Appendix

• Table Of Contents •

Sutton v. VanLeeuwen, etal.

5) Doc. No. 260 (Recommending Roderick Dismissed and Sum. Jud. For LePage),

6) Doc. No. 265 (Ordering Denied as to my motion to respond to Sum. Jud.),

And

7) Doc. No. 270 (Ordering my Sum. Jud. Objections Overruled, Leave to Supplement Sum. Jud. Response denied, Roderick Recommandation Accepted, and Judgment Entered).

Appendix D. Complete U.S. District Docket For This Case (14-cv-02379-RM-MJW).

End.

CO-USDC Case: 14cv02379-RM-MJW

Table of

~~ATTACHMENTS - 10th CIR. R. 28.2(B)~~ ATTACHMENTS

Attachment No.s	Docket No.	Description
1	74	Report and Recommendation on Docket Nos.59 and 62
2	103	Report and Recommendation on Docket No. 77
3	123	Report and Recommendation on Docket No. 112
4	195	Order on Docket Nos, 74, 103 and 123
5	260	Report and Recommendation on Docket Nos. 235 and 238
6	265	Order on Docket No. 263
7	270	Order on Docket Nos. 260, 266, 267, 269 and 218

Appendix C. (Taken from Appellees' Joint Answer Brief)

FILED
United States Court of Appeals
Tenth Circuit

September 19, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOSHUA LAMONT SUTTON,

Plaintiff - Appellant,

v.

MATTHEW VAN LEEUWEN; BRIAN GOWIN; ANTHONY RODERICK; FRAN LEPAGE,

Defendants - Appellees.

No. 17-1077
(D.C. No. 1:14-CV-02379-RM-MJW)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **BALDOCK** and **HOLMES**, Circuit Judges.

Joshua Lamont Sutton, a Colorado state prisoner, appeals pro se from the district court's adverse judgment. We dismiss this appeal as frivolous because Mr. Sutton has failed to adequately present any issues for this court's consideration, and we therefore assess a strike against Mr. Sutton for purposes of 28 U.S.C. § 1915(g).

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Appendix A.

I. BACKGROUND

We begin by briefly summarizing the most significant aspects of this case's somewhat lengthy procedural history. In Mr. Sutton's original complaint, he asserted multiple violations of his constitutional rights arising out of his arrest and confinement by a number of officers of the City of Pueblo, Colorado Police Department and the Pueblo County Sheriff's Office. The district court found the complaint deficient and ordered him to cure the deficiencies. Mr. Sutton filed an amended complaint. The district court found that complaint insufficient to satisfy the pleading requirements of Federal Rule of Civil Procedure 8 and also repetitious of causes of action he had filed in other cases. Accordingly, the district court ordered him to file an amended complaint. Mr. Sutton filed a second amended complaint. The court rejected that complaint, dismissing some claims as legally frivolous, and ordered him to file another amended complaint.

Mr. Sutton did so but then sought leave to file a fourth amended complaint. The fourth amended complaint asserted twelve claims against four defendants who are the appellees here (Van Leeuwen, Gowin, Roderick, and LePage). The district court dismissed some of the claims asserted in the fourth amended complaint sua sponte but otherwise accepted it.

Defendants Van Leeuwen and Gowin moved to dismiss the claims against them, and defendants Roderick and LePage filed an answer. A magistrate judge filed a report and recommendation that the motions to dismiss should be granted, concluding that the claims against Mr. Van Leeuwen were barred by *Heck v.*

Humphrey, 512 U.S. 477 (1994), that Mr. Van Leeuwen was otherwise entitled to qualified immunity because there was probable cause for him to arrest Mr. Sutton, and that Mr. Sutton failed to state a claim against Mr. Gowin for false imprisonment, malicious prosecution, or use of excessive force. Mr. Sutton filed objections to the recommendation, defendants Van Leeuwen and Gowin responded to those objections, and Mr. Sutton filed a reply.

Before the district court ruled on the recommendation, Mr. Sutton sought leave to file a fifth amended complaint, adding four defendants and some new claims. The magistrate judge recommended granting leave to amend in part and denying leave in part. Mr. Sutton and defendant Gowin both filed objections. But before the district court ruled on *that* recommendation and the objections to it, Mr. Sutton sought leave to file a sixth amended complaint. The magistrate judge recommended that the motion be denied. Mr. Sutton did not object to that recommendation.

The district court then issued a twenty-two page ruling on the outstanding motions and recommendations. The court (1) granted defendant Van Leeuwen and Gowin's motions to dismiss; (2) granted in part Mr. Sutton's motion for leave to file a fifth amended complaint (to allow amendment of claims against defendants Roderick and LePage) but otherwise denied that motion; and (3) denied Mr. Sutton's motion to file a sixth amended complaint.

The case then moved forward against defendants Roderick and LePage on four claims. Mr. Roderick filed a motion to dismiss, and both defendants filed a joint motion for summary judgment. The magistrate judge recommended granting defendant Roderick's motion to dismiss for failure to state a claim because Mr. Sutton failed to allege a constitutionally protected liberty interest that requires a hearing before placement in administrative segregation. The magistrate judge also recommended granting the motion for summary judgment based on Mr. Sutton's failure to exhaust administrative remedies. Mr. Sutton then asked for an opportunity to file a response to the summary judgment motion out of time, which the district court denied because Mr. Sutton already had filed a response, which the magistrate judge had considered, and had not shown excusable neglect justifying the requested relief. Turning to the magistrate judge's recommendation, the district court rejected Mr. Sutton's contentions of procedural error and reviewed the recommendation for clear error because the court determined that Mr. Sutton had not raised specific objections to the substantive basis for the recommendation. Finding no clear error, the court granted the motion to dismiss and the motion for summary judgment. Mr. Sutton appealed.

II. DISCUSSION

Although we construe pro se filings liberally, we have "repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (internal quotation marks omitted). Federal Rule of Appellate Procedure 28(a) requires an appellant's brief to contain, among other things, "a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief," and "the argument, which must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and . . . for each issue, a concise statement of the applicable standard of review." Fed. R. App. P. 28(a)(7)–(8). Thus, "[u]nder Rule 28, which applies equally to pro se litigants, a brief must contain more than a generalized assertion of error, with citations to supporting authority. When a pro se litigant fails to comply with that rule, we cannot fill the void by crafting arguments and performing the necessary legal research." *Garrett*, 425 F.3d at 841 (alteration, ellipsis, citation, and internal quotation marks omitted).

Mr. Sutton's opening brief falls wholly short in these important respects. As even our abbreviated recitation of the procedural history of this case shows, the district court entered many orders adverse to Mr. Sutton concerning a multitude of motions, four recommendations from the magistrate judge, and various objections (or the lack thereof) to the substance of those recommendations. In his opening appellate brief, Mr. Sutton identified several of the district court's orders but set forth no reasoned argument why any of them were erroneous other than to state the conclusion that they violated his "right to a jury trial," his "'Bill of Rights,'" or "other articles of the U.S. Constitution," Aplt. Opening Br. at 3, 4, and that the opposing parties' filings in district court "caused [him] confusion," *id.* at 4. Nor did he provide adequate record citations, and "[i]t is not our role to sift through the record to find evidence not cited by the parties to support arguments they have not made," *Cordova v. Aragon*, 569 F.3d 1183, 1191 (10th Cir. 2009).

In their answer brief, appellees called attention to these shortcomings, but Mr. Sutton made an inadequate attempt in his optional reply brief to rectify them. He asked us to examine various district court filings to deduce his arguments, but incorporation of district court filings is not "acceptable argument," and we "adhere to our rule that arguments not set forth fully in the opening brief are waived," *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 623–24 (10th Cir. 1998). His repetition of a wholly conclusory reason why he feels he should prevail on appeal (that he was denied his "Bill of Rights," in particular his right to a jury trial, *see* Reply at 4, 5, 6–7, 8, 10, 14), is of no avail because neither dismissal nor summary judgment violates the Seventh Amendment right to a jury trial. *Shannon v. Graves*, 257 F.3d 1164, 1167 (10th Cir. 2001) (summary judgment); *Smith v. Kitchen*, 156 F.3d. 1025, 1029 (10th Cir. 1997) (dismissal).

Mr. Sutton also faulted the appellees for not attaching to their answer brief his objections to the magistrate judge's recommendations, which he says leads to the conclusion that his objections were detrimental to their arguments. All of his objections, however, appear in the record transmitted by the district court or appellees' supplemental appendix, so his effort to blame the appellees offers him no refuge from his briefing failures. He blamed this court for sending him a blank opening-brief form that does not set out all the parts of an opening appellate brief prescribed by the Federal Rules of Appellate Procedure, but the form makes clear that it is only "intended to guide [the pro se appellant] in presenting . . . appellate issues and arguments to the court," and that if more space is needed, "<u>additional</u>

pages may be attached," Aplt. Opening Br. at 1. The form also emphasizes that the appellant "*should fully set forth* all of the arguments that you wish the court to consider." *Id.* (emphasis added). We therefore see no reason this court's form should excuse the patent inadequacies in Mr. Sutton's briefing.

Finally, Mr. Sutton alleged that his prison law-library time had been substantially reduced while he was preparing his opening brief, so he asked for leave to amend that brief or, in the alternative, that we consider his reply brief as an amended opening brief. He did not explain, however, what he might say in an amended opening brief other than what he said in his reply, which we have concluded falls far short of the requirements for an opening brief.

III. CONCLUSION

We dismiss this appeal as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) because Mr. Sutton has not presented a reasoned, non-frivolous argument. Accordingly, we assess a strike against Mr. Sutton for purposes of 28 U.S.C. § 1915(g) and deny his motion to proceed on appeal without prepayment of costs and fees. Mr. Sutton is directed to immediately pay the unpaid balance of the appellate filing and docketing fees. Mr. Sutton's motion to file an amended opening appellate brief is denied.

Entered for the Court

Jerome A. Holmes
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 14-cv-02379-RM-MJW

JOSHUA LAMONT SUTTON,

Plaintiff,

v.

ANTHONY RODERICK, and
FRAN LEPAGE,

Defendants.

ORDER

This matter is before the Court on the following matters: (1) "Report and Recommendation on Defendant Roderick's Motion to Dismiss Fourth and Final Amended Complaint (Docket No. 235) & Defendants' Motion for Summary Judgment (Docket No. 238)" ("Report and Recommendation") (ECF No. 260); (2) Plaintiff's "Urgent Objection to Recommendation" ("Objection") (ECF No. 266); (3) Plaintiff's "Motion for the Order (Doc. No. 195) to be Amended – Due to (Clerical) Error" ("Motion for Order") (ECF No. 267); and (4) Plaintiff's "Urgent Declared Reply/Motion Strike Defendant(s)' Response to Objection [268] and for Leave of Court to Allow Plaintiff's Supplemental Response to the Motion for Summary Judgment [238], per Practice Standard IV. D.3 and Sanctions" ("Motion to Strike") (ECF No. 269); and (5) Plaintiff's "Objection, LePage filed Two Answers to the Fourth Amended Complaint – Without Leave of Court" ("Objection to LePage") (ECF No. 218). Upon consideration of these matters, the relevant portions of the court file, the applicable rules and

ATTACHMENT 7

case law, and being otherwise fully advised, the Court (1) OVERRULES Plaintiff's Objection: (2) ACCEPTS the Report and Recommendation; (3) GRANTS Plaintiff's Motion for Order; (4) DENIES Plaintiff's Motion to Strike; and (5) OVERRULES Plaintiff's Objection to LePage.

I. BACKGROUND

Briefly, the remaining claims in this case are contained in Plaintiff's Fourth and Final Amended Prisoner Complaint ("Fourth Complaint"). They are Claims Thirteen and Fourteen against Defendant Roderick and Claims Fifteen and Sixteen against Defendant LePage.[1] (ECF No. 196.) As against Defendant Roderick, Plaintiff alleges that, after an assault arrest, Defendant Roderick placed Plaintiff in solitary confinement/administrative segregation for seven months (1) without a hearing, or a hearing was held without informing him, which deprived him of his liberty without due process of law under the Fifth or Fourteenth Amendment; and (2) without due process of law, which constituted cruel and unusual punishment under the Eighth Amendment. As against Defendant LePage, Plaintiff alleges that LePage denied Plaintiff's repeated requests for a no meat religious diet, in violation of the First Amendment and Eighth Amendment.

Before the Court allowed Plaintiff's Fourth Complaint, Defendants filed an answer (ECF No. 106). After the Court allowed the filing of Plaintiff's Fourth Complaint, Defendant Roderick filed a Motion to Dismiss (ECF No. 235) and both Defendants jointly filed a Motion for Summary Judgment (ECF No. 238). Defendants had previously filed similar motions but they were stricken upon objections filed by Plaintiff. (ECF No. 220.) The Magistrate Judge extended the dispositive motions deadline after striking such motions; Defendants thereafter filed

[1] Some of the documents refer to Defendant LePage as "LaPage." Because Plaintiff's Fourth Complaint uses LePage and Defendant LePage's Declaration (ECF No. 238–11) also uses LePage, the Court will use LePage.

the motions now at issue. Plaintiff filed responses to both motions, raising no objection to the extended deadline at that time.[2] (ECF Nos. 253 & 254.)

In the Report and Recommendation, the Magistrate Judge recommended that Defendant Roderick's Motion to Dismiss be granted because Plaintiff did not identify any state-created liberty interest protected by the Due Process Clause which requires a hearing prior to administrative segregation. The Magistrate Judge also recommended the Motion for Summary Judgment be granted as Plaintiff failed to exhaust administrative remedies for the matters at issue. The Report and Recommendation expressly advised that "specific written objections" to the recommendation were required.

Plaintiff filed an Objection to the Report and Recommendation, raising four sets of arguments.[3] First, Plaintiff makes the following procedural arguments: (1) Defendant Roderick did not timely file an answer to Plaintiff's Fourth Complaint and/or admitted that complaint by default; (2) Defendant LePage's Answer filed on April 19, 2016 (filed after the Court granted Plaintiff leave to file the Fourth Complaint) is defective as she had previously filed an answer to that complaint before it was accepted for filing; (3) Defendant Roderick's Motion to Dismiss is procedurally barred because he previously filed an answer to the Fourth Complaint and because he failed to confer as required by this Court's Civil Practice Standards; (4) Defendants' Motion for Summary Judgment is defective as it was their second such motion and formatting and content were defective. Next, Plaintiff raises the following objections concerning the Motion to Dismiss: (1) the claimed procedural errors; (2) unequal/unfair treatment as the Court's Order of

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[2] Plaintiff indicated he objected (ECF No. 263, page 1), but the Court was unable to find such objection. Nonetheless, even assuming an objection was made, the Court has considered the record and finds the Magistrate Judge's order allowing additional time to be neither clearly erroneous nor contrary to law.
[3] In some instances, Plaintiff's objections were unclear.

