NOT FOR PUBLICATION

FILED

JUL 5 2023

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHNNY LEE WARREN, Plaintiff-Appellant, v. MARK NAPIER, Sheriff at Pima County Jail; et al., Defendants-Appellees.	No. 22-15717 D.C. No. 4:21-cv-00540-JCH-PSOT MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
John Charles Hinderaker, District Judge, Presiding

Submitted June 26, 2023**

Before: CANBY, S.R. THOMAS, and CHRISTEN, Circuit Judges.

Johnny Lee Warren appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging various constitutional claims that arose while he was a pretrial detainee. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under 28 U.S.C. § 1915A. *Resnick v.*

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Hayes, 213 F.3d 443, 447 (9th Cir. 2000). We affirm.

The district court properly dismissed Warren's claims against defendants Conover and Judge Bernini as barred by absolute immunity. *See Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (holding that prosecutors are entitled to absolute immunity for activities "intimately associated with the judicial phase of the criminal process"); *Shucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir. 1988) ("A judge loses absolute immunity only when [the judge] acts in the clear absence of all jurisdiction or performs an act that is not judicial in nature.").

The district court properly dismissed Warren's claims against defendant Brerenton because Warren failed to allege facts sufficient to show that Brerenton acted under color of state law. *See Polk County v. Dodson*, 454 U.S. 312, 317-20 (1981) (explaining that a private attorney or public defender does not act under color of state law within the meaning of § 1983).

The district court properly dismissed Warren's claims against defendant Nanos because Warren failed to allege facts sufficient to show that Nanos made any particular decisions regarding the jail's COVID-19 policy, failed to train or supervise his subordinates, or discriminated against Warren. *See Gordon v. County of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018) (explaining that an unconstitutional conditions claim requires showing an "intentional decision" by the defendant and a failure to take reasonable measures to abate the risk of serious

harm to the plaintiff); *Barren v. Harrington*, 152 F.3d 1193, 1194-95 (9th Cir. 1998) (order) (explaining that a discrimination claim requires showing "an intent or purpose to discriminate" on the basis of the plaintiff's membership in a protected class); *Canell v. Lightner*, 143 F.3d 1210, 1213-14 (9th Cir. 1998) (explaining that liability for failure to train properly requires showing that inadequate training was a deliberate choice).

The district court properly dismissed Warren's claims against Sergeant Ariz, Nurse KMH, and the individual detention officers because Warren failed to allege facts sufficient to show that these defendants violated his constitutional rights. *See Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010) (explaining that although pro se pleadings are construed liberally, plaintiff must present factual allegations sufficient to state a plausible claim for relief); *Barren*, 152 F.3d at 1194 ("A plaintiff must allege facts, not simply conclusions, that show that an individual was personally involved in the deprivation of his civil rights.").

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

Warren's motion for a default judgment (Docket Entry No. 14) is denied. Warren's requests for a copy of his opening brief, set forth in his opening brief, are granted. The Clerk will send a copy of the opening brief submitted at Docket

Entry No. 8 to Warren.

AFFIRMED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Johnny Lee Warren,

Plaintiff,

v.

Mark Napier, et al.,

Defendants.

No. CV 21-00540-TUC-JCH

ORDER

Pending before the Court is Plaintiff's Second Amended Complaint (Doc. 18). The Court will dismiss the Second Amended Complaint and this action.

I. Procedural Background

On December 17, 2021, Plaintiff Johnny Lee Warren, who is confined in the Pima County Adult Detention Center, filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed In Forma Pauperis. In a February 7, 2022 Order, the Court granted the Application to Proceed and dismissed the Complaint with leave to amend. On February 14, 2022, Plaintiff filed a First Amended Complaint. In a March 29, 2022 Order, the Court dismissed the First Amended Complaint for failure to state a claim and with leave to amend. Plaintiff filed his Second Amended Complaint on April 8, 2022.

II. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff

has raised claims that are legally frivolous or malicious, that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1)–(2).

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

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

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

III. Second Amended Complaint

Plaintiff names the following Defendants in his two-count Second Amended Complaint: Pima County Sheriff Chris Nanos; Pima County Superior Court Judge Debra Bernini; Pima County Attorney Laura Conover; Attorney Nicolas Brerenton; Nurse K. KMH; Corrections Officers Mosley, Rodriguez, Lopez, Tucker (1), Tucker (2),

Dickinson, Alvarez, Coleman, Silva, Flucky, Biserno, Chavez, Ruiz, Espinoza, Zepeda, Vergerta, Gomez, and Questas (also listed as Cuestas); and Sergeant Ariz. In both counts, Plaintiff claims violations of his First, Fifth, Eighth, Eleventh, and Fourteenth Amendment rights. Plaintiff seeks monetary damages.

