Excerpts From The Court Ordered CoNseNt Decree.

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: February 10, 2021 10:43 PM CASE NUMBER: 2020CV31823
Plaintiffs: GARY WINSTON; JOHN PECKHAM; MATTHEW ALDAZ; WILLIAM STEVENSON; and, DEAN CARBAJAL; On behalf of themselves and all others similarly situated, v. **Defendant:** JARED POLIS, in his official capacity as Governor of Colorado; DEAN WILLIAMS, in his official capacity as Executive Director of the Colorado Department of Corrections.	▲ COURT USE ONLY ▲ Case Number: 20CV31823 Division: 209

ORDER AND CONSENT DECREE

This matter is before the Court in connection with the Joint Motion for Final Approval of Class Action Settlement, filed January 11, 2021, by Plaintiffs, on behalf of themselves and all others similarly situated, and Defendant Dean Williams, in his official capacity as Executive Director of the Colorado Department of Corrections ("Williams" or "CDOC").

1. On May 28, 2020, Plaintiffs filed this putative class action under the Colorado Constitution on behalf of themselves and all other proposed class members confined in the Colorado Department of Corrections, alleging violations of rights under Article II, Section 20 of the Colorado Constitution.

2. On May 28, 2020, Plaintiffs filed a Motion for Preliminary Injunction seeking immediate relief from alleged unconstitutional and otherwise illegal conditions of confinement.

3. After engaging in lengthy, good-faith negotiations, CDOC and Plaintiffs reached a settlement agreement. After notice to the putative class, the parties filed their Joint Motion for Final Approval of Class Action Settlement.[1]

[1] On December 24, 2020, the Court dismissed the claim asserted by Plaintiffs against Defendant Jared Polis. Plaintiffs are currently appealing that ruling. Defendant Polis in not a party to the CDOC Class Settlement, and the matters addressed in this Order and Consent Decree do not apply to any claims previously asserted by Plaintiffs against Defendant Polis.

State inmate, 86, dies in Sterling hospital with COVID symptoms

By Kieran Nicholson
The Denver Post

An 86-year-old Colorado Department of Corrections inmate died Friday at the Sterling Regional Medical Center after experiencing coronavirus symptoms.

The inmate, who was not identified, was taken to the hospital on Monday, according to a DOC news release. He was tested for COVID-19 while at the hospital.

The Logan County Coroner's Office will determine the cause and manner of the man's death.

The Sterling Correctional Facility has been on modified operations because of COVID-19 since April 14, the news release said.

On Wednesday, there were nearly 240 cases of COVID-19 reported at the prison.

More than 470 tests for the virus had been administered.

It is the largest known outbreak in the state.

Kieran Nicholson: 303-954-1822, knicholson@denverpost.com or @kierannicholson

Staff shortages, extended lockdowns in coronavirus-ridden Colorado prisons create "tenuous" situations

State vaccine plan means many inmates will not received shot until summer

Rachel Ellis, The Denver Post

Jamie Amaral poses for a portrait in her home in Aurora on Friday, Dec. 11, 2020. Amaral is a former correctional officer at the Sterling prison who quit in September. She said she quit, in part, over the lack of COVID-19 protections for people incarcerated at the prison.

By **ELISE SCHMELZER** | eschmelzer@denverpost.com | The Denver Post

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Appendix

FILED
United States Court of Appeals
Tenth Circuit

December 11, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRIAN ANDERSON,

Plaintiff - Appellant,

v.

JEFF LONG,

Defendant - Appellee.

No. 23-1050
(D.C. No. 1:21-CV-03453-KLM)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **HARTZ**, and **MORITZ**, Circuit Judges.

Brian Anderson appeals the dismissal of his pro se civil-rights action claiming that Jeff Long, the warden of Colorado's Sterling Correctional Facility, violated his Eighth Amendment rights by failing to implement a policy of providing single-person prison cells to medically vulnerable inmates to prevent him from contracting Covid-19. A magistrate judge acting with the parties' consent, *see* 28 U.S.C. § 636(c)(1), ruled that Anderson failed to allege an Eighth Amendment violation and

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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.