August 17, 2016 (ECF No. 265) denied Plaintiff's motion for extension of time; and (3) the Court previously granted Plaintiff leave to amend to include the claims against Defendant Roderick. Third, as to the Motion for Summary Judgment, Plaintiff objects that he was not given a chance to respond but Defendants were previously given an extension of time to refile their dispositive motions. Finally, Plaintiff appears to request leave to respond or file an amended response to the Motion to Dismiss and the Motion for Summary Judgment "due to good cause and[/] or excusable neglect."

In addition to the Objection, Plaintiff filed three other papers which are pending. A Motion to Strike Defendants' Response to the Objection, arguing no response may be filed under this Court's Civil Practice Standards and arguing leave should be granted to supplement his response to Defendants' Motion for Summary Judgment due to Defendants' alleged errors and disregard for the Civil Practice Standards. A Motion for Order, requesting an amendment to the Court's Order of April 5, 2016 (ECF No. 195) due to a clerical error. And, the objection to LePage filing two answers to the Fourth Complaint. The Court addresses Plaintiff's arguments below.

II. LEGAL STANDARD

A. Review of the Magistrate Judge's Report and Recommendation

When a magistrate judge issues a recommendation on a dispositive matter, Federal Rule of Civil Procedure 72(b)(3) requires that the district court judge "determine *de novo* any part of the magistrate judge's [recommendation] that has been properly objected to." In conducting its review, "[t]he district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P.

72(b)(3). An objection is proper if it is filed timely in accordance with the Federal Rules of Civil Procedure and specific enough to enable the "district judge to focus attention on those issues – factual and legal – that are at the heart of the parties' dispute." *United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1059 (10th Cir. 1996) (quoting *Thomas v. Arn*, 474 U.S. 140, 147 (1985)). In the absence of a timely and specific objection, "the district court may review a magistrate's report under any standard it deems appropriate." *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991) (citations omitted); *see also* Fed. R. Civ. P. 72 Advisory Committee's Note ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.").

B. Motion to Dismiss

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must be dismissed if it does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 545. A plaintiff must "'nudge[] [his] claims across the line from conceivable to plausible' in order to survive a motion to dismiss. . . . Thus, the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493

F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original, quoting *Twombly*, 550 U.S. at 570).

The United States Court of Appeals for the Tenth Circuit Court has held "that plausibility refers to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible." *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (internal quotation and citation omitted). Further, "the nature and specificity of the allegations required to state a plausible claim will vary based on context." *Id.* (internal quotation and citation omitted). Thus, the Tenth Circuit "concluded the *Twombly/Iqbal* standard is 'a middle ground between heightened fact pleading, which is expressly rejected, and allowing complaints that are no more than labels and conclusions or a formulaic recitation of the elements of a cause of action, which the [Supreme C]ourt stated will not do.'" *Id.* (citation omitted).

For purposes of a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept all well-pled factual allegations in the complaint as true and resolve all reasonable inferences in a plaintiff's favor. *Morse v. Regents of the Univ. of Colo.*, 154 F.3d 1124, 1126–27 (10th Cir. 1998) (citation omitted); *Seamons v. Snow*, 84 F.3d 1226, 1231–32 (10th Cir. 1996) (citations omitted). However, "when legal conclusions are involved in the complaint 'the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to [those] conclusions'...." *Khalik*, 671 F.3d at 1190 (quoting *Iqbal*, 556 U.S. at 678). "Accordingly, in examining a complaint under Rule 12(b)(6), [the court] will disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable." *Id.* at 1191.

C. Summary Judgment

Summary judgment is appropriate only if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Henderson v. Inter-Chem Coal Co., Inc.,* 41 F.3d 567, 569-70 (10th Cir. 1994). Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to a jury or is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986); *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1136 (10th Cir. 2000). Once the moving party meets its initial burden of demonstrating an absence of a genuine dispute of material fact, the burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute of material fact to be resolved at trial. *See 1-800-Contacts, Inc. v. Lens.com, Inc.,* 722 F.3d 1229, 1242 (10th Cir. 2013) (citation omitted). A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable jury could return a verdict for either party. *Anderson*, 477 U.S. at 248. The facts must be considered in the light most favorable to the nonmoving party. *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013)

D. Pro Se Party

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

III. ANALYSIS

A. The Objection to LePage

Plaintiff objects to Defendant LePage's filing of two answers to the Fourth Complaint. Plaintiff's objection is overruled. As the Magistrate Judge stated in his Order of September 24, 2015, Defendants' initial answer, filed before the Fourth Complaint was accepted for filing, is a nullity. (ECF No. 123, at page 6 n.1.) Thus, Defendant LePage has only one operative answer, found at ECF No. 201.

B. The Motion for Order

In the Motion for Order, to which no response has been filed by Defendants, Plaintiff correctly assesses that paragraph (4)(c) of the Court's Order of April 5, 2016, should read as follows:

> (c) The Clerk of the Court is directed to accept and file Plaintiff's "Fourth and Final Amended Prisoner Complaint Due to Initial Disclosures" (ECF No. 77-1), but such complaint is operative only as to Claims Thirteen *through* Sixteen as against Defendants Roderick and LaPage, as the case may be. All other claims in that complaint are hereby STRICKEN.

(Emphasis added.)[4] The Order currently reads:

> (c) The Clerk of the Court is directed to accept and file Plaintiff's "Fourth and Final Amended Prisoner Complaint due to Initial Disclosures" (ECF No. 77-1), but such complaint is operative only as to Claims Thirteen *and* Sixteen as against Defendants Roderick and LaPage, as the case may be. All other claims in that complaint are hereby STRICKEN.

[4]As the Court's April 5, 2016 Order used "LaPage," for consistency, it will maintain that spelling for that Order.

(Emphasis added.) Therefore, the Motion for Order is granted on this basis and the April 5, 2016 Order is modified accordingly.[5]

C. The Motion To Strike

Plaintiff's Motion to Strike seeks to strike Defendants' response to the Objection based on the Civil Practice Standards, but such relief is not warranted. The Report and Recommendation addressed *dispositive* motions; therefore, Defendants' response was – and is – proper. *See* Civil Practice Standards IV.E.1; Fed. R. Civ. P. 72(b)(2). Plaintiff's Motion to Strike also seeks leave to supplement his response to Defendants' Motion for Summary Judgment. For the reasons stated below and in this Court's Order of August 17, 2016 (ECF No. 265 at page 2), leave is denied.

D. The Objection

Starting with the procedural-based objections, the Court will address them seriatim. First, Defendant Roderick has not filed an answer because he filed the Motion to Dismiss at issue here. Next, as addressed above, Defendants' original answer to the Fourth Complaint was a nullity because it was filed before this Court granted Plaintiff leave to file his Fourth Complaint (ECF No. 123, page 6 n.1). Thus, Defendant LePage's operative Answer (ECF No. 201) is not defective and Defendant Roderick's Motion to Dismiss is not procedurally barred.[6] Finally, as Defendants' previously filed motion for summary judgment was stricken, the Motion for

[5] To the extent Plaintiff seeks any other relief via page 2 of the Motion for Order, the same is denied. Any objections to document numbers 79 and 83 are untimely. And, to the extent Plaintiff seeks further to support his Objection, the assertions will not be considered as Plaintiff has already filed his Objection.

[6] While Defendant Roderick apparently did not confer prior to filing his Motion to Dismiss, under the facts and circumstances of this case, the Court finds such failure does not bar that motion.

Summary Judgment at issue here does not constitute a "second" such motion.[7] Accordingly, any objections to the Report and Recommendation based on alleged procedural defects are overruled.

Next, the Court considers Plaintiff's objections concerning the Report and Recommendation as to the Motion to Dismiss. As to the alleged procedural errors, those were considered and overruled above. As for the Court's Order of August 17, 2016, which denied Plaintiff's motion for an extension of time, Plaintiff fails to show such denial was unfair or constituted unequal treatment. Moreover, Plaintiff's motion requested an extension of time to file a response to the Motion for Summary Judgment, not the Motion to Dismiss. And, finally, the fact that the Court granted leave to amend a complaint does not, by itself, mean that a claim is not otherwise subject to dismissal upon a properly filed motion. *See Milgard Corp. v. E.E. Cruz/Nab/Fronier-Kemper*, No. 99 Civ. 2952 LBS, 2003 WL 22801519, at *1 (S.D.N.Y. Nov. 24, 2003) ("This Court's decision to permit amendment of the complaint in no sense constituted a definitive determination as to its validity."). Accordingly, these objections are overruled. In addition, as Plaintiff raises no specific objections to the substantive basis for the recommendation to grant the Motion to Dismiss, the Court reviews the recommendation for clear error and finds none.[8]

Third, the Court considers Plaintiff's objection to the Report and Recommendation as to the Motion for Summary Judgment. Here, Plaintiff argues that he was not given a chance to respond to the motion. But, Plaintiff did respond (ECF No. 254) and his prior request for an

[7] Plaintiff also cursorily asserts that the formatting and content were defective, but fails to identify where such alleged defects exist. Accordingly, the Court will not consider this assertion.

[8] To the extent Plaintiff relies on any purported "punishment" under *Peoples v. CCA Detention Centers*, 422 F.3d 1090 (10th Cir. 2005), his bare allegation is insufficient. Moreover, even if dismissal is somehow not warranted under Rule 12(b)(6), Plaintiff's claims against Defendant Roderick are nonetheless subject to dismissal under Rule 56(b).

extension of time was previously addressed and denied (ECF No. 265). Accordingly, this objection is overruled. Further, in the absence of specific written objections to the substantive basis for the Report and Recommendation as the Motion for Summary Judgment, the Court reviews it only for clear error. Upon review, the Court finds no such error.

Finally, as for any request for leave to file a response or an amended response to the Motion to Dismiss or Motion for Summary Judgment, Plaintiff fails to show such relief should be granted. Plaintiff's bare reference to good cause or excusable neglect is insufficient. Accordingly, such request is denied

IV. CONCLUSION

Based on the foregoing, it is **ORDERED**

(1) That Plaintiff's "Motion for the Order (Doc. No. 195) to be Amended – Due to (Clerical) Error" (ECF No. 267) is **GRANTED** as stated herein, *i.e.*, page 22, paragraph (4)(c) of the Court's Order dated April 5, 2016 is hereby amended to read as follows:

> (c) The Clerk of the Court is directed to accept and file Plaintiff's "Fourth and Final Amended Prisoner Complaint Due to Initial Disclosures" (ECF No. 77-1), but such complaint is operative only as to Claims Thirteen through Sixteen as against Defendants Roderick and LaPage, as the case may be. All other claims in that complaint are hereby STRICKEN.

(ECF No. 195, page 22, paragraph (4)(c));

(2) That Plaintiff's "Objection, LePage filed Two Answers to the Fourth Amended Complaint – Without Leave of Court" (ECF No. 218) is **OVERRULED**;

(3) That Plaintiff's "Urgent Declared Reply/Motion Strike Defendant(s)' Response to Objection [268] and for Leave of Court to Allow Plaintiff's Supplemental Response

to the Motion for Summary Judgment [238], per Practice Standard IV. D.3 and Sanctions" (ECF No. 269) is **DENIED**;

(4) That Plaintiff's "Urgent Objection to Recommendation" (ECF No. 266) is **OVERRULED**;

(5) That the "Report and Recommendation on Defendant Roderick's Motion to Dismiss Fourth and Final Amended Complaint (Docket No. 235) & Defendants' Motion for Summary Judgment (Docket No. 238)" (ECF No. 260) is **ACCEPTED**;

(6) That Defendant Roderick's Motion to Dismiss Fourth and Final Amended Complaint (ECF No. 235) is **GRANTED**;

(7) That Defendants' Motion for Summary Judgment (ECF No. 238) is **GRANTED**;

(8) That the trial preparation conference set for March 10, 2017 and the jury trial set to begin April 3, 2017 are **VACATED**; and

(9) That the Clerk of the Court is directed to enter **JUDGMENT** in accordance with this Order and with the Court's Order of April 5, 2016, as amended herein (ECF No. 195).

DATED this 26th day of January, 2017.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-02379-RM-MJW

JOSHUA LAMONT SUTTON,

Plaintiff,

v.

MATTHEW VAN LEEUWEN,
BRIAN GOWIN,
ANTHONY RODERICK, and
FRAN LAPAGE,

Defendants.

REPORT & RECOMMENDATION ON

DEFENDANT BRIAN GOWIN'S COMBINED MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF (Docket No. 59)
&

MOTION TO DISMISS ON BEHALF OF DEFENDANT VAN LEEUWEN (Docket No. 62)

Michael J. Watanabe
United States Magistrate Judge

Following several docketed cases, amended pleadings, and summary review under 28 U.S.C. §§ 1915(e) and 1915A, Plaintiff's Third Amended Complaint was drawn to a district judge upon the following order:

> The twelve claims Plaintiff sets forth in the Cause of Action Section of the Third Amended Complaint are not supported with facts. The claims either are conclusory and vague, legally frivolous, or barred . . . . The only properly asserted claims in the Third Amended Complaint are found in the Nature of the Case section of the complaint form, where Plaintiff asserts that on August 25, 2012, he and his wife were stopped because they fit the description of "domestic violence suspects." ECF No. 30 at 4. Plaintiff further asserts that he was improperly arrested by Defendant Van Leeuwen for using a curse word, was then wrongly held for a total of nine hours by Defendant Gowin and falsely accused of assaulting Defendant

> Gowin, which resulted in his placement in solitary confinement by Defendant Roderick for seven months without due process and being repeated[ly] denied of his religious diet by Defendant LaPage during this time. Plaintiff also asserts that the assault charge against him was dismissed. In the Request for Relief section of the Third Amended Complaint, Plaintiff seeks declaratory and injunctive relief and money damages.
>
> The Court, therefore, finds that only those claims stated in the Nature of the Case section, as described above, comply with Rule 8. Claims One through Twelve, in the Cause of Action section of the Third Amended Complaint will be dismissed . . . .

(Docket No. 31, pp.4–5.) Defendants Roderick and LaPage filed an answer. (Docket No. 60.) Defendants Van Leeuwen and Gowin, however, filed motions to dismiss—which District Judge Raymond P. Moore referred to the undersigned. (Docket Nos. 59, 62 & 64.)

The Court has reviewed the parties' filings (Docket Nos. 59, 62, 63, & 71), taken judicial notice of the Court's entire file in this case, and considered the applicable Federal Rules of Civil Procedure, statutes, and case law. Now being fully informed, the Court makes the following report and recommendation that both motions be granted.

