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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRYCE JACKSON, Plaintiff-Appellant, v. TONY GOLICK; ANNA KLEIN, Defendants-Appellees.	No. 22-35821 D.C. No. 3:21-cv-05921-TL Western District of Washington, Tacoma ORDER

Before: CANBY, M. SMITH, and BRESS, Circuit Judges.

The district court has denied appellant leave to proceed on appeal in forma pauperis. *See* 28 U.S.C. § 1915(a). On January 20, 2023, the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, the response to the court's January 20, 2023 order, and the opening brief received on November 4, 2022, we conclude this appeal is frivolous. We therefore deny appellant's motions to proceed in forma pauperis (Docket Entry Nos. 2 and 4) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

DISMISSED.

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UNITED STATES COURT OF APPEALS

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U.S. COURT OF APPEALS

BRYCE JACKSON, Plaintiff-Appellant, v. TONY GOLICK; ANNA KLEIN, Defendants-Appellees.	No. 22-35821 D.C. No. 3:21-cv-05921-TL Western District of Washington, Tacoma ORDER

Before: CANBY, M. SMITH, and BRESS, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry Nos. 8, 10 and 12).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BRYCE ANTHONY JACKSON,

Plaintiff,

v.

TONY GOLICK, *et al.*,

Defendants.

CASE NO. 3:21-cv-05921-TL-JRC

REPORT AND RECOMMENDATION

NOTED FOR: **February 25, 2022**

The District Court has referred this action to United States Magistrate Judge J. Richard Creatura. The Court's authority for the referral is 28 U.S.C. § 636(b)(1)(A) and (B), and local Magistrate Judge Rules MJR3 and MJR4. Plaintiff filed this action under 42 U.S.C. § 1983.

Plaintiff alleges that defendants, state prosecutors, unlawfully failed to dismiss the charges in his criminal prosecution because probable cause did not support it. Plaintiff alleges additional errors in his prosecution, including that defendants unlawfully delayed his arraignment. However, because the conduct plaintiff challenges involves defendants' traditional functions as advocates, prosecutorial immunity bars most of these allegations. Furthermore, state

judicial records contradict plaintiff's allegation that defendants unlawfully delayed his arraignment. Moreover, plaintiff's claims against defendants in their official capacities are not viable because plaintiff did not allege that a municipal policy or custom caused their alleged constitutional violations. After the first initial screening, this Court ordered plaintiff to amend his complaint, but his amended complaint did not correct these deficiencies—and again allowing plaintiff to file an amended complaint would be futile. Accordingly, the amended complaint should be dismissed with prejudice.

AMENDED COMPLAINT'S ALLEGATIONS

Plaintiff sues Anna Klein, a state prosecutor, and Tony Golick, a supervisory prosecutor. *See* Dkt. 6 at 3. Plaintiff alleges that, in his state prosecution, defendant Klein knew that the state did not have probable cause to prosecute him because of evidentiary deficiencies. *See id.* at 4–5. Further, plaintiff alleges that defendant Klein knew that "the police report had a lot of [inconsistencies]" and did not "satisf[y] the state standard of probable cause." *See id.* at 5–6. However, "during the course of 17 months," defendant Klein "made no effort . . . to pursue any corrective action" or "dismiss the case." *See id.* Plaintiff adds that he was eventually found not guilty. *Id.* at 10.

Furthermore, plaintiff alleges that defendant Klein unlawfully delayed his arraignment until "2 weeks after the initial appearance" and demanded an excessively high bail in the amount of $30,000. *See id.* at 7, 10. Additionally, plaintiff alleges that defendant Golick knew about defendant Klein's actions and is liable for them as her supervisor. *See id.* at 8. Moreover, plaintiff alleges that the actions of defendant Klein and Golick were "motivated [by] malice." *Id.* at 8. Plaintiff asserts violations of the Fifth, Sixth, and Eighth Amendments and sues defendants

Klein and Golick in their individual and official capacities. *Id.* at 6, 10, 14. For relief, plaintiff seeks damages. *Id.* at 14.

