filed a memorandum brief with the Tenth Circuit as directed. After considering Plaintiff's memorandum brief, on May 6, 2021, the Tenth Circuit abated the

appeal pending this Court's resolution of Plaintiff's March 12, 2021 Motion to Alter Judgment. (ECF No. 48).

Plaintiff's instant Motion to Alter Judgment (ECF No. 43) challenges the Court's February 10, 2021 Order. For the reasons discussed below, the Court will grant Plaintiff's Motion to Alter Judgment.

II. Analysis

A litigant subject to an adverse judgment, and who seeks reconsideration by the district court of that adverse judgment, may "file either a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) or a motion seeking relief from the judgment pursuant to Fed. R. Civ. P. 60(b)." *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991). A motion to alter or amend the judgment must be filed within twenty-eight days after the judgment is entered. *See* Fed. R. Civ. P. 59(e). The Court will consider the motion under Rule 59(e) because, with the benefit of the prison mailbox rule, the motion was filed within twenty-eight days after the February 10, 2021 was entered. *See Van Skiver*, 952 F.2d at 1243 (stating that motion to reconsider filed within time limit for filing a Rule 59(e) motion under prior version of that rule should be construed as a Rule 59(e) motion); *see also Price v. Philpot*, 420 F.3d 1158, 1163-66 (10th Cir. 2005) (describing prisoner mailbox rule).

A Rule 59(e) motion may be granted "to correct manifest errors of law or to present newly discovered evidence." *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997) (internal quotation marks omitted). Relief under Rule 59(e) is appropriate when "the court has misapprehended the facts, a party's position, or the controlling law." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). A Rule 59(e)

motion should not revisit issues already addressed or advance arguments that could have been raised previously. *Id.*

In his most recent Motion to Alter Judgment (ECF No. 43), Plaintiff argues that he never received the Court's August 28, 2020 Order, which denied his August 7, 2020 Motion to Alter Judgment. According to Plaintiff, he is currently trying to obtain an audit of his prison mail receipts in order to provide evidence of his allegation that he did not receive the August 28, 2020 order. (ECF No. 43 at 3). As a result of not receiving the Court's August 28, 2020 Order, Plaintiff argues that his Motion to Reopen the Time to File an Appeal (ECF No. 32) should have been granted. Thus, he asks the Court to reconsider the February 10, 2021 Order (ECF No. 40), which denied his Motion to Reopen the Time to File an Appeal so that he can appeal the Court's August 28, 2020 Order.

On May 24, 2021, Plaintiff provided a Case Update (ECF No. 48), and attached a response from a prison official to one of his grievances, which listed all of the mail Plaintiff received between August 28, 2020 and September 31 [sic], 2020. The response and list indicate that Plaintiff did not receive any mail from this Court between those dates. Thus, Plaintiff has provided some evidence, in addition to his affidavit, to support his assertion that he never received the Court's August 28, 2020 Order.

Pursuant to Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure, a notice of appeal in a civil case generally must be filed with the clerk of the district court within thirty days after the judgment or order appealed from is entered. However, the district court may reopen the time to file a notice of appeal if three conditions are satisfied:

> (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of

> the judgment or order sought to be appealed within 21 days after entry;
>
> (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
>
> (C) the court finds that no party would be prejudiced.

Fed. R. App. P. 4(a)(6)(A-C). Plaintiff bears the burden of demonstrating compliance with Rule 4(a)(6). *See Portley-El v. Milyard*, 365 F. App'x 912, 916 (10th Cir. 2010) (unpublished).

Plaintiff has now provided additional evidence that he did not receive notice of the Court's August 28, 2020 Order. Further, Plaintiff filed his December 31, 2020 Motion to Reopen Time to File an Appeal (ECF No. 32) within 180 days after the August 28, 2020 Order (ECF No. 27) was entered. Additionally, the Court finds that no party would be prejudiced. Thus, upon consideration of the Motion to Alter Judgment and the entire file, the Court finds that Plaintiff has demonstrated that the Court should reconsider and vacate the February 10, 2021 Order. Plaintiff's Motion to Alter Judgment will be granted. !

Accordingly, it is

ORDERED that Plaintiff's "Motion to Alter Judgement" filed on March 12, 2021 (ECF No. 43) is GRANTED. It is

FURTHER ORDERED that the Court's February 10, 2021 Order (ECF No. 40) is VACATED. It is

FURTHER ORDERED that Plaintiff's Motion to Reopen Time to File an Appeal (ECF No. 32), seeking to reopen the time to file an appeal of the Court's August 28, 2020 Order, is GRANTED. It is

FURTHER ORDERED that Plaintiff's Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 (ECF No. 34), which is liberally construed as a motion to proceed *in forma pauperis* on appeal, is DENIED without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit.. It is

FURTHER ORDERED that Plaintiff's Motion to Suspend Notice of Appeal (ECF No. 35) is DENIED as moot.

DATED at Denver, Colorado, this 7th day of June, 2021.

BY THE COURT

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-02533-LTB-GPG

MICHAEL FARROW,

Plaintiff,

v.

