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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOHN HAROLD MCCULLOUGH,

3:16-cv-00225-MMD-VPC

Plaintiff,

v.

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

RICHARD MACHADO, et al.,

Defendants.

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This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is plaintiff's motion for leave to file a second amended complaint (ECF No. 30), which defendants opposed (ECF No. 32) and to which plaintiff replied (ECF No. 33). For the following reasons, the court recommends that the motion to amend be granted and that Count VIII be dismissed.

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I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

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John McCullough ("plaintiff") is an inmate in the custody of the Nevada Department of Corrections ("NDOC"). Presently, plaintiff is incarcerated at Northern Nevada Correctional Center ("NNCC") in Carson City, Nevada. On April 25, 2016, plaintiff filed a civil rights complaint pursuant to 42 U.S.C. § 1983 (ECF No. 1-1). On August 30, 2016, plaintiff filed a motion for leave to file a first amended complaint. (ECF No. 3.) The court entered a screening order on the first amended complaint on December 2, 2016 (ECF No. 4), by which plaintiff is permitted to proceed on a sole count, which alleges violations of plaintiff's Eighth Amendment right against deliberate indifferent to a serious medical need.

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Defendants Jerry Allen, Richard Machado, Thomas Bjerke, Don Poffenroth, Jerry Reid, and Philipp Pasqual filed their answer on January 26, 2017. (ECF No. 8.) On March 14, 2017, plaintiff filed a motion for leave to file a second amended complaint ("SAC"). (ECF No. 16.)

1 Briefing on the motion to amend was stayed pending a settlement conference, which was held on
2 May 9, 2017. (See ECF Nos. 20, 27.) The parties did not settle. (See ECF No. 27.) Plaintiff
3 then withdrew his prior motion to amend (ECF No. 29), and filed the present motion for leave to
4 file a SAC, which the court will now address. (ECF No. 30.)

5 **II. LEGAL STANDARD**

6 Federal Rule of Civil Procedure (“FRCP”) 15(a)(2) instructs that “[t]he court should
7 freely give leave [to amend a pleading] when justice so requires.” However, the ability to amend
8 is not without limits. Federal courts balance five factors when considering a motion to amend: (1)
9 bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) the futility of the amendment;
10 and (5) whether the plaintiff has previously amended his complaint. *Desertrain v. City of Los*
11 *Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014). The factors do not weigh equally; as the Ninth
12 Circuit has explained, prejudice receives greatest weight. *Eminence Capital, LLC v. Aspeon, Inc.*,
13 316 F.3d 1048, 1052 (9th Cir. 2003). Defendants bear the burden of establishing prejudice, and
14 absent its presence or a “strong showing” under the other factors, there is a presumption in favor
15 of permitting amendment. *Id.* (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186-87
16 (9th Cir. 1987)).

17 When considering prejudice, the court may weigh against the movant the amended
18 pleading’s great alteration of the litigation’s nature and its effect of requiring an entirely new
19 course of defense. *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.
20 1990). Alone, such alteration is not fatal. *Id.* In contrast, futility “alone can justify the denial of
21 a motion for leave to amend.” *Nunes v. Ashcroft*, 375 F.3d 805, 809 (9th Cir. 2003). Futility
22 arises when the amendment is legally insufficient, *Miller v. Rykoff-Sexon, Inc.*, 845 F.3d 209, 214
23 (9th Cir. 1988), or “where the amended complaint would . . . be subject to dismissal[.]” *Steckman*
24 *v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998).

25 **III. DISCUSSION**

26 Plaintiff moves to amend to cure alleged deficiencies in his first amended complaint, as
27 well as add new defendants and three additional counts. (ECF No. 30.) Defendants filed a partial
28 opposition to plaintiff’s motion for leave to file a SAC. (ECF No. 32.) Defendants oppose the

1 addition of Count VIII, arguing that it is wholly precluded by immunity. (Id. at 2.) Defendants
2 also note in their opposition that because Counts VI and VII are not entirely clear, they will await
3 screening of those claims and may file for dismissal at a later time. (Id.) For the following
4 reasons, the court recommends that plaintiff’s motion to file a SAC be granted. However, as
5 described below, the court recommends that plaintiff be allowed to proceed only on certain claims
6 within the SAC.

7 **A. Screening of Counts VI and VII**

8 To the extent defendants request a screening of plaintiff’s proposed SAC, or specifically
9 Counts VI and VII of the proposed SAC, the court declines to do so. 28 U.S.C. § 1915A governs
10 screenings of complaints filed in forma pauperis and states in relevant part that “[t]he court shall
11 review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a
12 complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer
13 or employee of a governmental entity.” 28 U.S.C. § 1915A(a). This court is not compelled under
14 28 U.S.C. § 1915A(a) to re-screen plaintiff’s proposed SAC. Instead, FRCP 15 governs
15 plaintiff’s proposed amended pleading, and defendants had an opportunity to oppose amendment
16 as to Counts VI and VII and chose not to do so. Accordingly, Counts VI and VII shall proceed.