Long was entitled to qualified immunity. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I

We summarize the facts alleged in the amended complaint and appropriately considered exhibits.[1] Anderson is 63 years old and suffers from an auto-immune disease that puts him at heightened risk of complications from Covid-19. In early 2020, when he was confined at Sterling Correctional Facility, the Colorado Department of Corrections (CDOC) took measures to prevent spread of the virus, including agreeing to issue medically vulnerable inmates single-person prison cells. CDOC's executive director advised Long to implement the single-cell policy under a consent decree entered in a different lawsuit, but Long failed to do so. In August 2020, correctional officers told inmates that those who were 60 years of age and older with medical conditions would be issued single cells to prevent them from catching Covid-19. Anderson told an officer identified as Sergeant Johnson that he had an auto-immune disease, and he asked if he would be placed in a single cell; but Sergeant Johnson replied that Anderson's name was not on the list of inmates being issued single cells. Although some inmates were temporarily granted single cells, others were not, and several died of Covid-19. Long's refusal to implement the single-cell policy caused Anderson to contract Covid-19 in November 2020. After

[1] Although this case was dismissed on a motion under Federal Rule of Civil Procedure 12(b)(6), we may consider documents attached to the amended complaint and those referenced therein that are central to Anderson's claim. *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997).

catching the virus he fainted twice, suffered two strokes, and sustained damage to his heart and lungs. He continues to suffer from complications and requires ongoing treatment. The complaint sought damages and injunctive relief.[2]

Long moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The magistrate judge granted the motion, ruling that Anderson failed to allege a constitutional violation and Long was entitled to qualified immunity. The magistrate judge determined that there were no allegations that Long subjectively knew about Anderson's condition or knew that Anderson faced a substantial risk of harm, and thus the allegations were insufficient to support a reasonable inference that Long consciously disregarded the risk to Anderson when he failed to implement the single-cell policy.

II

"We review de novo the district court's ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim for relief." *Bledsoe v. Carreno*, 53 F.4th 589, 606 (10th Cir. 2022). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on

[2] Anderson has abandoned his request for injunctive relief by failing to advance the issue on appeal. *See Reedy v. Werholtz*, 660 F.3d 1270, 1274 (10th Cir. 2011) (issues omitted from an opening brief are abandoned). He has also waived his argument that Long allegedly used the administrative grievance process to deny him a single cell. Anderson's opening brief contains one sentence stating that his grievance requesting a single cell was denied because an "administrative regulation prohibits filing grievances regarding cells." Aplt. Opening Br. at 9 (cleaned up). Such "scattered statements . . . fail to frame and develop an issue sufficient to invoke appellate review." *Murrell v. Shalala*, 43 F.3d 1388, 1389 n.2 (10th Cir. 1994).

its face." *Id.* (internal quotation marks omitted). We liberally construe pro se pleadings, but we may not craft arguments or otherwise advocate on behalf of a pro se litigant. *See Garrett Selby Connor Maddux & Janer*, 425 F.3d 836, 840-41 (10th Cir. 2005). A "broad reading of the plaintiff's complaint does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

When a defendant asserts qualified immunity "[o]n a motion to dismiss, it is the defendant's conduct as alleged in the complaint that is scrutinized for constitutionality." *Bledsoe*, 53 F.4th at 607 (cleaned up). We evaluate "1) whether the plaintiff has alleged facts showing a constitutional violation; and 2) whether that constitutional violation was clearly established or obvious at the time of the incident in question." *Id.* at 601. When, as here, the plaintiff fails on the first test, we need not consider the second.