BACKGROUND

Plaintiff filed a complaint, whose core allegations were the same as the amended complaint's. *See* Dkt. 1-1. Plaintiff also filed a motion to proceed *in forma pauperis* ("IFP"). Dkt. 4.

On January 26, 2022, the Court ordered him to file an amended complaint. Dkt. 5. Pertinently, the Court concluded that prosecutorial immunity barred plaintiff's allegations that defendant Klein refused to dismiss the charges against him and recommended excessively high bail. *Id.* at 5–6. Furthermore, the Court concluded that plaintiff's claim that defendant Golick was liable for defendant Klein's alleged misconduct as her supervisor was not viable because plaintiff had yet to adequately allege a constitutional violation on defendant Klein's part. *Id.* at 8. Regarding plaintiff's official-capacity claims, the Court concluded that plaintiff had not alleged a policy or custom that caused the alleged constitutional violations. *Id.*

Plaintiff timely filed his amended complaint. Dkt. 6. The amended complaint makes clear that plaintiff is pursuing only individual- and official-capacity claims under the Fifth, Sixth, and Eighth Amendment against defendants Klein and Golick. *See id.* at 6–10, 14. Plaintiff is not pursuing the other potential causes of action and defendants that the Court discussed in its order to amend. *See id.*; Dkt. 5 at 6–7.

As noted, plaintiff alleges that his arraignment took place on January 16, 2020, which came two weeks after his initial appearance. Dkt. 6 at 7. Plaintiff further alleges that, under state law, his arraignment had to come within 3 business days of his initial appearance. *See id.*

Plaintiff attributes this delay to defendant Klein and contends that it violated due process. *See id.* at 6–7.

The Court takes judicial notice of the docket sheet in plaintiff's prosecution. *See* https://odysseyportal.courts.wa.gov/ODYPORTAL/Home/Dashboard/29 (searching "Jackson, Bryce Anthony," then selecting Case Number 20-1-00008-06); *see also Harris v. Cty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) ("We may take judicial notice of . . . documents on file in federal or state courts." (citation omitted)). These records show that plaintiff's preliminary appearance was held on January 2, 2020 and that the state filed its information on January 6, 2020. *Id.* These records also show that the initial arraignment was held on January 16, 2020. *Id.*

LEGAL STANDARD UNDER 28 U.S.C. § 1915A and § 1915(e)

Under the Prison Litigation Reform Act ("PLRA"), the Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a); *O'Neal v. Price*, 531 F.3d 1146, 1152 (9th Cir. 2008). The Court must "dismiss the complaint, or any portion of the complaint, if the complaint—(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b).

Likewise, because plaintiff seeks to proceed IFP, the Court must screen his amended complaint under § 1915(e). *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc). Under § 1915(e)(2)(B), a district court must dismiss a prisoner's IFP case at any time if it determines that the case is (i) frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief. *O'Neal*, 531 F.3d at 1153 (citation and internal quotation marks omitted).

The standard for determining whether a plaintiff has failed to state a claim under § 1915A(b)(1) and § 1915(e)(2)(B)(ii) is the same as Federal Rule of Civil Procedure 12(b)(6)'s standard for failure to state a claim. *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012); *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). So, under § 1915A(b)(1) and § 1915(e)(2)(B)(ii), the court may dismiss a complaint that fails "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"In determining whether a complaint states a claim, all allegations of material fact are taken as true and construed in the light most favorable to the plaintiff." *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam) (citation omitted). "Dismissal is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that would entitle him to relief." *Watison*, 668 F.3d at 1112 (citation omitted). There is "an obligation where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt." *Byrd v. Phoenix Police Dep't*, 885 F.3d 639, 642 (9th Cir. 2018) (per curiam) (citation omitted). However, while the court can liberally construe a plaintiff's complaint, it cannot supply an essential fact an inmate has failed to plead. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (per curiam) (citation omitted).