TULUPIA, Officer,
RAMIREZ, Officer,
EDLIN BARRAZA, Officer,
DEANGELIS, Officer,
SNELLING, Officer,
BEHRINGER, Officer,
RIVAS, Officer,
HULEN, Officer,
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OTT, Officer,
WELT, Officer,
POLAMIREZ, Officer,
GOMEZ, Officer,
HOUSTON, Officer,
COSTA, Officer,
KIM HURT, Nurse,
LOPEZ, Nurse,
DURMOLA, Nurse,
GEORGE BRAUCHLER,
FIELDS, Arapahoe County District Attorney,

Defendants.

ORDER DENYING RECONSIDERATION

This matter is before the Court on Plaintiff's "Motion to Alter Judgement and Notice of Address Change" (the "Motion for Reconsideration") filed on August 7, 2020. (ECF No. 26). The Court dismissed this action without prejudice on June 16, 2020 for

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failure to comply with Rule 8 of the Federal Rules of Civil Procedure. (ECF No. 24). For the reasons discussed below, the Court will deny Plaintiff's Motion for Reconsideration.

A litigant subject to an adverse judgment, and who seeks reconsideration by the district court of that adverse judgment, may "file either a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) or a motion seeking relief from the judgment pursuant to Fed. R. Civ. P. 60(b)." *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991). A motion to alter or amend the judgment must be filed within twenty-eight days after the judgment is entered. *See* Fed. R. Civ. P. 59(e). The Court will consider Plaintiff's Motion for Reconsideration pursuant to Rule 60(b) because it was filed more than twenty-eight days after the dismissal order was entered on June 16, 2020. *See Van Skiver*, 952 F.2d at 1243. Rule 60(b)(1) allows the Court to grant relief from an order for mistake, inadvertence, surprise, or excusable neglect. Rule 60(b)(6) permits relief due to "any other reason that justifies relief." Relief under Rule 60(b) is appropriate only in extraordinary circumstances. *See Massengale v. Oklahoma Bd. of Examiners in Optometry*, 30 F.3d 1325, 1330 (10th Cir. 1994).

Upon consideration of the Motion to Reconsider and the entire file, the Court finds that Plaintiff fails to demonstrate any extraordinary circumstances that demonstrate the Court should reconsider and vacate the order to dismiss this action. In his Motion to Reconsider, Plaintiff contends he did not receive the March 24, 2020 Recommendation of United States Magistrate Judge. (*See* ECF No. 26). The Recommendation was sent to Plaintiff's address of record, at the Buena Vista Correctional Facility ("BVCF"), on March 24, 2020. (ECF No. 18). On March 25, 2020, Plaintiff submitted a motion, which included a notice of change of address, indicating he

had been moved to Centennial Correctional Facility to receive mental health care. (ECF No. 19). As a result, the March 24, 2020 United States Magistrate Judge Recommendation was returned to the Court by the United States Postal Service on April 13, 2020 because additional postage was due and Plaintiff was no longer at the BVCF address. (ECF No. 20). On May 4, 2020, the Court ordered the Clerk of Court to resend Plaintiff the March 24, 2020 Recommendation of United States Magistrate Judge and to affix the proper amount of postage. (ECF No. 21). However, the Court noted that the Colorado Department of Corrections' inmate locator website indicated that Plaintiff had returned to the Buena Vista Correctional Facility. (*Id.* citing www.doc.state.co.us/oss/). Therefore, the Clerk of Court resent the March 24, 2020 Recommendation of United States Magistrate Judge to Plaintiff at his BVCF address on May 4, 2020. (*See* docket entry at ECF No. 21). Plaintiff was informed that he had 30 days from the May 4, 2020 Order to file objections to the March 24 Recommendation of United States Magistrate Judge. (ECF No. 21). He was warned that if he failed to file Objections within the time allowed, he may be barred from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. (*Id.*). The Court's May 4, 2020 Order and the copy of the March 24, 2020 Recommendation of United States Magistrate Judge, which was resent on May 4, 2020, were not returned to the Court. (*See* docket).

On May 12, 2020, Plaintiff requested a "summary of action" and notified the Court that he had returned to BVCF. (ECF No. 22). On May 14, 2020, the Court granted Plaintiff's motion and the Clerk of Court sent Plaintiff a copy of the docket sheet in this action. (ECF No. 23).

The Court notes that Plaintiff has repeatedly alleged that he has not received Court mail. However, beyond his conclusory allegations, he has provided no evidence that the Court's mailings were not delivered. Only one Court Order was returned to the Court as undeliverable by the United States Postal Service (*see* ECF No. 20), and that Order was resent to Plaintiff (*see* ECF No. 21). Aside from that one Order, no other orders or correspondence from the Court to Plaintiff have been returned as undeliverable. (*See* docket). Thus, beyond his conclusory allegations, Plaintiff presents no evidence to rebut the presumption that he received the March 24, 2020 United States Magistrate Judge Recommendation. *See Witt v. Roadway Exp.*, 136 F.3d 1424, 1429-30 (10th Cir. 1998) ("A rebuttable presumption of receipt does arise on evidence that a properly addressed piece of mail is placed in the care of the postal service.").

Moreover, in his Motion for Reconsideration, Plaintiff provides no arguments that the factual findings and/or legal conclusions in the United States Magistrate Judge Recommendation were incorrect. As such, Plaintiff has failed to demonstrate extraordinary circumstances to justify vacating the order of dismissal. Plaintiff's motion for reconsideration will be denied.

