No. 98317-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SHYANNE COLVIN, SHANELL DUNCAN, TERRY KILL, LEONDIS BERRY, and THEODORE ROOSEVELT RHONE,

Petitioners,

v.

JAY INSLEE, Governor of the State of Washington, and STEPHEN SINCLAIR, Secretary of the Washington State Department of Corrections,
Respondents.

BRIEF OF *AMICI CURIAE* OF SEATTLE CHAPTER OF THE NATIONAL LAWYERS GUILD WASHINGTON DEFENDER ASSOCIATION, & WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS' WRIT OF MANDAMUS

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A. Introduction

> "No one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones."
>
> Nelson Mandela[1]

From declaring the death penalty unconstitutional due to racial bias, *State v. Gregory*, 192 Wn.2d 1, 14-17, 427 P.3d 621 (2018), to the extraordinary contempt order directing the Legislature to fund K-12 education, *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012), this Court has never shirked its constitutional responsibility to ensure that all of our state's citizens are treated fairly and decently. We now are in a global crisis and, once again, this Court is called on to show that we as a society have not forgotten what Nelson Mandela reminded us is the measure of a country – how it cares not just for "its highest citizens, but its lowest ones." In this spirit, the Seattle Chapter of the National Lawyers Guild ("NLG"), the Washington Defender Association ("WDA"), and the Washington Association of Criminal Defense Lawyers ("WACDL") urge this Court to grant the petitioners' requested relief.

[1] United Nations, "Standard Minimum Rules for the Treatment of Prisoners," (2015) (https://www.un.org/en/events/mandeladay/mandela_rules.shtml) (viewed 4/7/20).

B. Identity and Interest of Amici Curiae

The identity and interests of the Seattle Chapter of the NLG and WDA were set out in detail in the joint amici motion filed on March 27, 2020. WACDL is a nonprofit association devoted to improving the legal defense of persons accused of crimes in the State of Washington. The organization has over 1000 members who devote a significant portion of their practice to criminal defense work and now joins this brief. Because many of the members of the Seattle Chapter of the NLG, WDA and WACDL are either criminal defense lawyers or immigration lawyers, the three organizations have particular concerns for the rights of incarcerated people in Washington State.

C. Issues of Concern to Amici Curiae

1. What duty does the State have to protect the physical safety and welfare of incarcerated people in our state's prisons?

2. What historical experience has there been with the failure of the government to care for the physical safety and welfare of prisoners during times of emergency and epidemics?

3. What will the disparate impact of the State's response to the 2019 novel coronavirus (COVID 19) pandemic be on members of certain racial groups incarcerated in Washington's prisons?

4. Why this Court should act now to remedy the situation?

D. Statement of Facts

Amici accepts the statement of facts set by the parties, although has differences of interpretation as to some of the facts.

E. Argument

1. The State Has a Special Duty to Protect People Confined in its Prisons

Although Respondents disclaim any "special duty" to those within their care, *see, e.g.*, Brief of Respondents ("BOR") at 39 ("Petitioners fail to cite any legal authority that requires the Department to provide care in excess of that received by other Washingtonians"), Respondents, in fact, have a heightened duty to care for the Petitioners. "Washington courts have long recognized a jailer's special relationship with inmates, particularly the duty to ensure health, welfare, and safety." *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010)(plurality). A jail, and by extension its staff, also have a duty "to protect an inmate from injury by third parties and jail employees." *Id*. at 645 (Madsen, C.J., concurring/dissenting).

Over a hundred years ago in *Kusah v. McCorkle*, this Court acknowledged that a sheriff running a county jail "owes the direct duty to a prisoner in his custody to keep him in health and free from harm, and for

any breach of such duty resulting in injury he is liable to the prisoner or, if he be dead, to those entitled to recover for his wrongful death." 100 Wn. 318, 325, 170 P. 1023 (1918). The source of this duty arises from the very lack of freedom of the person imprisoned, and thus "a custodian has complete control over a prisoner deprived of liberty." *Gregoire v. City of Oak Harbor*, 170 Wn.2d at 635 (plurality) (quoting *Shea v. City of Spokane*, 17 Wn.App. 236, 242, 562 P.2d 264 (1977)), *aff'd*, 90 Wn.2d 43, 578 P.2d 42 (1978)).[2]

This special duty is not unique to prisons; it originates in the common law, by which innkeepers and common carriers owed a special duty to protect the welfare of travelers who were away from their home communities and particularly vulnerable.[3] This Court has recognized the innkeeper's duty,[4] and has extended this "special" duty of care in analogous

[2] *See also Hopovac v. State Department of Corrections*, 197 Wn.App. 817, 823, 391 P.3d 570 (citing *Gregoire*, 170 Wn.2d at 635), *rev. granted and case dismissed upon joint motion*, 188 Wn.2d 1014, 396 P.3d 339 (2017) ("It is undisputed the Department [of Corrections] owes a duty to ensure the health, welfare, and safety of incarcerated individuals.").

[3] *See generally* A.K. Sandoval-Strausz, Travelers, "Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America," 23 *Law and History Review* 53, 62-63 (2005). The U.S. Supreme Court recognized the deep roots of the innkeeper's duty in its major civil rights cases. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 95 S.Ct. 348, 13 L.Ed.2d 258 (1964) (quoted in *In re Johnson*, 71 Wn.2d 245, 252, 427 P.2d 968 (1967)).

[4] *See Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 227-28, 802 P.2d 1360 (1991) (holding that an innkeeper has a duty to protect guests from the criminal actions of third parties); *Miller v. Staton*, 58 Wn.2d 879, 883, 365 P.2d 333 (1961) (duty of tavern owner to protect customers from fights); *Gurren v. Casperson*, 147 Wn. 257, 258-59, 265 P. 472 (1928) (duty of hotel to protect guests from assaultive guest).

situations, where the health and safety of powerless people is entrusted to a much more powerful entity. For example, the State must protect foster children in care;[5] an adult care home must protect its disabled residents;[6] a school must protect students from reasonably anticipated dangers;[7] and a hospital must protect its patients from the reasonably foreseeable risk of self-inflicted harm through escape.[8] This "special" common law duty applies to the current situation, in which people committed to the trust of the State of Washington, through no fault of their own, are unable to protect themselves from exposure to and the dangers of the Severe Acute Respiratory Syndrome Coronavirus 2 ("SARS COV-2") and the disease it causes, 2019 novel coronavirus disease ("COVID-19").

The common law duty of care owed by Department of Corrections ("DOC") to people living in prisons is amplified by, not only constitutional protections, *see Petitioner's Brief in Support of Petition for a Writ of Mandamus* at 42-46, but by international human rights standards that require prisoners should have "the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their

[5] *See H.B.H. v. State*, 192 Wn.2d 154, 168-69, 429 P.3d 484 (2018).
[6] *See Niece v. Elmview Group Home*, 131 Wn.2d 39, 47, 929 P.2d 420 (1997).
[7] *See McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953).
[8] *See Hunt v. King County*, 4 Wn.App. 14, 20, 481 P.2d 593 (1971).

legal status." *United Nations Standard Minimum Rules for the Treatment of Prisoners* (the "Mandela Rules"), 70/175 (adopted 12/17/15), Rule 24.[9]

In the 1970s and early 1980s, the failure of the State of Washington to provide a safe and healthy environment in our state prisons, particularly the provision of medical care, led not only to prison unrest but also to extended litigation in federal court.[10] In the wake of this history, in 1989, the Legislature mandated that people "in the custody of the department of correction receive such basic medical services as may be mandated by the federal Constitution and the Constitution of the state of Washington." RCW 72.10.005. Yet, still today, people living at DOC, who are solely reliant DOC to protect them through prevention and healthcare treatment, have cause for concern as "[m]edical complaints are the number one issue reported to OCO." Office of Corrections Ombuds, Complaints & Investigations, Current Systemic Work.[11]

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[9] *See also* U.N. Resolution 2010/16, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*. The U.S. Supreme Court routinely relies on international law when construing the U.S. Constitution. *See Roper v. Simmons*, 543 U.S. 551, 575, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

[10] *See Hoptowit v. Ray*, 682 F.2d 1237, 1252-54 (9th Cir. 1982) (upholding finding that Washington State Penitentiary's medical care was so deficient it violated the Eighth Amendment).

[11] (https://oco.wa.gov/complaints-investigations/current-systemic-issue-work) (viewed 4/11/2020).

2. *Historically, the Government Has Not Always Protected Vulnerable People Locked Behind Prison Walls from Disease and Disasters*

Already before the Court is evidence and briefing regarding the specific way DOC chooses to operate its prisons that are incompatible with protecting the health of the people who are confined within them from this particular disease. The health risks posed by the use of these correctional procedures are not newly identified ones. Unfortunately, we as a society have failed to protect prisoners during prior epidemics and disasters because of a similar lack of concern for their essential humanity until it was too late.

During a similarly remarkable epidemic, known as "The 1918 Flu," San Quentin Prison in California experienced three waves of that influenza infection, causing half the prison population to become sick.[12] Over the past century, medical literature has also continued to document how American prisons have been unable to protect people from outbreaks of

[12] Despite the use of isolation as a tactic during the height of the first wave of the outbreak, the sheer numbers of infected overwhelmed the limited medical facilities in the prison. *See* Stanley, L. L. "Influenza at San Quentin Prison, California," 34 *Public Health Reports* 1896-1970 996 (1919) (www.jstor.org/stable/4575142); *see also* "1918 flu pandemic puts prison medical staff to test,"(https://www.cdcr.ca.gov/insidecdcr/2018/10/18/1918-flu-pandemic-puts-prison-medical-staff-to-test/) (viewed 4/9/20).

other diseases, like tuberculosis,[13] HIV/AIDS,[14] and Valley Fever,[15] which can sweep through prisons endangering the incarcerated people living there.

Perhaps the vulnerability of incarcerated people to unhealthy and dangerous correctional procedures was most vividly demonstrated by the callous abandonment by New Orleans jailers of people during the flooding after Hurricane Katrina in New Orleans. In August 2005, the sheriff's department locked people in their cells alone without food or water, as the floodwaters rose towards the ceiling, and left them there for several days.[16] Later investigations revealed not only complete and utter disregard for the

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[13] For instance, Tuberculosis (TB), spreads quickly through prisons because, like COVID-19, a person may asymptomatically carry the infection into the prison and transmit it to those around them. The spread of TB infection, like this current virus, is exacerbated by ordinary prison practices, such as prison overcrowding, poor nutrition, inadequate screening and treatment, delays in diagnosis and isolation of infection cases, frequent transfers, a disproportionate number people who are at high risk of infection, and the fact that in a prison setting segregation criteria are often based on crime characteristics rather than on public health concerns. I. Baussano *et al.*, "Tuberculosis Incidence in Prisons: A Systemic Review," 7 *P Lo S Med*. 1 (2010); L. Lambert *et al.*, "Transmission of *Mycobacterium Tuberculosis* in a Tennessee Prison, 2002-2004, 14 *J. of Correctional Health Care* 39 (2008); D. Bergmire-Sweat *et al.,* "Tuberculosis Outbreak in a Texas Prison, 1994," 117 *Epidemiology and Infection* 485 (1986).

[14] By 1992, there were an estimated 195 AIDS cases for every 100,000 persons incarcerated in a State or Federal prison, as compared with 18 cases for every 100,000 within the entire United States population. *See* S. Polonsky et al, "HIV Prevention in Prisons and Jails: Obstacles and Opportunities," 109 *Public Health Reports* 1974, 615 (1994).

[15] In the mid-2000s, California prisons saw an outbreak of coccidioidomycosis ("Valley Fever"), with one prison showing an infection rate 38 times higher than in the nearest town and 600 times higher than the surrounding county, with the risk level increasing, for unknown reasons, for African-American prisoners. *See Hines v. Youseff*, 914 F.3d 1218, 1223-26 (9th Cir. 2019).

[16] *See* Human Rights Watch, *New Orleans: Prisoners Abandoned to Floodwaters*, Sept. 21, 2005 (https://www.hrw.org/news/2005/09/21/new-orleans-prisoners-abandoned-floodwaters#) (viewed 3/25/20).

lives and well-being of the people who were abandoned, but there was a pattern of denials and cover-ups, where government officials falsely claimed that the prisoners had rioted, rather than simply admit to:

> widespread chaos, caused in large part by inadequate emergency planning and training by local officials, and of racially motivated hostility on the part of prison officials and blatant disregard for the individuals trapped in the jail.

American Civil Liberties Union, *Abandoned & Abused: Executive Summary and Recommendations* (2006).[17] This history of falsely claiming people inside a prison or jail have rioted to attempt to excuse a warden or jailer's failure to protect prisoners is also sadly not new, and is particularly relevant when evaluating the current situation.[18]

3. To Prevent the Spread of SARS-COV-2 Infection and to Preserve Scarce Medical Resources, DOC Should Reduce its Population Now

The Governor's emergency proclamations ordering all Washingtonians (whose work is not essential) to "stay at home, stay healthy" is focused on collective efforts of *stopping* and slowing the spread of the SARS COV-2 virus and the disease it causes, COVID-19. If too

[17](https://www.aclu.org/other/abandoned-abused-executive-summary-and-recommendations (viewed 3/25/20).

[18] See J. Brunner *et* al, "After Tensions Erupt Over Coronavirus Fears, Inslee Says He's Considering Early Release for Some Nonviolent Offenders," *Seattle Times* (April 9, 2020)(https://www.seattletimes.com/seattle-news/crime/gov-inslee-scolds-monroe-inmates-involved-in-disturbance-says-hes-considering-allowing-early-release-for-some-nonviolent-offenders/) (viewed 4/10/20).

many people become sick at the same time, a medical surge at Washington hospitals will overburden healthcare professionals resulting in healthcare rationing, as there will not be enough care providers and equipment for everyone who needs them.[19] Petitioners' requested relief here is in accord with this goal as the release of vulnerable people living in DOC prisons *before* a surge occurs, will prevent overburdening the State's precious medical resources and will protect not just the thousands of people living and working in DOC's prisons but also the surrounding communities, where they are located.

Under ordinary circumstances, DOC struggles to provide appropriate health care diagnosis and treatment to its residents.[20] DOC does not have gynecological, obstetric, cardiovascular, or pulmonary specialists on-site at their facilities.[21] DOC also does not have ventilators or intensive care capacity at their facilities to meet the medical needs of residents as they

[19] *See* Scarce Resource Management & Crisis Standards of Care, Overview & Materials, Washington State Department of Health (2019) (https://nwhrn.org/wp-content/uploads/2020/03/Scarce_Resource_Management_and_Crisis_Standards_of_Care_Overview_and_Materials-2020-3-16.pdf (viewed 4/10/20).

[20] *See* Washington DOC Health Plan, Department of Corrections (2020) (https://www.doc.wa.gov/docs/publications/600-HA001.pdf) (viewed 4/7/20).

[21] Washington DOC Health Plan, Washington Department of Corrections (2020), 3-4 (https://www.doc.wa.gov/docs/publications/600-HA001.pdf) (viewed 4/7/20).

become severely ill.[22] Rather, it will rely on medical providers in the community after residents have become severely ill.[23]

Many Washington prisons are located in remote, rural communities. As recognized by respondents, DOC must rely on local hospitals for care, BOR at 4, and thus, in times of pandemic response, overwhelmed local hospitals will have limited abilities for meeting the needs of patients who become severely ill.[24] Furthermore, overcrowding at DOC exacerbates the problem -- as of February 2020, DOC publicly reported being overcrowded at four large prisons: Washington Corrections Center ("Shelton"); Washington Corrections Center for Women ("Purdy"); Monroe Correctional Complex; and Airway Heights Correction Center.[25]

The only way to reduce risks to medically vulnerable people is to prevent them from becoming infected.[26] DOC's prisons are not prepared to

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[22] Washington DOC Health Plan, Washington Department of Corrections (2020), 1-2 (https://www.doc.wa.gov/docs/publications/600-HA001.pdf) (viewed 4/7/20).

[23] Washington DOC Health Plan, Washington Department of Corrections (2020), 1 (https://www.doc.wa.gov/docs/publications/600-HA001.pdf) (viewed 4/7/20).

[24] *See* Washington State Department of Health, *Scarce Resource Management & Crisis Standards of Care, Overview & Materials* (2019) at 2 (discussing how during a pandemic medical resources become scarce due to a surge of need) (https://nwhrn.org/wp-content/uploads/2020/03/Scarce_Resource_Management_and_Crisis_Standards_of_Care_Overview_and_Materials-2020-3-16.pdf) (viewed 4/8/20).

[25] Data for Average daily population at DOC for March 2020 has not yet been publicly posted. Department of Corrections, Average Daily Population of Incarcerated Individuals, Fiscal Year 2020 (https://www.doc.wa.gov/docs/publications/reports/400-RE002.pdf).

[26] Petitioner's Set of Documents ("PSD") 8. "Proactive risk mitigation, including eliminating close contact in congregate environments, is the only effective way to prevent the spread of this infection." PSD 15.

prevent the spread of this infection, treat those who are most medically vulnerable, or contain any outbreak.[27] In light of this precarious situation, the failure of the Governor and the Secretary to release vulnerable people up until now has already unnecessarily placed people at further risk, as it is the only targeted way to prevent the spread of COVID-19 in prison settings.[28]

DOC claims to have adopted the Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities,[29] but as of 2 April 2020 critical procedures to prevent transmission were still not in place. Office of Corrections Ombuds ("OCO"), *WA DOC Coronavirus Response* (April 2, 2020).[30] Even though transmission of SARS COV-2 can occur even when a person is asymptomatic, does not feel sick, or is not showing signs of fever, at the time the record was filed, DOC had not yet provided asymptomatic residents with face coverings.[31] Indeed, Respondents admit they have only provided facemasks to symptomatic people. BOR at 5.

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[27] PSD 19.

[28] PSD 52. Amici recognize that the Governor has stated he will begin releasing some categories of people. However, this has only happened because of this case, has not actually occurred yet, and is a classic example of "too little, too late."

[29] *See Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Centers for Disease Control and Prevention, 1 (https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf)(viewed 4/10/20).

[30] (https://oco.wa.gov/covid-19) (viewed 4/10/20).

[31] PSD 179, 231, 281-284, 427, 454, 468, 493, 521, 526, 531, 565, 569, 585, 642-

DOC has over 900 asymptomatic people in quarantine. *See* Respondents' Report on COVID-19 ("RROC") at 4. DOC procedures place entire residential units of asymptomatic people together.[32] RROC at 25; RROC, Attachment 2 at 10. Under these conditions, SARS COV-2 infection is likely spreading within quarantined units.[33] Without reducing the population dramatically, DOC's procedures will result in unnecessary illness, suffering, and ultimately death, as is currently happening in other jails and prisons around the country.[34]

4. The Failure to Reduce Prison Population Disparately Impacts African-Americans & Native Americans and Other Medically Vulnerable People, Who Already at Risk of Having the Poorest Health Outcomes

The Centers for Disease Control and Prevention ("CDC") warn that older people regardless of health and people with certain underlying medical conditions (such as asthma, heart conditions, and diabetes)

645, 663. *See also* Centers for Disease Control and Prevention, *Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission*, Centers for Disease Control and Prevention. (https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html) (viewed 4/10/20).

[32] *Id. see also PSD* 203 ("In prison, even if everyone is isolated in a single cell, there is still an increased risk of transmission among prisoners and staff because the institutional setting requires the delivery of food, cleaning supplies, documents, and other items.").

[33] Respondents claim that only a few people have tested positive, BOR at 10, but there they do not indicate how many people who have exhibited symptoms of illness were not tested and how many people have been exposed to them.

[34] *See* https://www.bop.gov/coronavirus/; S. Heffernan, "Nurses Warn COVID-19 Cases At Cook County Jail Aren't Just Staying Behind Bars," WBEZ (4/10/20) (https://www.wbez.org/stories/nurses-warn-covid-19-cases-at-cook-county-jail-arent-just-staying-behind-bars/44cc1e46-693b-44cc-8a5a-347737966185) (viewed 4/12/20).

regardless of age are at a higher risk for severe illness from COVID-19.[35] African-Americans and Native Americans in particular disproportionately suffer from these conditions.[36] There is no reason to believe that African-Americans or Native Americans living in DOC are different from their loved ones in the community when considering the prevalence of these underlying medical conditions in the group. The CDC also warn that pregnant people are at higher risk of negative health outcomes from SARS COV-2 infection.[37] Incarcerated pregnant people are already at risk for poor pregnancy outcomes.[38] Even when not incarcerated, African-Americans are three times more likely and Native-Americans are twice more likely than

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[35] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), People Who Need Extra Precautions, People Who Are At Higher Risk, Older Adults (2020) (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html) (viewed 4/9/20).

[36] The Asthma and Allergy Foundation of America reports that African-Americans are three times more likely to die from asthma than whites. *Ethnic Disparities in the Burden and Treatment of Asthma*. The Asthma and Allergy Foundation of America, The National Pharmaceutical Council (2005) (https://www.aafa.org/media/1633/ethnic-disparities-burden-treatment-asthma-report.pdf) (viewed 4/10/20). Certain racial and ethnic minorities have a higher prevalence and greater morbidity of diabetes compared to whites, and have higher rates of complications. Edward A. Chow, MD, Henry Foster, MD, Victor Gonzalez, MD and LaShawn McIver, MD, MPH, "The Disparate Impact of Diabetes on Racial/Ethnic Minority Populations," 30 *Clinical Diabetes*, 130 (2012) (https://clinical.diabetesjournals.org/content/30/3/130) (viewed 4/10/20).

[37] Centers for Disease Control and Prevention. Coronavirus Disease 2019 (COVID-19), People Who Need Extra Precautions, Others At Risk, Pregnancy and Breastfeeding (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnancy-breastfeeding.html) (viewed 4/10/20).

[38]This study looked the experiences of incarcerated pregnant people in 22 state prison systems and 26 federal prisons, including Washington State for one calendar year. *See* Sufrin *et al.*, "Pregnancy Outcomes in US Prisons, 2016–2017," 109 *Am. J. Pub Health*, 799 (2019). Washington State prisons reported in this study that four percent (4%) of all women admitted to DOC were pregnant (or approximately 40 people).[38] *Id.*, Table 2 at 802.

Whites to die from complications related to pregnancy or childbirth.[39] Thus, DOC's failure to follow public health recommendations for release of medially vulnerable people is just not equitable.

This Court has already explicitly taken judicial notice of the "implicit and overt racial bias against black defendants in this state." *State v. Gregory*, 192 Wn.2d at 22 (citing *inter alia* Task Force on Race & the Criminal Justice System, Research Working Group, *Preliminary Report on Race and Washington's Criminal Justice System* 7 (2011) ("Task Force on Race")). The disparate treatment described in the literature is not in dispute. Substantial evidence supports the conclusion that racial inequities still permeate Washington's criminal justice system. Task Force on Race, *supra,* at 7. Numerous studies confirm that disproportionate minority incarceration rates cannot be justified by the hypothesis that minorities commit more crimes. *Id.* Specifically, even after controlling for legally relevant factors, prosecutors are less likely to charge Whites with crimes and are more likely to request monetary bail against Blacks; while judges order Blacks confined at a higher rate than Whites, and impose longer sentences of confinement against Blacks than compared to Whites. *Id.* Said differently, because of this historic and ongoing racial discrimination in Washington State's

[39] Centers for Disease Control and Prevention. Reproductive Health, Maternal Mortality, (https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm) (viewed 4/10/20).

criminal justice system, Blacks are more likely to be sentenced to prison for crimes, for which Whites are less likely to receive prison sentences; and to be serving longer prison sentences than Whites, who are also sent to prison. *Id*. Recently additional research confirms that African-Americans and Native Americans are notably over-represented in the population receiving long or life prison sentences.[40] Thus, once sentenced to prison, African-Americans and Native Americans are more likely to be among the older population at DOC as well.

The cumulative result of all these factors is that the impact of COVID-19 within DOC will fall disproportionately on those who have already suffered from detrimental results of historic and ongoing discrimination. In other words, those who will suffer the most through DOC's inaction will be those same people already vulnerable to other poor outcomes due to society's failures to provide equity. Respondents completely fail to consider that this history of inequity particularly in sentencing people to prison and to longer (and lifelong) prison sentences is a direct outcome of our historic social behavior of casting entire communities aside to society's margins, in favor of social and economic

[40] Beckett, Katherine and Heather D. Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in WA State, A Report for ACLU Washington*. American Civil Liberties Union Washington: February 2020 at 27-28, (https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state) (viewed 4/8/20).

systems designed for other people's success. Respondents seek to justify their inhumane treatment by deciding that people in prison from certain communities are unworthy of the same medical protections and care as everybody else who is not in prison.

5. Only by This Action Can Those Who Reside Involuntarily Inside DOC Obtain Adequate Relief

People incarcerated in county jails who are still awaiting trial can sometimes avoid the ravages of COVID-19 by having their lawyers make bail motions to obtain pretrial release. In contrast, people living in DOC during this emergency do not have that option. They do not have the constitutional right to court-appointed counsel at public expense when collaterally attacking their felony convictions, and many are indigent (without the ability to hire an attorney). Furthermore, Washington's superior courts do not have the power to change a prison sentence to release a person or vacate a felony conviction for humanitarian reasons.[41]

A person living inside a DOC prison, who fears that their safety is threatened by the COVID-19 pandemic, might be able to file a PRP or other writ challenging conditions of confinement.[42] Yet, the process is lengthy

[41] *See State v. Shove*, 113 Wn.2d 83, 86-89, 776 P.2d 132 (1989)(court had no authority to reduce sentence after final judgment entered); *State v. Aguirre*, 73 Wn.App. 682, 871 P.2d 616 (1994) (court had no power to vacate judgment to avoid deportation).

[42] *See In re Pers. Restraint of Arseneau*, 98 Wn.App. 368, 989 P.2d 1197 (1999).

and cumbersome, with the PRP process, for instance, taking years.[43] There is also currently no emergency process set up to handle individual humanitarian requests or extraordinary medical requests for release from either the DOC Secretary or the Governor.[44] Under the current process people in prison are also not entitled to a right to counsel in such proceedings, and instead the ill or infected person would be required navigate this process on their own behalf.

Moreover, at this point Washington's superior courts have suspended most non-emergent civil hearings.[45] As Respondents recognized when noting the barriers to courts issuing protection orders, BOR at 16, courts are ill-equipped to process individual writs of *habeas corpus* by mostly *pro se* incarcerated people. This situation leaves incarcerated individuals, whose health may be failing, unable to access the courts in an expeditious way that protects their health. Indigent incarcerated people in remote locations within less populated counties far away from their families and friends would not easily have access to the basic mechanisms for filing

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[43] *See Dress v. Dep't of Corrections*, 168 Wn.App. 319, 338, 279 P.3d 875 (2012) ("Further, the court found, based on evidence submitted on the issue, that 'typically PRPs take six months or probably longer to address'").

[44] Other than issuing an emergency rule dealing with extensions of time for filing notices of appeal or petitions for review, this Court has not set up any other emergency procedures regarding PRPs at this time. S*ee* https://www.courts.wa.gov/opinions/index.cfm?fa=opinions.scorders.

[45] Notices of court closures are on the Washington courts website. Found online at: http://www.courts.wa.gov/index.cfm?fa=home.courtClosures.

pro se petitions, particularly being able to file motions to waive the filing fee and proceed *in forma pauperis*. Furthermore, if DOC continues its plans to isolate people with serious medical conditions who are not yet infected, it will restrict their ability to stay in touch with their loved ones and readily access the courts.[46]

As for seeking civil relief after infection, illness or death, history teaches us this avenue is grossly inadequate as a remedy. Civil suits against jailers or wardens following natural catastrophes and infectious outbreaks are extremely difficult to win. Despite claiming sympathy for the victims, the Ninth Circuit recently dismissed the claims of 117 incarcerated people infected with "Valley Fever" while in California prisons on qualified immunity grounds, finding "no evidence that society's attitude had evolved to the point that involuntary exposure to such a risk violated current standards of decency." *Hines v. Youseff*, 914 F.3d 1218, 1231 (9th Cir. 2019) (internal quotations omitted).[47] Thus, this Court must act now before it is too late.

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[46] "It is well established that prisoners have a constitutional right of access to the courts." *Whitney v. Buckner*, 107 Wn.2d 861, 865, 734 P.2d 485 (1987) (finding right in Due Process Clause of U.S. Const. amend. XIV).

[47] Most civil lawsuits regarding the abandonment of people in New Orleans' jails during the 2005 had a similar fate based on procedural grounds. *See Earl v. Gusman*, 228 So.3d 268, 272 (La. 2017); *Waganfeald v. Gusman*, 674 F.3d 475, 485 (5th Cir. 2012); *Fairley v. Stalder,* 294 Fed. Appx. 805 (Aug. 6, 2008) (unpub.) (cited under GR 14.1, copy in appendix); *Anders v. Gusman*, 2009 WL 1269232, *3 (May 5, 2009) (unpub.) (cited under GR 14.1, copy in appendix); *Kearns v. Gusman*, 2008 WL 2038938, *3 (May 12, 2008) (unpub.) (cited under GR 14.1, copy in appendix).

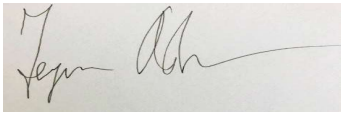
F. Conclusion

Former prisoner and current UN High Commissioner for Human Rights Michelle Bachelet has urged the release of prisoners during the current crisis.[48] *Amici* respectfully urge this Court to follow her lead and grant the requested relief, at a time when a pandemic viral infection, and the severe illnesses and risk of death it entails, can still be avoided.

Dated this 16th day of April 2020.

Neil Fox, WSBN 15277
Attorney for NLG[49]

D'Adre Cunningham, WSBN 32207
Attorney for WDA



Teymur Askerov, WSBN 45391
Attorney for WACDL

To be sure, a few lawsuits have had some success surviving procedural hurdles, but substantive relief may still be elusive. *See, e.g.*, *Edison v. United States*, 822 F.3d 510 (9th Cir. 2016) (allowing lawsuit for failure to warn to proceed in Valley Fever cases); *DeGidio v. Pung*, 920 F.2d 525 (8th Cir. 1990) (affirming jury verdict widespread tuberculosis infection in Minnesota prison); *Narvaez v. City of New York*, 2017 WL 1535386 (April 17, 2017)(unpub.)(cited under GR 14.1, copy in appendix)(dismissing most claims for housing inmate with others with active TB, but denying motion to dismiss under F.R.C.P. 12(b)(6) for one due process ground).

[48] Office of the High Commissioner for Human Rights (UN Human Rights) ,"Urgent action needed to prevent COVID-19 'rampaging through places of detention." (https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E) (viewed 4/7/20).

[49] With assistance from law students Sayer Rippey, Laura Lyons, Bobbi Fogle, Sara Suryan and Maya Ramakrishnan.

G. Appendices Required under GR 14.1

#1 *Fairley v. Stalder,* 294 Fed. Appx. 805 (Aug. 6, 2008)
#2. *Anders v. Gusman,* 2009 WL 1269232 (May 5, 2009)
#3. *Kearns v. Gusman,* 2008 WL 2038938 (May 12, 2008)
#4. *Narvaez v. City of New York*, 2017 WL 1535386 (April 17, 2017)

294 Fed.Appx. 805
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals,
Fifth Circuit.

Robert FAIRLEY; Ronald George, on their own behalf(s) and on behalf of all individuals similarly situated; Nathaniel Carr; Kevin Green; Fay Hardy; Tyrell LeBlanc; Ladoia Smith; Clifton Thompson, Plaintiffs–Appellants
Barbara Ann Anderson; et al, Appellants
v.
Richard L. STALDER, Secretary Department of Public Safety and Corrections, Defendant–Appellee.

No. 07–30589.
|
Aug. 6, 2008.

Synopsis
Background: State inmates filed putative class action alleging that state and parish penal officials violated their constitutional rights and state law by abandoning facility and abusing inmates during and after Hurricane Katrina. The United States District Court for the Eastern District of Louisiana, 2007 WL 914024,dismissed complaint, and inmates appealed.

Holdings: The Court of Appeals held that:

[1] state did not waive its Eleventh Amendment immunity;

[2] Congress did not abrogate state's Eleventh Amendment immunity; and

[3] Secretary of state Department of Public Safety and Corrections was not responsible for evacuating inmates from parish jail before hurricane.

Affirmed.

West Headnotes (6)

[1] **Federal Courts** Litigation conduct

State did not waive its Eleventh Amendment immunity in connection with inmates' action to recover under state law for injuries they sustained as result of sheriff's abandonment of jail during and after hurricane by litigating other suits arising from hurricane as plaintiff in federal court, where state's actions related to failures of levees and retaining walls after hurricane, and there was no indication that harms suffered by inmates were caused by those failures. U.S.C.A. Const.Amend. 11.

4 Cases that cite this headnote

[2] **Federal Courts** Participation in federal programs

State did not constructively waive its Eleventh Amendment immunity in connection with inmates' action to recover under state law for injuries they sustained as result of sheriff's abandonment of jail during and after Hurricane Katrina by participating in various federal programs, absent evidence of clear congressional desire to make state liable. U.S.C.A. Const.Amend. 11.

1 Cases that cite this headnote

[3] **Federal Courts** By constitution or statute

Louisiana's constitutional and statutory waivers of sovereign immunity to suit in state court did not waive its Eleventh Amendment immunity from suit in federal court, where waiver provisions did not express state's intention to subject itself to suit in federal court. U.S.C.A. Const.Amend. 11; LSA–Const. Art. 12, § 10; LSA–R.S. 9:2798.1, 13:5106(A).