The Eighth Amendment prohibits "cruel and unusual punishments," U.S. Const. amend. VIII, including a prison official's "deliberate indifference to serious medical needs of prisoners," *Self v. Crum*, 439 F.3d 1227, 1230 (10th Cir. 2006) (internal quotation marks omitted). Deliberate indifference has two prongs: an objective prong that requires an "alleged deprivation . . . sufficiently serious to constitute a deprivation of constitutional dimension," and a subjective prong requiring that "the prison official . . . have a sufficiently culpable state of mind." *Self*, 439 F.3d at 1230-31 (internal quotation marks omitted). "[A] prison official cannot be liable unless the official knows of and disregards an excessive risk to

inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 1231 (internal quotation marks omitted).

The question here is whether the allegations in the amended complaint satisfy the subjective prong. Anderson contends they do because he alleged that Long failed to implement the single-cell policy to prevent medically vulnerable inmates from contracting Covid-19. There are no allegations, however, that Long knew Anderson had an auto-immune disease or other risk factors that made him more vulnerable to Covid-19. Although he alleged that Sergeant Johnson and other prison staff knew he had an auto-immune disease, he did not allege that *Long* knew of the disease or that he had any particular vulnerability to Covid-19.

Nor did Anderson allege that Long consciously disregarded his particular risks. *See Self*, 439 F.3d at 1231 ("The subjective component is akin to recklessness in the criminal law, where, to act recklessly, a person must consciously disregard a substantial risk of serious harm." (internal quotation marks omitted)). Anderson simply alleged that Sergeant Johnson told him that his name was not on the list of inmates who were issued single cells. Although he also alleged that Long failed to implement the single-cell policy, that failure in itself could not establish that Long made a conscious decision to disregard Anderson's particular vulnerabilities and deny him an individual cell, which some inmates were granted.

Anderson maintains that Long's alleged failure to implement the single-cell policy contravened a consent decree entered in another case. He suggests that Long's

alleged violation of the consent decree supports his assertion of deliberate indifference. It does not. The consent decree was issued in another case after Anderson contracted Covid-19.

Anderson made only a conclusory assertion that Long was deliberately indifferent. He did not allege that Long knew he had an auto-immune disease, nor did he allege that Long made a decision to specifically deny Anderson an individual cell. Absent any such allegations, Anderson failed to state a constitutional violation, and Long was entitled to qualified immunity.

III

The district court's judgment is affirmed. Anderson's motion to proceed on appeal without prepayment of costs or fees is granted.

Entered for the Court

Harris L Hartz
Circuit Judge

Appendix

B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-03453-KLM

BRIAN ANDERSON,

Plaintiff,

v.

JEFF LONG,

Defendant.

ORDER GRANTING MOTION TO DISMISS

ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

This matter is before the Court on the **Motion to Dismiss** [#21][1] filed by the Colorado Attorney General on behalf of Defendant Jeff Long, the Warden of Sterling Correctional Facility ("SCF"), which is run by the Colorado Department of Corrections (the "CDOC"). Plaintiff, who proceeds as a pro se litigant,[2] filed a Response [#30] in opposition to the Motion [#21], and Defendant filed a Reply [#34]. The Court has reviewed the Motion, the Response, the Reply, the entire case file and the applicable law, and is

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[1] "[#21]" is an example of the convention the Court uses to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). This convention is used throughout this Order.

[2] The Court must construe liberally the filings of a pro se litigant. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). In doing so, the Court should not be the pro se litigant's advocate, nor should the Court "supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1175 (10th Cir. 1997) (citing *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)). In addition, a pro se litigant must follow the same procedural rules that govern other litigants. *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994).

312, 319 (1986). In reference to this case, the "incidence of diseases or infections, standing alone," do not "imply unconstitutional confinement conditions, since any densely populated residence may be subject to outbreaks." *Shepherd v. Dallas Cty.*, 591 F.3d 445, 454 (5th Cir. 2009).