Accordingly, it is

ORDERED that Plaintiff's "Motion to Alter Judgement and Notice of Address Change" (the "Motion for Reconsideration") filed on August 7, 2020 (ECF No. 26) is DENIED.

DATED at Denver, Colorado, this 28th day of August, 2020.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-02533-LTB-GPG

MICHAEL FARROW,

Plaintiff,

v.

TULUPIA, Officer,
RAMIREZ, Officer,
EDLIN BARRAZA, Officer,
DEANGELIS, Officer,
SNELLING, Officer,
BEHRINGER, Officer,
RIVAS, Officer,
HULEN, Officer,
MARTINEZ, Officer,
OTT, Officer,
WELT, Officer,
POLAMIREZ, Officer,
GOMEZ, Officer,
HOUSTON, Officer,
COSTA, Officer,
KIM HURT, Nurse,
LOPEZ, Nurse,
DURMOLA, Nurse,
GEORGE BRAUCHLER,
FIELDS, Arapahoe County District Attorney,

Defendants.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge filed on March 24, 2020 (ECF No. 18). The Recommendation states that any objection to the Recommendation must be filed within fourteen days after its

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service. *See* 28 U.S.C. § 636(b)(1)(C). The Recommendation was served on March 24, 2020. On May 4, 2020, the Court granted Plaintiff additional time to file objections. (ECF No. 21). He was directed to file any objections to the March 24, 2020 Recommendation of United States Magistrate Judge within thirty days of the Court's May 4, 2020 Order. No timely objection to the Recommendation has been filed, and Plaintiff is therefore barred from de novo review.

Accordingly, it is

ORDERED that the Recommendation of United States Magistrate Judge (ECF No. 18) is accepted and adopted. It is

FURTHER ORDERED that the Complaint is DISMISSED WITHOUT PREJUDICE for Plaintiff's failure to comply with Fed. R. Civ. P. 8. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this dismissal would not be taken in good faith.

DATED at Denver, Colorado, this 16th day of June, 2020.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-02533-LTB-GPG

MICHAEL FARROW,

Plaintiff,

v.

TULUPIA, Officer,
RAMIREZ, Officer,
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GOMEZ, Officer,
HOUSTON, Officer,
COSTA, Officer,
KIM HURT, Nurse,
LOPEZ, Nurse,
DURMOLA, Nurse,
GEORGE BRAUCHLER,
FIELDS, Arapahoe County District Attorney,

Defendants.

ORDER

On April 13, 2020, a copy of the March 24, 2020 Recommendation of United States Magistrate Judge (ECF No. 18), which was sent to Plaintiff at the Buena Vista Correctional Facility, was returned to the Court as undeliverable. (*See* ECF No. 20). Review of the returned envelope indicates that the mail did not include sufficient postage and that Plaintiff was no longer at the address. (*Id.*). Plaintiff's most recent

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motion filed with this Court indicates his new address is at the Centennial Correctional Facility ("CCF"). (*See* ECF No. 19 at 10). However, the Colorado Department of Corrections' inmate locator website indicates that Plaintiff has now returned to the Buena Vista Correctional Facility. *See* www.doc.state.co.us/oss/. Therefore, the Clerk of the Court will be directed to send Plaintiff a copy of this Minute Order and a copy of the March 24 Recommendation (ECF No. 18) at his current address at the Buena Vista Correctional Facility and to include sufficient postage. Plaintiff is reminded that pursuant to D.C.COLO.LCivR 5.1(c), he must file a notice of change of address within five days of any change of address.

On March 25, 2020, Plaintiff filed a "Motion for Stay of Court Proceedings and reconsideration for Probono [sic] Counsel." (ECF No. 19). In the Motion, Plaintiff asserts that he has faced repeated severe retaliation from defendants for proceeding with this court action. (*Id.* at 2-5). He also states that he has been in six different DOC facilities in the last ninety days, so he has been unable to comply with the Court's order to amend his complaint within the time allowed. (*Id.* at 5).

He further states that on March 2, 2020, he experienced a mental health crisis. (*Id.* at 4). On March 17, 2020, he was transferred to CCF and was hospitalized for mental health treatment. (*Id.*). According to Plaintiff, he will be unable to proceed with this action while he is receiving mental health treatment and is heavily medicated. (*Id.* at 5-6 & 8-9). Therefore, he requests a stay of the proceedings for up to 120 days.

Plaintiff further requests that he be appointed pro bono counsel because he has physical and mental disabilities. (*Id.* at 1 & 8-9). He alleges that he is entitled to pro

bono counsel pursuant to D.C.COLO.LAttyR 15, C.R.S § 13-81-101.5, and D.C.COLO.LAttyR. 2(b)(1).

Plaintiff's request for a stay of the proceedings will be denied. It appears Plaintiff has been returned to the Buena Vista Correctional Facility and, therefore, is no longer hospitalized for mental health treatment at CCF. The Court will grant him 30 days from the date of this Order to file objections to the March 24 Recommendation of United States Magistrate Judge. If Plaintiff requires an extension of time beyond the 30 days, he shall request such extension before the 30 day time limit has expired. No further extensions of time will be granted without good cause. If Plaintiff fails to file Objections within the time allowed, he may be barred from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court.