In Count One, Plaintiff alleges he is a Black man with a serious heart condition and that Defendant Nanos "is personally [liable] for Plaintiff contract[ing] COVID 19 from one of Nanos's Corrections officers," who were "not trained in quarantine." Plaintiff claims Defendant Nanos "personally did not inform his staff members of the U.S. [Constitutional] Amendments" and that Nanos, "a white male[,] clearly discriminated against Plaintiff in his individual capacity." Plaintiff states he has been "in Sheriff Chris Nanos's jail under his command" for 10 months and asserts Defendant Nanos violated his constitutional rights "by his own action and inactions." Plaintiff contends Defendant Nanos is responsible for knowing "all that goes on in the jail," is "in charge of operations," and "failed to act, or form[] a policy for COVID 19, in accordance [the] Center for Disease Control (CDC) guidelines for COVID-19, to prevent the spread thereof, resulting in the Plaintiff contracting the deadly virus from his officers under his command." Plaintiff asserts officers moving between infected and uninfected housing pods caused the spread of the virus.

Plaintiff claims Defendant Bernini violated his speedy trial rights. Plaintiff claims he "is a 59 year old black male and Debra Bernini, a white female, clearly discriminated against the Plaintiff in her individual capacities." He claims Defendant Bernini appointed an ineffective attorney to represent Plaintiff and the attorney "wants Plaintiff to sign a plea agreement against his will when no evidence of a crime has ever been produced." Plaintiff also claims he suffers from "severe heart failure" and Bernini "denied Plaintiff any help and continued on with a Rule 11, when she knew [he] needed immediate medical treatment." Plaintiff claims that as a result, he contracted COVID-19.

Plaintiff asserts Defendant Conover discriminated against him "in her individual capacities." He claims Defendant Conover is not immune "when acting beyond her authority . . . [in] CR 20212462, 1/3/22 and 2/3/2022 hearings in Judge Bernini's

Courtroom." Plaintiff asserts he has been in custody for 10 months and his speedy trial rights have been violated. Plaintiff further claims he was compelled to go to court with an attorney "Conover knew was ineffective and wanted Plaintiff to sign a plea agreement against his will, when no evidence of a crime has ever been produced." Plaintiff also claims Conover knew he need medical treatment but "continued with Rule 11," and, as a result, Plaintiff contracted COVID-19.

Plaintiff contends Defendant Brerenton discriminated against Plaintiff "in his individual capacities." He alleges Defendant Brerenton is not immune and is providing Plaintiff with ineffective assistance of counsel. Plaintiff further claims that he needed medical treatment and, because Brerenton "denied Plaintiff," Plaintiff contracted COVID-19.

In Count Two, Plaintiff claims he has been denied basic necessities. Plaintiff alleges Defendant Nanos "personally did not inform his staff members of the U.S. Constitution's 1st amendment" prohibiting actions that inhibit the free exercise of religion. He claims that on June 26, 2021, he was "given the right to 2 trays," and on July 15, 2021, the chaplain "also granted Plaintiff [a] pork free religious diet." Plaintiff claims Defendant Nanos failed to provide these. He alleges that on July 15, 2021, Defendant KMH "signed off on Plaintiff's second meal tray after his second meal alert." Plaintiff states "the first was on 6/26/21, for malnutrition, she had no authority to override the doctor's [order because] she is only a nurse, depriving Plaintiff of his meals of 2 trays."

Plaintiff contends Defendants Mosley, Rodriguez, Lopez, Tucker (1), Tucker (2), Dickinson, Alvarez, Coleman, Silva, Orr, Flucky, Bisnero, Chavez, Espinoza, Zepeda, Questas, Ariz, Vergerta, and Gomez each "personally deprived Plaintiff of his pork free diet and second tray for malnutrition in violation of [Plaintiff's constitutional] rights."

IV. Failure to State a Claim

Although pro se pleadings are liberally construed, *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), conclusory and vague allegations will not support a cause of action. *Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982). Further, a liberal interpretation of a

civil rights complaint may not supply essential elements of the claim that were not initially pled. *Id.*

A. Judge Bernini

Judges are absolutely immune from § 1983 suits for damages for their judicial acts except when they are taken "in the 'clear absence of all jurisdiction.'" *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (quoting *Bradley v. Fisher*, 80 U.S. 335, 351 (1871)); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986). An act is "judicial" when it is a function normally performed by a judge and the parties dealt with the judge in his or her judicial capacity. *Stump*, 435 U.S. at 362; *Crooks v. Maynard*, 913 F.2d 699, 700 (9th Cir. 1990). This immunity attaches even if the judge is accused of acting maliciously and corruptly, *Pierson v. Ray*, 386 U.S. 547, 554 (1967), or of making grave errors of law or procedure. *See Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir. 1988). All of Plaintiff's claims against Judge Bernini are based on her actions as the presiding judge in Plaintiff's criminal case. Judge Bernini is therefore immune from suit under § 1983 and will be dismissed.