Turning to the deliberate indifference test, the Court finds that Plaintiff satisfies the objective prong. This Court has stated that "COVID-19 is a potentially deadly disease that has led to unprecedented measures around the world to stop its spread." *Carranza v. Reams*, No. 20-CV-00977-PAB, 2020 WL 2320174, at *8 (D. Colo. May 11, 2020); *see also Wilson v. Williams*, 961 F.3d 829, 840 (6th Cir. 2020) (stating that the COVID-19 virus creates a substantial risk of serious harm leading to pneumonia, respiratory failure, or death); *Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020) (stating that "COVID-19 specifically can pose a risk of serious or fatal harm to prison inmates). Plaintiff's complaint, taken as true, states that he contracted COVID-19 and suffered two strokes and a host of lingering medical issues such as chest tightness, numbness, and trouble walking. *Statement of Claims* [#8-1] at 8-9. Plaintiff has thus alleged facts for the Court to plausibly infer for purposes of the Motion [#21] that he was "incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834 at 114.

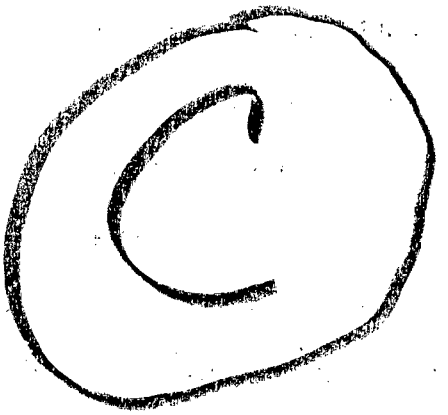
As to the subjective prong, the question is whether Plaintiff has sufficiently alleged that Defendant's response to the COVID-19 pandemic amounted to deliberate indifference to this serious risk of harm associated with the virus. The Court agrees with Defendant that the primary factual allegation that purports to directly tie Defendant to any harm Plaintiff suffered is Defendant's failure to implement a policy requiring medically

vulnerable inmates to be provided single cells, which allegedly caused Plaintiff to contract COVID-19. *Statement of Claims* [#8-1] at 2. The Court finds that Plaintiff makes no allegations from which the Court can infer that Defendant knew that Plaintiff faced a substantial risk to his health or safety and consciously disregarded that risk when he failed to implement a policy that would result in Plaintiff's placement in a single cell. In fact, there are no allegations that Defendant knew anything about Plaintiff's condition, or how Plaintiff might face a substantial risk to his health or safety by Defendant's failure to implement the policy. This Court has held that a defendant cannot be held personally liable for an inmate contracting COVID-19 if there are no allegations that the defendant was actually aware of the plaintiffs' particular medical vulnerabilities or that the plaintiff had a particular substantial risk of catching the virus, as opposed to the general inmate population. *Jones v. Elder*, No. 21-CV-00925-PAB-NRN, 2021 WL 6280202, at *6 (D. Colo. Dec. 13, 2021), *report and recommendation adopted,* No. 21-CV-00925-PAB-NRN, 2022 WL 43898 (D. Colo. Jan. 5, 2022).

The same analysis applies to Plaintiff's averment that in November 2020, Defendant lifted quarantine requirements and required inmates to eat in the cafeteria, which cause "[h]undreds of inmates" to catch COVID-19. *Statement of Claims* [#8-1] at 6. There are simply no allegations from which the Court can infer that Defendant somehow knew that lifting the quarantine requirements at that time would cause an excessive risk to Plaintiff's or the other inmates' health or safety, and that Defendant purportedly disregarded that risk.

Plaintiff agues, however, that a warden has a responsibility to maintain safety in

Appendix



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United States Court of Appeals
Tenth Circuit

January 3, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRIAN ANDERSON,

Plaintiff - Appellant,

v.

JEFF LONG,

Defendant - Appellee.

No. 23-1050
(D.C. No. 1:21-CV-03453-KLM)
(D. Colo.)

ORDER

Before **HOLMES**, Chief Judge, **HARTZ**, and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk