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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 CHARLES R.P. URLACHER,
9 Plaintiff,

10 v.

11 PATRISHA LASHWAY, KEVIN
QUIGLEY, et al.,

12 Defendants.
13

CASE NO. 3:16-cv-05912-RJB

ORDER ADOPTING REPORT
AND RECOMMENDATION

14 THIS MATTER comes before the Court on the Report and Recommendation of
15 Magistrate Judge J. Richard Creatura. Dkt. 39. The Court has reviewed the Report and
16 Recommendation (R&R); objections filed by Plaintiff (Dkt. 40); response to Plaintiff's
17 objections filed by Defendants (Dkt. 41); pleadings relating to the underlying motion,
18 Defendants' Motion to Dismiss (Dkt. 27); and the remainder of the file herein.

19 The Court will adopt the Report and Recommendation, which recommends dismissal for
20 claims except those challenging Plaintiff's conditions of confinement. This Court adds the caveat
21 that, except for the 5th Amendment/Double Jeopardy claim, dismissal must be without prejudice
22 and with leave to amend. The Court also adds the following additional analysis to address
23 Plaintiff's discrete objections.
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1 A) Objection to “factual error” in R&R regarding the amount of SOTP treatment.

2 According to Plaintiff, he receives 8-16 hours of SOTP treatment per month, but the
3 R&R refers to 8-16 hours per week. Dkt. 40 at 1, 2; *See* Dkt. 39 at 1. Plaintiff objects to this
4 “factual error” that Plaintiff requests, “must be corrected . . . before the jury trial.” *Id.* However,
5 the R&R is not evidence to be presented at trial, so Plaintiff’s concern that the jury could be
6 misinformed by the R&R is misguided. Further, even assuming that Plaintiff is correct, the
7 difference in the amount of treatment is immaterial to the legal analysis and conclusions of the
8 R&R. The Court notes, however, that the sufficiency of treatment may be a theory for Plaintiff’s
9 conditions of confinement claim.

10 B) Objection to comparing Plaintiff other types of detainees.

11 Plaintiff objects to comparing the conditions of his confinement to a county jail “or other
12 pretrial detainment facility.” Dkt. 40 at 2. The objection is unpersuasive, because this Court
13 adopts the law discussed in the R&R, including the R&R’s observation that Plaintiff is a civil
14 detainee. Civil detainees have been compared to incarcerated persons as courts have sought to
15 distinguish the ways that the government may—or may not—detain persons like Plaintiff. *See,*
16 *e.g., Youngberg v. Romeo*, 457 U.S. 307, 315 (1982). *See* Dkt. 39 at 6-11. Plaintiff is not
17 incarcerated, but his freedoms have been curtailed due to this status as a civilly committed
18 detainee, so the comparison is not without merit. *Id.*

19 C) Objection to R&R use of *Bell v. Wolfish*, 441 U.S. 520, 554 (1979).

20 Plaintiff’s objection to the R&R’s reliance on *Wolfish* is noted, but it is without merit.
21 The R&R, which this Court adopts, states:

22 The [*Jones v. Blanas*, 393 F.3d at 931] court also noted that ‘an individual detained under
23 civil process—like an individual accused but not convicted of a crime—cannot be
24 subjected to conditions that ‘amount to punishment.’” [*Jones v. Blanas*, 393 F.3d 918,
932 (9th Cir. 2004)] (quoting *Bell v. Wolfish*, 441 U.S. 520, 536 (1979)).

1 Dkt. 39 at 8. The reference to *Wolfish* is proper citation to binding authority. *Wolfish* is still good
2 law, so Plaintiff's argument is unavailing.

3 D) Objection to dismissal of 5th Amendment/double jeopardy claim.

4 Plaintiff opines that the "exact same" "historical records . . . [used for] criminal
5 prosecution" are being used "for the purpose of depriving liberty a second time classed as a
6 sexually violent predator (SVP)." Dkt. 40 at 4. The Supreme Court of the United States squarely
7 rejected challenges to Washington's civil commitment statutes on the basis of double jeopardy.
8 *Selig v. Young*, 531 U.S. 250, 263 (2001). Allowing Plaintiff to amend this claim would be futile,
9 so dismissal should be with prejudice. As noted by the R&R, the bar against the double jeopardy
10 claim does not preclude Plaintiff from challenging the conditions of confinement as a substantive
11 due process claim.