DISCUSSION

I. Prosecutorial Immunity

Prosecutors are entitled to absolute immunity from liability for damages under § 1983. *Imbler v. Pachtman*, 424 U.S. 409, 427, 430–31 (1976). This absolute immunity applies when

prosecutors perform "activities [] intimately associated with the judicial phase of the criminal process," such as "initiating a prosecution and in presenting the State's case, *see id.*, or, put differently, "when performing the traditional functions of an advocate," *Kalina v. Fletcher*, 522 U.S. 118, 131 (1997) (citations omitted).

Here, plaintiff alleges that defendant Klein failed to dismiss the charges even though she knew that probable cause did not support his prosecution. Further, plaintiff alleges that defendant Klein demanded excessively high bail. Broadly construing the amended complaint, plaintiff also alleges that defendant Golick knew of these actions and failed to stop them. *See* Dkt. 6 at 8. Plaintiff adds, without further explanation, that malice motivated their actions. Prosecutorial immunity bars these allegations; they all involve activities intimately associated with the judicial phase of the criminal process. *See, e.g.*, *Ismail v. Cty. of Orange*, 676 F. App'x 690, 691 (9th Cir. 2017) ("[R]equesting high bail [is a] prosecutorial decision[] intimately associated with the judicial phase of the criminal process."); *Slater v. Clarke*, 700 F.3d 1200, 1203 (9th Cir. 2012) ("It has long been the law of this circuit that a decision whether to prosecute or not prosecute is entitled to absolute immunity." (citation omitted)); *Genzler v. Longanbach*, 410 F.3d 630, 637 (9th Cir. 2005) ("[A] prosecutor enjoys absolute immunity from a suit alleging that he maliciously initiated a prosecution . . . ." (citation omitted)). Defendant Golick also enjoys this immunity with respect to these allegations. *See Garmon v. Cty. of Los Angeles*, 828 F.3d 837, 845 (9th Cir. 2016) ("An attorney supervising a trial prosecutor who is absolutely immune is also absolutely immune." (citation omitted)).

II. Failure to State a Claim

Plaintiff also alleges that defendant Klein delayed his arraignment until January 16, 2020. Dkt. 6 at 7. This date came "2 weeks after [his] initial appearance" even though under state law

defendant Klein had only 3 business days to "conduct the arraignment." *See id.* at 6–7. Plaintiff adds that this delay violated due process. *Id.* at 7.

Here, the judicial records from plaintiff's prosecution undermine this claim. Plaintiff's preliminary appearance was held on January 2, 2020. The state filed the information on January 6, 2020 and plaintiff's arraignment was held on January 16, 2020. Because plaintiff's arraignment was held within 14 days after the state filed the information, this delay did not violate state law. *See* CrR 4.1(a)(1)–(2); *State v. Pleasant*, 7 Wash. App. 2d 1064, at *2 (2019). And the Court has found no authority proposing that a 2-week delay between a preliminary appearance and an arraignment violates due process. In short, this claim is not viable.

Moreover, plaintiff has failed to state any viable official-capacity claims for the reasons in the Court's order to amend. Specifically, plaintiff has not alleged that a municipal "policy or custom" of Clark County caused the alleged constitutional violations at issue. *See* Dkt. 5 at 8. Because he has been given the opportunity to amend the complaint to allege a viable claim and because the Court cannot see that allowing plaintiff to amend the complaint, once again, will cure these deficiencies, the Court recommends that the amended complaint be dismissed with prejudice.

III. The Dismissal Should Count as a "Strike" Under 28 U.S.C. § 1915(g)

Section 1915(g) provides that, if a prisoner has brought, while incarcerated, three or more prior federal civil actions or appeals that courts dismissed for failure to state a claim, frivolity, or maliciousness, the prisoner may not bring a federal civil action without paying the filing fee unless (s)he is in imminent danger of serious physical injury. *Id.*

Here, prosecutorial immunity bars some of plaintiff's allegations. Because this bar is obvious on the face of the amended complaint, the dismissal of these allegations qualifies as a

dismissal for failure to state a claim. *See Jones v. Bock*, 549 U.S. 199, 215 (2007) ("A complaint may be subject to dismissal under Rule 12(b)(6) when an affirmative defense appears on its face." (alterations adopted) (citation and internal quotation marks omitted)); *Milstein v. Cooley*, 257 F.3d 1004, 1007, 1011–13 (9th Cir. 2001) (affirming district court's dismissal under Rule 12(b)(6) of claims on grounds of prosecutorial immunity). Furthermore, the Court expressly dismissed plaintiff's remaining claims for failure to state a claim.