Factual Background

I. As Alleged in the Complaint

On August 25, 2012, Plaintiff and his then-wife were walking home, when several police cars surrounded them. (Docket No. 30, p.4.) The officers claimed that the couple met the description of the individuals in a reported domestic violence incident. (*Id.*) The officers posed the same questions over and over; after ten minutes, Plaintiff and his then-wife began arguing that they had established they weren't the people the officers were looking for and had a right to leave. (*Id.*) Plaintiff cursed. (*Id.*) Defendant Van Leeuwen arrested Plaintiff and put him on a "four hour hold." (*See id.*)

Defendant Gowin then caused Plaintiff to be held for an additional five hours (for a total of nine hours). (*Id.*) At the end of that period:

> I [Plaintiff] began arguing with him that I had a right to leave, he became angry, repeatedly pushed me, tried to choke me, shoved my face into the ground, wrote a statement about the incident, later made changes to his statement that were false, used the false charges to charge me with assaulting him, and then deceived a judge into approving the charge based on the false charges.

(*Id.*) Later, Plaintiff was held for seven months in solitary confinement without any kind of hearing. (*Id.*) After those seven months, the District Attorney's office reviewed a video of the altercation between Gowin and Plaintiff and dismissed the assault charges. (*Id.* at 5.)

II. <u>As Reflected in Official Records</u>

Generally speaking, only the Complaint is to be considered when ruling on a motion to dismiss. *See Archuleta v. Wagner*, 523 F.3d 1278, 1281 (10th Cir. 2008). However, the Court may take judicial notice (if otherwise appropriate under Federal Rule of Evidence 201) of the existence and contents of certain public records, although the Court may not rely on truth or falsity of the contents of those records. *See, e.g.*, *ASARCO LLC v. Union Pac. R. Co.*, 755 F.3d 1183, 1188 n.5 (10th Cir. 2014); *Tal v. Hogan*, 453 F.3d 1244, 1265 n.24 (10th Cir. 2006).

The parties have relied on several documents from Plaintiff's arrest, and the Court will take notice of those documents:

- Document 59-1 is an August 25, 2012, Affidavit in Support of Warrantless Arrest, sworn by Defendant Gowin. It shows that Plaintiff was arrested on August 25, 2015, for assault in the second degree based on the altercation between Plaintiff and Gowin. It bears a Pueblo County Combined Courts case number of 12CR1220.

- Document 59-2 is an August 25, 2015, incident report written by Defendant Gowin. It repeats the same basic factual narrative as the warrantless-arrest affidavit, but makes no mention of specific criminal charges.

- Document 71, p.16, is an October 25, 2012, affidavit from Plaintiff's then-wife recanting her allegations of domestic violence (as to an incident at some point *after* August 25, 2012) and asking the Pueblo County Combined Courts to lower Plaintiff's bond. It bears a Pueblo County Combined Courts case number of 12CR1220.

- Document 71, p.20, is a January 4, 2013, handwritten confession to the crime of using an obstacle to obstruct or interfere with a police officer, signed by Plaintiff, a prosecutor, and a public defender. It was filed in open court in Pueblo County Combined Courts case number of 12CR1220.

- Document 59-3 is a February 22, 2013, Sentence Order from Pueblo County Combined Courts, showing that the assault charge was dismissed but that Plaintiff pleaded guilty to obstructing a police officer. It bears a Pueblo County Combined Courts case number of 12CR1220.

- Document 62-2 is an August 20, 2013, order from the District Court in Pueblo County rejecting Plaintiff's appeal (from the Municipal Court) of a disorderly conduct conviction based on his interaction with Defendant Van Leeuwen. It bears a Pueblo County District Court case number of 13CV75 but does not provide any citation to the associated Municipal Court case number. It describes a trial to the Court in December 2012, with a conviction entered on December 27, 2012.

- Document 62-3 is a February 23, 2015, Order from the Colorado Supreme Court denying as untimely Plaintiff's petition for certiorari as to his disorderly conduct conviction. The order refers to Pueblo County District Court case number 13CV75 and Municipal Court case number EO41371.

Based on the foregoing documents, the Court finds (for purposes of this motion) that Plaintiff has two convictions: a disorderly-conduct conviction based on Plaintiff's altercation on the street with Defendant Van Leeuwen, and an obstructing-an-officer conviction based on Plaintiff's altercation at the police station with Defendant Gowin.

III. <u>As Reflected in the Video Tapes</u>

"In addition to the complaint, the district court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002) (citing *GFF Corp. v. Associated Wholesale Grocers, Inc.,* 130 F.3d 1381, 1384 (10th Cir. 1997)). Here, Defendant Gowin asks the Court to take notice of the police station's security video showing the altercation between Plaintiff and Defendant Gowin. Plaintiff effectively makes the same request, submitting still-shots from the video in support of his objection to the motions.

This rule has been applied to videos. *See, e.g., Crutchfield v. Nash*, 2015 WL 1268162, at *1 n.2 (W.D. Va. Mar. 19, 2015). That said, some courts have declined to extend the rule that far. *Stewart v. City of Prairie Vill., Kan.*, 904 F. Supp. 2d 1143, 1154 n.17 (D. Kan. 2012). Here, although Plaintiff mentions the video, the video itself is not "central to the plaintiff's claims" in the way that a contract or a copyrighted work would be. Moreover, the Court does not find the video necessary to resolve the questions raised in these motions to dismiss (primarily because Plaintiff disclaims any intent to press an excessive-force claim). As a result, the Court declines to consider the video evidence in resolving these motions.

Discussion

As recently formulated by Judge Moore:

> Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must be dismissed if it does not plead enough facts to state a claim to relief that is plausible on its face. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.
>
> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and

> conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. A plaintiff must nudge his claims across the line from conceivable to plausible in order to survive a motion to dismiss. Thus, the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims.
>
> . . .
>
> For purposes of a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept all well-pled factual allegations in the complaint as true and resolve all reasonable inferences in a plaintiff's favor. However, when legal conclusions are involved in the complaint the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to those conclusions. Accordingly, in examining a complaint under Rule 12(b)(6), the court will disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable.

Watts v. Donley, No. 15-cv-00320-RM-KLM, 2015 WL 2330019, at *3–4 (D. Colo. May 14, 2015) (internal citations, quotation marks, and alterations omitted).

Defendants Gowin and Van Leeuwen both argue that the claims against them are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), and by the statute of limitations. Defendant Gowin further argues that Plaintiff fails to plausibly allege any claim for relief, and Defendant Van Leeuwen further argues that he is entitled to qualified immunity.

I. <u>Statute of Limitations</u>

The statute of limitations arguments can be disposed of quickly. All parties agree that a two-year statute of limitations applies, and that the earliest Plaintiff's claims could have accrued is August 25, 2012. Plaintiff provided evidence that he placed his prisoner complaint in the prison mail system on August 25, 2014. (Docket No. 71, pp.23–24.) Applying the prison mailbox rule, *Price v. Philpot*, 420 F.3d 1158, 1163–64 (10th Cir. 2005), Plaintiff's claims are thus timely.

The Court therefore need not decide whether some of Plaintiff's claims may have accrued at a later date or whether Plaintiff is entitled to equitable tolling. The Court recommends that Defendants' motions be denied insofar as they are based on the statute of limitations.

II. ***Heck v. Humphrey***

Plaintiffs may not bring actions under § 1983 that collaterally challenge criminal convictions, even where they seek monetary rather than injunctive relief. *Heck v. Humphrey*, 512 U.S. 477 (1994). The Supreme Court explains:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Id. at 486–87 (footnotes omitted). Here, Defendant Van Leeuwen argues that no suit against him can be maintained without necessarily implying that Plaintiff's disorderly conduct conviction was invalid; Defendant Gowin argues that no suit against him can be maintained without necessarily implying that Plaintiff's obstructing-an-officer conviction was invalid.

Defendant Van Leeuwen. Plaintiff's complaint alleges that Defendant Van Leeuwen stopped him because he allegedly fit the description of a suspect in a domestic violence case, and that Defendant Van Leeuwen arrested him for cursing. In response to Defendant Van Leeuwen's *Heck* argument, Plaintiff argues:

> [Van] Leeuwen did not have probable cause to believe I had committed any arrestable offense when he arrested me – though I was later convicted of the charges I had been arrested for – and I do not challenge the conviction(s), only the "arrested was improper" (under the totality of the circumstances). Thus, my claim that I was improperly arrested by Defendant Van Leeuwen is correctly asserted.

(Docket No. 71, p.4.) Thus, it does not appear that Plaintiff challenges the initial stop; rather, he challenges the arrest for lacking probable cause.

The Court does not see any way that this challenge can proceed without calling into question Plaintiff's disorderly-conduct conviction. On different facts, it is possible for a plaintiff to concede guilt but nonetheless argue that the arresting officer did not have knowledge of that guilt or sufficient probable cause to suspect that guilt. But here, as alleged by Plaintiff, the arrest and subsequent conviction were predicated entirely on conduct that took place in the presence of the arresting officers—thus, the evidence establishing his conviction is the exact same evidence establishing probable cause to support the arrest. Plaintiff cannot challenge the factual premise underlying the arrest without also challenging the factual premise underlying the conviction. Accordingly, Plaintiff's claims against Defendant Van Leeuwen are barred. The Court recommends that Defendant Van Leeuwen's motion to dismiss be granted insofar as it is based on *Heck v. Humphrey*.

Defendant Gowin. Plaintiff's complaint alleges that Defendant Gowin wrongfully held him for nine hours (at least five hours longer than Plaintiff believes he could have been lawfully detained), and that Defendant Gowin falsely accused him of assault. In response to Defendant Gowin's *Heck* argument, Plaintiff argues:

> . . . I did hold open the door and was convicted of obstructing Gowin because I held the door, [but] I never challenged that conviction in any of my documents filed with this court. I only asserted that Gowin falsely imprisoned me before I held the door, and maliciously prosecuted me after I held the door.

(Docket No. 71, pp.4–5.) Thus, Plaintiff confirms that he has two different claims: one for false imprisonment (for the five hour period preceding his altercation with Defendant Gowin), and one for malicious prosecution on assault charges rather than obstruction charges.

Neither of Plaintiff's claims rely on showing that he did not impede Defendant Gowin by refusing to allow the door to be closed. Accordingly, neither claim necessarily calls into question the validity of Plaintiff's conviction for obstructing a peace officer. The claims are therefore not barred. The Court recommends that Defendant Gowin's motion to dismiss be denied insofar as it is based on *Heck v. Humphrey*.

III. Plausibly Stating a Claim

Defendant Gowin further argues that Plaintiff fails to plausibly allege any claim for relief. The Court agrees.

False Imprisonment. Plaintiff's first claim against Defendant Gowin is for false imprisonment—which, in the language of federal law, would be a claim for unlawful seizure. "[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford,* 543 U.S. 146, 152 (2004). "Accordingly, when a warrantless arrest is the subject of a § 1983 action, in order to succeed, a plaintiff must prove that the officer(s) lacked probable cause." *Buck v. City of Albuquerque,* 549 F.3d 1269, 1281 (10th Cir. 2008). "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." *Henry v. United States,* 361 U.S. 98, 102 (1959). "Even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity." *Romero v. Fay,* 45 F.3d 1472, 1476 (10th Cir. 1995).

Plaintiff was initially arrested by Defendant Van Leeuwen for disorderly conduct. Defendant Gowin did not encounter Plaintiff until later, at the police station. So far as can be inferred from Plaintiff's complaint, Defendant Gowin had no reason to doubt the lawfulness of the initial seizure. But Plaintiff's claim *against Defendant Gowin* isn't that the initial seizure was unlawful: it's that the seizure became unlawful after the first four hours. But Plaintiff provides no reason to believe that the probable cause supporting his arrest somehow dissipated after four hours—and indeed, he was ultimately convicted at trial. Under the Fourth Amendment, the government is entitled to forty-eight hours to bring a suspect under warrantless arrest before a judicial officer. *County of Riverside v. McLaughin*, 500 U.S. 44 (1991). Plaintiff's allegation is that holding him past four hours was unlawful; this fails to state a claim under federal law. The Court thus recommends that any such claim against Defendant Gowin be dismissed under Rule 12(b)(6).[1]

Malicious Prosecution. Plaintiff's second claim against Defendant Gowin is for malicious prosecution. Under Tenth Circuit precedent, "a § 1983 malicious prosecution claim includes the following elements: (1) the defendant caused the plaintiff's continued

[1] To the extent Plaintiff asserts a claim under state law, it is recommended that the Court decline to exercise its supplemental jurisdiction.

confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages." *Wilkins v. DeReyes,* 528 F.3d 790, 799 (10th Cir. 2008); *see also Novitsky v. City Of Aurora,* 491 F.3d 1244, 1258 (10th Cir. 2007) (addressing claim under both the Fourth and Fourteenth Amendments). Where, as here, the prosecution involved more than one charge, the third element (probable cause) must be determined as to each charge, but the second element (favorable termination) is determined as to the entire criminal proceeding. *See, e.g., Kossler v. Crisanti*, 564 F.3d 181, 188 (3d Cir. 2009) (probable-cause element); *Johnson v. Knorr*, 477 F.3d 75, 86 (3d Cir. 2007) (favorable-termination element); *Miller v. Spiers*, 339 F. App'x 862, 868 & n.3 (10th Cir. 2009) (favorable-termination element).

Defendant Gowin does not explain where he believes Plaintiff's malicious-prosecution claim falls short, but the favorable-termination element seems likely. Plaintiff was ultimately convicted of a crime (obstructing an officer) predicated on the same conduct that his assault charge was predicated on. Although Plaintiff pleaded guilty only to using an obstacle (the door) to obstruct the officer, and did not plead guilty to assaulting Defendant Gowin, it remains the case that the criminal proceedings as a whole ended with a conviction based on the charged conduct. The proceedings did not end favorably for him—and as a result, Plaintiff cannot state a federal claim for malicious prosecution. The Court therefore recommends that any such claim against Defendant Gowin be dismissed under Rule 12(b)(6).[2]

IV. Qualified Immunity

Finally, Defendant Van Leeuwen argues that he is entitled to qualified immunity because, on the facts as established through the pleadings and judicial notice, he did not violate any of Plaintiff's clearly established rights. Based on Plaintiff's conviction for disorderly conduct, it seems clear that probable cause supported his arrest by Defendant Van Leeuwen—and therefore, the Court agrees that Defendant Van Leeuwen did not violate any of Plaintiff's clearly established rights. To the extent the claims against Defendant Van Leeuwen are not barred by *Heck v. Humphrey*, the Court recommends that they be dismissed based on qualified immunity.

Recommendation

For the foregoing reasons, it is recommended that:

(1) Defendant Brian Gowin's Combined Motion to Dismiss and Memorandum in Support Thereof (Docket No. 59) be GRANTED;

(2) Motion to Dismiss on Behalf of Defendant Van Leeuwen (Docket No. 62) be GRANTED; and

(3) Defendants Gowin and Van Leeuwen be DISMISSED from this case.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District

[2] To the extent Plaintiff asserts a claim under state law, it is recommended that the Court decline to exercise its supplemental jurisdiction.

Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives de novo review of the recommendation by the District Judge, Thomas v. Arn, 474 U.S. 140, 148-53 (1985), and also waives appellate review of both factual and legal questions. Makin v. Colo. Dep't of Corr., 183 F.3d 1205, 1210 (10th Cir. 1999); Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Date: May 29, 2015
Denver, Colorado

s/ Michael J. Watanabe
Michael J. Watanabe
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-02379-RM-MJW

JOSHUA LAMONT SUTTON,

Plaintiff,

v.

MATTHEW VAN LEEUWEN,
BRIAN GOWIN,
ANTHONY RODERICK, and
FRAN LAPAGE,

Defendants.

REPORT & RECOMMENDATION ON

PLAINTIFF'S URGENT PARTIES CONSENTED TO AMENDMENT OF PLEADINGS; ALTERNATIVELY, BECAUSE JUSTICE REQUIRES IT, SWORN, MOTION FOR LEAVE OF THE COURT TO AMEND PLEADING DUE TO NEW EVIDENCE FROM INITIAL DISCLOSURES
(Docket No. 77)

Michael J. Watanabe
United States Magistrate Judge

On May 29, 2015, I recommended that two motions to dismiss (Docket Nos. 59 & 62) be granted and that Defendants Matthew VanLeeuwen and Brian Gowin be dismissed from this case. (Docket No. 74.) On June 12, 2015, Plaintiff filed an objection to that report and recommendation. (Docket No. 76.) On the same day, Plaintiff also moved for leave to amend his pleadings. (Docket No. 77.)

Plaintiff's objection to the report and recommendation is fully briefed and pending before District Judge Raymond P. Moore. (Docket Nos. 76, 87 & 91.) Judge Moore referred to me Plaintiff's motion for leave to amend. (Docket No. 79.) I have reviewed the parties' filings (Docket Nos. 59, 62, 63, & 71), taken judicial notice of the Court's

ATTACHMENT 2

entire file in this case, and considered the applicable Federal Rules of Civil Procedure, statutes, and case law. Now being fully informed, I make the following report and recommendation that Plaintiff's motion be granted in part and denied in part.

Legal Standards

Federal Rule of Civil Procedure 15 governs the amendment of pleadings. Because Plaintiff has already amended, and because the most recent amendment is opposed, he must seek the court's leave to file his new pleading. Fed.R.Civ.P. 15(a). Pursuant to Rule 15, "[t]he court should freely give leave when justice so requires." *Id.* at 15(a)(2). "The purpose of the Rule is to provide litigants 'the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties.'" *Minter v. Prime Equip. Co.,* 451 F.3d 1196, 1204 (10th Cir. 2006). Thus:

> "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'"

Id. (quoting *Foman v. Davis,* 371 U.S. 178, 182 (1962)).

Allegations in Proposed Amended Complaint

Plaintiff's lawsuit, roughly speaking, concerns three subjects: Plaintiff's stop and subsequent arrest on August 25, 2012; Plaintiff's detention for nine to ten hours following thereafter, ending in an incident in which Plaintiff was charged with assaulting an officer; and the conditions under which Plaintiff was detained or incarcerated in the months following these incidents. The new proposed pleading sets forth sixteen claims against eight defendants—four who are already part of this case (Defendants

VanLeeuwen, Gowin, Roderick, and LaPage), and four new defendants (proposed Defendants Guerin, Lightcap, Baillargeon, and Ordway).

The general allegations of the proposed amended complaint are brief, and will be set forth here in full:

1. I and my wife had been stopped repeatedly, because my skin color being dark, by Pueblo Police Officers.

2. Again, we were stopped, by racial profiling, as we were walking home from the hospital, by VanLeeuwen, on Aug. 25, 2012, at 1 AM.

3. We answered all of the Officers's questions but we were not allowed to leave.

4. I used a curse word, committing disorderly conduct, and was placed on a 4 hr. hold.

5. VanLeeuwen told Guerin I was there on a summons and a 4 hr. hold maximum.

6. Guerin let a white female out at her 4 hr. hold max but not me.

7. Over the 10 hr. period Guerin, Gowin, and Lightcap repeatedly made false reasons not to release me, but released the white female

8. I demand my release and held open the door committing obstruction of Gowin.

9. Gowin pushed me three times, chased me to the back of the cell, tried to choke me, pushed my face into the floor, tied me to a chair, and left me with bodily injuries.

10. Gowin and Lightcap punished me by arresting me for assault to increase my bail amount so I could not get released, during which time I lost my properties.

11. Ordway was my friend, saw the video of me and Gowin but did not help me.

12. Baillargeon saw the video of me and Gowin but did not turn in his report to help me.

13. Roderick punished me with solitary confinement without any hearing or chance to defend.

14. LaPage punished me by repeatedly denying me my religious no meat diet, during which time I became very suicidal, but received no help when I asked.

(Docket No. 77-1, p.4.)

As grounds for his motion, Plaintiff argues that he has newly discovered evidence, mostly from Defendants' initial disclosures. More specifically, according to Plaintiff:

- Defendants' initial disclosures show no documentation of any report of domestic violence, and Plaintiff spoke with someone at the Pueblo Police Dispatch who also stated that there were no calls reporting possible domestic violence around 1:00 a.m. on August 25, 2012. (Docket No. 77 ¶ 6.)

- A September 2014 supplemental report shows that proposed Defendant Guerin was responsible for processing 4-hour holds, and that after four hours proposed Defendant Guerin released similarly situated Caucasians but not Plaintiff. (*Id.* ¶ 7.)

- Defendants' initial disclosures show that proposed Defendant Baillargeon withheld from his reports information that would have been favorable to Plaintiff, contributing to Plaintiff's arrest. Several other individuals, including most Defendants and proposed Defendants, contributed false information to the official reports. (*Id.* ¶ 8.)

- Disclosed medical records show bodily injury to Plaintiff. (*Id.* ¶ 9.)

- The September 2014 supplemental report includes false statements about Plaintiff being on drugs and being drunk at the time of his arrest. (*Id.* ¶ 10.)

- Proposed Defendant Ordway, a friend or associate of Plaintiff's, failed to intervene on Plaintiff's behalf. (*Id.* ¶ 11.)

- Defendants' initial disclosures show that three of the proposed new Defendants added the assault charges to Plaintiff's second arrest in order to increase the amount of bail past Plaintiff's means to pay. (*Id.* ¶ 12.)

- Finally, the initial disclosures confirm that Defendant Roderick caused Plaintiff to be held in solitary confinement without a hearing, and the disclosures further confirm (among other things) that Plaintiff was once tasered, presumably in his cell, at 2:00 a.m. (*Id.* ¶¶ 12–13.)

Discussion

Plaintiff argues that the newly discovered evidence warrants leave to amend his complaint. Defendants argue that amendment would be futile because (1) the claims against existing defendants fail to state a claim, and (2) the claims against the new defendants are time-barred. Aside from Defendant's arguments, many of these claims echo theories that were discarded earlier under the Court's 28 U.S.C. § 1915A prescreening authority. The Court will therefore also review the claims under its independent authority to review *in forma pauperis* prisoner complaints. *See* 28 U.S.C. § 1915(e)(2)(B)(ii).

I. Failure to State a Claim

Claims One through Three. Plaintiff's first three proposed claims allege that Defendant VanLeewuen lacked reasonable suspicion to stop and question Plaintiff, and that the stop was the product of unlawful discrimination.

The first theory fails. It is true that a plaintiff may challenge an initial stop as unlawful, without necessarily undermining the factual predicate underlying the arrest. *Heck v. Humphrey*, 512 U.S. 477, 478 n.7 (1994). But in doing so, the plaintiff must still point to an "actual, compensable injury" other than "the 'injury' of being convicted and imprisoned (until his conviction has been overturned)." *Id.* Here, all of Plaintiff's alleged injuries stem from his arrest and conviction—which, under the *Heck* doctrine, cannot be challenged in this proceeding. Even assuming that Plaintiff has plausibly alleged an unlawful stop, Plaintiff has not plausibly alleged an actual, compensable injury that occurred in the brief moment of time between that stop and the disorderly conduct for which he was arrested and convicted. He therefore has not stated a claim, and leave to amend would be futile.

The second theory fails as well. To allege a racially selective stop, a plaintiff must plausibly allege not only a racially discriminatory purpose, but also a racially discriminatory effect. *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1168 (10th Cir. 2003). Here, Plaintiff has not alleged that any similarly situated non-minorities were not stopped, nor has he provided anything more than bare, conclusory allegations that he was stopped on the basis of his skin color. He therefore has not plausibly alleged a violation of the Equal Protection Clause.

The Court concludes that leave to amend for purposes of asserting Claims One, Two, and Three would be futile.

Claims Four through Seven. Claims Four and Five, asserted against would-be-Defendant Guerin, allege that Plaintiff's continued detention past the four hours he expected to be detained were unlawful because (1) a similarly situated white woman was released before he was, and (2) he was not brought to court within 48 hours. Claims Six and Seven are identical, but are asserted as conspiracy claims against would-be-Defendants Guerin and Lightcap as well as Defendant Gowin.

The first theory fails, for lack of factual sufficiency. Plaintiff alleges that one white arrestee was released from custody quicker than he was. He also suggests (though doesn't say) that Defendant Guerin chose not to timely release him because of his race. But he alleges no other facts suggesting any racial motive; there are literally no allegations in the general narrative or in these specific claims from which a racially discriminatory intent might be inferred. This does not nudge Plaintiff's claims across the line from conceivable to plausible. *See Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012).

The second theory fails as well. Plaintiff argues he was not brought before a court until more than fifty hours after his arrest. But the record in this case, of which the Court may take judicial notice (as explained in the Court's previous Recommendation, Docket No. 74, pp. 3–4), shows that a judicial officer reviewed the arresting officer's affidavit and made a probable cause determination on August 26, 2012—less than 48 hours after the arrest. (Docket No. 59-1, p.2.) All that is required within 48 hours of a warrantless arrest is that an impartial magistrate make a probable cause determination. *See County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *Gerstein v. Pugh*, 420 U.S. 103 (1975). That happened here.

The Court concludes that leave to amend for purposes of asserting Claims Four through Seven would be futile.

Claim Eight. Claim Eight is an excessive-force claim against Defendant Gowin. As Defendants point out, Plaintiff previously disclaimed any intention to assert such a claim. (Docket No. 71, p.10 ("[N]or do I plan to Amend the Complaint to include a claim for excessive force because the amount of force may have been reasonable to make a lawful arrest when I held the door open.").) Because Plaintiff is a pro se litigant, the Court will not hold Plaintiff to this statement as if it were a binding judicial admission.

The claim states: "[D]uring my lawful arrest Brian Gowin push [sic] me three times, chased me to the back of the cell, cornered me, tried to put me in a choke hold, pushed my face into the floor, while squeezing my neck, tied me to a chair, and left me tried [sic] to the chair, during this time I was in pain in my back neck and wrist, and the pain lasted for about one (1) week." (Docket No. 77-1, p. 7.) At the 12(b)(6) stage, this plausibly states a claim for excessive force.

In his earlier motion to dismiss (Docket No. 59), Defendant Gowin argued that any excessive force claim would be barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). But this is true only if the excessive-force claim necessarily undermines the factual predicate supporting Plaintiff's obstruction conviction. Where, as here, Plaintiff's theory concedes the factual predicate of his arrest and conviction but argues that the officer employed more force than was reasonably necessary under the circumstances, the claim is not barred by *Heck*. *Havens v. Johnson*, 783 F.3d 776, 782–83 (10th Cir. 2015) ("An excessive-force claim against an officer is not necessarily inconsistent with a conviction for assaulting the officer. For example, the claim may be that the officer used too much force to respond to the assault or that the officer used force after the need for force had disappeared."). Defendant Gowin also argued that the reasonableness of the force can be decided as a question of law where there are no disputed facts about the circumstances or amount of force. But the Court has viewed the video of the altercation (Docket No. 59-5) and finds that the question is not so clear that it need not go to a jury.

The Court concludes that leave to amend for purposes of asserting Claim Eight would *not* be futile.

Claims Nine through Twelve. The next four claims all relate to Defendants' decision to charge Plaintiff with assault as well as with obstruction of an officer, following the incident with Defendant Gowin. Plaintiff alleges that the assault charge was added with the subjective intent of increasing his bail past his ability to pay; that two different proposed Defendants failed to intervene to prevent the excessive charge; and that the high bail (which he apparently did not meet) led to "cruel and unusual punishment" in the form of bankruptcy, foreclosure, divorce, and other personal tragedies.

These claims are all predicated on the idea that the assault charge was without probable cause. To state a claim for excessive bail, for example, a plaintiff must show that the judicial officer setting bail was misled by the defendants. *Galen v. County of Los Angeles,* 477 F.3d 652, 664 (9th Cir. 2007). If the charges upon which plaintiff was charged were supported by probable cause, and the other facts presented to the court for purposes of setting bail were true, it cannot be said that the court was misled. *See id.* Here, Plaintiff bases his excessive-bail claim solely on the assault charge and not on any other misrepresentations. But the Court has reviewed the affidavit upon which Plaintiff was charged with assault, and finds that it establishes probable cause for the charged offense. (*See* Docket No. 59-1.) Plaintiff disagrees with the affidavit's characterization of his actions as "violent," but even setting that characterization aside, probable cause exists nonetheless. As a result, Plaintiff fails to state a claim for excessive bail. By necessity, the claims that are predicated on excessive bail also fail. Finally, to the extent Plaintiff's failure to make bail led to a variety of personal setbacks, those setbacks are properly considered as part of his damages (should he establish liability) rather than as part of his state-imposed punishment.

The Court concludes that leave to amend for purposes of asserting Claims Nine through Twelve would be futile.

Claims Thirteen through Sixteen.

Claims thirteen through sixteen are all claims against existing Defendants Roderick and LaPage. Defendants Roderick and LaPage joined in the objection to Plaintiff's motion for leave to amend, but made no arguments at all as to themselves or as to these claims. (*See* Docket No. 90.) As to these claims, then, the motion has been confessed.

Further, although Defendants Roderick and LaPage have already filed an Answer (Docket No. 60), there are no explicit claims against them due to the difficulty Plaintiff had in surviving § 1915A screening (*see* Docket No. 31 (dismissing Plaintiff's claims for relief but allowing his factual narrative to be drawn to a judge)). Even had Defendants Roderick and LaPage not already waived their objections, the Court would nonetheless deem it appropriate to allow Plaintiff to state actual claims.

The Court concludes that leave to amend for purposes of asserting Claims Thirteen through Sixteen would *not* be futile.

II. <u>Statute of Limitations</u>

Further, Defendants argue that any claims against the four proposed new Defendants would be futile because the statute of limitations has run as to those individuals. This argument is moot because the Court has concluded that none of the claims against the proposed new defendants state a claim upon which relief can be granted. But the Court will nonetheless address the statute of limitations, in the alternative.