16 Cases that cite this headnote

[4] **Federal Courts** Abrogation by Congress

Congress did not abrogate Louisiana's Eleventh Amendment immunity in areas of flood

control, hurricane protection, prison reform, and disaster preparation and response; there are no allegations that flood control, hurricane protection, and disaster preparation and response statutes were enacted by Congress pursuant to post-Eleventh Amendment power or that Congress attempted to abrogate, unequivocally or otherwise, state sovereign immunity from suit in those areas. U.S.C.A. Const.Amend. 11.

5 Cases that cite this headnote

[5] **Civil Rights** Criminal law enforcement; prisons

Secretary of Louisiana Department of Public Safety and Corrections was not responsible for evacuating inmates from parish jail before Hurricane Katrina, and thus injunctive relief was not warranted requiring Secretary to take action to avoid future constitutional deprivations during hurricanes. 42 U.S.C.A. § 1983; LSA–R.S. 15:702, 15:704, 33:1435, 33:4715.

12 Cases that cite this headnote

[6] **Prisons** Liabilities

Public Employment Law enforcement personnel

Secretary of Louisiana Department of Public Safety and Corrections was not responsible for evacuating inmates from parish jail before Hurricane Katrina, and thus was not subject to liability under Louisiana law for injuries suffered by inmates when jail was abandoned during and after hurricane, absent allegation of any particular action or inaction by Secretary individually. LSA–R.S. 15:702, 15:704, 33:1435, 33:4715.

12 Cases that cite this headnote

Attorneys and Law Firms

***806** Ashton R. O'Dwyer, Jr., New Orleans, LA, for Plaintiffs–Appellants.

Michael C. Keller, Office of the Attorney General for the State of Louisiana, New Orleans, LA, for Defendant–Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana, No. 2:06–cv–3788.

Before SMITH, WIENER, and HAYNES, Circuit Judges.

Opinion

PER CURIAM: *

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

****1** Plaintiffs–Appellants Robert Fairley and Ronald George, on their own behalves and on behalf of all individuals similarly situated, et al. ("Fairley") appeal dismissal of their claims against Louisiana Department of Public Safety and Corrections Secretary Richard Stalder, in both his individual and official capacities. [1] Fairley contends that (1) the State of Louisiana waived its sovereign immunity either constructively or by its litigation conduct, (2) Congress abrogated Louisiana's sovereign immunity by attaching "strings" to funds it granted to the State, (3) Louisiana is a "person" subject to suit under 42 U.S.C. § 1983 (2000), and (4) the claims against Stalder in his individual capacity were improperly dismissed. Concluding that these contentions are wholly without merit, with some bordering on frivolous, we affirm their dismissal by the district court.

1 Fairley also contends that his claims against the State of Louisiana and the Louisiana Department of Public Safety and Corrections were improperly dismissed. As he only urges jurisdiction pursuant to 28 U.S.C. § 1291 as the basis for this appeal, however, dismissals outside of the Rule 54(b) partial final judgment entered by the district court cannot be considered by us at this juncture. Although it is possible for a district court's order to be final without explicit reference to Rule 54(b), counsel is required to direct our attention to language that "either independently or together with related parts of the record reflects the trial judge's clear intent to enter a partial final judgment under Rule 54(b)." *Kelly v. Lee's Old Fashioned Hamburgers, Inc.,* 908 F.2d 1218, 1220 (5th Cir.1990) (en banc). The fact that the district court did enter a Rule 54(b) partial final judgment as to some of the claims dismissed in its earlier orders will be taken by us as some evidence that the court did not intend to create

a final judgment for our review of the claims dismissed but not part of the Rule 54(b) partial final judgment.

I. FACTS AND PROCEEDINGS

Fairley filed a putative class action in the district court on behalf of inmates and former inmates of penal facilities in Orleans Parish[2] prior to and in the aftermath of Hurricane Katrina. The complaint ***807** sought damages stemming from the alleged deprivation and violation of federal constitutional rights and rights under Louisiana law caused by the State of Louisiana, the Louisiana Department of Public Safety and Corrections (the "DOC"), Stalder, in his individual and official capacities, the Orleans Parish Criminal Sheriff's Office, Orleans Parish Criminal Sheriff Marlin Gusman, in his individual and official capacities, and unnamed deputies, officers, and troopers.

2 Each of the penal facilities named appears to be a unit within the Orleans Parish Criminal Sheriff's Office (the "OPCSO").

The complaint alleged that despite a declaration of emergency by Louisiana Governor Kathleen Blanco on August 26, 2005, and a mandatory evacuation order issued by New Orleans Mayor Ray Nagin on August 28, 2005, both in advance of Hurricane Katrina's landfall on August 29, 2005, the defendants failed to plan for evacuation of the plaintiffs, to evacuate the plaintiffs, and to provide food, water, clothing, bedding, sanitary facilities, and medication. The conditions Fairley describes after Katrina are deeply troubling: abandonment by the defendants; incarceration under lock and key in fetid conditions without food, water, or sanitary facilities and without information as to when assistance might come; and immersion in "toxic soup" during evacuation to a filthy, hot, and uncomfortable highway overpass. He claims, under various theories, that these acts and omissions violated his rights, and those of others similarly situated, under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as under Louisiana law. Suit for relief on the federal claims was brought pursuant to 42 U.S.C. § 1983, and supplemental jurisdiction was asserted for the state law claims.

Louisiana, the DOC, and Stalder, in his official capacity, moved to dismiss the state law claims under Federal Rule of Civil Procedure 12(b)(1) and to dismiss the § 1983 claims under Rule 12(b)(6), asserting sovereign immunity and contending that Louisiana and the DOC are not "persons" susceptible to suit under § 1983. Stalder also moved under Rule 12(b)(6) to dismiss all federal claims against him in his individual capacity under the doctrine of qualified immunity and to dismiss all state claims under Louisiana Revised Statutes sections 9:2798.1 and 29:735.

****2** Fairley then filed a first amended complaint, which added additional plaintiffs. After further motion practice, the magistrate judge to whom the case had been referred ordered Fairley to file another amended complaint to comply with the requirement, for cases in which qualified immunity has been asserted as a defense, that plaintiffs plead "with factual detail and particularity, not mere conclusionary allegations"[3] any claims against Stalder in an individual capacity. This second amended complaint was filed and included, inter alia, new claims for prospective injunctive relief. Fairley's effort to comply with the heightened pleading standard for qualified immunity cases consisted of a four-line paragraph purporting to incorporate by reference, in toto, the American Civil Liberties Union ("ACLU") National Prison Project report entitled *Abandoned & Abused: Orleans Parish Prisoners in the Wake of Hurricane Katrina.*

3 The magistrate judge was quoting *Anderson v. Pasadena Independent School District,* 184 F.3d 439, 443 (5th Cir.1999) (internal quotation marks omitted).

The magistrate judge recommended that all state and federal claims against Louisiana and the DOC be dismissed on grounds of sovereign immunity, and that all claims against Stalder in his official capacity be dismissed because he is not a person susceptible to suit under § 1983 in his official capacity. The district court adopted the magistrate judge's report and recommendations and dismissed all claims against Louisiana, the DOC, and Stalder in his ***808** official capacity pursuant to Rules 12(b)(1) and 12(b)(6). The district court also dismissed the claims against Stalder in his individual capacity under Rule 12(b)(6). Leave to amend a third time was denied, and the district court dismissed Fairley's claims against Stalder for prospective injunctive relief.[4] An unopposed motion for a partial final judgment under Rule 54(b) as to all claims for damages and injunctive relief against Stalder in his individual and official capacities was then granted. This timely appeal followed.

4 The basis for this dismissal does not appear in the record, but from the motion Stalder filed in the district court, it appears to have been based on Rule 12(b)(6).

II. ANALYSIS

A. Standard of Review

We review de novo a district court's dismissal of claims under Rules 12(b)(1) and 12(b)(6).[5] We "accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff" and do not dismiss a claim "unless the plaintiff would not be entitled to relief under any set of facts or any possible theory that it could prove consistent with the allegations in the complaint."[6] "However, conclusory allegations will not suffice to prevent a motion to dismiss, and neither will unwarranted deductions of fact."[7]

5 *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough,* 354 F.3d 348, 351 (5th Cir.2003); *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir.2001).

6 *Jones v. Greninger,* 188 F.3d 322, 324 (5th Cir.1999).

7 *United States ex rel. Willard v. Humana Health Plan of Tex., Inc.,* 336 F.3d 375, 379 (5th Cir.2003) (internal quotation marks and citations omitted).

When claims have been asserted under § 1983 against a government official, plaintiffs "must plead specific facts that, if proved, would overcome the individual defendant's immunity defense; complaints containing conclusory allegations, absent reference to material facts, will not survive motions to dismiss."[8] "When a public official pleads the affirmative defense of qualified immunity in his answer [and] the district court ... require[s] the plaintiff to reply to that defense in detail[,] .... the reply must be tailored to the assertion of qualified immunity and fairly engage its allegations."[9] Finally, "[i]n deciding a motion to dismiss[,] the court may consider documents attached to or incorporated in the complaint and matters of which judicial notice may be taken."[10]

8 *Geter v. Fortenberry,* 849 F.2d 1550, 1553 (5th Cir.1988).

9 *Schultea v. Wood,* 47 F.3d 1427, 1433 (5th Cir.1995).

10 *Humana Health Plan of Tex.,* 336 F.3d at 379.

B. Merits

1. Official–Capacity Claims Against Stalder

****3** Fairley asserts claims against Stalder in his official capacity for both damages and injunctive relief.

a. Damages

We begin an analysis of Fairley's claim against Stalder in his official capacity for damages under § 1983 by quoting long and clearly established Supreme Court precedent on the matter: "[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983."[11] ***809** As § 1983 only provides a remedy against a "person," the dismissal of Fairley's § 1983 claims was indisputably proper.

11 *Will v. Mich. Dept. of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (barring suits for money damages under § 1983 against states and state officials in their official capacity).

The claims asserted against Stalder in federal court on state law grounds[12] for money damages, although not barred by *Will v. Michigan Department of State Police,*[13] must still overcome Louisiana's Eleventh Amendment immunity.[14] Fairley asserts five theories for his conclusion that this immunity is overcome: (1) Louisiana has waived its sovereign immunity by litigating *other* Hurricane Katrina-related suits in federal court as a plaintiff; (2) Louisiana has constructively waived its sovereign immunity by participating in various federal programs; (3) Louisiana has waived its sovereign immunity by statute and constitutional provision; (4) Congress abrogated Louisiana's sovereign immunity as to the issues in the case, namely, flood control, hurricane protection, prison reform, and disaster preparation and response; and (5) the federal judiciary has "badly misconstrued" the Eleventh Amendment or it "does not apply under the facts and circumstances of this case." As to the final "theory," whatever its merit, we are unable to act on it as "only the Supreme Court may overrule a Supreme Court decision."[15] And, as we show below, Supreme Court precedents clearly speak to each of Fairley's contentions.

12 Fairley claims that the alleged federal constitutional torts were also "practiced intentionally, with malice, and/or with reckless disregard for and/or with deliberate indifference to plaintiffs' federally protected rights, as well as plaintiffs' rights under State law."

13 491 U.S. at 71, 109 S.Ct. 2304. The state law claims are not barred by *Will* because they are not brought under § 1983.

14 *See Edelman v. Jordan,* 415 U.S. 651, 663–64, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (barring suits against states and state officials in their official capacity for damages without mention of the state or federal nature of the claims); *Hughes v. Savell,* 902 F.2d 376, 378 (5th Cir.1990).

15 *Medellin v. Dretke,* 371 F.3d 270, 280 (5th Cir.2004).

[1] The first theory fails when analyzed as a litigation-conduct waiver. [16] There is an interesting argument to be made that invocations of federal jurisdiction ***810** in related suits waive sovereign immunity as to other suits. This argument emerges from language in *Lapides v. Board of Regents of the University System of Georgia,* in which the Supreme Court distinguished litigation-conduct waivers from other kinds of (repudiated) constructive waivers. [17] There the Court said:

16 *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.,* 535 U.S. 613, 619, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002) ("[A] State's *voluntary* appearance in federal court ... [is] a waiver of its Eleventh Amendment immunity." (emphasis added)); *see also id.* ("[A] State waives any immunity respecting the adjudication of *a* 'claim' that it voluntarily files in federal court." (emphasis added) (internal quotation marks omitted)); *Gunter v. Atl. Coast Line R.R. Co.,* 200 U.S. 273, 284, 26 S.Ct. 252, 50 L.Ed. 477 (1906) ("[W]here a state voluntarily becomes a party to *a* cause, and submits its rights for judicial determination, it ... cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." (emphasis added)); *cf. College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 675, 119 S.Ct. 2219, 144 L.Ed.2d 605 ("[O]ur test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." (internal quotation marks omitted)). Clearly, if invocations of a federal court's jurisdiction in one instance waived a state's sovereign immunity for all other suits, the exception would swallow the rule and the test for waiver would hardly be "stringent." Fairley's citation to *Clark v. Barnard,* 108 U.S. 436, 2 S.Ct. 878, 27 L.Ed. 780 (1883), is inapposite, as Louisiana has not intervened in the instant suit. If, for example, Louisiana should intervene in a case and assert a claim against the plaintiffs, but simultaneously assert a defense of sovereign immunity against claims brought against it, a very different case, under *Clark* and *Lapides,* would be present. Further, if this case were consolidated with a case in which Louisiana were a plaintiff, perhaps a different case would be present before us. Whether *Lapides* goes much further than *Clark* is a question on which we do not pass today.

17 535 U.S. at 620, 122 S.Ct. 1640.

> [A]n interpretation of the Eleventh Amendment that finds waiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages. [18]

18 *Id.*

Fairley, however, has made no effort to link other pending Katrina litigation to this case in a way that would highlight potential "inconsistency, anomaly, and unfairness." He asserts that this litigation and the *Louisiana v. United States* [19] cases arise out of the "same transactions and occurrences" and are "logically related" to this case because they all relate to the failures of levees and retaining walls after Hurricane Katrina. Additionally, he contends that the evidence in these cases will be the same as in the instant litigation. These observations, without more particularized development to demonstrate the potential for "inconsistency, anomaly, and unfairness" (particularly anomaly, which we do not, without more, see here), or without an elaboration of why the cases arise out of the "same transactions and occurrences," are woefully insufficient to trump Louisiana's sovereign immunity.

19 *E.g., Louisiana v. United States,* No. 2:07–cv–05040 (E.D. La. filed Aug. 29, 2007).

****4** **[2]** The second theory, constructive waiver, is similarly meritless. Even if constructive waiver arguments remain viable, [20] a waiver of this type may be found only when a congressional desire to make states liable is found in the "unmistakable language in the statute itself." [21] That not being the case here (or, counsel not having invited our attention to any such statutory language), discovery is unnecessary and dismissal is appropriate. [22]

20 *See Edelman v. Jordan,* 415 U.S. 651, 673, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights and we see no place for it here.").

21 *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 243, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). In fact, it is now more difficult for Congress to comply with this requirement from *Atascadero* after *Seminole Tribe v. Florida,* 517 U.S. 44, 55, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), which ended the Court's experimentation with abrogation through pre-Eleventh Amendment congressional powers.

22 Fairley does not make clear in his briefs whether he is arguing that a constructive waiver has arisen because of participation in the programs or because of an actual agreement between Louisiana and the United States. In a late filing with this court, devoid of argument or specific citations, Fairley's counsel provided a copy of an article by Gil Seinfeld, *Waiver–in–Litigation: Eleventh Amendment Immunity and the Voluntariness Question,* 63 OHIO ST. L.J. 871 (2002). Perhaps the only basis of support in it for Fairley's request for discovery is the case *Innes v. Kansas State University (In re Innes),* 184 F.3d 1275 (10th Cir.1999). There, the Tenth Circuit found a waiver of sovereign immunity in a contract between Kansas State University and the United States. We question the reasoning of the court in that case, particularly as *Tennessee Student Assistance Corp. v. Hood,* 541 U.S. 440, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004), addressed the same situation with different, and broader, reasoning. *See* Susan E. Hauser, *Necessary Fictions: Bankruptcy Jurisdiction After* Hood *and* Katz, 82 TUL. L.REV.. 1181, 1202–09 (2008). Nevertheless, it is important to note that even *Innes* appears to recognize the necessity of a specific statutory or constitutional authorization for state officials to waive sovereign immunity by contract. *See Innes,* 184 F.3d at 1280 ("[T]hese cases ... firmly establish that a state agent acting *with proper authorization* can effectuate a waiver ...." (emphasis added)). Fairley has not brought to our attention any authorization to enter into an agreement that waives immunity.