Additionally, Plaintiff's request for appointment of pro bono counsel will be denied as premature. There is no constitutional or statutory right to counsel for civil litigants. *See Johnson v. Johnson*, 466 F.3d 1213, 1217 (10th Cir. 2006). However, "[t]he court may request an attorney to represent any person unable to employ counsel." 28 U.S.C. § 1915(e)(1). The factors to be considered in deciding whether to appoint counsel generally include the merits of the claims, the nature of the factual issues raised, the plaintiff's ability to present his claims, and the complexity of the legal issues being raised. *See Rucks v. Boergermann,* 57 F.3d 978, 979 (10th Cir. 1995). "'The burden is on the [*pro se* litigant] to convince the court that there is sufficient merit to his claim to warrant the appointment of counsel.'" *Steffey v. Orman,* 461 F.3d 1218, 1223 (10th Cir. 2006) (quoting *Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1115 (10th Cir. 2004)). "It is not enough 'that having counsel appointed would have assisted [the *pro se*

litigant] in presenting his strongest possible case, [as] the same could be said in any case.'" *Id.* (quoting *Rucks*, 57 F.3d at 979).

The Court does not believe that appointment of counsel to represent Plaintiff is warranted at this time. Although the Court is not required to complete an initial review pursuant to D.C.COLO.LCivR 8.1(b) before appointing counsel, such initial review is an important step in considering whether Plaintiff's claims have potential merit. In this case, as discussed in the March 24 Recommendation of United States Magistrate Judge, it appears Plaintiff's claims are barred by the statute of limitations. Thus, his claims do not appear to have sufficient merit to warrant appointment of counsel. Further, it does not appear that Plaintiff's claims are particularly complex. Finally, although Plaintiff asserts that he has physical and mental disabilities, he has filed coherent and persuasive pleadings in this case. Therefore, it does not appear that he lacks the ability to argue the merits of his claims.

In his Motion, Plaintiff argues that the statute of limitations for his claims should be four years pursuant to 28 U.S.C. § 1658. However, the four year limitations period in § 1658 only applies to civil actions "arising under an Act of Congress enacted after the date of the enactment of this section," which was December 1, 1990. Section 1983 was enacted prior to December 1, 1990. *See Laurino v. Tate*, 220 F.3d 1213, 1217–18 (10th Cir. 2000). Further, although § 1983 was amended on October 19, 1996, to limit injunctive relief against judicial officers, such amendment did not create a cause of action, and none of Plaintiff's claims are based upon it in any way. *Id.* at 1218. Thus, the four year statute of limitations provided for in § 1658 does not appear to apply to Plaintiff's § 1983 claims in this action. Plaintiff may include this argument, or any other

argument that he wishes to make, by submitting them in his Objections to the Recommendation of United States Magistrate Judge.

Accordingly, it is

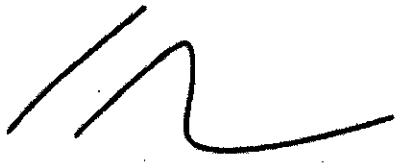
ORDERED that the Clerk of Court shall send Plaintiff a copy of this Order, as well as a copy of the March 24 Recommendation of United States Magistrate Judge, at his Buena Vista Correctional Facility address and shall include sufficient postage. It is

FURTHER ORDERED that Plaintiff shall have thirty (30) days from the date of this Order to file Objections to the March 24 Recommendation of Untied States Magistrate Judge. It is

FURTHER ORDERED that Plaintiff's "Motion for Stay of Court Proceedings and reconsideration for Probono [sic] Counsel" (ECF No. 19) is DENIED without prejudice.

DATED May 4, 2020

BY THE COURT:



Gordon P. Gallagher
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-02533-LTB-GPG

MICHAEL FARROW,

Plaintiff,

v.

TULUPIA, Officer,
RAMIREZ, Officer,
EDLIN BARRAZA, Officer,
DEANGELIS, Officer,
SNELLING, Officer,
BEHRINGER, Officer,
RIVAS, Officer,
HULEN, Officer,
MARTINEZ, Officer,
OTT, Officer,
WELT, Officer,
POLAMIREZ, Officer,
GOMEZ, Officer,
HOUSTON, Officer,
COSTA, Officer,
KIM HURT, Nurse,
LOPEZ, Nurse,
DURMOLA, Nurse,
GEORGE BRAUCHLER,
FIELDS, Arapahoe County District Attorney,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on the Prisoner Complaint (ECF No. 1)[1] filed

[1] "(ECF No. 1)" identifies the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). This manner of identifying a document on the electronic docket is used throughout this order.

(Appendix (E) pg 1 of 16)

pro se by Plaintiff on September 5, 2019. The matter has been referred to this Magistrate Judge for recommendation (ECF No. 15)[2].

The Court has reviewed the filings to date. The Court has considered the entire case file, the applicable law, and is sufficiently advised in the premises. This Magistrate Judge respectfully recommends that the Prisoner Complaint be dismissed without prejudice.