Defendants Guerin, Lightcap, and Baillargeon. These three Defendants are named on Plaintiff's claims arising out of the failure to release him from detention after four hours and from the decision to charge him with assault. These claims are subject to a two-year statute of limitations, C.R.S. § 13–80–102; *Blake v. Dickason*, 997 F.2d 749, 750–51 (10th Cir. 1993), and would have accrued on August 25, 2012, or in the two or three days shortly thereafter, *see Johnson v. Johnson County Comm'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991). These claims are therefore stale as to the proposed new Defendants, unless the proposed pleading can relate back to the filing of the original complaint under Federal Rule of Civil Procedure 15(c).

For purposes of adding a new party, the proposed pleading will relate back to the original so long as, within the period for timely service under Rule 4(m), the party to be added (1) "received such notice of the action that it will not be prejudiced in defending on the merits," and (2) "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Fed. R. Civ. P. 15(c)(1)(C). Here, these three proposed Defendants were actually named on Plaintiff's original complaint. (Docket No. 1.) Plaintiff had a difficult time getting through preliminary screening under 28 U.S.C. § 1915A, and they were not included in the amended complaint that ultimately went forward. (Docket Nos. 30 & 31.) But on such facts, the Court has no difficulty concluding that they were on timely constructive notice of the case through shared counsel. *See Santistevan v. City of Colorado Springs*, Case No. 11-cv-01649-MEH, 2012 WL 280370, at *4 (D. Colo. Jan. 31, 2012).

The harder question is whether the failure to include these proposed new Defendants in the operative pleading was due to some mistake as to their identity or role, rather than due to a lack of knowledge about their identity. *See Garrett v. Fleming*, 362 F.3d 692, 696–97 (10th Cir. 2004). Here, it appears from the papers that Plaintiff removed them from the case not due to any deliberate strategy, but rather based on a mistake as to which individuals were responsible for which actions. Thus, it appears that Plaintiff seeks not to add a new claim so much as he seeks, due to a misunderstanding of the facts, to change the identities of certain parties liable for the claims already at issue. This constitutes a mistake as to identity for purposes of Rule 15(c). *See Santistevan*, 2012 WL 280370, at *5–7. Accordingly, the Court concludes that the claims against proposed Defendants Guerin, Lightcap, and Baillargeon relate back to the original pleading and are not time-barred.

Defendant Ordway. Plaintiff did not list proposed Defendant Ordway in his original pleading. Further, the claim now asserted against Ordway, claim eleven, is simply that Ordway failed to file a report with his favorable characterization of Plaintiff's altercation with Defendant Gowin. This is a different theory of liability, unrelated to the ones already at issue. Thus, it cannot be said that Defendant Ordway was on notice of the claim, nor that the failure to name him was based on a mistake as to identity. The proposed claim against Ordway does not relate back to the original pleading and is therefore time-barred.

Recommendation

For the foregoing reasons, it is recommended that Plaintiff's Urgent Parties Consented To Amendment Of Pleadings; Alternatively, Because Justice Requires It, Sworn, Motion For Leave Of The Court To Amend Pleading Due To New Evidence From Initial Disclosures (Docket No. 77) be DENIED IN PART and GRANTED IN PART, as follows:

- Leave to amend should be granted as to proposed Claim 8, Claim 13, Claim 14, Claim 15, and Claim 16; and
- Leave to amend should be denied as to all other claims.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives de novo review of the recommendation by the District Judge, Thomas v. Arn, 474 U.S. 140, 148-53 (1985), and also waives appellate review of both factual and legal questions. Makin v. Colo. Dep't of Corr., 183 F.3d 1205, 1210 (10th Cir. 1999); Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Date: July 28, 2015
Denver, Colorado

s/ Michael J. Watanabe
Michael J. Watanabe
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-02379-RM-MJW

JOSHUA LAMONT SUTTON,

Plaintiff,

v.

MATTHEW VAN LEEUWEN,
BRIAN GOWIN,
ANTHONY RODERICK, and
FRAN LAPAGE,

Defendants.

REPORT & RECOMMENDATION ON

PLAINTIFF'S URGENT AMENDED MOTION FOR LEAVE OF THE COURT TO AMEND PLEADING DUE TO NEW EVIDENCE FROM INITIAL DISCLOSURES—CONFORMING TO JUDGE'S ANALYSIS
(Docket No. 112)

Michael J. Watanabe
United States Magistrate Judge

The pleading stage of this case has been drawn out for over a year now. As things stand at the moment:

- I previously recommended that two motions to dismiss (Docket Nos. 59 & 62) be granted and that Defendants Matthew VanLeeuwen and Brian Gowin be dismissed from this case. (Docket No. 74.)
- In response, Plaintiff filed both an objection and a motion for leave to amend his pleadings. (Docket Nos. 76 & 77.)
- I recommended that Plaintiff's motion be granted in part and denied in part, such that one claim against Defendant Gowin be added, the already-pending claims be clarified, and no new defendants be added. (Docket No. 103).
- Both Plaintiff and Defendant Gowin filed objections. (Docket Nos. 107 & 110.)
- Plaintiff has now filed a *second* motion for leave to amend his pleadings, even though his first motion is still pending. (Docket No. 112.)

ATTACHMENT 3

The objections are fully briefed and pending before District Judge Raymond P. Moore. (Docket Nos. 76, 84, 87, 91; 107, 110, 116, 117, 118, 120.) Judge Moore referred to me Plaintiff's second motion for leave to amend. (Docket No. 113.) I have reviewed the parties' filings (Docket Nos. 112, 119, & 121), taken judicial notice of the Court's entire file in this case, and considered the applicable Federal Rules of Civil Procedure, statutes, and case law. Now being fully informed, I make the following report and recommendation that Plaintiff's motion be denied.

Discussion

The Court set forth the background of this case in detail in its two previous reports and recommendations (Docket Nos. 74 & 103), including the legal standards for a motion to amend (Docket No. 103, p.2), Plaintiff's factual allegations (*id.* pp.2–4), and Plaintiff's grounds for leave (*id.* p.4). Those discussions are incorporated herein.

Counts One through Three. These counts challenge Plaintiff's initial stop on August 25, 2012, claiming that the stop was unsupported by reasonable suspicion and was the product of racial discrimination. I concluded that the amended claims would be futile, because the complaint alleged neither a compensable injury traceable to the stop as opposed to the arrest and conviction, *see Heck v. Humphrey*, 512 U.S. 477, 478 n.7 (1994), nor factual content from which an inference of discriminatory animus or discriminatory impact could be inferred, *see Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1168 (10th Cir. 2003). (Docket No. 103, pp.5–6.)

Plaintiff's new proposed pleading makes no material changes to Counts One and Two. As a result, Plaintiff has not overcome *Heck*.

As to Count Three, the new proposed claim alleges that Defendant VanLeeuwen released Plaintiff's then-wife (a white woman) from the stop, but not Plaintiff (a black man). (Docket No. 112-1, p.5.) It also adds that, after Plaintiff's disorderly conduct and during the course of the arrest, Plaintiff told Defendant VanLeeuwen "you thought I was just another n**** beating up a white girl . . . didn't you?", to which Defendant VanLeeuwen nodded and replied "you said it, not me." (*Id.*) This does not state a plausible claim for racial discrimination. Assuming without deciding that Defendant VanLeeuwen's remark can reasonably support an inference of discriminatory animus, the allegations do not support an inference of discriminatory impact. That same exchange shows that Plaintiff and his then-wife had been stopped on suspicion of domestic violence; in such a situation, Plaintiff and his then-wife were not "similarly situated" within the meaning of equal-protection law because (in context) one of them was a potential criminal and one of them was not. Thus, the allegation that Plaintiff's then-wife was released from the stop earlier than Plaintiff does not raised a plausible inference that a similarly situated white individual was treated differently than Plaintiff. As a result, Plaintiff has not overcome *Marshall*.

I recommend that Plaintiff's second motion for leave to amend be denied as to Counts One through Three.

Counts Four through Seven. These claims all concern Plaintiff's detention for longer than four hours on August 25, 2012. I concluded that the racial-discrimination claims failed because they did not provide factual content from which an inference of discriminatory animus or discriminatory impact could be inferred, *see Marshall*, 345 F.3d at 1168, and that the unreasonable-detention claims failed because a probable-cause determination was made within 48 hours, *see County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). (Docket No. 103, pp.6–7.)

Plaintiff's new proposed pleading removes Counts Five and Seven, the unreasonable-detention claims. As to Counts Four and Six, Plaintiff's new proposed pleading seeks to add more factual content. Specifically, in Plaintiffs first motion for leave to amend, Counts Four and Six allege that one white female was released from detention after four hours and Plaintiff was not (Docket No. 77-1, p.5); now, in this new motion for leave to amend, they allege that *several* white females were released after four hours, while *several* black males were not (Docket No. 112-1, p.6). This proposed change contradicts Plaintiff's proposed facts over the course of several attempted pleadings, and contradicts Plaintiff's own sworn testimony that *one* white woman was released why he was detained. (*See, e.g.*, Docket No. 6-2, p.25.) I find that Plaintiff's proposed pleading goes beyond curing technical deficiencies and, rather, is a bad faith in an attempt to change his version of events. Rule 15(a) does not allow seriatim, bad-faith attempts to survive dismissal. *See Foman v. Davis,* 371 U.S. 178, 182 (1962).

I recommend that Plaintiff's second motion for leave to amend be denied as to Counts Fourt through Seven.

Count Eight. Count Eight is an excessive-force claim against Defendant Gowin. I recommended, previously, that this claim be allowed to go forward, and my recommendation stands. (Docket No. 103, pp.7–8.)

Judge Moore has not yet ruled on Plaintiff's first motion for leave to amend (Docket No. 77), but nonetheless Plaintiff provides no explanation for why he should be allowed to change the proposed pleading now. I find that changing the pleading now would be unduly prejudicial to Defendant Gowin, because the original proposed pleading is already fully briefed. To change the pleading now be duplicative and wasteful, for no clear reason.

I recommend that Plaintiff's new motion be denied as to Count Eight.

Counts Nine through Twelve. These counts are all predicated on Plaintiff's assault charge. I concluded previously that each of the claims fail because the judicial officers who made probable cause and bail determinations were not misled where the assault charge was supported by probable cause, *see Galen v. County of Los Angeles,* 477 F.3d 652, 664 (9th Cir. 2007), and the arrest affidavit in this case would establish probable cause even if the affidavit's characterization of Plaintiff's conduct as "violent" were to be removed (see Docket No. 59-1).

In Plaintiff's new proposed pleading, he expands on the alleged error in the affidavit. Rather than simply disputing the affidavit's characterization of his conduct as "violent," Plaintiff now alleges that he made no contact whatsoever (violent or otherwise) with Defendant Gowin. (Docket No. 117-1, p.7.) This new attempt fails because the surveillance video that Plaintiff himself asked the Court to take judicial notice of shows that Plaintiff made contact with Defendant Gowin. Moreover, if it were Plaintiff's honest belief that he made no contact at all in removing Defendant Gowin's hand from Plaintiff's shoulder, one would have expected Plaintiff to mention that fact at some point in the first several attempts to plead his case. As a result, the Court finds that Plaintiff's motion is made in bad faith and should not be granted. *See Foman,* 371 U.S. 182.

Counts Eleven and Twelve in Plaintiff's initial proposed pleading allege that two proposed new Defendants failed to lodge their recommendations that Plaintiff not be charged with assault. (Docket No. 77-1, p.8) In the new proposed pleading, Plaintiff adds that they failed to lodge their opinions not only with their supervisors, but also with the judge who made the probable-cause determination. (Docket No. 112-1, p.8.) This is not a material change. Moreover, these Defendants cannot be liable for mere negligence; they must knowingly or recklessly violate Plaintiff's rights to be liable under § 1983, *Daniels v. Williams*, 474 U.S. 327 (1986), and there are no allegations from which the Court can conclude that a difference of opinion as to charging decisions constitutes a knowing or reckless violation.

I recommend that Plaintiff's new motion be denied as to Counts Nine through Twelve.

Claims Thirteen through Sixteen. These Counts are already pending, as the Defendants on these claims (Defendant Roderick and Defendant LePage) chose to file an answer rather than a motion to dismiss. (Docket No. 60.) I recommended, previously, that the proposed counts be allowed to go forward instead of the original pleading, and my recommendation stands. (Docket No. 103, p.10.)

Judge Moore has not yet ruled on Plaintiff's first motion for leave to amend (Docket No. 77), but nonetheless Plaintiff provides no explanation for why he should be allowed to change the proposed pleading now. I find that changing the pleading now would be unduly prejudicial to Defendants Roderick and LePage, because the original proposed pleading is already fully briefed. To change the pleading now be duplicative and wasteful, for no clear reason.[1]

[1] The Court notes that Defendants Roderick and LePage have already filed an answer to Counts Thirteen through Sixteen in Plaintiff's proposed amended pleading. (Docket No. 106.) Judge Moore has not ruled on Plaintiff's first motion for leave to amend

I recommend that Plaintiff's new motion be denied as to Counts Thirteen through Sixteen.

Recommendation

For the foregoing reasons, it is recommended that Plaintiff's Urgent Amended Motion For Leave Of The Court To Amend Pleading Due To New Evidence From Initial Disclosures—Conforming To Judge's Analysis (Docket No. 112) be DENIED.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives de novo review of the recommendation by the District Judge, Thomas v. Arn, 474 U.S. 140, 148-53 (1985), and also waives appellate review of both factual and legal questions. Makin v. Colo. Dep't of Corr., 183 F.3d 1205, 1210 (10th Cir. 1999); Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Date: September 24, 2015
Denver, Colorado

s/ Michael J. Watanabe
Michael J. Watanabe
United States Magistrate Judge

(Docket No. 77), and as a result the new answer filed by Defendants Roderick and LePage is a nullity: it answers a pleading that has not yet been accepted for filing, *i.e.*, has not yet been pleaded.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 14-cv-02379-RM-MJW

JOSHUA LAMONT SUTTON,

Plaintiff,

v.

MATTHEW VAN LEEUWEN,
BRIAN GOWIN,
ANTHONY RODERICK, and
FRAN LAPAGE,

Defendants.

ORDER

This matter is before the Court on the following matters:

(1) The "Report & Recommendation on Defendant Brian Gowin's Combined Motion to Dismiss and Memorandum in Support Thereof (Docket No. 59) & Motion to Dismiss on Behalf of Defendant Van Leeuwen (Docket No. 62)" (the "First Recommendation") (ECF No. 74);

(2) The "Report & Recommendation on Plaintiff's Urgent Parties Consented to Amendment of Pleadings; Alternatively, Because Justice Requires it, Sworn, Motion for Leave of the Court to Amend Pleading Due to New Evidence from Initial Disclosures (Docket No. 77)" (the "Second Recommendation") (ECF No. 103); and

(3) The "Report & Recommendation on Plaintiff's Urgent Amended Motion for Leave of the Court to Amend Pleading Due to New Evidence from Initial Disclosures –

ATTACHMENT 4

Confirming to Judge's Analysis (Docket No. 112)" (the "Third Recommendation") (ECF No. 123).