Although plaintiff alleges that he has experienced "abuses" in jail, his allegations do not support a reasonable inference that he is still being subjected to these alleged abuses. *See* Dkt. 6 at 7. Again, moreover, plaintiff makes clear that he does not base this lawsuit on these alleged abuses. *See id.* at 7–8. So plaintiff has not adequately alleged that he is in imminent danger of serious physical injury.

In short, this dismissal should count as a strike under § 1915(g).

IN FORMA PAUPERIS ("IFP") STATUS ON APPEAL

Plaintiff should not be granted IFP status for purposes of an appeal of this matter. IFP status on appeal shall not be granted if the district court certifies "before or after the notice of appeal is filed" "that the appeal is not taken in good faith[.]" *See* Fed. R. App. P. 24(a)(3)(A). "The good faith requirement is satisfied if the petitioner seeks review of any issue that is not frivolous." *Gardner v. Pogue*, 558 F.2d 548, 551 (9th Cir. 1977) (citation and internal quotation marks omitted). Generally, an issue is not frivolous if it has an "arguable basis either in law or in facts." *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Because any appeal from this matter would be frivolous, IFP status should not be granted for purposes of appeal.

CONCLUSION

In sum, it is **recommended** that:

(1) The amended complaint (Dkt. 6) be **dismissed with prejudice**.

(2) The dismissal **count as a strike** under 28 U.S.C. § 1915(g).

(3) Plaintiff's IFP motion (Dkt. 4) be **denied as moot**.

(4) This case be **closed**.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo* review by the district judge, *see* 28 U.S.C. § 636(b)(1)(C), and can result in a waiver of those objections for purposes of appeal. *See Thomas v. Arn*, 474 U.S. 140, 142 (1985); *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012). Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on **February 25, 2022** as noted in the caption.

Dated this 8th day of February, 2022.

J. Richard Creatura
Chief United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BRYCE A. JACKSON,

Plaintiff,

v.

TONY GOLICK, *et al.*,

Defendants.

CASE NO. 3:21-cv-05921-TL-JRC

ORDER ADOPTING REPORT AND RECOMMENDATION

The Court, having reviewed the report and recommendation of Magistrate Judge J. Richard Creatura, objections to the report and recommendation, if any, and the remaining record, does hereby find and **ORDER**:

(1) The Court **adopts** the report and recommendation.

(2) Plaintiff's amended complaint (Dkt. 6) is **dismissed with prejudice**.

(3) This dismissal **counts as a strike** under 28 U.S.C. § 1915(g).

(4) Plaintiff's IFP motion (Dkt. 4) is **denied as moot**.

(5) The Clerk is directed to **close** this case and **send** copies of this order to plaintiff, counsel for defendants, and to the Hon. J. Richard Creatura.

DATED this () day of ()/2022.

Tana Lin
United States District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BRYCE A. JACKSON,

Plaintiff,

v.

TONY GOLICK, *et al.*,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NO. 3:21-cv-05921-TL-JRC

__ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

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

THE COURT HAS ORDERED THAT

The amended complaint (Dkt. 6) is **dismissed with prejudice**. This dismissal **counts as a strike** under 28 U.S.C. § 1915(g).

Dated () XX, 2022.

Ravi Subramanian
Clerk of Court

Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BRYCE ANTHONY JACKSON,

Plaintiff,

v.

TONY GOLICK, et al.,

Defendants.