I. Factual and Procedural Background

Plaintiff, Michael Farrow, is in the custody of the Colorado Department of Corrections, currently incarcerated at the Buena Vista Correctional Complex. He initiated this action by submitting *pro se* a Prisoner Complaint (ECF No. 1), and a Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 (ECF No. 2). He has been granted leave to proceed *in forma pauperis.* (ECF No. 4).

On October 17, 2019, the Court reviewed the Prisoner Complaint, determined there were pleading deficiencies that needed to be addressed, and entered an Order Directing Plaintiff to File an Amended Prisoner Complaint ("Order to Amend"). (ECF No. 8). Specifically, Plaintiff was directed to file an Amended Prisoner Complaint that

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[2] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

complies with Rule 8 of the Federal Rules of Civil Procedure, that states claims for relief that are not time-barred (or that includes specific facts to support the application of equitable tolling), that does not include claims that are barred by prosecutorial immunity, that adequately asserts the subjective and objective components for his deliberate indifference to serious medical needs claim, that adequately asserts the personal participation of the defendants, and that adequately asserts municipal liability. (*Id.*).

On October 30, 2019, Plaintiff submitted a Letter to the Court (ECF No. 9), requesting a "summary of actions" for this case as well as any orders or notices filed after September 24, 2019. On October 31, 2019, the Court issued a Minute Order, granting Plaintiff's request. (ECF No. 10). In the Minute Order, the Clerk of Court was directed to mail Plaintiff a copy of the docket in this action as well as a copy of the Court's October 17 Order to Amend. (*Id.*). Further, Plaintiff was directed to file an Amended Prisoner Complaint, as directed in the October 17 Order to Amend, within thirty days of the October 31 Minute Order. (*Id.*). He was warned that if he failed to file an Amended Prisoner Complaint as directed, within the time allowed, the action could be dismissed without further notice. (*Id.*).

As of December 17, 2019, Plaintiff had not filed an Amended Prisoner Complaint. Therefore, I filed a Recommendation that his Prisoner Complaint be dismissed without prejudice for failure to comply with Rule 8 of the Federal Rules of Civil Procedure. (ECF No. 12). On December 31, 2019, Plaintiff filed Objections to the Recommendation indicating that he had not received previous court orders. (ECF No. 13). Based on Plaintiff's Objections and the fact that the Recommendation had been mistakenly

entered prior to the Order of Reference, the December 17, 2019 Recommendation was withdrawn. (ECF No. 16).

On January 13, 2020, the Court ordered the Clerk of Court to send Plaintiff (at his new address) a copy of the Court's October 17, 2019 Order to Amend, a copy of the Court's October 31, 2019 Minute Order (ECF No. 10), and a copy of the docket in this action. (ECF No. 16). Plaintiff was directed that he must file an amended complaint, as directed in the Court's October 17, 2019 Order to Amend, within thirty days of the January 13, 2020 Minute Order. (*Id.*). Plaintiff was warned that if he failed to file an amended complaint as directed within the time allowed, the action may be dismissed without further notice. (*Id.*).

Plaintiff has not filed an Amended Prisoner Complaint within the time allowed. On February 19, 2020, he filed a Notice of Change of Address. (ECF No. 17). In his change of address notice, he informed the Court that the last document he received was the Court's Minute Order filed on January 13, 2020. (*Id.*). Therefore, he did receive the Court's January 13, 2020 Minute Order which directed him to file an Amended Complaint. As he has not filed an amended pleading, the Prisoner Complaint (ECF No. 1) filed on September 5, 2019 is the operative pleading.

In his Prisoner Complaint, Plaintiff asserts six claims for relief stemming from conduct that occurred while he was incarcerated at the Aurora Municipal Detention Center. The Defendants are officers at the detention center, nurses at the detention center, and Arapahoe County District Attorneys.

Claim One

In his first claim, Plaintiff alleges that on September 2, 2015, Defendant Officer Tulupia sexually assaulted him by threatening to shove his stick up Plaintiff's anus. According to Plaintiff, Defendant Tulupia then forced Plaintiff to strip nude and lay face down on a concrete floor, while he stuck his fingers up Plaintiff's rectum.

Claim Two

In his second claim, Plaintiff alleges that on September 1, 2015, Defendant Officer Houston stripped Plaintiff nude, placed him in a cell, and allowed other officers to tease, mock, and humiliate him.

Claim Three

In his third claim, Plaintiff alleges that on September 2, 2015, Defendant Officers Tulupia, Ramirez, Barraza, Deangelis, Snelling, Behringer, Hulen, Ott, Welt, Polamirez, Gomez, Houston, Costa, as well as Officer Edlin (who is not a named defendant), beat Plaintiff multiple times, stripped him nude, and placed him in a cold cell with the air conditioning on. As a result, he suffered mild hypothermia. He also alleges that the officers humiliated, teased and mocked him. Additionally, Plaintiff asserts that they denied him medical help.

Claim Four

In claim four, Plaintiff alleges that on September 2, 2015, he sought medical help for injuries inflicted prior to his detention, as well as injuries inflicted during the sexual and physical assaults alleged in claims one and three. However, Defendant Nurses Hurt, Lopez, and Durmola failed to provide him any medical care.