***811** **[3]** The third waiver argument advanced by Fairley turns on the contention that Louisiana has waived sovereign immunity expressly by constitutional provision and statute. Under the Supreme Court's rubric, however, an express waiver may be found only when a provision expresses "the State's intention to subject itself to suit in *federal* court." [23] There is no express consent to suit in federal court in section 10, article XII of the Louisiana Constitution or Louisiana Revised Statutes section 9:2798.1, the provisions cited by Fairley. Further, Louisiana Revised Statutes section 13:5106(A) provides: "No suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court." These are the reasons that we have unequivocally stated, on numerous occasions, that Louisiana has not waived its Eleventh Amendment immunity in this manner. [24]

23 *Atascadero,* 473 U.S. at 241, 105 S.Ct. 3142 (emphasis in original).

24 *E.g., Delahoussaye v. City of New Iberia,* 937 F.2d 144, 147 (5th Cir.1991).

[4] Finally, the contention that Congress has abrogated Louisiana's immunity in the areas of flood control, hurricane protection, prison reform, and disaster preparation and response is feckless. Undoubtedly, Congress may abrogate state sovereign immunity, [25] but only pursuant to a post-Eleventh Amendment grant of congressional power and then only through an unequivocal expression of intent to exercise of that power. [26] There are no allegations that flood control, hurricane protection, and disaster preparation and response statutes were enacted by Congress pursuant to a post-Eleventh Amendment power or that Congress attempted to abrogate, unequivocally or otherwise, state sovereign immunity from suit in these areas. Nevertheless, the plaintiffs request discovery on these matters. As a statute "must contain an unequivocal statement of congressional intent to abrogate," [27] however, discovery is unwarranted here and dismissal is appropriate.

25 *See Seminole Tribe v. Florida,* 517 U.S. 44, 55, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

26 *See id.* at 55, 65, 72, 116 S.Ct. 1114.

27 *Pace v. Bogalusa City Sch. Bd.,* 403 F.3d 272, 277 (5th Cir.2005).

b. Injunctive Relief

[5] Injunctive relief against Stalder is also unwarranted. [28] *Ex Parte Young* does permit suits against state officials to force compliance with the Constitution and federal law, [29] but Stalder is not the proper party from whom to obtain relief from harms Fairley may have suffered (or may fear suffering) in OPCSO facilities. We find instructive district courts opinions that describe in some detail the Louisiana framework governing parish penal facilities. In *Galo v. Blanco,* for example, the court dismissed claims against Stalder, Governor Blanco, and Mayor Nagin because "there is no legal basis for holding ***812** [the defendants]

liable for the conditions of plaintiff's confinement within the Orleans Parish Prison system." [30] We have examined Louisiana Revised Statutes sections 15:702, 15:704, 33:1435, and 33:4715, and we agree that day-to-day operation of the parish prison is the responsibility of the local sheriff, and that financing and maintenance are the responsibility of the local governing authority. Our analysis of sections 15:826 and 15:827, which establish the services and duties of the Department of Public Safety and Corrections, and section 15:823, which establishes the duties of the Director of Corrections, further supports this view. Accordingly, Stalder is not in a position to provide the requested relief. [31]

28 The claims of former inmates for injunctive relief are moot. *See Herman v. Holiday,* 238 F.3d 660, 665 (5th Cir.2001); *Cooper v. Sheriff, Lubbock County, Tex.,* 929 F.2d 1078, 1084 (5th Cir.1991); *Beck v. Lynaugh,* 842 F.2d 759, 762 (5th Cir.1988). As some of the named plaintiffs may still be incarcerated, although whether or not that is so is hard to tell from Fairley's briefing, we nevertheless explain why the claims would fail even if they were not moot.

29 209 U.S. 123, 155–56, 166–67, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

30 No. Civ.A. 06–4290, 2006 WL 2860851, at *2 (E.D.La. Oct. 4, 2006); *Broussard v. Foti,* No. Civ.A. 00–2318, 2001 WL 258055, at *1–2 (E.D.La. Mar. 14, 2001).

31 *See Broussard,* 2001 WL 258055, at *1–2; *see also O'Quinn v. Manuel,* 773 F.2d 605, 609 (5th Cir.1985) ("The administration of the jails is the province of the sheriff."); *Howard v. Fortenberry,* 723 F.2d 1206, 1212–13 (5th Cir.1984), *vacated in part,* 728 F.2d 712 (5th Cir.1984) (noting the absence of a duty for the Secretary of the Louisiana Department of Public Safety and Corrections to supervise local prison officials). It is questionable whether anyone can be ordered to implement some of Fairley's requests. For example, it is doubtful that a district court could enjoin a person to "[b]egin to view detention as a process rather than a place."

2. Individual–Capacity Claims [32]

32 It appears at one point that Fairley is requesting injunctive relief against Stalder in an individual capacity. As Stalder has no control over OPCSO facilities in his official capacity, it is odd to suggest that he might have such control in an individual capacity. The claim, if in fact made, is frivolous.

****5** Counsel for Fairley has abandoned any quarrel with the district court's determination that Stalder's defense of qualified immunity for federal claims against him individually was not overcome by Fairley's responsive pleading. Our searching review reveals no argument by Fairley, adequately briefed on appeal, [33] that engages this dispositive issue. Fairley's initial brief does not even contain the phrase "qualified immunity." Any references to Stalder lacking immunity generally are beyond conclusional. Fairley's reply brief, at which point it was too late to preserve the issue in any event, [34] is scarcely better. Accordingly, we will not disturb the district court's determination that Fairley did not adequate reply to Stalder's defense of qualified immunity.

33 *See Audler v. CBC Innovis Inc.,* 519 F.3d 239, 255 (5th Cir.2008) ("A party waives an issue if he fails to adequately brief it. Though pro se litigants' briefs are liberally construed so as to avoid waiver of issues, the indulgence for parties represented by counsel is necessarily narrower." (internal quotation marks and citations omitted)). Were we to grant the same level of indulgence that we would to a pro se appellant, the shape of the briefs filed by counsel for Fairley prevents even a liberal construction from preserving the issue.

34 *See Yohey v. Collins,* 985 F.2d 222, 225 (5th Cir.1993).

[6] As for the state law claims against Stalder, Fairley has again failed to brief the issue adequately. The district court was not able to find any allegations of action or inaction by Stalder individually in the complaint or in the ACLU report that was purported to be incorporated by reference. [35] Other than a few regurgitations of ***813** portions of his complaint, the only remotely relevant portions of Fairley's appellate brief are those that state: "The State of Louisiana and Secretary Stalder, in particular, played a prominent role in what happened, and what is likely to happen 'next time.' ... '[S]omeone' had to make the decision not to evacuate the inmates.... Other than Sheriff Gusman and/or Secretary Stalder, who were the 'someone's' who made this moronic and misery-causing decision?" At best these are the "unwarranted deductions of fact" that are not considered sufficient to survive a Rule 12(b)(6) challenge. The rest of the hyperbolized, meandering comments in that section of the brief have to do with the Eleventh Amendment and counsel's railings about the perceived injustice of the heightened pleading rules. Nowhere does Fairley point to a place in the complaint where he alleges action or inaction by Stalder individually, without which the state law claims fail.

35 To describe the report as incorporated and properly part of the complaint is to be generous. It was attached without any particular references or evidence that it contained material concerning the plaintiffs in the action. We join the district court in condemning this type of trial practice. And, we analogize this method of pleading to "scattershot" rather than to "buckshot" as did the district court.

III. CONCLUSION

For the foregoing reasons, the partial final judgment of the district court, dismissing all claims against defendant-appellant Richard L. Stalder, is, in all respects, AFFIRMED. We also GRANT Stalder's motion to strike sixty-one individuals from this appeal for want of jurisdiction over them or the order denying leave to add them below. [36] Therefore, the only plaintiffs-appellants ***814** subject to this judgment are Robert Fairley, Ronald George, Fay Hardy, Ladoia Smith, Nathaniel Carr, Kevin Green, Tyrell LeBlanc, and Clifton Thompson.

36 We granted, in a per curiam order, Stalder's motion to strike the eight duplicate names that appeared in the notice of appeal sent to us. A motion to strike the names of sixty-one individuals who were not parties to the litigation below was carried with the case. These individuals were the subject of a failed (third) attempt by Fairley's counsel to amend the complaint in the district court. In denying the motion for leave to amend a third time, the magistrate judge said: "The proposed Third Supplemental and Amending Complaint appears to be a veiled effort to continue to add party-plaintiffs rather than properly pursue the class action certification. The repeated addition of named plaintiffs is prejudicial to the defendants and fails to account for the applicable statute of limitations and the relating-back doctrine.... To allow the plaintiffs to file the Third Supplemental and Amended Complaint would be prejudicial and futile." Rather than appeal this determination at the appropriate time, Fairley's counsel surreptitiously attempted to add these sixty-one plaintiffs to this appeal. When caught by counsel for Stalder, counsel for Fairley responded: "[P]laintiffs/appellants were erroneously denied leave to amend their Complaint.... They are aggrieved by this erroneous ruling.... They are 'appellants' no matter how one may look at this case."

Denial of a motion for leave to amend a complaint is ordinarily not immediately appealable, *Wallace v. County of Comal,* 400 F.3d 284, 291–92 (5th Cir.2005), and it is quite unclear that any cognizable attempt to appeal that denial was made before slapping these extra names on the case. Further, the Federal Rule of Civil Procedure 54(b) partial final judgment in the district court did not include denial of this motion. And it is axiomatic that we only possess appellate jurisdiction, absent another basis urged, over final decisions, making appeal of this motion for leave to amend improper. *See* 28 U.S.C. § 1291 (2000). Even if we did possess jurisdiction, it was clearly not an abuse of discretion for the district court to deny leave to amend a third time, particularly given counsel's attempt to add plaintiffs endlessly without regard for the district court's prior orders. Therefore, as to this appeal, the sixty-one individuals are nonparties.

Nonparties may appeal only after satisfying a three-part test that focuses on actual participation by the nonparties, the equities in favor of hearing them, and the personal stake of the nonparties in the outcome. *See Castillo v. Cameron County, Tex.,* 238 F.3d 339, 349–50 (5th Cir.2001). Fairley's counsel has made absolutely no effort to identify this test or to apply it, and our sua sponte examination reveals it would be improper to allow these nonparties to appeal.

We remind counsel of Federal Rule of Appellate Procedure 38 for our purposes, and, for his purposes, we remind him of Louisiana Rules of Professional Conduct 1.1, 3.1, and 3.3(a)(2).

All Citations

294 Fed.Appx. 805, 2008 WL 3244022

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United States District Court,
E.D. Louisiana.

Kent V. ANDERS
v.
Marlin GUSMAN, Sheriff, et al.

Civil Action No. 06–2898.
|
May 5, 2009.

Attorneys and Law Firms

Kent V. Anders, Baker, LA, pro se.

Freeman Rudolph Matthews, Timothy R. Richardson, Usry, Weeks & Matthews, New Orleans, LA, for Marlin Gusman, Sheriff, et al.

ORDER

KURT D. ENGELHARDT, District Judge.

***1** The Court, having considered the complaint, the record, the applicable law, the Report and Recommendation of the United States Magistrate Judge, and the failure of any party to file an objection to the Magistrate Judge's Report and Recommendation, hereby approves the Report and Recommendation of the United States Magistrate Judge and adopts it as its opinion in this matter. Therefore,

IT IS ORDERED that Kent V. Anders's claims against the Defendants are **DISMISSED WITH PREJUDICE** as frivolous and for otherwise failing to state a claim for which relief can be granted.

REPORT AND RECOMMENDATION

KAREN WELLS ROBY, United States Magistrate Judge.

This matter was referred to a United States Magistrate Judge to conduct a hearing, including an Evidentiary Hearing, if necessary, and to submit proposed findings and recommendations for disposition pursuant to **Title 28 U.S.C. § 636(b)(1)(B) and (C), § 1915e(2), and § 1915A,** and as applicable, **Title 42 U.S.C. § 1997e(c)(1) and (2).** Upon review of the entire record, the Court has determined that this matter can be disposed of without an Evidentiary Hearing.

I. ***Factual Summary***

The Plaintiff, Kent V. Anders ("Anders") was incarcerated in the Allen Correctional Center in Kinder, Louisiana, at the time of the filing of this *pro se* and *in forma pauperis* Complaint. Anders filed this Complaint pursuant to Title 42 U.S.C. § 1983 against Orleans Parish Criminal Sheriff Marlin Gusman, the Special Investigation Department and unknown tier deputies seeking damages as a result of the conditions of his confinement in the House of Detention within the Orleans Parish Prison System, at the time Hurricane Katrina struck the New Orleans area on August 29, 2005.

Anders alleges, after the hurricane, he was forced to go without food and clean water for four days, because no one came to assist him and the other inmates. He complains that he and other inmates were abandoned and forced to live in an unsanitary, messy environment that was hazardous to his health.

Anders further alleges that, at one point, he feared for his life when a deputy told him that he would "kill my black ass, if I didn't get moving." The deputy allegedly made this statement when Anders complained that his legal papers were in the water, and he was forced to leave the papers behind to evacuate the prison. He claims, therefore, that he reluctantly did as he was told.

Anders also complains that he was required to sit for several hours on the Broad Street overpass in the excruciating heat with no food, water, or medical attention. He complains that the delay of emergency help is evidence of intentional denial of his rights. After boarding a bus, he was finally given one cup of water and a sandwich. Anders claims that he requested more but was denied.

He further alleges that these conditions violated the Eighth Amendment and he should be allowed to recover for the emotional and psychological aspect of his experience and awarded damages that are appropriate under the circumstances. Anders has not alleged any physical injury as a result of this experience.

***2** Anders amended his suit to name Assistant Warden Bonita Pittman, Sgt. Bell, Captain Marshall, Deputy Bergeron, Deputy Tina Johnson, Deputy Tyra Brooks, Deputy

Christina Foster, Deputy Lionel Lipscomb, and Deputy T.J. Johnson. He did not, however, assert additional allegations against these defendants. He did amend his allegations against Sheriff Gusman; namely that his staff was unfit, negligently trained and unsupervised.

II. *Frivolous Review*

Title 28 U.S.C. §§ 1915(e)(2), 1915A and Title 42 U.S.C. § 1997e(c) require the Court to *sua sponte* dismiss complaints filed by prisoners proceeding *in forma pauperis* upon a determination that they are frivolous. The Court has broad discretion in determining the frivolous nature of the complaint. *See Cay v. Estelle,* 789 F.2d 318 (5th Cir.1986), *modified on other grounds, Booker v. Koonce,* 2 F.3d 114 (5th Cir.1993). However, the Court may not *sua sponte* dismiss an action merely because of questionable legal theories or unlikely factual allegations in the complaint.

Under these statutes, a claim is frivolous only when it lacks an arguable basis either in law or in fact. *Neitzke v. Williams,* 490 U.S. 319 (1989); *Talib v. Gilley,* 138 F.3d 211, 213 (5th Cir .1998). A claim lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist. *Harper v. Showers,* 174 F.3d 716, 718 (5th Cir.1999). It lacks an arguable factual basis only if the facts alleged are "clearly baseless," a category encompassing fanciful, fantastic, and delusional allegations. *Denton v. Hernandez,* 504 U.S. 25, 32–33 (1992); *Neitzke,* 490 U.S. at 327–28. Therefore, the Court must determine whether the plaintiff's claims are based on an indisputably meritless legal theory or clearly baseless factual allegations. *Reeves v. Collins,* 27 F.3d 174, 176 (5th Cir.1994); *see Jackson v. Vannoy,* 49 F.3d 175, 176–77 (5th Cir.1995); *Moore v. Mabus,* 976 F.2d 268, 269 (5th Cir.1992).

III. *Analysis*

The Eighth Amendment's prohibition on "cruel and unusual punishments" forbids conditions of confinement "which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society' ... or which 'involve the unnecessary and wanton infliction of pain.' " *Estelle v. Gamble,* 429 U.S. 97, 102–03 (1976) (citations omitted). "[C]onditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." *Rhodes v. Chapman,* 452 U.S. 337, 347 (1981).

Proof of an individual defendant's personal involvement in the alleged wrong is, of course, a prerequisite to his liability on the claim for damages under § 1983. The plaintiff must also establish that the prison official, such as the tier deputies in this case, acted with deliberate indifference to the inmate's health and safety. A prison official acts with deliberate indifference in violation of the Eighth Amendment "only if he knows that the inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan,* 511 U.S. 825, 847 (1994); *Jones v. Greninger,* 188 F.3d 322, 326 (5th Cir.1999). "Deliberate indifference cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of harm." *Thompson v. Upshur County, Tex.,* 245 F.3d 447, 459 (5th Cir.2001).