CASE NO. 3:21-cv-05921-TL-JRC

ORDER ON REPORT AND RECOMMENDATION

Plaintiff filed a civil rights action under 42 U.S.C. § 1983 related to his prosecution by Defendants for an alleged robbery.[1] This matter comes before the Court on the Report and Recommendation of the Honorable J. Richard Creatura, Chief United States Magistrate Judge (Dkt. No. 10), and Plaintiff Bryce Anthony Jackson, Jr.'s objections to the Report and Recommendation (Dkt. No. 13). Having reviewed the Report and Recommendation, Plaintiff's

[1] This was a Washington state prosecution, No. 20-1-00008-06. Dkt. No. 1-1 at 55; Dkt. No. 6 at 4.

untimely objections and memoranda, and the remaining record,[2] the Court ADOPTS the Report and Recommendation and OVERRULES the objections.

The Report and Recommendation was filed on February 8, 2022. Dkt. No. 10. "Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b)(2). Plaintiff did not file his objections until March 29, 2022, beyond the timeline allowed for in the rules. Dkt. No. 13. Untimely objections can be deemed waived. *See, e.g.*, *Norling v. Uttecht*, No. 19-5697, 2020 WL 42418, at *1 (W.D. Wash. Jan. 3, 2020) (petitioner waived his right to object to the report and recommendation because he filed objections nearly a month after the 14-day deadline expired); *Hausken v. Lewis*, No. 12-5882, 2014 WL 1912058, at *2 (W.D. Wash. May 12, 2014) (plaintiff waived his objections because he filed them approximately six weeks after the 14-day deadline expired). Further, a party filing an untimely objection is not entitled to de novo review. Fed. R. Civ. P. 72(b)(3) (a district judge "must determine de novo any part of the magistrate judge's disposition that has been properly objected to") (emphasis added).

The Court has reviewed Plaintiff's objections and memoranda despite their untimely filing. Plaintiff repeatedly raises the case of *Heck v. Humphrey*, 512 U.S. 477 (1994), in his filings to "illustrate[ ] that a prosecutor can be named as a Defendant." Dkt. No. 14 a 1; *see also* Dkt. No. 16 at 1; Dkt. No. 17 at 1; Dkt. No. 18 at 4. But the *Heck* decision addressed the "favorable termination" rule which is a specific element of Section 1983 damages claims in malicious prosecution actions (*i.e.*, what counts as a termination in favor of the accused of the prior criminal proceeding that resulted in the challenged conviction or confinement). *Id.* at

[2] In addition to his objection, Plaintiff has filed eight memoranda, the first of which was filed on March 28, 2022. Dkt. Nos. 11, 14, 16-20, 22. Plaintiff also filed a letter requesting certain documents in this case because his copies were disposed of by Department of Corrections officials (Dkt. No. 15), and he filed a Motion to Amend Judgment (Dkt. No. 21).

485–6. *Heck* does not support Plaintiff's objections regarding whether Defendants have absolute immunity for the actions he challenges. However, Plaintiff is correct that there are some situations in which absolute immunity may not apply to a prosecutor. For example, absolute immunity does not apply when a prosecutor is not acting as "an officer of the court," but is instead engaged in investigative or administrative tasks such as making statements to the press, or acting as a complaining witness in support of an arrest warrant application. *Van de Kamp v. Goldstein*, 555 U.S. 335, 342-343 (2009) (citations omitted). But those actions, unlike the actions Plaintiff complains of, are not "intimately associated with the judicial phase of the criminal process." *Kalina v. Fletcher*, 522 U.S. 118, 131 (1997). It is important to understand that "the absolute immunity that protects the prosecutor's role as an advocate is not grounded in any special 'esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself.' " *Id.* at 127 (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)).