12 E) Objection to dismissal of *Bounds* claims.

13 Plaintiff objects to the R&R's reliance on *Lewis v. Casey*, 518 U.S. 343 (1996). *Lewis*
14 held that in the context of a *Bounds* claim, the plaintiff must show an actual injury, which is
15 "actual prejudice with respect to contemplated or existing litigation." Dkt. 39 at 14. Plaintiff
16 requests that he be permitted to conduct discovery to establish "imminent harm." However, the
17 R&R recommended dismissal for failure to state a claim in his written complaint. Dkt. 39 at 16.
18 The law requires a statement of claim which, if adequate, is the foundation for discovery to prove
19 the claim alleged. The law does not allow discovery without that foundation. Permitting Plaintiff
20 to conduct discovery on the *Bounds* claim is not warranted, because even if Plaintiff proved all
21 the allegations in the Complaint he would not be entitled to recovery. The Complaint does not, as
22 a matter of law, state a claim upon which relief can be granted. As the R&R recommends, the
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1 *Bounds* claims should be dismissed, but dismissal should be without prejudice and with leave to
2 amend.

3 F) Objection to dismissal of defendants pled under theory of respondeat superior.

4 Plaintiff defends his argument—rejected by the R&R—that two supervisors, Kevin
5 Quigley and Patrisha Lashway, could be liable under a theory of respondeat superior. Dkt. 40 at
6 7. Resolving the legal issue raised by Plaintiff’s objection is of no importance to the issue of
7 whether claims should be dismissed against Mr. Quigley and Ms. Lashway. The R&R
8 recommends denying dismissal of Ms. Lashway on other grounds, namely, because the
9 Complaint alleges personal conduct by Ms. Lashway, that she “knew of the [constitutional]
10 violaitons and failed to prevent them.” As to Mr. Quigley, who was named as a “former
11 supervisor,” the R&R recommended dismissal on Eleventh Amendment grounds. Dkt. 39 at 19,
12 21, 22.

13 Nonetheless, addressing the substance of Plaintiff’s objection, Plaintiff’s argument is not
14 supported by the law. *See Iqbal*, 556 at 676. To the extent that Plaintiff seeks damages from Mr.
15 Quigley and Ms. Lashway under 28 U.S.C. §1983, alleging supervisory liability under an agency
16 theory is insufficient. Instead, the complaint must allege a violation, by a defendant personally,
17 of governmental ordinance, policy, practice, or custom that is the moving force behind the
18 constitutional violation. *Monell v. Dep’t of Soc. Servs. of the City of New York*, 436 U.S. 658,
19 694 (1978).

20 G) Objection to dismissal of allegations against defendants in their personal and
21 individual capacity.

22 Plaintiff argues that, contrary to the R&R’s finding, “clearly at this stage of pleadings
23 [he] need not specifically delineate how each named Defendant individually or personally
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1 contributed to any violation of his constitutional rights.” Dkt. 40 at 10, 11. The R&R dismissed
2 the request for damages without prejudice as to all individually-named defendants because the
3 Complaint repeats the same factual allegations—and then attributes liability—“to each
4 enumerated employee, without any explanation as to how each person participated.” Dkt. 39 at
5 22, 23.

6 This Court adopts the R&R’s reasoning, which relied on *Leer v. Murphy*, 844 F.2d 628
7 (9th Cir. 1988), for the rule that pleadings must allege causation that is “individualized and
8 focus[ed] on the duties and responsibilities of each individual defendant whose acts or omission
9 are alleged to have caused a constitutional deprivation.” Dkt. 39 at 22. Concededly, *Leer*
10 analyzed a motion for summary judgment, whereas in this case there is pending a motion to
11 dismiss for failure to state a claim. However, even taking all Plaintiff’s allegations as true, the
12 Complaint does not allege a sufficient basis for recovery against individual defendants. The
13 Complaint must allege “that each Government-official defendant, through the official’s own
14 individual actions, has violated the Constitution,” *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009),
15 which the Complaint has not done. Dismissal should be without prejudice with leave to amend,
16 because if Plaintiff particularizes the complaint to named individuals, he may be able to state a
17 claim.