***3** In this case, Anders does not allege that any of the defendants were personally involved in the unfortunate conditions of his confinement caused by Hurricane Katrina. In fact, the only personal involvement alleged was that Sheriff Gusman failed to train his staff, which caused the delay and difficulty in Anders's evacuation. Further, the delay did not cause physical harm; rather, it caused inconvenience. Otherwise, there is no indication by Anders that any of the officials personally and intentionally denied him access to more comfortable conditions or in any way intentionally violated his constitutional rights.

Furthermore, to the extent Anders claims that Sheriff Gusman or any of the other defendants acted negligently in responding to or preparing for this emergency situation, his claims are still frivolous. Acts of negligence do not implicate the Due Process Clause such to give rise to a claim under § 1983. *See Daniels v. Williams,* 474 U.S. 327, 328 (1986); *see also Davidson v. Cannon,* 474 U.S. 344 (1986). Allegations amounting to negligence cannot support a § 1983 claim for violation of the Eighth Amendment. *Eason v. Thaler,* 73 F.3d 1322, 1328–29 (5th Cir.1996) (noting no negligent deprivation of religious rights or gross negligence in permitting a gas leak to occur); *Hare v. City of Corinth, Ms.,* 74 F.3d 633, 641–42, 646 (5th Cir.1996) (finding no negligent failure to protect); *Mendoza v. Lynaugh,* 989 F.2d 191, 195 (5th Cir.1993) (noting that negligent medical care does not constitute a valid claim under § 1983); *Doe v. Taylor Independent School District,* 975 F.2d 137, 142 (5th Cir.1992), *vacated on other grounds,* 15 F.3d 443 (5th Cir.1994) ("Even when constitutional liberty

interests are implicated, not all bodily injuries caused by state actors give rise to a constitutional tort, for it is well settled that mere negligence does not constitute a deprivation of due process under the Constitution.")

Instead, as discussed above, an official must act with deliberate indifference to be liable under § 1983. An official is deliberately indifferent to an inmate's health and safety in violation of the Eighth Amendment "only if he knows that the inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan,* 511 U.S. 825, 847 (1994); *Jones v. Greninger,* 188 F.3d 322, 326 (5th Cir.1999). "Deliberate indifference cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of harm." *Thompson v. Upshur County, Tex.,* 245 F.3d 447, 459 (5th Cir.2001). In this case, Anders has made no such showing, nor has he asserted such an allegation of intentional indifference by the Defendants.

In addition, Anders also has failed to show that the temporary conditions caused by Hurricane Katrina violated his constitutional rights. To prove that the conditions of his confinement violated the Constitution, an inmate must show, "that, from an objective standpoint, [they] denied him the minimal measure of necessities required for civilized living". *Farmer,* 511 U.S. at 834. An episodic act or omission of a state jail official does not violate an inmate's constitutional right to be secure in his basic human needs unless he demonstrates that the official acted or failed to act with deliberate indifference to those needs. *Hare,* 74 F.3d at 633. Anders has not done so.

***4** Furthermore, federal courts have repeatedly held that the Constitution does not mandate that prisons provide comfortable surroundings or commodious conditions. *Talib,* 138 F.3d at 215. For these reasons, a short term sanitation restriction or problem, although admittedly unpleasant, does not amount to a constitutional violation. *Whitnack v. Douglas County,* 16 F.3d 954, 958 (8th Cir.1994); *Knop v. Johnson,* 977 F.2d 996, 1013 (6th Cir.1992); *Robinson v. Illinois State Corr. Ctr.,* 890 F.Supp. 715, 720 (N.D.Ill.1995).

Anders has not alleged that the Defendants personally acted with deliberate indifference to his safety, any specific medical need, or to the sanitation of the prison during the unprecedented events and temporary conditions resulting from Hurricane Katrina. Anders recognizes that the officials realized the risk of harm caused by the rising waters and successfully evacuated the inmates from the prison, albeit under difficult and unpleasant circumstances.

Having failed to make this initial showing, Anders's claims must be dismissed as frivolous and otherwise for failure to state a claim for which relief can be granted pursuant to Title 28 U.S.C. § 1915(e)(2) and Title 42 U.S.C. § 1997e(c)(1).

Furthermore, Anders has failed to allege any injury resulting from his experience in the prison or during the evacuation. Under Title 42 U.S.C. § 1997e(e), an inmate cannot recover for "mental and emotional injury suffered while in custody without a prior showing of physical injury." The United States Court of Appeals for the Fifth Circuit, in interpreting this provision, has held that the phrase "physical injury" in § 1997e(e) means an injury that is more than *de minimis,* but it need not be significant. *Alexander v. Tippah County, Miss.,* 351 F.3d 626 (5th Cir.2003) (quoting *Harper,* 174 F.3d at 719 (quoting *Siglar v. Hightower,* 112 F.3d 191, 193 (5th Cir.1997) (where the Fifth Circuit first set forth its § 1997e(e) definition of physical injury). In *Alexander,* the Fifth Circuit held that vomiting and nausea were *de minimis* injuries and were therefore insufficient for recovery under § 1997e(e)). *Alexander,* 351 F.3d at 631. Anders alleged that some inmates, not himself, suffered similar symptoms when crowded onto the second floor of the prison. This does not entitle him to relief under § 1983. He only claims damages consisting of emotional distress, which are not compensable under § 1997e(e).

Therefore, Anders's claims are based on emotional not physical damages and must be dismissed as frivolous and otherwise for failure to state a claim for which relief can be granted pursuant to Title 28 U.S.C. § 1915(e)(2) and Title 42 U.S.C. § 1997e(c)(1).

IV. *Recommendation*

It is therefore **RECOMMENDED** that Kent V. Anders's claims against Sheriff Marlin Gusman, Assistant Warden Bonita Pittman, Sgt. Bell, Captain Marshall, Deputy Bergeron, Deputy Tina Johnson, Deputy Tyra Brooks, Deputy Christina Foster, Deputy Lionel Lipscomb, and Deputy T.J. Johnson be dismissed as failing to state a claim for which relief may be granted pursuant to Title 28 U.S.C. § 1915(e) and § 1915A and Title 42 U.S.C. § 1997e.

***5** A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within **ten (10) days**

after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. *Douglass v. United Services Automobile Ass'n,* 79 F.3d 1415, 1430 (5th Cir.1996).

All Citations

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Appendix #3

2008 WL 2038938
Only the Westlaw citation is currently available.
United States District Court,
E.D. Louisiana.

Leo KEARNS Jr.
v.
Orleans Parish Correctional
Facility Sheriff GUSMAN.

Civil Action No. 06-2896.
|
May 12, 2008.

Attorneys and Law Firms

Leo Kearns, Jr., St. Gabriel, LA, pro se.

Timothy R. Richardson, Freeman Rudolph Matthews, Usry, Weeks & Matthews, New Orleans, LA, for Marlin Gusman.

ORDER AND REASONS

KAREN WELLS ROBY, United States Magistrate Judge.

***1** This matter is before the undersigned United States Magistrate Judge upon consent of the parties pursuant to Title 28 U.S.C. § 636(c). The defendant, Orleans Parish Criminal Sheriff Marlin Gusman, filed a Motion for Judgment on the Pleadings (Rec.Doc. No. 26) seeking dismissal of the plaintiff's claims for failure to state a claim for which relief can be granted. The plaintiff, Leo Kearns Jr., pro se, has filed a memorandum in opposition (Rec.Doc. No. 27). Upon review of the entire record, the Court has determined that this matter can be disposed of without an Evidentiary Hearing.

I. ***Factual and Procedural Summary***

A. ***The Complaint***

The plaintiff, Leo Kearns Jr. ("Kearns"), is an inmate presently incarcerated in the Elayn Hunt Correctional Center ("Hunt") in St. Gabriel, Louisiana. Kearns filed this *pro se* and *in forma pauperis* complaint pursuant to Title 42 U.S.C. § 1983 against Orleans Parish Criminal Sheriff Marlin Gusman seeking monetary damages for the conditions of his confinement in the Orleans Parish Prison system ("OPP") during Hurricane Katrina.

Kearns alleges that in August of 2005, he was incarcerated in OPP when Hurricane Katrina struck the City of New Orleans. He alleges that, as a result of the storm, water poured through the ceiling and began to rise inside of the jail. He also alleges that the deputies had abandoned their posts leaving him to die in the contaminated water. He claims that he survived for three days without food or water. He also states that there was a lack of ventilation in the jail due to a power outage.

Kearns further alleges that the inmates could not use the toilets and showers. He claims that the toilets were filled with urine and stool which caused foul odors. Kearns further states that the flooding in the jail destroyed important legal work vital to him proving his innocence. Finally, he claims that he is diabetic and had to go three days without medication, which caused him to fear for his life. He seeks $1 million for having endured these conditions during Hurricane Katrina.

In his separately filed Memorandum on Jurisdiction and Venue (Rec .Doc. No. 12), Kearns also alleges that he broke his left pinky finger, which healed without medical treatment. He also suggests that Gusman was aware of the call for a mandatory evacuation of the city and did nothing until after the storm.

B. ***Pending Motion***

Sheriff Gusman filed a Motion for Judgment on the Pleadings Pursuant to Rule 12(c) (Rec.Doc. No. 26). Sheriff Gusman argues that the plaintiff has failed to allege any personal involvement or intentional indifference with regard to the conditions of the prison during Hurricane Katrina or in the evacuation process itself.

In his opposition memorandum (Rec.Doc. No. 27), Kearns alleges that Sheriff Gusman, knowing that a mandatory evacuation was ordered, made no preparations for the inmates housed in OPP. Kearns alleges that Gusman failed to exercise the powers that come from his position of authority at the jail. He further suggests that the conditions of the jail during Hurricane Katrina amounted to cruel and unusual punishment. He reiterates that he lived in fear because he was without medication and that he slipped in the water and broke his finger. Kearns argues that Gusman had the authority to ensure the safety of all inmates in OPP and failed to take action to protect them from the storm.

II. ***Standards of Review of a Motion for Judgement on the Pleadings Pursuant to Fed.R.Civ.P. 12(c)***

***2** Rule 12(c) of the Federal Rules of Civil Procedure provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." The standard for addressing a Rule 12(c) motion is the same as that used for deciding motions to dismiss pursuant to Rule 12(b)(6). *Great Plains Trust Co. v. Morgan Stanley Dean Witter,* 313 F.3d 305, 313 n. 8 (5th Cir.2002) (citing 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure,* § 1368 at 591).

Thus, a motion brought pursuant to Rule 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts. *Great Plains Trust Co.,* 313 F.3d at 313 (quoting *Hebert Abstract Co. v. Touchstone Props., Ltd.,* 914 F.2d 74, 76 (5th Cir.1990)). The query for the Court is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief. *Hughes v.. Tobacco Inst., Inc.,* 278 F.3d 417, 420 (5th Cir.2001) (quoting *St. Paul Mercury Ins. Co. v. Williamson,* 224 F.3d 425, 440 n. 8 (5th Cir.2000)).

The Court can dismiss a claim under Fed.R.Civ.P. 12(c) when it is clear that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Jones v. Greninger,* 188 F.3d 322, 324 (5th Cir.1999) (citing *Fee v. Herndon,* 900 F.2d 804, 807 (5th Cir.1990)). In considering the motion, the pleadings should be construed liberally and judgment on the pleadings granted only if there are no disputed issues of fact and only questions of law remain. *Hughes,* 278 F.3d at 420 (citing *Voest-Alpine Trading USA Corp. v. Bank of China,* 142 F.3d 887, 891 (5th Cir.1998)). "In analyzing the complaint, we will accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Id.* (citing *Doe v. Hillsboro Indep. Sch. Dist.,* 81 F.3d 1395, 1401 (5th Cir.1996)).

The Court will not, however, accept as true conclusory allegations or unwarranted deductions of fact. *Great Plains Trust Co.,* 313 F.3d at 312-13 (citing *Collins,* 224 F.3d at 498). "The issue is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim. Thus, the court should not dismiss the claim unless the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove consistent with the allegations in the complaint." *Jones,* 188 F.3d at 324 (citations omitted).

III. ***Analysis***

Kearns complains that Sheriff Gusman should be held liable, as sheriff and administrator of the jail, for the failure to evacuate the prison before the storm and for the conditions of his confinement, i.e., no electricity, food, water, or ventilation, caused by the storm and the rising water. He also complains that he was without medication for his diabetes for three days, which caused him to fear for his life. He further claims that, at some point, he slipped in the water and broke his left pinky finger, which healed without medical care. He claims that these conditions, and the timing of the evacuation, amounted to cruel and unusual punishment and constituted negligence, which caused him to be fearful.

***3** The Eighth Amendment's prohibition on "cruel and unusual punishments" forbids conditions of confinement "which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society' ... or which 'involve the unnecessary and wanton infliction of pain.' " *Estelle v. Gamble,* 429 U.S. 97, 102-03 (1976) (citations omitted). "[C]onditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." *Rhodes v. Chapman,* 452 U.S. 337, 347 (1981).

Proof of an individual defendant's personal involvement in the alleged wrong is, of course, a prerequisite to his liability on the claim for damages under § 1983. However, a supervisory official, like Sheriff Gusman, cannot be held liable pursuant to § 1983 under any theory of *respondeat superior* simply because an employee or subordinate allegedly violated the plaintiff's constitutional rights. *See Alton v. Texas A & M University,* 168 F.3d 196, 200 (5th Cir.1999); *see also Baskin v. Parker,* 602 F.2d 1205, 1220 (5th Cir.1979). Moreover, a state actor may be liable under § 1983 only if he "was personally involved in the acts causing the deprivation of his constitutional rights or a causal connection exists between an act of the official and the alleged constitutional violation." *Douthit v. Jones,* 641 F.2d 345, 346 (5th Cir.1981); *see also Watson v. Interstate Fire & Casualty Co.,* 611 F.2d 120 (5th Cir.1980). An official is deliberately indifferent to an inmate's safety in violation of the Eighth Amendment "only if he knows that the inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan,* 511 U.S. 825, 847 (1994). The same standard is true with regard to medical care. *Estelle v. Gamble,* 429 U.S. 97, 104 (1976).

In this case, the plaintiff does not allege that Sheriff Gusman personally created the conditions of his confinement. He alleges instead that Sheriff Gusman, as a person of authority, knew of the impending dangers from the storm, in light of the city-wide evacuation order, and he either chose not to exercise his authority to protect the plaintiff and other inmates or chose to leave the inmates in harms way. Kearns claims, under a broad reading, that this administrative decision resulted in a violation of his constitutional rights.

Supervisory liability may exist "without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." *Thompkins v. Belt,* 828 F.2d 298, 304 (5th Cir.1987). An official policy is:

1. a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the [government entity] ... or by an official to whom the [entity] ha[s] delegated policy-making authority; or

***4** 2. A persistent, widespread practice of ... officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents [the entity's] policy.

Johnson v. Moore, 958 F.2d 92, 94 (5th Cir.1992). A plaintiff may also establish a custom or policy based on an isolated decision made in the context of a particular situation if the decision was made by an authorized policymaker in whom final authority rested regarding the action ordered. *City of St. Louis v. Praprotnik,* 485 U.S. 112, 124-25 (1988); *Bennett v. Pippin,* 74 F.3d 578, 586 (5th Cir.1996).

In this case, as mentioned above, Kearns has alleged that Sheriff Gusman knew of the dangers posed by Hurricane Katrina and was aware that the danger prompted the evacuation of the city. Kearns further alleges that, in spite of this knowledge, Sheriff Gusman failed to issue or chose not to issue a directive for the prison to be evacuated for the safety of the inmates. He argues that Sheriff Gusman was the person with the authority to ensure the safety of the inmates and rather than make arrangements for their protection, his decision was to leave them in the aged prison facility to fend for themselves. This is sufficient to at least state a basis for policy-maker liability so as to overcome dismissal at the pleading stage.

Therefore, a review of Kearns's allegations, and opposition to the defendant's motion, present more than conclusory allegations which are, at this stage, sufficient to overcome the defendants' Rule 12(c) motion. *Great Plains Trust Co.,* 313 F.3d at 312-13. Kearns has made an initial showing of some basis for liability against Sheriff Gusman in disregard to his personal safety.

For the foregoing reasons, **IT IS ORDERED** that Sheriff Gusman's **Motion for Judgment on the Pleadings (Rec.Doc. No. 26)** is **DENIED.**

IT IS FURTHER ORDERED that this case will proceed to non-jury trial before the undersigned Magistrate Judge as scheduled for 9:00 a.m. on May 20, 2008, with the plaintiff participating by telephone and counsel for the defendant and his witnesses appearing in person in Chambers for trial.