(The First, Second, and Third Recommendations, collectively, the "Recommendations.") The Court has reviewed the Recommendations, all relevant portions of the court file, the applicable rules, statutes, and case law, and being otherwise fully advised, ORDERS as follows: (1) The First Recommendation is ACCEPTED; (2) the Second Recommendation is ACCEPTED in part, MODIFIED in part, and REJECTED in part; and (3) the Third Recommendation is ACCEPTED.

I. BACKGROUND

Plaintiff filed this action on August 25, 2014,[1] against eight Defendants, including Defendants Van Leeuwen and Gowin. Ultimately, the case was ordered drawn to a presiding judge, but only as against Defendants Matthew Van Leeuwen, Brian Gowin, Anthony Roderick, and Fran LaPage. (ECF No. 31.) As Senior Judge Lewis T. Babock ordered:

> The only properly asserted claims in the Third Amended Complaint are found in the Nature of the Case section of the complaint form, where Plaintiff asserts that on August 25, 2012, he and his wife were stopped because they fit the description of "domestic violence suspects." ECF No. 30 at 4. Plaintiff further asserts that he was improperly arrested by Defendant VanLeeuwen for using a curse word, was then wrongly held for a total of nine hours by Defendant Gowin and falsely accused of assaulting Defendant Gowin, which resulted in his placement in solitary confinement by Defendant Roderick for seven months without due process and being repeated denied of his religious diet by Defendant LaPage during this time. Plaintiff also asserts that the assault charge against him was dismissed. In the Request for Relief section of the Third Amended Complaint, Plaintiff seeks declaratory and injunctive relief and money damages.

(ECF No. 31, pages 4-5.) Plaintiff was allowed to move forward only as to such claims. (ECF No. 31, page 7.)

[1] Plaintiff's first complaint was received by the court on August 27, 2014. Applying the mailbox rule, *Price v. Philpot*, 420 F.3d 1158, 1163-64 (10th Cir. 2005), Plaintiff's complaint is considered filed on August 25, 2014. Initially, Plaintiff's then-wife was also a plaintiff.

II. LEGAL STANDARD

A. Review of a Magistrate Judge's Recommendation

When a magistrate judge issues a recommendation on a dispositive matter, Federal Rule of Civil Procedure 72(b)(3) requires that the district court judge "determine de novo any part of the magistrate judge's [recommendation] that has been properly objected to." In conducting its review, "[t]he district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3). An objection is proper if it is filed within fourteen days of the Magistrate Judge's recommendations and specific enough to enable the "'district judge to focus attention on those issues – factual and legal – that are at the heart of the parties' dispute.'" *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1059 (10th Cir. 1996) (quoting *Thomas v. Arn*, 474 U.S. 140, 147 (1985)). In the absence of a timely and specific objection, "the district court may review a magistrate's report under any standard it deems appropriate." *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991); *see also* Fed. R. Civ. P. 72 Advisory Committee's Note ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.").

B. Plaintiff's Pro Se Status

Plaintiff proceeds pro se; thus, the Court must liberally construe his pleadings. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). The Court, however, cannot act as advocate for Plaintiff, who must still comply with the fundamental requirements of the Federal Rules of Civil Procedure. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

C. Motion to Dismiss

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, 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). Pursuant to Rule 12(b)(6), a complaint must be dismissed if it does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . ." *Id.* at 555 (internal citations and brackets omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* "[A] plaintiff must 'nudge [ ] [his] claims across the line from conceivable to plausible' in order to survive a motion to dismiss. . . . Thus, the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (internal citation and quotation marks omitted; italics in original).

The Tenth Circuit Court of Appeals has held "that plausibility refers to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible." *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (internal quotation marks and citation omitted). The Tenth Circuit has further noted "that [t]he nature and specificity of the allegations required to state a plausible claim will vary based on context." *Id.* (internal quotation marks omitted). Thus, the Tenth Circuit "concluded the *Twombly/Iqbal* standard is 'a middle ground between heightened fact pleading, which is expressly rejected, and allowing complaints that are no more than labels and conclusions or a formulaic recitation of the elements of a cause of action, which the [Supreme C]ourt stated will not do.'" *Id.* (quoting *Robbins v. Okla.,* 519 F.3d 1242, 1247 (10th Cir. 2008)).

For purposes of a motion to dismiss pursuant to Rule 12(b)(6), the court must accept all well-pled factual allegations in the complaint as true and resolve all reasonable inferences in the plaintiff's favor. *Morse v. Regents of the Univ. of Colo.,* 154 F.3d 1124, 1126-27 (10th Cir. 1998); *Seamons v. Snow*, 84 F.3d 1226, 1231-32 (10th Cir. 1996). However, "when legal conclusions are involved in the complaint 'the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to [those] conclusions' . . . ." *Khalik,* 671 F.3d at 1190 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Accordingly, in examining a complaint under Rule 12(b)(6), [the court] will disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable." *Id.*

D. Motion to Amend

Pursuant to Fed. R. Civ. P. 15(a)(2), "[t]he court should freely give leave when justice so requires." *See also Wopsock v. Natchees*, 279 F. App'x 679, 688 (10th Cir. 2008) (unpublished). "The Supreme Court has indicated district courts may withhold leave to amend only for reasons such as 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of [the] amendment.'" *U.S. ex rel. Ritchie v.*

Lockheed Martin Corp., 558 F.3d 1161, 1166 (10th Cir. 2009) (quoting *Forman v. Davis*, 371 U.S. 178, 182 (1962)) (brackets in original).

III. THE FIRST RECOMMENDATION

A. Factual Allegations

The parties do not object to the factual background (including which documents the Magistrate Judge determined were appropriate to consider or not consider); therefore, the Court adopts the background set forth in the First Recommendation. To the extent the Court relies on any additional matters to address the issues raised by the parties in the objections, they are set forth in this Order.

Essentially, as set forth in the Recommendation, on August 25, 2012, Plaintiff and his then-wife were walking home when several police cars surrounded them. The officers claimed that the couple met the description of the individuals in a reported domestic violence incident. The officers posed the same questions over and over, and Plaintiff and his then-wife began arguing that they had established they were not the people the officers were looking for and had a right to leave. Plaintiff cursed, and Defendant Van Leeuwen arrested Plaintiff and put him on a "four hour hold."

Plaintiff was taken to the Sheriff's office for the four-hour hold. Defendant Gowin then had Plaintiff held for an additional five hours (for a total of nine hours). At the end of that period, Plaintiff began arguing with Defendant Gowin that Plaintiff had a right to leave. Defendant Gowin then "became angry, repeatedly pushed me [Plaintiff], tried to choke me, shoved my face into the ground, wrote a statement about the incident, later made changes to his statement that were false, used the false charges to charge me with assaulting him, and then deceived a judge into approving the charge based on the false charges," citing to Case No. 12CR1220. (ECF No. 30, page 4.)

Later, Plaintiff was held for seven months in solitary confinement without any kind of hearing. While Plaintiff was being held, Defendant LaPage repeatedly denied requests to accommodate Plaintiff's religious diet. After those seven months, the District Attorney's office reviewed a video of the altercation between Defendant Gowin and Plaintiff and dismissed the assault charges. Plaintiff, however, was convicted of obstructing a peace officer based on his altercation with Defendant Gowin. (ECF No. 59-3.)

As for Plaintiff's initial arrest by Defendant Van Leeuwen, Plaintiff was convicted of disorderly conduct which was affirmed. (ECF No. 62-2.) Plaintiff's petition for writ of certiorari was dismissed as untimely. (ECF No. 62-3.)

B. Defendants' Motions to Dismiss, the First Recommendation, and the Objection

Defendants Van Leeuwen and Gowin filed motions to dismiss. Defendant Van Leeuwen argued: (1) statute of limitations; (2) *Heck v. Humphrey*[2]; and (3) qualified immunity. (ECF No. 62.) Defendant Gowin argued: (1) statute of limitations; (2) *Heck v. Humphrey*; and (3) failure to state a claim. The Magistrate Judge recommended the following: (1) statute of limitations – denied as Plaintiff's action is timely; (2) *Heck v. Humphrey*: granted as to Defendant Van Leeuwen and denied as to Defendant Gowin; (3) failure to state a claim for false imprisonment or malicious prosecution – granted in favor of Defendant Gowin; and (4) qualified immunity – granted in favor of Defendant Van Leeuwen, to the extent any claim is not barred by *Heck v. Humphrey*.

[2] 512 U.S. 477 (1994).

Plaintiff filed a timely objection (ECF No. 76) as to Section III of the First Recommendation, which found Plaintiff failed to plausibly state a claim against Defendant Gowin. Plaintiff did not object to discussions which recommended dismissal of Defendant Van Leeuwen. As to his objection concerning Section III regarding Defendant Gowin, Plaintiff argues: (1) he had reason to believe he had to be released at the 4-hour mark, as that was the official amount of time on "the summons note"; (2) a white female on a similar arrest was released; and (3) "Initial Disclosures" revealed that neither Defendant Van Leeuwen nor Defendant Gowin took Plaintiff to court until 58 hours after his arrest, when he was required to be brought to court within 48 hours, citing to *Riverside v. McLaughlin*, 500 U.S. 44 (1991). Plaintiff attaches a copy of "Citation: Notes" and of portions of the Transcript of Proceedings in *People v. Sutton,* before the Pueblo Municipal Court, Case E41371, held on December 27, 2012, which showed Defendant Van Leeuwen testified he issued Plaintiff a citation, who was then placed on a four-hour hold.

Defendant Van Leeuwen filed a response to Plaintiff's objection, asserting Plaintiff provides no argument as to the why the Recommendation should not be adopted as to the claim against him. In addition, he asserts that Plaintiff's transcript shows Defendant Van Leeuwen had no involvement with what occurred in the county jail after he was brought there; the determination of whether to hold Plaintiff longer was up to the jail.

Defendant Gowin also responded; however, he read Plaintiff's objection as one which contests the Magistrate Judge's determination that Plaintiff failed to plausibly state a claim against Defendants Gowin and *Van Leeuwen*. (ECF No. 84, pages 1, 2.) As to Plaintiff's first challenge – that he was detained five hours longer than he should have been detained before he was arrested for assaulting Defendant Gowin, Defendant Gowin asserts that, under *McLaughlin, supra*, being held more than four hours is not a constitutional violation. As for Plaintiff's second challenge – that he was not taken to court for a probable cause determination until 58 hours after his arrest, Defendant Gowin argues: (1) this argument is waived as it was not initially raised; and (2) a probable cause determination was made and Plaintiff's bond was set on Sunday, August 26, 2012, within 48 hours of his arrest on August 25, 2012. That probable cause determination was for Plaintiff's arrest from his altercation with Defendant Gowin in the jail.

In Reply, Plaintiff asserts his objection is also directed against Defendant Van Leeuwen, and his failure to take Plaintiff before a court within 48 hours of his warrantless arrest.

C. Analysis

1. Defendant Van Leeuwen

Starting with Defendant Van Leeuwen, the Court finds that Plaintiff's Objection is directed at Section III of the Recommendation, which analyzes and recommends the dismissal of Plaintiff's false imprisonment claim as to Defendant *Gowin*. Plaintiff made no objections as to the Magistrate Judge's findings or recommendations as to Defendant Van Leeuwen. Accordingly, as the Court finds no clear error in the Magistrate Judge's analysis or conclusions, the Court adopts the Recommendation as to Defendant Van Leeuwen.

Plaintiff's Objection apparently argues that his false imprisonment claim extends to Defendant Van Leeuwen and to more than the nine hours alleged in the Third Amended Complaint (ECF No. 30). The problem with this Objection is two-fold: (1) first, such arguments were not raised in the first instance in the papers addressing Defendants Van Leeuwen's and Gowin's respective motion to dismiss; and (2) second, such arguments are not within the scope of the claims alleged against Defendant Van Leeuwen. As the arguments were not raised or addressed by the Magistrate Judge, Plaintiff can hardly object to something not contained within the Recommendation. Similarly, as the arguments are not within the scope of the claims alleged, they cannot save the claims alleged from dismissal on the bases given in the Recommendation. Accordingly, Plaintiff's Objection as to the recommended dismissal of Defendant Van Leeuwen is OVERRULED.

2. Defendant Gowin

As with Defendant Van Leeuwen, Plaintiff's complaint contains no allegations, or claim, against Defendant Gowin based on the purported failure to bring him before a court within 48 hours. And, as Defendant Gowin argues, Plaintiff made no arguments as to such alleged failure in his filing with the court. Therefore, for essentially the same reasons stated as to Defendant Van Leeuwen, Plaintiff's Objection as to Section III against Defendant Gowin is OVERRULED.

As for the other recommended bases for dismissal against Defendant Gowin, Plaintiff makes no objections; therefore, the Court only reviews them for clear error. As the Court finds no clear error, it accepts the other recommended bases for dismissal as to Defendant Gowin.

D. Conclusion

Based on the foregoing, Plaintiff's Objection is OVERRULED, the recommended disposition is ACCEPTED, and Defendants Gowin and Van Leeuwen are DISMISSED from this case.

IV. THE SECOND RECOMMENDATION

A. The Requested Amendment and the Second Recommendation

On June 12, 2015, Plaintiff requested leave to amend his complaint. This is the same day that Plaintiff filed his objection to the First Recommendation. If allowed, this would be Plaintiff's sixth complaint. *See* ECF Nos. 1, 9, 20, 26, 30.

Plaintiff argued leave to amend should be granted due to "new evidence" – information Defendants disclosed on a compact disc containing about 300 pages of electronically stored documents. According to Plaintiff, he studied the information and compared them to what he possessed and to his knowledge of the events which occurred on or after August 25, 2012. As a result of his alleged studies and investigations of the information disclosed, his knowledge, information, and belief as to what occurred on and after August 25, 2012 "increased dramatically." (ECF No. 77, page 2.) The "new evidence" as to Plaintiff's proposed excessive force claim are "[m]edical records [which]...clearly indicate staff nurse(s) recorded I had bodily injuries from the force used against me…." (ECF No. 77, page 3 at ¶ 9.)