B. Defendant Conover

Prosecutors are absolutely immune from liability for damages under § 1983 for their conduct in "initiating a prosecution and in presenting the State's case" insofar as that conduct is "intimately associated with the judicial phase of the criminal process." *Buckley v. Fitzsimmons*, 509 U.S. 259, 270 (1993) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976)). Immunity even extends to prosecutors for "eliciting false or defamatory testimony from witnesses or for making false or defamatory statements during, and related to, judicial proceedings." *Buckley*, 509 U.S. at 270; *see also Broam v. Bogan*, 320 F.3d 1023, 1029-30 (9th Cir. 2003) (prosecutor absolutely immune from liability for failure to investigate the accusations against a defendant before filing charges; for knowingly using false testimony at trial; and for deciding not to preserve or turn over exculpatory material before trial, during trial, or after conviction); *Roe v. City & County of S.F.*, 109 F.3d 578, 583-84 (9th Cir. 1997) (absolute immunity for decision to prosecute or not to prosecute

and for professional evaluation of a witness and evidence assembled by the police). Plaintiff's claims against Defendant Conover are based on Conover's actions as prosecutor in Plaintiff's criminal proceedings, and Conover is therefore immune from suit. Accordingly, the Court will dismiss Defendant Conover.

C. Defendant Brerenton

Defendant Brereton is a private attorney appointed to represent Plaintiff in his criminal proceedings.[1] A prerequisite for any relief under 42 U.S.C. § 1983 is a showing that the defendant has acted under the color of state law. An attorney representing a criminal defendant does not act under color of state law. *See Polk County v. Dodson*, 454 U.S. 312, 325 (1981); *see also Szijarto v. Legeman*, 466 F.2d 864, 864 (9th Cir. 1972) (per curiam) ("[A]n attorney, whether retained or appointed, does not act 'under color of' state law."). The Court will dismiss Defendant Brerenton.

D. Defendant Nanos

1. COVID-19

A pretrial detainee has a right under the Due Process Clause of the Fourteenth Amendment to be free from punishment prior to an adjudication of guilt. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). "Pretrial detainees are entitled to 'adequate food, clothing, shelter, sanitation, medical care, and personal safety.'" *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996) (quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982)). To state a claim of unconstitutional conditions of confinement against an individual defendant, a pretrial detainee must allege facts that show:

> (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by

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[1] *See* http://www.cosc.pima.gov/PublicDocs/ (search "case number" for "CR20212462"; click hyperlink for "Change of Plea") (last visited Apr. 26, 2022).

> not taking such measures, the defendant caused the plaintiff's injuries.

Gordon v. County of Orange, 888 F.3d 1118, 1125 (9th Cir. 2018).

Whether the conditions and conduct rise to the level of a constitutional violation is an objective assessment that turns on the facts and circumstances of each particular case. *Id.*; *Hearns v. Terhune*, 413 F.3d 1036, 1042 (9th Cir. 2005). However, "a de minimis level of imposition" is insufficient. *Bell*, 441 U.S. at 539 n.21. In addition, the "'mere lack of due care by a state official' does not deprive an individual of life, liberty, or property under the Fourteenth Amendment." *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (quoting *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986)). Thus, a plaintiff must "prove more than negligence but less than subjective intent—something akin to reckless disregard." *Id.*

Although Plaintiff alleges Defendant Nanos is responsible for jail operations and failed to implement adequate COVID-19 policies, Plaintiff does not allege facts showing Defendant Nanos made an intentional decision with respect to COVID-19 practices that placed Plaintiff at substantial risk of suffering serious harm. Plaintiff does not describe what mitigation measures, if any, were implemented at the jail or what measures were lacking. Plaintiff alleges he contracted COVID-19 as a result of officers moving between quarantined and non-quarantined pods, but does not state when this occurred, when he contracted COVID-19, how long he was ill with the disease, or what, if any, symptoms he continues to experience. Further, Plaintiff does not allege whether Defendant Nanos was aware of his health issues prior to his contracting COVID-19, whether he requested different housing or other accommodations in light of his health issues, and what response, if any he received. Plaintiff's allegations regarding COVID-19 are too vague to state a claim.