All Citations

Not Reported in F.Supp.2d, 2008 WL 2038938

Appendix #4

2017 WL 1535386
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Segundo NARVAEZ, Plaintiff,
v.
CITY OF NEW YORK; Commissioner Joseph Ponte; Stetven Wettenstein, Warden Manhattan Detention Center; Clayton Augustus, Warden Brooklyn Detention Center; Monica Windley, Warden North Infirmary Command; Angelo Jamieson, Warden George Motchan Detention Center; Achille Antonie, P.A.; Lynn Devivo, PA.; Rony Joseph, P.A.; Brenda R. Harris, M.D.; David Viera, P.A.; Rosemary Nwanne, P.A.; Frantz Medard, M.D.; Myriam Blain, P.A.; Francisco Peguero, P.A.; Ronald Schliftman; Vittorio Harris; Anne Francois; Warden John Does; John Doe Doctors; John Doe and Jane Doe Nurses, Defendants.

16 Civ. 1980 (GBD)
|
Signed April 17, 2017

Attorneys and Law Firms

Segundo Narvaez, Comstock, NY, pro se.

Alejandra Rosa Gil, Heidell, Pittoni, Murphy & Bach, Daryl Paxson, Lord Day Lord, White Plains, NY, Charles Thomas Gura, Marshall, Dennehey, Warner, Coleman and Goggin, Rye Brook, NY, Andrew James Rauchberg, New York City Law Department, New York, NY, for Defendants.

MEMORANDUM DECISION AND ORDER

GEORGE B. DANIELS, United States District Judge

***1** Plaintiff, currently in the custody of the New York State Department of Corrections and Community Supervision (DOCCS) at Washington Correctional Facility in Comstock, New York, brings this *pro se* action under 42 U.S.C. §§ 1983, 1985 and the Americans with Disabilities Act. [1] He alleges that while he was in the custody of the New York City Department of Correction (DOC), he contracted tuberculosis (TB) and Hepatitis A. Plaintiff also asserts that his medical and mental health care in DOC custody failed to satisfy a constitutional minimum.

1 By order dated May 11, 2016, the Court granted Plaintiff's request to proceed *in forma pauperis.*

Plaintiff brings suit against the City of New York; DOC Commissioner Joseph Ponte; the Wardens of the GMDC, NIC, BKDC, and MDC; and eleven individual medical care providers, including mental health practitioner Anne Francois; seven physician's assistants (Achille Antoine; David Viera; Myriam Blain; Francisco Peguero; Vittorio Harris; Rony Joseph; Rosemary Nwanne; and Lynn Devivo); and three doctors, Brenda Harris, M.D., Frantz Medard, M.D., and Ronald Schliftman, M.D. [2]

2 Plaintiff also named as Defendants John and Jane Doe nurses but no Doe defendants were ever identified, and Plaintiff never filed an amended complaint substituting true names.

Defendants moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, Defendants' motion to dismiss is DENIED as to Plaintiff's § 1983 due process claim against the City of New York for deliberate indifference to a risk of harm from the conditions of Plaintiff's confinement with TB-positive inmates. Defendants' motion to dismiss is GRANTED as to Plaintiff's remaining claims under §§ 1983, 1985, and the ADA.

LEGAL STANDARD

To survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Brown v. Daikin Am. Inc.*, 756 F.3d 219, 225 (2d Cir. 2014) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). While "the plausibility standard is not akin to a probability requirement," *id.* (internal quotation marks omitted), the plaintiff must "nudge[ ] [her] claims across the line from conceivable to plausible...." *Twombly*, 550 U.S. at 570. A court must take "factual allegations [in the complaint] to be true and draw[ ] all reasonable inferences in the plaintiff's favor." *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009) (citation omitted). Legal

conclusions, conversely, do not benefit from a presumption of truth. *See Iqbal*, 556 U.S. at 678.

When the plaintiff is proceeding *pro se,* the Court must "construe [the] complaint liberally and interpret it to raise the strongest arguments that [it] suggest[s]." *Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir. 2010) (citation and internal quotation marks omitted); *see Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). Indeed, "if a *pro se* litigant pleads facts that would entitle him to relief, that petition should not be dismissed because the litigant did not correctly identify the statute or rule of law that provides the relief he seeks." *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008). But "[e]ven in a *pro se* case ... threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Chavis*, 618 F.3d at 170 (internal quotation marks omitted). Thus, although the Court is "obligated to draw the most favorable inferences" that the complaint supports, it "cannot invent factual allegations that [the plaintiff] has not pled." *Id.*

***2** In its analysis, the Court is generally limited to facts presented "within the four corners of the complaint" but may consider documents that plaintiff references in the complaint, or matters of which the Court may take judicial notice. *See Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 776 (2d Cir. 2002); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002).

On September 14, 2016, Defendants moved to dismiss the Complaint. (ECF No. 38.)[3] The Court repeatedly extended the time for Plaintiff to oppose the September 14 2016 motion —first until October 31, 2016, then until December 27, 2016, and finally until February 10, 2017. (ECF Nos. 49, 51, 54.) Plaintiff failed to file an opposition to the motion, and the Court therefore deemed the motion fully briefed. (ECF No. 55.)

3 The September 14, 2016 Motion to Dismiss was filed on behalf of the City Of New York, Archille Antione, Clayton Augusnus, Myriam Blain, Anne Francois, Brenda Harris, Vittorio Harris, Angelo Jamieson, Rony Joseph, Frantz Medard, Rose Mary Nwanne, Francisco Peguero, David Viera, Steven Wettenstein, and Monica Windley. On April 13, 2017, Defendant Ronald Schlifman filed a separate motion to dismiss on substantially similar grounds. (ECF No. 59.)

A pro se litigant's failure to oppose Defendants' motion does not by itself merit dismissal of his complaint. *See Goldberg v. Danaher*, 599 F.3d 181, 183-84 (2d Cir. 2010); *McCall v. Pataki*, 232 F.3d 321, 322-23 (2d Cir. 2000). When presented with an unopposed motion, the Court must determine whether there are sufficient bases for granting the motion. *McCall*, 232 F.3d at 322-23 ("[A]lthough a party is of course to be given a reasonable opportunity to respond to an opponent's motion, the sufficiency of a complaint is a matter of law that the court is capable of determining based on its own reading of the pleading and knowledge of the law.").

BACKGROUND

The Court accepts Plaintiff's factual allegations as true for the purposes of this motion to dismiss under Rule 12(b)(6). *See Harris*, 572 F.3d at 71. The facts summarized in this section are from Plaintiff's Complaint and the documents that he has attached thereto.

A. Infection with Tuberculosis

On July 12, 2013, Plaintiff Segundo Narvaez entered into DOC custody on Rikers Island. (Compl., ECF No. 1, at 24.) During intake, Plaintiff's purified protein derivative screening test for TB was negative, reflecting that he "had no active or dormant tuberculosis." (*Id.* at 12.) In addition, Plaintiff tested negative for Hepatitis A. (*Id.* at 16.)

Even though Plaintiff "did not have TB, [he] was housed with multiple inmates who had been tested and found to be positive with *active* tuberculosis." (*Id.* at 14) (emphasis added). The DOC housed these contagious inmates together with healthy pretrial detainees in facilities with "poor air ventilation." (*Id.* at 26.) For his first month in custody, the DOC housed Plaintiff in the Robert N. Davoren Center (RNDC), building four. (*Id.* at 24.) The DOC then relocated Plaintiff to the George Motchan Detention Center (GMDC), in building three, one main, B side. He was housed with inmate Ramirez who "was diagnosed with positive to tuberculosis [but] medical staff were not sure if he really had T.B." (*Id.*) Ramirez was retested and again "found to be positive to T.B.," but Ramirez "refused to take any medication or treatment." (*Id.*)

***3** In 2014, "the whole house (block cells)," including Ramirez, was relocated to the GMDC's one upper, B-side cells. (*Id.*) The DOC then also housed two more detainees who had tested positive for TB in the one upper, B-side cells. "Medical staff ... permitted those infected inmates [to be] mixed with the healthier inmates." (*Id.* at 25.) In February

2015, the DOC removed one of the TB positive inmates, identified at T. Belmejo, from the housing block because Belmejo was involved in an altercation.

In March 2015, the DOC relocated the "whole house" to the Brooklyn Detention Complex (BKDC), and "serological[ ] examinations were performed." (*Id.* at 25.) Inmates Ramirez and "Roys" again tested positive for TB and "showed [Plaintiff] their medical results from the clinic, but they refused to take the treatment." (*Id.*) The DOC then transferred Plaintiff, together with these TB positive inmates, to the North Infirmary Command (NIC). On May 9, 2015, Plaintiff tested positive for TB. (*Id.* at 32.) He was "devastated" because he had been free of TB when he entered Rikers Island. (*Id.* at 25.)

Plaintiff alleges that medical personnel claimed that he "had not only tuberculosis ... but that it was active [even though] an X-Ray indicated [that he] did not have TB active. Nor did [he have] any symptoms associated with active TB. No sputum or bronchoscope was used to support or dissuade this false positive" that his TB was active. "[A]s a result of this false positive, which did not indicate [active] miliary tuberculosis, [Plaintiff] was forced into direct observed therapy (DOT) and poisoned with variants of isoniazid, rifampin, pyrazinamide." (*Id.* at 13.) Defendant Ronald Schliftman and Vittorio Harris at some point allegedly "determined through x-ray" that Plaintiff did not have active tuberculosis yet recommended that he take TB medication. (*Id.* at 11.)[4] Plaintiff had an allergic reaction to the medication, including a painful red rash on his face and body. (*Id.* at 13-14.) Plaintiff also experienced nausea, vomiting, headaches, and chest and joint pain. (*Id.* at 14.) He asserts that because of the medication, his optic nerve and liver are damaged, and his hearing is impaired. (*Id.*)

4 Plaintiff also alleges that medical personnel "administer[ed] tuberculosis medication when [he] did not have tuberculosis and when [he] acquired it, discontinued [the medication] and did not provide alternative treatment." (Compl. at 10.) It is unclear if Plaintiff means that Defendants: (1) administered medication when he did not have *active* TB and failed to administer medication later when he had active TB; or (2) administered medication when he tested negative for TB and failed to administer medication later when he tested positive. As Defendants point out, there is no suggestion in the medical records that Plaintiff annexes to his Complaint that medical personnel administered TB medication before he tested positive for latent TB. (Def. Mem. at 13.) The Court therefore assumes for purpose of this motion that Plaintiff is alleging the former.

Plaintiff asserts that the "New York City Jails are infested with contagious diseases" and that they "do not follow the New York City Health Code [or] the New York State Sanitary Code." (Compl. at 8.) Plaintiff "is yet another victim." (*Id.*) He further asserts that "medical staff did not do their job by mixing healthy inmates together with the infected inmates and exposing [them to] that easily contagious disease (T.B.) .... It has been approximately two years and the problem hasn't been resolved." (*Id.* at 26.) He alleges that the DOC "should screen better the inmates and categorize[ ] the inmates according[ ] to whatever disease they were found to have." (*Id.* at 27.)

B. Medical Treatment for Tuberculosis and Hepatitis A

***4** On June 29, 2015, the DOC relocated Plaintiff from NIC to MDC. (Compl. 1.1 at 8.) Plaintiff annexes to his Complaint grievances stating that medical staff at MDC failed to provide Plaintiff with his daily dose of TB medication on June 4, 2015, June 29, 2015, and July 2, 2015. (*Id.*) In the same grievance, he asserts that "since [he] was diagnosed with TB, [he has] not received adequate care." (*Id.*) In another grievance, Plaintiff states that on July 27, 2015, he was not escorted to the location where he could receive his medication. (*Id.* 1.1 at 9.) In addition to Defendants' lapses in providing Plaintiff with doses of his prescribed medication for four days, Plaintiff states that medical personnel did not test his liver functioning every month. (*Id.* 1.1 at 16). Medical personnel tested Plaintiff's liver function on May 21, 2015, and June 1, 2015. (Compl. 1.2 at 33-35.)

On July 6, 2015, Plaintiff learned that he had tested positive for Hepatitis A. (Compl. 1.1 at 11.) According to Plaintiff's grievance, doctors informed Plaintiff that he did not require any medication for Hepatitis A. (*Id.*)

C. Mental Health Treatment

Plaintiff suffers from, among other things, post-traumatic stress disorder from working at the September 11, 2001 World Trade Center site. (Compl. at 15.) When he was at BKDC and GMDC, Plaintiff saw a Spanish-speaking therapist. (Compl. 1.2 at 33.)

After he was transferred to the NIC, on May 6, 2015, Plaintiff was scheduled to meet with mental health clinician Anne Francois, LMSW, who does not speak Spanish. (*Id.*) Plaintiff

annexes to his Complaint a letter dated June 22, 2015, which states that:

> [T]he mental health person did not speak Spanish so she made an intercom communication telephone [call.] I spoke to someone in Spanish but it wasn't satisfactory to me because I d[idn't] know to whom I was speaking ... Besides, I feel more comfortable [with] a person to person communication. Furthermore, the telephone volume is too high and everyone is listening to your communication.

(Compl. 1.2 at 19.) Francois's May 6, 2015 treatment notes, which are annexed to the Complaint, state that Plaintiff told her that he "speak[s] English but [is] more comfortable talking about [his] feelings in Spanish." (Compl. 1.3 at 19.) Francois's May 29, 2015 treatment notes reflect that Plaintiff stated that he didn't "like the [telephone] translation service because [he] felt that they didn't understand what [he] was saying to them or explain it correctly ... [He] had two workers before who spoke to [him] in Spanish." (*Id.* 1.3 at 5.) In Plaintiff's appeal of the response to his mental health services Complaint, Plaintiff writes that "there isn't anyone that speaks Spanish and I can communicate better in Spanish." (*Id.* 1.2 at 21.) He asserts that he was required to use an interpreter who "was not a translator in the field of mental health" and that the telephone interpreter service was merely a "time and cost saving devi[c]e." (Compl. at 20.)

FAILURE TO STATE A CLAIM

Liberally construing the Complaint, Plaintiff asserts three claims against both the City of New York and the individual defendants, in their personal and official capacities. First, Plaintiff contends that he contracted TB and Hepatitis A because of the conditions of his confinement in DOC custody. Second, Plaintiff asserts that Defendants were deliberately indifferent to his serious medical needs in their treatment of these medical conditions. [5] Third, Plaintiff contends that for his mental health treatment Defendants provided only an interpreter by telephone rather than a Spanish-speaking mental health clinician, in violation of his rights under the Fourteenth Amendment and the Americans with Disabilities Act (ADA). Plaintiff also asserts a claim against the individual defendants under 42 U.S.C. § 1985 for conspiring to violate his civil rights.

5 Plaintiff also mentions in passing that Defendant Lynn Devivo "determine[d] that [he] had 9-11-2001 lung problems and did not treat it." (Compl. at 10.) He also mentions respiratory issues in a grievance. (Compl. 1.2 at 25) ("I was being treated for my lung disease.").

A. Conditions of Confinement: Tuberculosis

***5** According to public records, Plaintiff entered New York State DOCCS custody on September 8, 2015, to serve a sentence of ten years' incarceration. [6] The claims in Plaintiff's Complaint arose at the New York City DOC between July 2013 and August 2015, and the Court thus assumes for purposes of this motion that Plaintiff was a pretrial detainee for most or all of the events giving rise to his claims. As a pretrial detainee, Plaintiff's claims regarding the conditions of his confinement arise under the Due Process Clause of the Fourteenth Amendment.

6 http://nysdoccslookup.doccs.ny.gov/GCA00P00/WIQ3/WINQ130. "Courts in this district have taken judicial notice of information obtained from online inmate tracking services." *Tavares v. New York City Health & Hosps. Corp.*, No. 13-CV-3148 (PKC) (MHD), 2015 WL 158863, at *3 (S.D.N.Y. Jan. 13, 2015) (citing *Tribble v. City of N.Y.* No. 10-CV-8697(JMF), 2013 WL69229, at *1 n. 1 (S.D.N.Y. Jan. 3, 2013), and *Williams v. City of N.Y.*, No. 07-CV-3764 (RJS), 2008 WL 3247813, at *2 (S.D.N.Y. Aug. 7, 2008) (using DOCCS's tracking service)).

To plead a Fourteenth Amendment claim for deliberate indifference to unconstitutional conditions of confinement, a pretrial detainee must allege that: (1) "the challenged conditions were sufficiently serious to constitute an objective deprivation of the right to due process"; and (2) the defendant "acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety." *Darnell v. Pineiro*, No. 15-2870, 2017 WL 676521, at *9, 14 (2d Cir. Feb. 21, 2017) (relying on *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), and overruling *Caiozzo v. Koreman*, 581 F.3d 63, 70 (2d Cir. 2009), to the extent that *Caiozzo*

determined that the standard for deliberate indifference is the same under the Fourteenth Amendment as it is. under the Eighth Amendment). [7]

7 The Ninth Circuit recently held that in light of *Kingsley*, the elements of a pretrial detainee's deliberate indifference claim against an individual are: "(1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (2) Those conditions put the plaintiff at substantial risk of suffering serious harm; (3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable [individual] in the circumstances would have appreciated the high degree of risk involved —making the consequences of the defendant's conduct obvious; and (4) By not taking such measures, the defendant caused the plaintiff's injuries." *Castro v. County of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (*en banc*).