Claim Five

In claim five, Plaintiff alleges, without providing any dates, that Defendant Officers Tulupia, Ramirerz, Barraza, Deangelis, Snelling, Behringer, Rivas, Hulen, Martinez, Ott, Welt, Polamirez, Gomez, Houston and Costa conspired to make false reports about the assaults against Plaintiff alleged in claims one and three. They also retaliated against Plaintiff for reporting the criminal assaults by having him charged with a new criminal charge of False Reporting. Plaintiff alleges he went to trial for the False Reporting charge and he was found not guilty.

Claim Six

Finally, in claim six, Plaintiff alleges that the Arapahoe County District Attorney's Office Supervisor Defendant Brauchler and Assistant District Attorney Fields violated his rights by charging him with Falsely Reporting a Crime, even though they knew he was innocent. He also alleges that they attempted to get him to plead guilty to another charge in order for the False Reporting charge to be dismissed. Finally, Plaintiff alleges that they retaliated against him by re-filing a misdemeanor charge as a felony charge.

II. Analysis

The Court must construe the Prisoner Complaint liberally because Plaintiff is a *pro se* litigant. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not act as a *pro se* litigant's advocate. *See id.*

As explained in the Court's October 17 Order to Amend, Plaintiff's Prisoner Complaint is deficient for numerous reasons.

A. Rule 8

First, the Prisoner Complaint is deficient because Plaintiff has not complied with the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure. Pursuant to Rule 8 of the Federal Rules of Civil Procedure, a complaint "must contain (1) a short and plain statement of the grounds for the court's jurisdiction, . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought." Fed. R. Civ. P. 8(a). The philosophy of Rule 8(a) is reinforced by Rule 8(d)(1), which provides that "[e]ach allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). Taken together, Rules 8(a) and (d)(1) underscore the emphasis placed on clarity and brevity by the federal pleading rules.

A plaintiff's vague and conclusory allegations that his rights have been violated do not entitle a *pro se* pleader to a day in court regardless of how liberally the court construes such pleadings. *See Ketchum v. Cruz*, 775 F. Supp. 1399, 1403 (D. Colo. 1991), *aff'd*, 961 F.2d 916 (10th Cir. 1992). Thus, "in analyzing the sufficiency of the plaintiff's complaint, the court need accept as true only the plaintiff's well-pleaded factual contentions, not his conclusory allegations." *Hall*, 935 F.2d at 1110.

To comply with Rule 8, a plaintiff must allege, in a clear, concise, and organized manner, what each named defendant did to him, when the defendant did it, how the defendant's action harmed him, what specific legal right he believes the defendant violated, and what specific relief he requests. *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1163 (10th Cir. 2007) (citations omitted).

The Prisoner Complaint does not comply with Rule 8 because it does not provide a short and plain statement of the Plaintiff's claims showing that he is entitled to relief.

1. Statute of Limitations: Claims One, Two, Three, and Four

Plaintiff fails to show he is entitled to relief for claims one, two, three, and four because the claims appear to be barred by the statute of limitations, and Plaintiff fails to allege specific facts that would support the application of equitable tolling.

The "[l]imitation periods in § 1983 suits are to be determined by reference to the appropriate state statute of limitations and the coordinate tolling rules." *Hardin v. Staub*, 490 U.S. 536, 539 (1989) (internal quotation marks and citation omitted). The applicable statute of limitations for § 1983 claims in Colorado is two years. *See Blake v. Dickason*, 997 F.2d 749, 750-51 (10th Cir. 1993). "Although state law determines the applicable statute of limitations period, federal law governs the particular point in time at which a claim accrues." *Kripp v. Luton*, 466 F.3d 1171, 1175 (10th Cir. 2006). Under federal law, the claims accrue "when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Id.* (internal quotation marks omitted); *see also Fogle v. Pearson*, 435 F.3d 1252, 1258 (10th Cir. 2006) ("A § 1983 action accrues when facts that would support a cause of action are or should be apparent."). The test is an objective one, with the focus "on whether the plaintiff knew of facts that would put a reasonable person on notice that wrongful conduct caused the harm." *Alexander v. Okla.*, 382 F.3d 1206, 1216 (10th Cir.2004).

Although the statute of limitations is an affirmative defense, *see* Fed. R. Civ. P. 8(c)(1), the court may dismiss a claim *sua sponte* on the basis of an affirmative defense if the defense is "obvious from the face of the complaint" and "[n]o further factual record [is] required to be developed in order for the court to assess the [plaintiff's] chances of success." *Yellen v. Cooper*, 828 F.2d 1471, 1476 (10th Cir. 1987); *see also Fratus v.*

DeLand, 49 F.3d 673, 676 (10th Cir. 1995) (stating that dismissal under § 1915 on the basis of an affirmative defense is permitted "when the claim's factual backdrop clearly beckons the defense").

In this case, it is clear from the face of the Prisoner Complaint that the conduct alleged in Plaintiff's first, second, third, and fourth claims took place on September 1, 2015 and September 2, 2015. Plaintiff initiated this action on September 5, 2019, more than four years after the alleged unconstitutional conduct that is the basis for those claims. Therefore, it is obvious from the face of the Prisoner Complaint that Plaintiff's § 1983 claims based on conduct occurring prior to September 5, 2017 are time-barred unless equitable tolling applies.