2. Failure to Train

Plaintiff alleges that as a result of Defendant Nanos's failure to adequately train or supervise detention officers, detention officers spread COVID-19 in the jail and, on

multiple occasions, he was not provided with a pork-free meal, as required by his religious diet, and did not receive a second meal tray, as required by a medical order. To state a claim based on a failure to train or supervise, a plaintiff must allege facts to support that the alleged failure amounted to deliberate indifference. *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998). A plaintiff must allege facts to support that not only was particular training or supervision inadequate, but also that such inadequacy was the result of "a 'deliberate' or 'conscious' choice" on the part of the defendant. *Id.* at 1213-14; *see Clement v. Gomez,* 298 F.3d 898, 905 (9th Cir. 2002) (a plaintiff must allege facts to support that "in light of the duties assigned to specific officers or employees, the need for more or different training is obvious, and the inadequacy so likely to result in violations of constitutional rights, that the policy[]makers . . . can reasonably be said to have been deliberately indifferent to the need." (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 (1989))). A plaintiff must also show a "sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Redman v. County of San Diego*, 942 F.2d 1435, 1446 (9th Cir. 1991) (citations omitted).

Plaintiff has not alleged facts showing that any inadequacies in the detention officers' training was the result of a deliberate or conscious choice by Defendant Nanos, nor has he alleged facts linking Defendant Nanos's actions with the alleged constitutional violations. Plaintiff's allegations against Nanos are too vague to state a failure-to-train claim.

3. Discrimination

Plaintiff alleges Defendant Nanos, "a white male, clearly discriminated against the Plaintiff" because Plaintiff is Black. Generally, "[t]o state a claim . . . for a violation of the Equal Protection Clause . . . [,] a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). Although Plaintiff alleges he is a member of a protected class, he does not allege facts showing he was treated differently from other inmates, or that any such treatment was *because of* his membership

in a protected class. Plaintiff's conclusory allegations are insufficient to state an equal protection claim against Defendant Nanos.

E. Individual Detention Officers and Sergeant Ariz

Plaintiff claims each of the named detention officers failed to provide him food consistent with his religious diet and denied him a medically ordered second tray of food. Plaintiff provides no other details about these claims. Plaintiff does not allege whether each officer was aware of Plaintiff's religious diet or aware of the medical order that required Plaintiff to receive a second tray of food. Plaintiff fails to allege the dates on which the individual officers denied him his religious diet or a second tray of food, and he also fails to allege whether he requested the correct diet or second tray of food from the officers or what response, if any, he received. In sum, the Court determines that Plaintiff's allegations are too vague to state a claim against the individual detention officers and Sergeant Ariz.

F. Nurse KMH

Plaintiff's only allegations against Defendant Nurse KMH is that on July 15, 2021, she "signed off on Plaintiff's second meal tray after his second meal alert" and "she had no authority to override the doctor's [order because] she is only a nurse." Plaintiff's allegations against Defendant Nurse KMH are too vague to state a claim; it is unclear what Plaintiff means when he says Defendant Nurse KMH "signed off" on the second tray or how this overrode a medical order. Plaintiff has failed to state a claim against Defendant Nurse KMH.

V. Dismissal without Leave to Amend

Because Plaintiff has failed to state a claim in his Second Amended Complaint, the Court will dismiss his Second Amended Complaint. "Leave to amend need not be given if a complaint, as amended, is subject to dismissal." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). The Court's discretion to deny leave to amend is particularly broad where Plaintiff has previously been permitted to amend his complaint. *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). Repeated failure to cure deficiencies is one of the factors to be considered in deciding

whether justice requires granting leave to amend. *Moore*, 885 F.2d at 538.

Plaintiff has made three efforts at crafting a viable complaint and appears unable to do so despite specific instructions from the Court. The Court finds that further opportunities to amend would be futile. Therefore, the Court, in its discretion, will dismiss Plaintiff's Second Amended Complaint without leave to amend.

IT IS ORDERED:

(1) The Second Amended Complaint (Doc. 18) is **dismissed** for failure to state a claim pursuant to 28 U.S.C. § 1915A(b)(1), and the Clerk of Court must enter judgment accordingly.

(2) The Clerk of Court must make an entry on the docket stating that the dismissal for failure to state a claim may count as a "strike" under 28 U.S.C. § 1915(g).

(3) The docket shall reflect that the Court, pursuant to 28 U.S.C. § 1915(a)(3) and Federal Rules of Appellate Procedure 24(a)(3)(A), has considered whether an appeal of this decision would be taken in good faith and finds Plaintiff may appeal in forma pauperis.

Dated this 27th day of April, 2022.

Honorable John C. Hinderaker
United States District Judge

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