1. Objectively Serious Risk of Harm

The Court therefore first considers whether Plaintiff adequately pleads that the conditions of his confinement in DOC custody "were sufficiently serious to constitute an objective deprivation." *Darnell*, 2017 WL 676521, at *9. Courts must analyze challenged conditions of confinement on a case-by-case basis. *Willey v. Kirkpatrick*, 801 F.3d 51, 68 (2d Cir. 2015) (holding that there is no "bright-line durational requirement" or "minimum level of grotesquerie required" for a conditions-of-confinement claim). Moreover, some conditions may rise to the level of a constitutional violation "in combination when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need." *Wilson v. Seller*, 501 U.S. 294, 304 (1994); *Darnell,* 2017 WL 676521, at * 11 (relying on *Wilson*, 501 U.S. at 304). For example, an overcrowded cell may exacerbate unsanitary conditions or infestation may compound inadequate nutrition. *Darnell*, 2017 WL 676521, at * 10; *see also Willey,* 801 F.3d at 55 (holding that poor air circulation and being naked exacerbated unsanitary conditions in feces-smeared cell); *Wilson*, 501 U.S. at 304 (1994) (noting synergy between cold temperatures and failure to provide blankets).

***6** Here, Plaintiff alleges that the DOC housed him with at least three different inmates with active tuberculosis in a location with "poor air ventilation." (Compl. at 26.) Moreover, he remained with TB-infected inmates through three moves to different areas or housing facilities—notwithstanding that the inmates were retested and continued to test TB-positive while he tested TB-negative. (*Id.* at 24-25.) Although the dates are not entirely clear, Plaintiff appears to allege that he remained housed with inmates with active TB for approximately 21 months—from one month after his intake in July 2013 until May 2015, when he tested positive for TB for the first time.

In their moving papers, Defendants have not argued that housing TB-negative detainees together with inmates with active TB does not put detainees at serious risk of harm. Indeed, Defendants describe the City as having a policy of "separating inmates with tuberculosis from inmates without tuberculosis." (Def. Mem. (ECF No. 40) at 28.) Courts analyzing prison policies regarding TB have cited to evidence explaining that TB "exists in both dormant and active stages. During the dormant stage, the individual is not infectious and exhibits no symptoms.... If the infection becomes active and established in the lungs, however, the individual becomes infectious." *DeGidio v. Pung*, 920 F.2d 525, 527-28 (8th Cir. 1990) ("Tuberculosis can spread to other individuals who share air for prolonged periods with an individual infected with an active case of pulmonary tuberculosis"); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (noting that "plaintiff does not have active TB and is therefore not contagious"). "Active cases of tuberculosis are treated with INH and other antibiotics and must be isolated until no longer infectious—generally one to two weeks after treatment begins." *DeGidio*, 920 F.2d at 527. Plaintiff's allegation that during his pretrial detention, the DOC housed him with inmates with active TB who were not taking medication suffices at the pleading stage to allege that he faced an objectively serious risk of harm, that is, of contracting TB.

2. Deliberate Indifference of Individual Defendants

Defendants—relying on *Caiozzo* for the proposition that the standards that apply to a convicted prisoner's Eighth Amendment claim also apply to a pretrial detainee's Fourteenth Amendment claim—contend that Plaintiff has failed to plead the mental element of a deliberate indifference claim. (Def. Mem. at 9-10.) After Defendants filed their motion to dismiss, however, the Second Circuit explicitly overruled this aspect of *Caiozzo*, holding that pretrial detainees asserting deliberate indifference claims need not plead or prove that an individual defendant actually drew an inference that there was a serious risk of harm to the plaintiff.

Darnell, 2017 WL 676521, at *14. For a pretrial detainee's deliberate indifference claim under the Due Process Clause, the "mental element" or *"mens rea"* prong is instead defined objectively: "[T]he Due Process Clause can be violated when an official does not have subjective awareness that the official's acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm." *Id.* [8]

8 In contrast to a pretrial detainee, a convicted prisoner asserting claims under the Eighth Amendment must show that the defendant-official is both "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [that he] also dr[e]w the inference." *See Farmer v. Brennan,* 511 U.S. 825, 836-37 (1994).

Defendants characterize Plaintiff's placement with inmates who tested positive for TB as a "mistake" that would at most support an inference of negligence. (Def. Mem. at 20.) Even after *Darnell*, a pretrial detainee must plead that the "reckless or intentional action (or inaction) required to sustain a § 1983 deliberate indifference claim [is] the product of a voluntary act (or omission)." *Darnell*, 2017 WL 676521 at *15 n.16 (holding that "deliberate" is defined to mean acts that are "voluntary, not accidental"); *Castro*, 833 F.3d at 1070 (a pretrial detainee must show that the "defendant made an intentional decision"). Plaintiff alleges that inmates in his cell-block were repeatedly retested for TB, yet at least three times the DOC moved TB-positive and TB-negative inmates to be housed together. Allegations regarding these repeated decisions plausibly allege action that is more than accidental or negligent.

***7** Defendants also argue that Plaintiff does not state a claim against individual defendants because he fails to plead "which official placed him in inappropriate housing." (Def. Mem. at 21.) A § 1983 plaintiff must allege facts showing what each individual defendant personally did or failed to do that violated his rights. *See Spavone v. N.Y. State Dep't of Corr. Serv.*, 719 F.3d 127, 135 (2d Cir. 2013). Plaintiff alleges generally that "medical staff did not do their job by mixing healthy inmates together with the infected inmates and exposing [them to] that easily contagious disease (T.B.)." (*Id.* at 26.) Plaintiff names as defendants individual medical care providers involved in testing him and treating him but does not allege facts suggesting that any particular individual played a role in housing him with TB-active detainees. Because Plaintiff does not plead facts suggesting what any of the individual defendants personally did or failed to do that caused him to be housed with TB-active inmates, Plaintiff fails to state a claim against Defendants Achille Antoine; David Viera; Myriam Blain; Francisco Peguero; Vittorio Harris; Rony Joseph; Rosemary Nwanne; Brenda Harris, M.D., Frantz Medard, M.D., or Ronald Schliftman, M.D., based on the conditions of Plaintiff's confinement.

Plaintiff also fails to state a claim against the supervisory defendants in their individual capacities, including Wardens and Commissioner Joseph Ponte, for personally causing his confinement with TB-active inmates. Plaintiff's vague and conclusory allegation that "wardens are liable because their administrative care requires them to have jails clean" (Compl. at 9) is insufficient to allow an inference that these defendants personally caused the violation of his rights. *Iqbal,* 556 U.S. at 676 ("Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior.*"). He therefore fails to state a personal capacity claim against any of the Wardens or the DOC Commissioner arising from his infection with TB.

Any claim against the supervisory defendants in their official capacities is redundant of Plaintiff's claims against the City of New York. *See Castanza v. Town of Brookhaven*, 700 F. Supp. 2d 277, 284 (E.D.N.Y. 2010) ("Based upon the understanding that it is duplicative to name both a government entity and the entity's employees in their official capacity, courts have routinely dismissed corresponding claims against individuals named in their official capacity as redundant and an inefficient use of judicial resources."); *Emma v. Schenectady City Sch. Dist.,* 28 F. Supp. 2d 711, 725 (N.D.N.Y. 1998) ("[D]istrict courts have dismissed official-capacity claims against individuals as redundant or unnecessary where *Monell* claims were also asserted against the entity.").

Defendant's motion to dismiss Plaintiff's conditions-of-confinement claims against these supervisory defendants is granted.

3. City of New York

Defendants argue that Plaintiff has failed to plead that the City of New York, through its own customs or policies, violated his rights. "[M]unicipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible.' " *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (citing *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480 (1986)). A municipality may be liable under § 1983 based on: (1) an officially promulgated policy sanctioned or

ordered by the municipality, *see Pembaur,* 475 U.S. at 480; (2) a pervasive custom or practice of which the municipality is or should be aware, *see Praprotnik,* 485 U.S. 112, 130 (1988); *Oklahoma City v. Tuttle,* 471 U.S. 808, 823-24 (1985); (3) a single act by a municipal employee who has final policymaking authority with respect to the area in question, *see McMillian v. Monroe Cnty.,* 520 U.S. 781 (1997); or (4) the municipality's failure to train its employees, where this rises to the level of deliberate indifference to the constitutional rights of others, *see City of Canton v. Harris*, 489 U.S. 378, 385 (1989).

Plaintiff's TB-related claim appears to rely on three theories of liability: the City of New York failed to train its employees, failed to supervise its employees, and has sanctioned unconstitutional customs or practices. To support a claim that a municipality's failure to train or supervise amounted to deliberate indifference, a plaintiff must show: "(1) that 'a policymaker of the municipality knows to a moral certainty that its employees will confront a given situation'; (2) that 'the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation'; and (3) that 'the wrong choice by the employee will frequently cause the deprivation of a citizen's constitutional rights.' " *Nicholson v. Scoppetta,* 344 F.3d 154, 166-67 (2d Cir. 2003) (quoting *Walker v. City of New York,* 974 F.2d 293, 297-98 (2d Cir. 1992)). It will *not* "suffice to prove that an injury or accident could have been avoided if an officer had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury." *City of Canton,* 489 U.S. 378 at 391. Instead, Plaintiff must plead facts suggesting "a likelihood that the failure to train or supervise will result in the officer making the wrong decision." *Walker*, 914 F.2d at 299.

***8** Plaintiff alleges that wardens of MDC, BKDC, NIC, and GMDC are liable for failing to have "properly trained and supervised staff." (Compl. at 9.) He states that if they "had done their supervising work, [he] would not have been injured." (*Id.*) Such conclusory assertions, with no supporting facts about the alleged deficiencies in the training program or supervision, are insufficient to state a deliberate indifference claim under a failure-to-train or failure-to-supervise theory. Bare allegations that more (or better) training could have avoided plaintiff's injury are precisely the type of allegations that the Supreme Court has deemed insufficient. *See City of* Canton, 489 U.S. 378 at 391.

The Court next considers whether Plaintiff adequately alleges that the City has a *de facto* custom or practice that is actionable under § 1983. A plaintiff may be able to plead and prove "the existence of a widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a 'custom or usage' with the force of law.' " *Praprotnik,* 485 U.S. at 127 (citing *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 167-168 (1970)). The policy or custom requirement "is satisfied where a local government is faced with a pattern of misconduct and does nothing, compelling the conclusion that the local government has acquiesced in or tacitly authorized its subordinates' unlawful actions." *Reynolds v. Giuliani,* 506 F.3d 183, 192 (2d Cir. 2007) (relying on *Amnesty Am. v. Town of W. Hartford,* 361 F.3d 113, 125 (2d Cir. 2004)).

Defendants contend that the City cannot be liable for housing Plaintiff with inmates with active TB because Plaintiff's Complaint "can be interpreted as alleging that the City failed to follow its policy of separating inmates with tuberculosis from inmates without tuberculosis" and that "the City made a mistake when they improperly housed him with other inmates who had tested positive for tuberculosis." (Def. Mem. at 21.) But interpreting the Complaint in this manner would be inconsistent with the Court's duty on a motion to dismiss to construe the facts in the light most favorable to the plaintiff. *Chavis,* 618 F.3d at 170. Moreover, while it is true that a plaintiff cannot show that the City has a custom or practice based on a single incident, a "series of decisions by a subordinate official" may "manifest[ ] a 'custom or usage' of which the supervisor must have been aware." *Praprotnik,* 485 U.S. at 130. Thus, a plaintiff may state a claim of municipal liability where the plaintiff alleges facts sufficient to suggest that defendants' noncompliance with a policy is widespread and therefore "that a municipality's *actual* policies were different from the ones that had been announced." *Praprotnik,* 485 U.S. at 131 (Brennan, J., *concurring*) (emphasis added); *Davis v. City of N.Y.,* No. 86-CV-6345 (SWK), 1990 WL 165763, at *13 (S.D.N.Y. Oct. 22, 1990) ("[W]ide-spread refusals to comply with the City's ... policies might tend to demonstrate either a municipal custom or that a municipality's actual policies differ from those it has promulgated.").

Here, Plaintiff alleges that the "New York City Jails are infested with contagious diseases," that Defendants "do not follow the New York City Health Code [or] the New York State Sanitary Code," and that he is "yet another victim." (Compl. at 8.) He alleges that the DOC continued to

re-test detainees in his cell block for TB, finding that two or three inmates had active TB and finding him TB-negative, yet on three different occasions when they were moved, decided to continue to house them together. (*Id.* at 25.) He also alleges that these prisoners with active TB declined treatment (*id.*), which suggests that they may have been contagious.

***9** Plaintiff's allegations, that Defendants decided each time that he was moved to continue to house detainees with active TB in his cell block after re-testing them all for TB, suffice at this stage to plead a "series of decisions" of which a supervisor must have been aware, *Praprotnik,* 485 U.S. at 130, or a widespread pattern or custom. *Compare Davis v. City of N.Y.,* 228 F. Supp. 2d 327, 346 (S.D.N. Y 2002) (holding that the evidence did not support jury's verdict because "two incidents of unconstitutional conduct by low-level employees in a city agency with over 35,000 employees can never provide a reasonable basis for finding a widespread or well-settled custom"), *aff'd,* 75 Fed.Appx. 827 (2d Cir. 2003), *with Ferrari v. City of Suffolk,* 790 F. Supp. 2d 34, 46 (E.D.N.Y. 2011) ("Three instances (including Plaintiff's own claim) might not suffice to overcome summary judgment. But [on a 12(b)(6) motion], they do permit a plausible inference of a widespread practice or informal custom"). Defendants' motion to dismiss Plaintiff's claim that the City of New York violated Plaintiff's rights under the Due Process Clause by repeatedly deciding to continue housing him with inmates with active-TB is denied.

B. Conditions of Confinement: Hepatitis A

To state a claim of unconstitutional conditions of confinement, a plaintiff must allege facts sufficient to suggest "a causal relation between the harm [he] suffered and the defendant's action or inaction." *Barnes v. Anderson,* 202 F.3d 150, 158 (2d Cir. 1999); *Castro,* 833 F.3d at 1070 (a pretrial detainee must plead, among other things, that "the defendant caused the plaintiff's injuries").

Here, Plaintiff fails to plead facts showing that any action or inaction on the part of Defendants caused him to contract Hepatitis A. *See, e.g., Mabry v. N.Y. City Dep't of Corr.,* 465 Fed.Appx. 31, 32 (2d Cir. 2012). Plaintiff's bare allegations that the jail is not "clean" (Compl. at 9), or that Defendants did not take unspecified "precautions" (*id.* at 20) are insufficient to state a claim that any action or omission on the part of the City of New York or any individual Defendant caused his infection with Hepatitis A. In contrast to Plaintiff's claims that the City of New York caused his TB infection by continuing to house him with contagious inmates, Plaintiff has not alleged that Defendants made any departure from protocol that resulted in his Hepatitis A infection. The Court therefore grants Defendants' motion to dismiss Plaintiff's claims that Defendants are liable for his infection with Hepatitis A.

C. Medical Care Claims

1. Medication and Testing Delays

Plaintiff's allegations regarding his medical care are contradictory. He alleges both that Defendants were "not providing [him] with medical care once exposed to T.B" (Compl. at 16), and that he was "forced into direct observed therapy" and treated with various antituberculosis medications (*id.* at 13), in other words, that he was compelled to accept medication.

For pretrial detainees, the standards articulated in *Darnell* apply to *all types* of deliberate indifference claims, including claims for deliberate indifference to serious medical needs. *Darnell,* 2017 WL 676521, at *12 n.9 ("[D]eliberate indifference means the same thing for each type of claim under the Fourteenth Amendment."); *see also Castro v. County of Los Angeles,* 833 F.3d 1060, 1070 (9th Cir. 2016) (*en banc*) (overruling *Clouthier v. County of Contra Costa,* 591 F.3d 1232 (9th Cir. 2010), which had held that a subjective test applied to due process claims for deliberate indifference to serious medical needs).

If a complaint alleges that defendants provided medical treatment, but the treatment was inadequate, the seriousness inquiry focuses on the alleged inadequacy. *See Salahuddin v. Goord,* 467 F.3d 263, 280 (2d Cir. 2006). When the basis for a deliberate indifference claim is "a temporary delay or interruption in the provision of otherwise adequate medical treatment, it is appropriate to focus on the challenged *delay* or *interruption* in treatment rather than the prisoner's *underlying medical condition* alone in analyzing whether the alleged deprivation is, in 'objective terms, sufficiently serious.' " *Smith v. Carpenter,* 316 F.3d 178, 185 (2d Cir. 2003).