18 H) Objection to dismissal of claim for unbiased forensic examiners.

19 The Complaint alleges a § 1983 claim against fourteen defendants for violations of the
20 Fourteenth and Sixth Amendments on the basis that they “acted with deliberate or willful
21 indifference . . . in both their individual capacity and/or official capacity,” by hiring forensic
22 evaluators with a direct interest in prolonging Plaintiff’s SCC detention. Dkt. 1-1 at § 5.4 The
23 Complaint alleges that Plaintiff would have been released but for the evaluations. *Id.* Plaintiff’s
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1 Objection adds new facts beyond the pleadings, including the fact that at his October 8, 2015
2 annual review, SCC provided Plaintiff, who is indigent, with his own expert, but Plaintiff was
3 not provided with—and could not afford—his own rebuttal expert. Dkt. 40 at 13.

4 Sexually Violent Predators may be civilly committed under Washington’s statutory
5 scheme. RCW 71.09 *et seq.* By statute, civilly committed persons are entitled to “a current
6 examination of his or her mental condition made by the department at least once very year.”
7 RCW 71.09.070(1). The persons “may retain, or if he or she is indigent and so requests, the court
8 may appoint a qualified expert or a professional person to examine him[.]” RCW
9 71.09.070(6)(a). Washington’s statutory scheme comports with basic notions of Due Process.
10 *See discussion, Hickey v. Morris*, 722 F.2d 543, 548-49 (9th Cir. 1983).

11 To the extent that the Complaint alleges a facial constitutional challenge to Washington’s
12 process for SVP annual examinations, the claim should be dismissed with prejudice, because the
13 statutory scheme is constitutional. The statute provides that, at no cost to him, Plaintiff is entitled
14 to “a qualified expert or a professional person,” not a team of experts, or even one more expert
15 for rebuttal.

16 To the extent that the Complaint has alleged an “as applied” constitutional challenge, the
17 claim should be dismissed without prejudice for failure to state a claim. Even if the statute was
18 ambiguous about what Plaintiff is entitled to, the Complaint has not alleged what difference it
19 would have made for Plaintiff to have a second rebuttal witness. Without more, Plaintiff has not
20 stated a claim for relief. The claim should be dismissed without prejudice, but with leave to
21 amend.

22 * * *

1 THEREFORE, the Court **HEREBY ORDERS:**

2 (1) The Court adopts the Report and Recommendation (Dkt. 39).

3 (2) Defendants' Motion to Dismiss (Dkt. 27):

- 4 ■ Conditions of confinement claims: GRANTED IN PART and DENIED IN
5 PART:

6 ○ Official capacity: To the extent the conditions of confinement claims
7 are alleged against persons named in their official capacity, the request
8 for damages is dismissed with prejudice on Eleventh Amendment
9 grounds, but the request for declaratory or injunctive relief may
10 proceed.

11 ○ Individual and personal capacity: To the extent conditions of
12 confinement claims are alleged against persons named in their
13 individual and personal capacity, claims are dismissed without
14 prejudice for failure to state a claim, with leave to amend.

- 15 ■ Double Jeopardy/Fifth Amendment claim: GRANTED. The claim is
16 dismissed with prejudice.

- 17 ■ *Bounds* claims: GRANTED. The claims are dismissed without prejudice for
18 failure to state a claim, with leave to amend.

- 19 ■ Claim for unbiased forensic examiner: Defendants' motion is GRANTED. To
20 the extent the claim alleges a facial constitutional claim, the claim is
21 dismissed with prejudice. The claim is otherwise dismissed without prejudice
22 for failure to state a claim, with leave to amend.

23 (3) Any amended pleadings must be filed before **July 15, 2017**.

1 (4) This matter is re-referred to Magistrate Judge J. Richard Creatura.

2 **DATED** this 14th day of June, 2017.

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5 ROBERT J. BRYAN
6 United States District Judge
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