"[W]hen a federal statute [like § 1983] is deemed to borrow a State's limitations period, the State's tolling rules are ordinarily borrowed as well . . . ." *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 616 (2013). Thus, in most § 1983 actions, "a state statute of limitations and the coordinate tolling rules" are "binding rules of law." *Board of Regents v. Tomanio*, 446 U.S. 478, 484 (1980). The State of Colorado recognizes the doctrine of equitable tolling to suspend a statute of limitations period "when flexibility is required to accomplish the goals of justice." *Morrison v. Goff*, 91 P.3d 1050, 1053 (Colo. 2004) (internal quotation marks omitted). For example, equitable tolling of a statute of limitations is appropriate when "plaintiffs did not timely file their claims because of 'extraordinary circumstances' or because defendants' wrongful conduct prevented them from doing so." *Id.* However, "when the dates given in the complaint make clear that the right sued upon has been extinguished, the plaintiff has the burden of establishing a factual basis for tolling the statute." *Aldrich v. McCulloch*

Properties, Inc., 627 F.2d 1036, 1041 n. 4 (10th Cir. 1980). In the Prisoner Complaint, Plaintiff fails to allege any specific facts that would support the application of equitable tolling in this case. Therefore, I recommend that claims one, two, three, and four be dismissed for failure to comply with Rule 8.

2. Medical Care: Included in Claims Three and Four

Additionally, in claims three and four, Plaintiff includes allegations that several defendants denied him proper medical care. It is unclear if Plaintiff was a pretrial detainee at the time he alleges he was denied proper medical care. If Plaintiff was a pre-trial detainee during the period relevant to his §1983 medical claims, his claims would arise under the Fourteenth Amendment Due Process Clause rather than the Eighth Amendment. *See Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009) (pretrial detainee's medical treatment claims properly are asserted as Fourteenth Amendment due process claims but the Eighth Amendment provides the relevant constitutional standards). However, even though the claims would arise under the Fourteenth Amendment, the analytical framework of the Eighth Amendment would be used to address such claims. *See Craig v.* Eberly, 164 F.3d 490, 495 (10th Cir. 1998).

In order to state an arguable claim pursuant to the Eighth Amendment analytical framework, Plaintiff must allege specific facts that demonstrate deliberate indifference to his serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976). "A claim of deliberate indifference includes both an objective and a subjective component." *Al-Turki v. Robinson*, 762 F.3d 1188, 1192 (10th Cir. 2014). "A medical need is considered sufficiently serious to satisfy the objective prong if the condition has been diagnosed by a physician as mandating treatment or is so obvious that even a lay

person would easily recognize the necessity for a doctor's attention." *Id.* at 1192-93 (internal quotation marks omitted). A delay in providing adequate medical care violates the Eighth Amendment only if the delay resulted in substantial harm. *See id.* at 1193. "[T]he substantial harm caused by a delay in treatment may be a permanent physical injury, or it may be an intermediate injury, such as the pain experienced while waiting for treatment and analgesics." *Id.* (internal quotation marks omitted).

Under the subjective prong, "a prison official may be held liable . . . only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Simple negligence and even gross negligence are not sufficient to support an Eighth Amendment claim. *See Berry v. City of Muskogee*, 900 F.2d 1489, 1495 (10th Cir. 1990). Furthermore, mere disagreement with prison officials regarding medical care does not satisfy the subjective prong of a deliberate indifference claim. *See Callahan v. Poppell*, 471 F.3d 1155, 1160 (10th Cir. 2006) (prisoners do not have a constitutional right to a particular course of treatment).

The conclusory allegations in Plaintiff's Prisoner Complaint regarding numerous Defendants failing to provide him medical treatment do not adequately assert the required subjective and objective components for a constitutional claim. Therefore, Plaintiff has failed to adequately allege facts showing he is entitled to relief for any claim of deliberate indifference to his serious medical needs. As such, for this alternative reason, I recommend that his claims based on failure to provide medical care, included in claims three and four, be dismissed for failure to comply with Rule 8 for this additional reason.

3. Personal Participation: Claim Five

In Claim Five, Plaintiff alleges that numerous officers at the detention center "conspired" together to make false reports about the assaults against Plaintiff, and also to persuade Defendant Officers Martinez and Rivas that no crime against Plaintiff occurred. According to Plaintiff, the Defendant Officers also testified in court that no crime occurred. Further, Plaintiff alleges that the Defendant Officers retaliated against Plaintiff by conspiring with police to have Plaintiff charged with a crime of False Reporting.

Plaintiff's allegations in the Prisoner Complaint fail to show that he is entitled to relief on claim five because he has failed to adequately allege the personal participation of any of the named defendants in the alleged constitutional violation. Personal participation is an essential allegation in a § 1983 action against a public officer sued in his or her individual capacity. *See Bennett v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976). To establish personal participation, a plaintiff must show that each individual defendant caused the deprivation of a federal right. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985). There must be an affirmative link between the alleged constitutional violation and each individual defendant's participation, control, direction, or failure to supervise. *See Butler v. City of Norman*, 992 F.2d 1053, 1055 (10th Cir. 1993). As the Tenth Circuit has explained,

> [b]ecause § 1983 [is a] vehicle[] for imposing personal liability on government officials, we have stressed the need for careful attention to particulars, especially in lawsuits involving multiple defendants. It is particularly important that plaintiffs make clear exactly *who* is alleged to have done *what* to *whom*, . . . as distinguished from collective allegations. When various officials have taken different actions with respect to a plaintiff, the plaintiff's facile,

> passive-voice showing that his rights "were violated" will not suffice. Likewise insufficient is a plaintiff's more active-voice yet undifferentiated contention that "defendants" infringed his rights.