Plaintiff's proposed amended complaint would add four additional defendants, three of whom he previously named but were dismissed by the court. The proposed amended complaint would also contain 16 claims. (ECF No. 77-1.) After analyzing the papers, the Magistrate Judge recommended the following:

(1) Claims One through Three against Defendant Van Leeuwen: recommended denial based on futility;

(2) Claims Four and Five against proposed Defendant Guerin: recommended denial based on futility;

(3) Claims Six and Seven against proposed Defendants Guerin and Lightcap and Defendant Gowin: recommended denial based on futility;

(4) Claim Eight against Defendant Gowin for excessive force: recommended granting leave to amend as such claim would not be futile;

(5) Claims Nine through Twelve against various Defendants: recommended denial as futile; and

(6) Claims Thirteen through Sixteen against Defendants Roderick and LaPage: recommended granting leave to amend as the motion was confessed and the claims would not be futile.

In addition, the Recommendation found the claims against three of the four proposed new Defendants would not be time barred, *i.e.*, the claims against proposed Defendants Guerin, Lightcap, and Baillargeon. As for the fourth proposed defendant, Defendant Ordway, the Magistrate Judge found any claim would be time-barred. In summary, the Magistrate Judge recommended leave to amend to add the following five proposed Claims: Eight (against Defendant Gowin); Thirteen and Fourteen (against Defendant Roderick); and Fifteen and Sixteen (against Defendant LaPage).

B. The Objections

1. The recommendations with no objections filed

No objections have been filed to the recommendation to deny leave to amend the following claims: Three; Five; Seven; Nine; Ten; Eleven; and Twelve. No objections have also been filed to the recommendation to allow leave to amend the following claims: Thirteen through Sixteen. The Court reviews these recommendations for clear error, and finds none as to the recommended dispositions of these claims. However, as to Claims Five and Seven, the Court reaches this result on a different basis than that provided in the Second Recommendation.

Plaintiff's Claims Five and Seven Claims are for unlawful seizure and "conspiracy in unlawful seizure," both based on allegations that he was not brought to court within 48 hours under *McLaughlin, supra.* Here, Plaintiff was arrested on two charges – disorderly conduct based on his interactions with Defendant Van Leeuwen, and then assault based on his interactions with Defendant Gowin. The probable cause determination relied upon to satisfy the 48-hour window, found at ECF No. 59-1, does satisfy *McLaughlin*, but only as to the arrest for assault. That probable cause determination did not address the disorderly conduct charge. Thus, there is nothing which contradicts Plaintiff's allegations that he was not brought before a court for a probable cause determination until more than 48 hours had passed since his arrest around 1:00 a.m. on August 25, 2012. Moreover, Plaintiff's papers showing his Municipal Court date of August 27, 2012, at 8:30 a.m. (ECF No. 107, page 5), show support for his allegations.

Unfortunately, this does not save Claims Five or Seven for Plaintiff has alleged no compensable injuries from such action. First, because Plaintiff was already being held after a probable cause determination on Sunday, August 26, 2012, on the assault charge. And, secondly, because damages for violations of § 1983 to compensate persons for injuries caused by the deprivation of constitutional rights "must be based on actual injuries...." *Makin v. Colorado Dept. of Corrections*, 183 F.3d 1205, 1214 (10th Cir. 1999) (citing *Carey v. Piphus*, 435 U.S. 247, 264 (1978)). "'The deprivation of constitutional rights, standing alone, does not entitle a plaintiff to general damages.'" *Lippoldt v. Cole,* 468 F.3d 1204, 1220 (10th Cir. 2006) (quoting *Taxpayers for the Animas-La Plata Referendum v. Animas-La Plata Water Conservancy Dist.*, 739 F.2d 1472, 1480-81 (10th Cir. 1984)). And, "the abstract value of a constitutional right may not form the basis for § 1983 damages." *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986).

Moreover, Claim Seven also fails for another reason – inadequate factual allegations of a conspiracy. Conclusory allegations are insufficient. *E.g., Durre v. Dempsey*, 869 F.2d 543, 545 (10th Cir. 1989) (district court properly dismissed conspiracy claim where plaintiff failed to allege specific facts showing agreement and concerted action among defendants); *Marino v. Mayger,* 118 F. App'x 393, 405 (10th Cir. 2004) (unpublished).

Accordingly, the Court adopts the Second Recommendation, as modified above, as to the claims for which no objection has been filed, *i.e.*, Claims Three, Five, Seven, Nine, Ten, Eleven, Twelve, and Thirteen through Sixteen.

2. The recommendations to which there are objections

a) Plaintiff's Objection

Plaintiff filed an objection (the "Objection")[3] (ECF No. 107), contesting the recommended denial of leave to add Claims One and Two (against Defendant Van Leeuwen), Four (against proposed Defendant Guerin), and Six (against Defendant Gowin and proposed Defendants Guerin and Lightcap). As to Defendant Van Leeuwen, Plaintiff argues: (1) on Plaintiff's First Claim for unlawful seizure: the Magistrate Judge's determination of lack of injury was in error because Plaintiff "points" to the unlawful seizure caused by Defendant Van Leeuwen stopping Plaintiff before his disorderly conduct and then failing to bring Plaintiff to

[3] "Sworn Objection to the Report & Recommendation on Plaintiff's Urgent Parties Consented to Amendment of Pleadings; Alternatively, Because Justice Requires it, Sworn, Motion for Leave of the Court to Amend Pleading Due to New Evidence from Initial Disclosures (Docket No. 77)."

court until more than 58 hours had past; and (2) on Plaintiff's Second Claim for unlawful search based on Defendant Van Leeuwen's unreasonable questioning before Plaintiff's disorderly conduct: the Magistrate Judge's determination was in error as he failed to address this claim altogether or to support futility with any facts or findings. As to Defendants Guerin, Lightcap, and Gowin, Plaintiff argues his factual allegations are sufficient to state a cognizable sex and/or race discrimination. In addition, Plaintiff argues that if this Court should find his claims are not cognizable, he seeks leave to further amend. That request to amend is set forth in "Plaintiff's Urgent Amended Motion for Leave of the Court to Amend Pleading Due to New Evidence from Initial Disclosures – Confirming to Judge's Analysis" (ECF No. 112), addressed below.

Starting with Defendant Van Leeuwen, his response addresses Plaintiff's objection on Claims One and Two. He argues Plaintiff's objection fails to raise any arguments justifying rejecting the Second Recommendation on these claims. The Court agrees. First, the Second Recommendation discussing Plaintiff's allegations of lack of reasonable suspicion to stop and question encompasses Claims One (unlawful seizure – the stop) and Two (unlawful search – the questions). Second, Plaintiff alleges no compensable injury for any of the conduct alleged;[4] instead, his alleged injuries stem from his arrest and conviction which, under *Heck, supra*, cannot be challenged in this proceeding. Accordingly, Plaintiff's Objection as to the recommended denial of the leave to amend to add Claims 1 and 2 against Defendant Van Leeuwen is OVERRULED.

[4] The Court recognizes that Plaintiff's Claim One also encompasses an allegation that he was not taken to court until 58 hours after his initial arrest for disorderly conduct. As previously stated, Plaintiff alleges no compensable injury based on such asserted delay.

Next, as to Defendants Gowin, Roderick, and LaPage, their joint response addresses Plaintiff's objections as to his proposed Fourth and Sixth Claims. They argue, as to both claims, that mere differences in race do not, by themselves, support an inference of racial animus. In addition, these Defendants assert the Sixth Claim falls because Plaintiff failed to state a claim for conspiracy and because Plaintiff was brought before a judge in less than 48 hours after his arrest so there is no constitutional violation to support a conspiracy claim. The Court agrees, in part.

These claims fail because "[i]n order to state [a] race-based equal protection claim, a plaintiff must sufficiently allege that the defendant was motivated by racial animus." *Green v. Corr. Corp. of Am.*, 401 F. App'x 371, 376 (10th Cir. 2010) (unpublished). "Mere differences in race do not, by themselves, support an inference of racial animus." *Id.* Moreover, as previously stated, conclusory allegations of conspiracy are insufficient. *E.g., Durre*, 869 F.2d at 545. As for the last argument concerning whether Plaintiff was brought to court within 48 hours, the Court finds such argument irrelevant as it reads the Magistrate Judge's analysis of this issue as being directed at the Fifth and Seventh Claims. Accordingly, on these bases, the Court OVERRULES Plaintiff's objection as to Claims Four and Six and accepts the recommendation as to such claims.

b) Defendant Gowin's Objection

Defendant Gowin also challenges the Second Recommendation, arguing the Magistrate Judge erred in recommending allowing Plaintiff to add a claim for excessive force because: (1) Plaintiff is bound by his prior admission that he was not seeking a claim for excessive force (ECF No. 71, page 10), filed in response to Defendant Gowin's initial Motion to Dismiss (ECF No. 59); (2) as a matter of law, the videos show the force used by Defendant Gowin was objectively reasonable – it does not show a jury question – thus, the claim would be futile; (3) the claim is barred by *Heck v. Humphrey*; and (4) Plaintiff has already been given multiple attempts to state a claim against Defendant Gowin, and, despite knowing all the facts which form the basis of this claim, raised it only after the Magistrate Judge recommended dismissal of Defendant Gowin from this action. In response, Plaintiff continues to argue his amendment relies on the medical records of his bodily injuries. Upon review of the record, the Court agrees with Defendant Gowin's last contention – that an amendment should not be allowed, because Plaintiff's assertion this amendment relies on "new evidence" is not well taken.

Mr. Gowin has been named as a defendant since day one. Plaintiff's proposed amendment, filed June 12, 2015, is based on the following allegations: "Gowin pushed me three times, chased me to the back of the cell, cornered me, tried to put me in a choke me, pushed my face into the floor, while squeezing my neck, tied me to a chair, and left me tied to the chair…." (ECF No 77-1, page 6; *see also* page 4.) Plaintiff further alleges that he was in pain in the back of his neck and wrist, and the pain lasted for about one week. (ECF No. 77-1, page 7.) The record, however, undisputedly shows that Plaintiff knew of his alleged injuries, who allegedly caused them, and how they were caused at the time they occurred – on August 25, 2012 – and not almost three years later as Plaintiff asserts. *See, e.g.,* ECF No. 20 (Amended Prisoner Complaint), pages 16-17 (On August 25, 2012, "Gowin shoved me further into the jail cell. Then came in the jail cell after me attempting to put me in a choke hold, shoved me to the floor, shoved my face into the floor, and continued pushing[.]"); No. 26 (Second Amended Prisoner Complaint), pages 18-19 ("The Pueblo County Sheriff's Office Deputies…Brian Gowin [and others]…pushed me back into the cell, chased after me as I continued to back into the cell away from them, and they continued to push me, repeatedly tr[ied] to choke me, pushed my face into the floor....The action harmed me by causing more pain in my already injured shoulder, pain in my neck and head...."); No. 30 (Prisoner Complaint), page 4 ("I began arguing with him [Gowin] that I had a right to leave, he became angry, repeatedly pushed me, tried to choke me, shoved my face into the ground...."); and No. 99, pages 7, 9, 12 (Inmate Request Forms and "Notice of Claim" asserting "excessive force" against Gowin and others, filed in February 2013).

In fact, as Defendant Gowin argues, he raised the possibility of an excessive force claim in his motion to dismiss, but Plaintiff responded that the court did not order Defendants to answer a claim for excessive force "nor do I plan to Amend the Complaint to include a claim for excessive force because the amount of force may have been reasonable to make a[] lawful arrest when I held the door open." (ECF No. 71, page 10.) While the Court agrees with the Second Recommendation that, under the facts and circumstances of this case, Plaintiff's statement will not be taken as a judicial admission which serves to bar him from pursuing such a claim, Plaintiff's response nonetheless recognizes that force was used against him. Indeed, it would be hard for Plaintiff to not recognize he allegedly sustained any bodily injuries and how, especially since the events were captured on video. The fact that Plaintiff chose to wait until his sixth complaint to seek to add this claim, and after the recommended dismissal of Defendant Gowin, comes too late. Due to Plaintiff's undue delay, repeated failure to cure deficiencies by amendments previously allowed, and undue prejudice to the opposing party by virtue of allowance of the amendment, the Court SUSTAINS Defendant Gowin's objection as to Claim Eight.

C. Summary

In summary, the Court modifies the Second Recommendation as to Claims Five and Seven; accepts the Second Recommendation as to Claims One through Four, Six, and Nine through Sixteen; and rejects the Second Recommendation as to Claim Eight.

V. THE THIRD RECOMMENDATION

On or about August 17, 2015, after filing his objection to the Second Recommendation, Plaintiff filed another motion to amend his complaint (the "Urgent Amended Motion"). Plaintiff asserts the amendment is made to conform to the Magistrate Judge's analysis in the Second Recommendation and to "cure technical errors." (ECF No. 112, page 1.) After an analysis of the record, including recognizing that Plaintiff's proposed pleading shows a bad faith attempt to change the version of events, the Magistrate Judge recommended denial of Plaintiff's Urgent Amended Motion. No objections have been filed to the Third Recommendation and the time to do so has expired. The Court concludes the Magistrate Judge's analysis was thorough and sound, and that there is no clear error on the face of the record.[5] The Recommendation is, therefore, adopted as an order of this Court.

VI. CONCLUSION

Based on the foregoing, the Court **ORDERS** as follows:

(1) As to the "Report & Recommendation on Defendant Brian Gowin's Combined Motion to Dismiss and Memorandum in Support Thereof (Docket No. 59) & Motion to Dismiss on Behalf of Defendant Van Leeuwen (Docket No. 62)" (the "First Recommendation") (ECF No. 74):

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[5] The Court also notes Plaintiff's proposed seventh complaint contains claims which the Magistrate Judge recommended leave to add be denied. Despite filing no objections to such recommendation, Plaintiff nonetheless sought leave to amend again to add such claims.