Plaintiff's claims center on the decisions and actions taken by Defendants in prosecuting the case related to his arrest in December 2019, and his objections and memoranda focus on the issue of prosecutorial misconduct.[3] Plaintiff objects to the magistrate judge's "belief that supposedly a citizen has no legal recourse against prosecutorial misconduct." Dkt. No. 13 at 1. But it is not merely a "belief" the magistrate judge was following but the law. As explained in

[3] As the Court was preparing this Order, Plaintiff filed a new memorandum regarding long delays in this case. *See* Dkt. No. 22. The Court understands Plaintiff's frustration with the length of time it has taken to issue this Order. For some context, as of September 2021, this district was facing a judicial emergency caused by five vacant positions (out of a total of seven active judge positions on this Court). *See* United States Courts, *Judicial Emergencies for September 2021*, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2021/09/emergencies. By December, 2021, three judges, including the undersigned, had only recently taken the bench (filling three of five initial judicial vacancies). *See* U.S. District Court for the Western District of Washington, *Updated – Judicial Nominations for the Western District of Washington*, Dec. 16, 2021, https://www.wawd.uscourts.gov/news/updated-judicial-nominations-western-district-washington. This Court inherited a significant number of cases with pending motions and has been diligently working to adequately and carefully review the motions pending before it and issue decisions on both the inherited and newly-filed motions.

detail in the Report and Recommendation, it has long been the law of both the Supreme Court and this Circuit that absolute immunity applies when prosecutors perform "activities intimately associated with the judicial phase of the criminal process" such as initiating prosecutions and setting bail. *Kalina*, 522 U.S. at 131; *see also Ismail v. Cnty. of Orange,* 676 F. App'x. 690, 691 (9th Cir. 2017) (the bail request is a prosecutorial decision entitled to absolute immunity); *Slater v. Clark*, 700 F.3d 1200, 1203 (9th Cir. 2012) (a decision as to whether to prosecute is entitled to absolute immunity). While it may be a difficult pill to swallow, that is the state of the law with regard to the specific claims brought by Plaintiff in this case, and both the magistrate judge and this Court are duty bound to follow it.

The magistrate judge also recommends that should the Court dismiss Plaintiff's complaint for failure to state a claim, the dismissal should count as a "strike" under 28 U.S.C. § 1915(g). Dkt. No. 10 at 7–8. In giving Plaintiff a chance to amend his complaint, Chief Magistrate Judge Creatura explained the issue of absolute immunity with respect to the claims Plaintiff alleged. Dkt. No. 5. While Plaintiff did not renew some of the claims in his amended complaint, he re-alleged the same claims with regard to Defendants that he was warned would be barred by prosecutorial immunity. *See* Dkt. No. 5 at 5–6; Dkt. No. 6 at 4–6, 8–10. The Supreme Court has held that "[a] dismissal of a suit for failure to state a claim counts as a strike, whether or not with prejudice." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1727 (2020). Just as the Court has no choice but to dismiss Plaintiff's complaint for failure to state a claim, the Court also has no discretion about whether the dismissal should count as a strike or not. Under *Lomax*, the dismissal will count as a strike. 140 S. Ct. 1727.

Finally, unrelated to the Report and Recommendation, Plaintiff filed a letter requesting a copy of his original complaint and the documentation attached to it as his copies were disposed of by Department of Corrections officials. Dkt. No. 15. The Court GRANTS this request.

For the foregoing reasons, the Court hereby ORDERS:

(1) The Report and Recommendation is APPROVED and ADOPTED.

(2) Plaintiff's amended complaint (Dkt. No. 6) is DISMISSED WITH PREJUDICE.

(3) This dismissal counts as a strike under 28 U.S.C. § 1915(g).

(4) Plaintiff's IFP motion (Dkt. No. 4) and Motion to Amend Judgment (Dkt. No. 21) are DENIED as moot.

(5) The Clerk is DIRECTED to close this case and send copies of this order to Plaintiff, counsel for Defendants, and to the Honorable J. Richard Creatura.

(6) The Clerk is also DIRECTED to send Plaintiff a copy of his Application to Proceed *In Forma Pauperis* along with his original complaint and all attachments to the complaint (Dkt. No. 1), his Motion for Leave to Proceed *In Forma Pauperis* (Dkt. No. 4), and his amended complaint (Dkt. No. 6).

Dated this 11th day of October 2022.

Tana Lin
United States District Judge