Pahls v. Thomas, 718 F.3d 1210, 1225-26 (10th Cir. 2013) (internal citations and quotation marks omitted) (emphasis in original).

In the Prisoner Complaint, Plaintiff provides only conclusory and collective allegations of "conspiracy" and "retaliation" by the "officers." Such conclusory and undifferentiated assertions do not sufficiently allege the personal participation of Defendant Officers Tulupia, Ramirerz, Barraza, Deangelis, Snelling, Behringer, Rivas, Hulen, Martinez, Ott, Welt, Polamirez, Gomez, Houston and Costa in a violation of Plaintiff's constitutional rights. Thus, I recommend that claim five be dismissed for failure to comply with Rule 8.

4. Prosecutorial Immunity: Claim Six

In claim six, Plaintiff asserts claims against Defendants Brauchler and Fields, who are district attorneys. He alleges that the district attorneys violated his constitutional rights by filing a charge of False Reporting against him even though they knew he was innocent. He also alleges that they attempted to get him to plead guilty on another charge in order for the False Reporting charge to be dismissed and that they retaliated against him by re-filing a misdemeanor charge as a felony charge.

As Plaintiff was informed in the October 17 Order to Amend, prosecutors are entitled to absolute immunity in § 1983 suits for activities within the scope of their prosecutorial duties. (ECF No. 8 at 9 (citing *Imbler v. Pachtman*, 424 U.S. 409, 420-24 (1976); *see also Butz v. Economou*, 438 U.S. 478, 504 (1978)). Initiating and pursuing a criminal prosecution are acts "'intimately associated with the judicial process.'" *Snell v.*

Tunnell, 920 F.2d 673, 686 (10th Cir. 1990) (quoting *Imbler*, 424 U.S. at 430). All of Plaintiff's allegations regarding the district attorneys' conduct, including deciding to file criminal charges, attempting to plea bargain, and deciding how criminal conduct should be charged, are actions associated with initiating and pursuing a criminal prosecution. Thus, Plaintiff has failed to adequately allege facts showing he is entitled to relief for claim six because the alleged conduct is within the scope of prosecutorial immunity. As a result, I recommend that claim six be dismissed for failure to comply with Rule 8.

5. Official Capacity Claims against Municipal Employee Defendants: Applies to All Official Capacity Claims

Finally, the Prisoner Complaint is also deficient because it does not adequately allege municipal liability. Plaintiff asserts all of his claims against municipal employees (either City of Aurora or Arapahoe County employees) in their official and personal capacities. "[A]cts of municipal department officials in their official capacity are equated with the acts of a municipality itself." *Stump v. Gates*, 777 F. Supp. 808, 816 (D. Colo. 1991) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n. 55 (1978)); *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978) (official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent").

A municipality, such as the City of Aurora or the County of Arapahoe, are not liable under 42 U.S.C. § 1983 solely because its employees inflict injury on a plaintiff. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694 (1978); *Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993). In order to state a cognizable claim against a municipality, a plaintiff must show that a policy or custom exists and that there is a direct causal link between the policy or custom and the injury alleged. *See*

Schneider v. City of Grand Junction Police Dept., 717 F.3d 760, 769-71 (10th Cir. 2013) (discussing Supreme Court standards for municipal liability); *Dodds v. Richardson*, 614 F.3d 1185, 1202 (10th Cir. 2010). A single incident generally is insufficient to show municipal liability, unless a plaintiff can demonstrate that "the particular illegal course of action was taken pursuant to a decision made by a person with authority to make policy decisions on behalf of the entity being sued." *Moss v. Kopp*, 559 F.3d 1155, 1169 (10th Cir. 2009). In the Prisoner Complaint, Plaintiff fails to allege specific facts to show that Defendants City of Aurora and/or Arapahoe County violated his constitutional rights pursuant to an unconstitutional policy or custom.

Therefore, for the additional reason that Plaintiff failed to adequately allege municipal liability, I recommend that all of the claims against Defendants in their official capacities be dismissed for failure to comply with Rule 8.

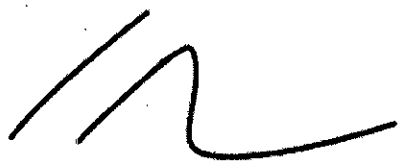
III. Recommendations

For the reasons set forth herein, this Magistrate Judge respectfully

RECOMMENDS that Plaintiff's Prisoner Complaint (ECF No. 1) and this action be DISMISSED WITHOUT PREJUDICE for failure to comply with Rule 8 of the Federal Rules of Civil Procedure.

DATED March 24, 2020.

BY THE COURT:



Gordon P. Gallagher

United States Magistrate Judge