(a) Plaintiff's Sworn Objection to the Report and Recommendation (ECF No. 76) is **OVERRULED**;

(b) The Second Recommendation is **ACCEPTED** and made an order of this Court;

(c) Defendant Brian Gowin's Combined Motion to Dismiss and Memorandum in Support Thereof (ECF No. 59) is **GRANTED**;

(d) The Motion to Dismiss on Behalf of Defendant Van Leeuwen (ECF No. 62) is **GRANTED**; and

(e) Defendants Gowin and Van Leeuwen are **DISMISSED** from this case; and

(2) As to the "Report & Recommendation on Plaintiff's Urgent Parties Consented to Amendment of Pleadings; Alternatively, Because Justice Requires it, Sworn, Motion for Leave of the Court to Amend Pleading Due to New Evidence From Initial Disclosures (Docket No. 77)" (the "Second Recommendation") (ECF No. 103):

(a) Plaintiff's "Sworn Objection to the Report & Recommendation on Plaintiff's Urgent Parties Consented to Amendment of Pleadings; Alternatively, Because Justice Requires it, Sworn, Motion for Leave of the Court to Amend Pleading Due to New Evidence from Initial Disclosures (Docket No. 77)" (ECF No. 107) is **OVERRULED**;

(b) "Defendant Brian Gowin's Objections to Magistrate Judge's Report and Recommendation on Plaintiff's Motion for Leave to Amend his Complaint (ECF No. 103)" (ECF No. 110) is **SUSTAINED**, and the Second Recommendation to allow an amendment to add Claim Eight against Defendant Gowin for excessive force is rejected;

(c) The Second Recommendation, **as modified herein,** is **ACCEPTED** in all other respects and made an order of this Court;

(d) Plaintiff's "Urgent Parties Consented to Amendment of Pleadings; Alternatively, Because Justice Requires it, Sworn, Motion for Leave of the Court to Amend Pleading Due to New Evidence from Initial Disclosures" (the "Urgent Motion") (ECF No. 77) is **GRANTED IN PART** and **DENIED IN PART**. Plaintiff is **GRANTED** leave to amend his complaint to add Claims Thirteen and Fourteen against Defendant Roderick and Claims Fifteen and Sixteen against Defendant LaPage. The remainder of Plaintiff's Urgent Motion is **DENIED**; and

(3) As to the "Report & Recommendation on Plaintiff's Urgent Amended Motion for Leave of the Court to Amend Pleading Due to New Evidence From Initial Disclosures – Conforming to Judge's Analysis (Docket No. 112)" (the "Third Recommendation") (ECF No. 123):

(a) The Third Recommendation is **ACCEPTED** and made an order of this Court;

(b) "Plaintiff's Urgent Amended Motion for Leave of the Court to Amend Pleading Due to New Evidence From Initial Disclosures – Conforming to Judge's Analysis" (ECF No. 112) is **DENIED;**

(4) Based on the foregoing:

(a) There being no claims remaining against Defendants Van Leeuwen and Gowin, their names shall be removed from the caption of this action in all future filings with the Court;

(b) This case shall proceed against Defendants Roderick and LaPage; and

(c) The Clerk of the Court is directed to accept and file Plaintiff's "Fourth and Final Amended Prisoner Complaint Due to Initial Disclosures" (ECF No. 77-1), but such complaint is operative only as to Claims Thirteen and Sixteen as against Defendants Roderick and LaPage, as the case may be. All other claims in that complaint are hereby STRICKEN.

DATED this 5th day of April, 2016.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-02379-RM-MJW

JOSHUA LAMONT SUTTON,

Plaintiff,

v.

ANTHONY RODERICK, and
FRAN LAPAGE,

Defendants.

REPORT & RECOMMENDATION ON

DEFENDANT RODERICK'S MOTION TO DISMISS FOURTH AND FINAL AMENDED COMPLAINT (Docket No. 235)
&
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Docket No. 238)

Michael J. Watanabe
United States Magistrate Judge

Two dispositive motions are pending and have been referred to the undersigned: a motion to dismiss under Fed. R. Civ. P. 12(b)(6), and a motion for summary judgment under Fed. R. Civ. P. 56(a). The Court has reviewed the parties' filings, taken judicial notice of the Court's entire file in this case, and considered the applicable Federal Rules of Civil Procedure and case law. Now being fully informed the Court makes the following report and recommendations.

Motion to Dismiss

This being the fourth report and recommendation in this case, the Court assumes the reader's familiarity with the factual allegations and the applicable legal standards.

The two claims against Defendant Roderick are both Due Process claims:

ATTACHMENT 5

> [Claim Thirteen:] On Aug. 25, 2012, in Pueblo, CO, after an assault arrest, Anthony Roderick classified me [as] Administrative Segregation and place[d] me in solitary confinement without a hearing, or had a hearing without informing me, without confrontation with witnesses, without a process for obtaining witnesses, and or without assistance in my defense.
>
> [Claim Fourteen:] On Aug. 25, 2012, in Pueblo, CO, after an arrest for assault, I was placed in solitary confinement without due process of law for about seven months, during this time approximately I lost my real and personal property(s), became very suicidal, started shaking and feeling like I could not breathe while I was in my cell, most of the time, and was subsequently diagnosed with Post Traumatic Stress [Disorder] (P.T.S.D.).

(Docket No. 196, pp. 8–9.) Defendant Roderick argues that the claims against him fail to state a claim upon which relief can be granted, because: (1) Plaintiff has no liberty interest protected by the Due Process Clause that requires a hearing prior to administrative segregation; and (2) any such claim is barred by the applicable statute of limitations.[1]

The Court agrees with the first argument. As the U.S. Supreme Court has explained:

> While no State may deprive any person of life, liberty, or property, without due process of law, it is well-settled that only a limited range of interests fall within this provision. Liberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States. Respondent argues, rather weakly, that the Due Process Clause implicitly creates an interest in being confined to a general population cell, rather than the more austere and restrictive administrative segregation quarters. While there is little question on the record before us that respondent's confinement added to the restraints on his freedom, we think his argument seeks to draw from the Due Process Clause more than it can provide.
>
> . . .

[1] The current motion to dismiss was filed in response to the Fourth Amended Complaint. (Docket No. 196.) Defendant Roderick filed answers to the previous versions of the complaint, but preserved the issue by asserting the statute of limitations in both of those answers. (Docket No. 60, p.6; Docket No. 106, p.5.)

> It is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence. The phrase "administrative segregation," as used by the state authorities here, appears to be something of a catchall: it may be used to protect the prisoner's safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer. Accordingly, administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration. This conclusion finds ample support in our decisions regarding parole and good-time credits. Both these subjects involve release from institutional life altogether, which is a far more significant change in a prisoner's freedoms than that at issue here, yet in *Greenholtz* and *Wolff* we held that neither situation involved an interest independently protected by the Due Process Clause. These decisions compel an identical result here.

Hewitt v. Helms, 459 U.S. 460, 466–68 (1983) (internal citations, quotation marks, and alterations omitted), *abrogated on other grounds*, *Sandin v. Conner*, 515 U.S. 472 (1995). In *Hewitt*, the Court did indeed hold that a pre-segregation hearing was required. But that requirement was created by state prison regulations, not by the Due Process clause. *Id.* at 470–72.

Here, Plaintiff does not identify any state-created liberty interest. Thus, to find a liberty interest protectable by the Due Process Clause, Plaintiff would need to allege conditions imposing atypical or significant hardship. In *Wilkinson v. Austin*, 545 U.S. 209 (2005), for example, the Supreme Court found a protected liberty interest on the following showing:

> For an inmate placed in OSP, almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in Sandin, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an

> otherwise eligible inmate for parole consideration. While any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context. It follows that respondents have a liberty interest in avoiding assignment to OSP.

Id. at 223–24 (internal citations omitted). Plaintiff has alleged nothing speaking to any of these considerations. All he has alleged is that he was in segregation in the Pueblo jail for seven months. He has not alleged, for example, how much contact he had with guards and other inmates, nor how much exercise and out-of-cell time he received. When allegations "are so general that they encompass a wide swath of conduct, much of it innocent," a plaintiff has "not nudged [his] claims across the line from conceivable to plausible." *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (internal quotations and citations omitted). The Court recommends that the claims against Defendant Roderick be dismissed under Fed. R. Civ. P. 12(b)(6).

<u>Motion for Summary Judgment</u>

Defendants Roderick and LaPage both move for summary judgment. As Judge Moore has recently stated it:

> Summary judgment is appropriate only if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. A party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion. Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to a jury or is so one-sided that one party must prevail as a matter of law. Once the moving party meets its initial burden of demonstrating an absence of a genuine dispute of material fact, the burden then shifts to the non-moving party to move beyond the pleadings and to designate evidence which demonstrates the existence of a genuine dispute of material fact to be resolved at trial. A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable jury could return a verdict for either party. In considering

> whether summary judgment is appropriate, the facts must be considered in a light most favorable to the non-moving party.
>
> If a movant properly supports a motion for summary judgment, the opposing party may not rest on the allegations contained in his complaint, but must respond with specific facts showing a genuine factual issue for trial. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact, the court may: (1) give an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or (4) issue any other appropriate order.

United Food & Commercial Workers Int'l Union, Local No. 7 v. King Soopers, Inc., 2016 WL 1586375, at *2 (D. Colo. Apr. 20, 2016) (internal citations, quotation marks, and alterations omitted).

Plaintiff filed no meaningful response to the motion, arguing only (in two brief paragraphs) that the Court's April 5, 2016, order (Docket No. 195) allowing Plaintiff to file an amended complaint precludes summary judgment. This is not true, of course, and as a result Plaintiff has not carried his burden Fed. R. Civ. P. 56(c)(1). Thus, if Defendants have properly supported their motion, they are entitled to summary judgment.

One of Defendants' arguments quickly resolves the entire case. Defendants argue that, as to the claims against them, Plaintiff failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). Defendants assert as undisputed facts:

- That the prison has a three-step grievance system, preceded by an informal grievance process (Docket No. 238-1 ¶¶ 67–73);
- That Plaintiff never filed any grievance regarding his claims against Defendants Roderick and LaPage (*Id.* ¶¶ 74–79).

These asserted facts are supported by a Declaration from Captain Leroy Mora, a captain at the Pueblo County Sheriff's Office. (Docket Nos. 238-26 through -37.) The Mora Declaration attests that the only grievance filed by Plaintiff concerns his claims against the other, since-dismissed Defendants in this case.[2] (Docket No. 238-26 ¶ 18.) The grievance, and appeals from its denial, are attached as exhibits, and they support the Mora Declaration's averments.

The Mora Declaration, even viewed in the light most favorable to Plaintiff, establishes that the jail has an administrative grievance system and that Plaintiff did not use that system to exhaust administrative remedies for the matters at issue here. Plaintiff's response makes no evidentiary showing that might rebut Defendants' evidence. Accordingly, I recommend that Defendants' motion for summary judgment be granted.

Recommendation

For the foregoing reasons, it is hereby RECOMMENDED that:

- Defendant Roderick's Combined Motion to Dismiss Fourth and Final Amended Complaint (Docket No. 235) be GRANTED and all claims against Defendant Roderick be DISMISSED under Fed. R. Civ. P. 12(b)(6);
- Defendants' Motion for Summary Judgment (Docket No. 238) be GRANTED and judgment be entered against Plaintiff on all claims, for failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997e(a).

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve

[2] All of the claims against the since-dismissed Defendants pertained to different matters.

and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives de novo review of the recommendation by the District Judge, Thomas v. Arn, 474 U.S. 140, 148-53 (1985), and also waives appellate review of both factual and legal questions. Makin v. Colo. Dep't of Corr., 183 F.3d 1205, 1210 (10th Cir. 1999); Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Date: July 29, 2016
Denver, Colorado

s/ Michael J. Watanabe
Michael J. Watanabe
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 14-cv-02379-RM-MJW

JOSHUA LAMONT SUTTON,

Plaintiff,

v.

ANTHONY RODERICK, and
FRAN LAPAGE,

Defendants.

ORDER

This matter is before the Court on Plaintiff's "Urgent Declaration Motion for Extension of Time to Object to the Magistrate Judge's Recommendation (Doc. No. 260), and to File for Leave of Court to Respond to Doc. No. 238 – Outside of Time for Good Cause (to be Stated in that Motion)" ("Motion") (ECF No. 263). The Court finds no response from Defendants is required before ruling on the Motion. *See* D.C.COLO.LCivR 7.1(d) ("Nothing in this rule precludes a judicial officer from ruling on a motion at any time after it is filed.")

Upon consideration of the Motion, the Court finds good cause has been shown for the requested extension to file an objection to the Recommendation. The Court notes that Plaintiff's "Certificate of Service and Declaration" is dated August 9, 2016, his envelope is postmarked the August 10, but his Motion was not received by the court until August 15, 2016. Thirty days (assuming three days for mailing) from July 29, 2016 is Wednesday, August 31. Today is August 17. In light of the time lag between Plaintiff's filing of the Motion and the court's

ATTACHMENT 6

receipt, the Court will exercise its discretion and allow Plaintiff one additional week. Accordingly, Plaintiff's objection to the Recommendation (ECF No. 260) is due on or before Wednesday, September 7, 2016.

As to Plaintiff's request to file a response to Defendants' Motion for Summary Judgment, that request is denied. Plaintiff contends good cause exists "to be stated in that motion," but that is not the standard. Plaintiff's request comes after the date for any response; therefore, excusable neglect must be shown. Fed. R. Civ P. 6(b)(1)(B). But, no such showing has been made.[1] To the extent Plaintiff is relying on his "Urgent Objection to Motion for Summary Judgment and Memorandum in Support Thereof – Due to Confession and Not Futile Judgment(s)" (ECF No. 254), to support a requested extension, it is unclear how that "objection" does so. Moreover, the objection was not a challenge to any procedural issue, *e.g.*, that the Motion for Summary Judgment was untimely, but was, rather, a response to the merits of the Motion for Summary Judgment. And, accordingly, such objection was considered by the Magistrate Judge in ruling on Defendants' Motion for Summary Judgment. (ECF No. 260, page 5.) Finally, if Plaintiff intended the objection to be something other than his response, he failed to act when he received Defendants' Reply in support of their Motion for Summary Judgment, filed July 5, 2016, more than a month ago. (ECF No. 255.) Therefore, Plaintiff's request is denied for having failed to show any basis for granting the requested relief.

Based on the foregoing, it is **ORDERED** that Plaintiff's "Urgent Declaration Motion for Extension of Time to Object to the Magistrate Judge's Recommendation (Doc. No. 260), and to

[1] If Plaintiff is stating that any showing will be made sometime later, that is insufficient. It must be shown in his request for an extension of time. *See* Fed. R. Civ. P. 6(b)(1)(B).

File for Leave of Court to Respond to Doc. No. 238 – Outside of Time for Good Cause (to be Stated in that Motion)" (ECF No. 263) is

(1) **GRANTED** as to Plaintiff's request for an extension of time to file any objection to the Magistrate Judge's Recommendation (ECF No. 260). Plaintiff's objection is due on or before **September 7, 2016**; and

(2) **DENIED** as to Plaintiff's request for leave to file a response to Defendants' Motion for Summary Judgment.

DATED this 17th day of August, 2016.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge

FILED
United States Court of Appeal
Tenth Circuit

October 16, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPE

FOR THE TENTH CIRCUIT

JOSHUA LAMONT SUTTON,

Plaintiff - Appellant,

v.

MATTHEW VAN LEEUWEN; BRIAN GOWIN; ANTHONY RODERICK; FRAN LEPAGE,

Defendants - Appellees.

No. 17-1077
(D.C. No. 1:14-CV-02379-RM-MJW)
(D. Colo.)

ORDER

Before **TYMKOVICH**, Chief Judge, **BALDOCK** and **HOLMES**, Circuit Judges.

The matter before the court is Joshua Lamont Sutton's petition for panel rehearing, which also contains requests for this court to appoint counsel and to issue a subpoena to the appellees. The petition and accompanying requests are denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

Appendix B.