17 **B. Count VIII – Immunity**

18 In Count VIII, plaintiff alleges that his First, Sixth, Eighth, and Fourteenth Amendment
19 rights were violated by Justice Court Judge Karen R. Stephens (“Stephens”), district attorney
20 James Shirley (“Shirley”), and public defender Steven W. Cochran (“Cochran”). (ECF No. 30 at
21 22.) Plaintiff alleges that the defendants “failed to act on plaintiff’s notification of violations of
22 health and welfare conditions at County Jail.” (Id.) Defendants oppose the addition of Count
23 VIII as they assert that the judge, prosecutor, and public defender are entitled to immunity.

24 **1. Judicial and Prosecutorial Defendants**

25 Plaintiff’s claim for monetary damages against the judge and prosecutor are barred, as
26 these defendants are entitled to immunity from civil liability. See *Ashelman v. Pope*, 793 F.2d
27 1072, 1075 (9th Cir. 1986) (“[j]udges and those performing judge-like functions are absolutely
28 immune from damage liability for acts performed in their official capacities”); *Imbler v.*

1 Pachtman, 424 U.S. 409, 424 (1976) (absolute immunity protects those activities undertaken by a
2 prosecutor in his or her function as an advocate that are “intimately associated with the judicial
3 phase of the process”). Further, 42 U.S.C. § 1983 provides that “in any action brought against a
4 judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief
5 shall not be granted unless a declaratory decree was violated or declaratory relief was
6 unavailable.” Accordingly, Judge Stephens and District Attorney Shirley are entitled to absolute
7 judicial immunity for acts performed in their official capacities, as plaintiff has alleged here.
8 See Ashelman, 793 F.2d at 1075; see also Moore v. Brewster, 96 F.3d 1240, 1243 (9th Cir.
9 1996) (“The judicial or quasi-judicial immunity available to federal officers is not limited to
10 immunity from damages, but extends to actions for declaratory, injunctive and other equitable
11 relief”) (citation omitted).

12 **2. Public Defender Defendant**

13 42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority to
14 deprive individuals of their federally guaranteed rights.” Anderson v. Warner, 451 F.3d 1063,
15 1067 (9th Cir. 2006) (quoting McDade v. West, 223 F.3d 1135, 1139 (9th Cir. 2000)). The statute
16 “provides a federal cause of action against any person who, acting under color of state law,
17 deprives another of his federal rights[,]” Conn v. Gabbert, 526 U.S. 286, 290 (1999), and
18 therefore “serves as the procedural device for enforcing substantive provisions of the Constitution
19 and federal statutes,” Crumpton v. Gates, 947 F.2d 1418, 1420 (9th Cir. 1991). Claims under §
20 1983 require a plaintiff to allege (1) the violation of a federally-protected right by (2) a person or
21 official acting under the color of state law. Warner, 451 F.3d at 1067. An attorney representing a
22 criminal defendant, whether privately retained, a public defender, or court-appointed counsel,
23 does not act under color of state law. See Georgia v. McCollum, 505 U.S. 42, 53 (1992); Jackson
24 v. Brown, 513 F.3d 1057, 1079 (9th Cir. 2008). Therefore, plaintiff cannot state a claim against
25 public defender Cochran.

26 **IV. CONCLUSION**

27 The court has considered the motion and the parties’ papers. For good cause appearing,
28 the court recommends that plaintiff’s motion for leave to amend be granted and plaintiff be

1 allowed to proceed with Counts I, II, III, IV, V, VI, and VII. However, the court recommends
2 that Count VIII be dismissed, as amendment would be futile. See *Cato v. United States*, 70 F.3d
3 1103, 1106 (9th Cir. 1995) (citation omitted).

4 The parties are advised:

5 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
6 Practice, the parties may file specific written objections to this Report and Recommendation
7 within fourteen days of receipt. These objections should be entitled “Objections to Magistrate
8 Judge’s Report and Recommendation” and should be accompanied by points and authorities for
9 consideration by the District Court.

10 2. This Report and Recommendation is not an appealable order and any notice of
11 appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of judgment.

12 **V. RECOMMENDATION**

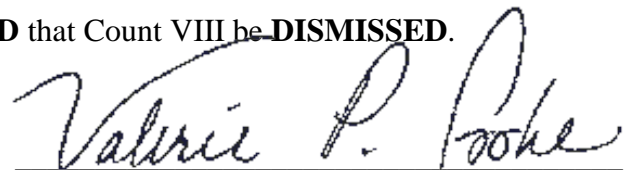
13 **IT IS THEREFORE RECOMMENDED** that plaintiff’s motion to amend (ECF No. 30)
14 be **GRANTED**;

15 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** the second amended
16 complaint (ECF No. 30);

17 **IT IS FURTHER RECOMMENDED** that Counts I, II, III, IV, V, VI, and VII of the
18 second amended complaint **PROCEED**; and

19 **IT IS FURTHER RECOMMENDED** that Count VIII be **DISMISSED**.

20 **DATED:** August 30, 2017.

21 
22 **UNITED STATES MAGISTRATE JUDGE**