***10** With respect to his treatment for TB, Plaintiff alleges that defendants caused him to miss doses of TB medication and failed to test him monthly for liver functioning. He annexes to his Complaint grievances stating that medical staff failed to provide Plaintiff his medication on June 4, 2015, June 29, 2015, and July 2, 2015. (Id. 1-1 at 8.) Plaintiff wrote a grievance stating that "since I was diagnosed with TB, I

have not received adequate care." (*Id.*) In another grievance, Plaintiff stated that on July 27, 2015, he was not escorted to the location where he could receive his medication. (*Id.* 1-1 at 9.) Although TB is undoubtedly a serious medical condition, Plaintiff's allegations that he missed doses of medication on these few occasions are not objectively sufficiently serious to rise to the level of a constitutional violation.

Plaintiff also wrote in a grievance that medical personnel did not test his liver functioning each month after he tested TB-positive in May 2015. (*Id.* 1-1 at 16). He annexes to the Complaint medical records reflecting "liver profile" tests on May 19, 2015, and June 1, 2015. (*Id.* 1-1 at 32-33.) Notes from his June 10, 2015 appointment with Defendant Rony Joseph, P.A., state: "Liver function is normal. We continue to follow up liver function." (*Id.* at 21.) On August 5, 2015, Plaintiff filed a Complaint asserting, among other things, that "Corizon medical didn't call [him] for [his] blood test," which he was supposed to have on the first day of every month. (*Id.* 1-1 at 9.) The New York State DOCCS took custody of Plaintiff on September 8, 2015. The Court liberally construes Plaintiff's Complaint as asserting that medical staff failed to conduct liver tests in July and August 2015, after his normal liver tests at the end of June 2015. Without more, such allegations of a limited delay or interruption in treatment are insufficient to plead an objectively serious risk to Plaintiff's health rising to the level of a constitutional claim.

Plaintiff also alleges that DOC medical personnel informed him that no medication or treatment was necessary to treat the discovery of Hepatitis A antibodies in his blood. (Compl. 1.2 at 11.) Plaintiff has not alleged that doctors withheld some treatment that was available to him for Hepatitis A or that was medically necessary. He simply alleges that doctors informed him that no medication or treatment was indicated for his condition. (*Id.*) Without further allegations suggesting that the treating physicians' proposed course of action posed a risk of harm to him that was in "objective terms, sufficiently serious," *Smith,* 316 F.3d at 185, Plaintiff fails to state a deliberate indifference claim based on the lack of medication or other active treatment for Hepatitis A. Defendants' motion to dismiss Plaintiff's claims under § 1983 based on a failure to provide adequate medical care is granted.

2. Compelled Medication

"Although the right of a prisoner to be free from unwanted medical treatment is protected under the Fourteenth Amendment, there are instances where a state's interest in providing a safe and secure prison environment outweighs the liberty interests of an individual." *Brown v. Ionescu,* No. 02-CV-1218 (LMM), 2004 WL 2101962, at *4 (S.D.N.Y. Sept. 21, 2004). Cases that have balanced these interests in favor of the government include instances where an inmate's refusal of treatment could impact the health of other inmates and prison personnel. *Brown,* 2004 WL 2101962, at *4. Thus, in *McCormick v. Stalder,* the Court held that a prison could, consistent with the Constitution, require an inmate who had tested positive for TB to be medicated as part of the treatment of his condition. 105 F.3d 1059, 1061-62 (5th Cir. 1997) ("In light of the contagious nature of TB, the prison had a legitimate interest in forcibly treating the prisoner to prevent the spread of an infectious disease for the benefit of both the prisoner himself as well as other prisoners and staff."); *see also Hasenmeier-McCarthy v. Rose,* 986 F. Supp. 464, 468 (S.D. Ohio 1998) (holding that "the critical need of the defendants to detect, control, and treat a highly contagious disease more than satisfies their burden under *Turner v. Safley*").

***11** Plaintiff does not specifically allege that Defendants compelled him to accept medical treatment, whether for latent or active tuberculosis. Plaintiff alleges that he was "forced into direct observed therapy (DOT) and poisoned with variants of Isoniazid, rifampin, pyrazinamide." (Compl. at 13.) But he also alleges that Defendant Antoine Achille recommended, rather than required, medication for TB: Achille "examine[d] [Plaintiff's] blood [and] determine[d that Plaintiff] was negative for [active] tuberculosis and recommended [that he] be put on tuberculosis medication." (*Id.* at 10.) Plaintiff was also aware that some inmates had declined to take medication and does not suggest that this option was unavailable to him. (*Id.* at 25 ("Mr. Ramirez and Mr. Belmejo ... refused to take the treatment.").) Moreover, although Plaintiff alleges that he suffered some side effects from the medication, he nowhere suggests that he informed any Defendant of such side effects and was nevertheless required to continue with medications that caused the side effects.

Numerous courts, applying *Turner v. Safley,* have concluded that in some instances, the critical need to detect, control, and treat a highly contagious disease can justify an infringement on any constitutional right that a prisoner may have to refuse medication. [9] *See Brown,* 2004 WL 2101962; *McCormick,* 105 F.3d at 1061-62; *Hasenmeier-McCarthy,* 986 F. Supp. at 468. Indeed, Plaintiff himself argues that the DOC

should "categorize the inmates according to whatever disease they were found to have ... [and] should make them take their medications or treatment constructively." (Compl. at 27.) Plaintiff's inconsistent and conflicting allegations are insufficient to state a claim that he has suffered any violation of his constitutional rights in connection with the TB medication that he received at DOC.

9 Plaintiff has not asserted any objection on religious grounds to the medication.

D. Mental Health Treatment

Plaintiff alleges that he suffers from "stress, mental anguish, anxiety, mood disorder, and depression," as well as post-traumatic stress disorder attributable at least in part to his work on the September 11, 2001 World Trade Center site. (*Id.* at 15.) While in DOC custody, Plaintiff initially had mental health treatment with clinicians who spoke Spanish, but in May 2015, at the NIC, there were no Spanish-speaking clinicians. (*Id.* 1-3 at 7.) Plaintiff's allegation that the DOC is required to provide bilingual mental health counselors can be construed as either a claim that (1) the DOC was deliberately indifferent to his serious medical needs by providing constitutionally inadequate care; or (2) violated a right to privacy because medical information was conveyed to an interpreter outside the relationship between the medical provider and the patient. Plaintiff fails to adequately state a claim under either theory.

1. Class Action

As an initial matter, Plaintiff indicates that he seeks to assert this claim regarding bilingual mental health care on behalf of similarly-situated inmates. He argues that because "this issue affects thousands of Hispanics, Plaintiff is entitled to class-action injunctive relief." (*Id.* at 20.) *A pro se* prisoner cannot prosecute a class action. *Rodriguez v. Eastman Kodak Co.,* 88 Fed.Appx. 470, 471 (2d Cir. 2004) ("[I]t is well established that *a pro se* class representative cannot adequately represent the interests of other class members.") (internal quotation marks omitted); *see also Iannaccone v. Law,* 142 F.3d 553, 558 (2d Cir. 1998). The Court therefore denies Plaintiff's request that he proceed as representative of a class.

2. Deliberate Indifference to Mental Health Needs

"[P]sychiatric or mental health care is an integral part of medical care," and prison authorities must provide a prisoner with "reasonably necessary medical care (including psychiatric or mental health care) which would be available to him or her if not incarcerated." *Langley v. Coughlin,* 888 F.2d 252, 254 (2d Cir. 1989); *Smith v. Grefinger,* 208 F.3d 203 (2d Cir. 2000) ("[P]rison officials must provide inmates with "reasonably necessary medical care.").

***12** Here, Plaintiff fails to allege that he suffered an interruption of mental health services that created an objectively serious risk of harm. As set forth previously, courts must "focus on the challenged *delay* or *interruption* in treatment rather than the prisoner's *underlying medical condition* alone in analyzing whether the alleged deprivation is, in 'objective terms, sufficiently serious.' " *Smith,* 316 F.3d at 185. The question is not whether Plaintiff's underlying mental health issues were serious but rather whether any interruption in care caused by the absence of Spanish-speaking clinicians posed a serious risk.

Plaintiff alleges that in May 2015, at the NIC, the "mental health person did not speak Spanish so she made a [telephone] call, [and he] spoke to someone in Spanish but it wasn't satisfactory to [him] because [he] d[idn't] know to whom [he] was speaking," and he feels "more comfortable [with] a person to person communication." (*Id.* 1-2 at 19.)[10] It thus appears from Plaintiff's Complaint and the documents that he annexes to it that no Spanish-speaking clinician was available to him but that an interpreter was available to him by telephone. (Compl. 1-3 at 7.)

10 This letter indicates that it was written by "Joe Jimenez," for Plaintiff Segundo Narvaez. (Compl. 1-2 at 19.) Most or all of the other grievances and letters appear to have been written by Plaintiff himself in English.

The Court therefore understands Plaintiff to be alleging not that defendants denied him *any* mental health treatment, but rather that during this period, the only mental health treatment available to him was through a non-Spanish-speaking clinician assisted by an interpreter by phone. The Second Circuit has not specifically addressed whether inmates enjoy a constitutional right to medically-qualified interpreters.

At least one district court in this Circuit recognized that an interpreter may be necessary for "instances of medical care in which communication between the patient and medical personnel are essential to the efficacy of the treatment in

question." *Clarkson v. Coughlin,* 898 F. Supp. 1019, 1049 (S.D.N.Y. 1995) (holding that disabled prisoners were entitled to an American Sign Language interpreter). The district court in *Clarkson* reasoned that an interpreter was necessary to obtain informed consent and was a corollary to the significant liberty interest in avoiding the unwanted administration of medical treatment. The district court noted that several class members had "experienced improper and possibly harmful treatment through the provision of medical treatment in the absence of qualified interpreters." *Id.* at 1049 ("Plaintiffs' protected liberty interest is implicated by Defendants' failure to provide the necessary information through a qualified interpreter even though the plaintiff in question may have 'voluntarily' ingested the proffered medication."); *see also Morales v. Fischer,* 46 F. Supp. 3d 239, 253 (W.D.N.Y. 2014) (concluding that even if DOCCS had failed to provide a Spanish interpreter for one medical appointment, this did not violate Plaintiff's Eighth Amendment rights where "there is nothing to suggest—and Plaintiff does not assert—that he was overall unable to effectively express his concerns in that treatment session").

Here, Plaintiff has not alleged that his mental health session with social worker Anne Francois implicates any interest in consent to particular medical treatment or even that he cannot speak English. Rather, Plaintiff alleges that he was "more comfortable" speaking in Spanish about his feelings. (Compl. 1.3 at 19; Compl. 1.2 at 21). The reasoning in *Clarkson* therefore is inapposite here. Plaintiff's allegations that Defendants provided only a telephone interpreter for his mental health appointment with a social worker thus do not show that he faced an objectively serious risk of harm. Plaintiff therefore fails to state a claim that Defendants were deliberately indifferent to his serious mental health needs.

3. Confidentiality of Medical Information

***13** Plaintiff also fails to adequately plead that Defendants violated his right to privacy in his medical information. The Constitution does not provide prisoners with an unqualified right to complete confidentiality of medical records. *Cortes,* 114 F. Supp. 2d at 185. The Second Circuit has recognized that prisoners possess a right to maintain the confidentiality of certain previously undisclosed medical information, particularly where "disclosure [to other inmates] might lead to inmate-on-inmate violence. *Powell v. Schriver,* 175 F.3d 107, 112 (2d Cir. 1999) (recognizing a right to avoid disclosure of inmate's status as transsexual); *Doe v. City of New York,* 15 F.3d 264 (2d Cir. 2004) ("Individuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition."). By contrast, "innocuous concerns" such as complaints of back and leg pain, "do not compel the same heightened confidentiality as information concerning an inmate's HIV positive status or transsexualism." *Cortes,* 114 F. Supp. 2d at 185. Even where a prisoner has some rights to medical confidentiality, prison officials can impinge on that right "to the extent that their actions are reasonably related to legitimate penological interests." *Powell,* 175 F.3d at 112.

In *Cortes,* where the inmate had "the luxury of determining whether he wanted a particular inmate or even a noninmate [staff counselor] to serve as his interpreter," the Court concluded that medical personnel had taken "reasonable steps to allow plaintiff to have the services of a translator while maintaining the confidentiality of his medical information." *Id.* at 186. Other district courts have likewise rejected privacy claims, in some cases even where inmates were used as translators. *See Franklin v. District of Columbia*, 163 F.3d 625, 638-39 (D.C. Cir. 1998) ("[P]risoners with limited proficiency in English do not have a privacy right, derived from the Constitution, to force the District to hire bilingual medical personnel so that the prisoners may communicate their medical information only to such employees.").

Here, using the telephone interpreter service for Plaintiff's meeting with a social worker for his post-traumatic stress disorder was a reasonable effort to allow plaintiff to have the services of an interpreter while maintaining the confidentiality of his medical information. He fails to plead facts showing that having only a telephone interpreter service impinged on any right to the confidentiality of sensitive medical information. Therefore, the Court grants Defendants' motion to dismiss Plaintiff's § 1983 claims arising from his mental health care in DOC custody.

E. Americans with Disabilities Act

To state a claim under Title II of the Americans with Disabilities Act (ADA), a prisoner must show: "(1) he or she is a 'qualified individual with a disability'; (2) he or she is being excluded from participation in, or being denied the benefits of some service, program, or activity by reason of his or her disability; and (3) the entity [that] provides the service, program, or activity is a public entity." *Clarkson,* 898 F. Supp. at 1037. Plaintiff alleges that his "mental issue" was a recognized disability and that Defendants "took no steps to protect [his] rights under the ADA." (Compl. at

21.) As Defendants point out, Plaintiff's allegations do not suggest that Defendants denied him participation in any program or service *because of* his mental health issues or any other disability. (Def. Mem. at 3.) Plaintiff's allegation that Defendants denied him mental health care with a Spanish-speaking counselor does not suggest that they denied him mental health care by reason of his disability. Plaintiff's allegations thus fail to state a claim under Title II of the ADA. Defendants' motion to dismiss Plaintiff's ADA claim is granted.

F. Conspiracy under 42 U.S.C. §§ 1983 and 1985(3)

A plaintiff asserting a conspiracy claim under § 1983 must allege "(1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Pangburn v. Culbertson,* 200 F.3d 65, 72 (2d Cir. 1999).

***14** In order to state a claim under § 1985(3), a plaintiff must allege facts that plausibly show that there exists: (1) a conspiracy (2) for the purpose of depriving the plaintiff of the equal protection of the laws, or the equal privileges or immunities under the laws; (3) an overt act in furtherance of the conspiracy; and (4) an injury to his person or property, or a deprivation of his right or privilege as a citizen of the United States. *Thomas v. Roach,* 165 F.3d 137, 146 (2d Cir. 1999). "[T]he [§ 1985(3)] conspiracy must also be motivated by some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action." *Id.* (internal quotation marks and citation omitted). Vague and conclusory assertions of a conspiracy claim, either under § 1983 or under § 1985(3), will not suffice. *See, e.g., Webb v. Goord,* 340 F.3d 105, 110-11 (2d Cir. 2003); *Boddie v. Schnieder,* 105 F.3d 857, 862 (2d Cir. 1997).

Plaintiff alleges that unspecified Defendants are liable under § 1985 because they "transfer[red him], discontinued treatment, [and] ignore[d] it when [he] was positively diagnosed." (Compl. at 20.) He further asserts, without further factual elaboration, that "similarly situated inmates who spoke English were given medical care and not exposed to said diseases," (*id.* at 21), and that Defendants denied him medical care or exposed him to contagious diseases because he "was not of [defendants'] consanguinity and spoke only Spanish," (*id.* at 19). Plaintiff's allegations about a conspiracy are unsupported by any factual allegations and thus fail to state a claim on which relief can be granted. The Court therefore grants Defendants' motion to dismiss Plaintiff's claims of conspiracy under §§ 1983 and 1985(3).

CONCLUSION

Defendants' motion to dismiss is DENIED as to Plaintiff's § 1983 due process claim against the City of New York for deliberate indifference to a risk of harm from the conditions of Plaintiff's confinement with TB-positive inmates. Defendants' motion to dismiss is GRANTED as to Plaintiff's remaining claims under §§ 1983, 1985, and the ADA.

The Clerk of the Court is instructed to close the motion at ECF No. 38.

SO ORDERED.

All Citations

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CERTIFICATE OF SERVICE

I, D'Adre Cunningham, certify and declare as follows:

On April 16, 2020, I served a copy of the BRIEF OF *AMICI CURIAE* OF SEATTLE CHAPTER OF THE NATIONAL LAWYERS GUILD, WASHINGTON DEFENDER ASSOCIATION, & WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS' WRIT OF MANDAMUS on counsel for the Respondents and all other parties by filing this pleading through the Portal and thus a copy will be delivered electronically to all parties.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 16th day of April 2020 at Seattle, Washington.

/s/D'Adre Cunningham
WSBA No. 32207

WASHINGTON DEFENDER ASSOCIATION

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