IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-00884-CMA-STV

CHAYCE AARON ANDERSON,

Plaintiff,

v.

JASON SHUTTERS,

Defendants.

RECOMMENDATION AND ORDER

Magistrate Judge Scott T. Varholak

This matter is before the Court on Plaintiff's Motion to Amend "Amended Prisoner Complaint" in Compliance with Federal Rule of Civil Procedure #15 (the "Motion to Amend") [#50] and Defendant Jason Shutters' Motion to Dismiss Plaintiff's Amended Complaint (ECF No. 9) Pursuant to Fed.R.Civ.P. 12(b)(6) (the "Motion to Dismiss") [#43]. Both Motions have been referred to this Court. [##51, 58] This Court has carefully considered the Motions, related briefing, the case file, and the applicable case law, and has determined that oral argument would not materially assist in the disposition of the instant Motions. For the following reasons, the Court **GRANTS** the Motion to Amend and **DENIES WITHOUT PREJUDICE** the Motion to Dismiss as moot. In addition, pursuant to 28 U.S.C. § 1915(e)(2)(B), the Court respectfully **RECOMMENDS** that certain claims in the Second Amended Complaint be **DISMISSED**.

I. BACKGROUND

Plaintiff initiated this action on April 11, 2017, by filing pro se a Prisoner Complaint pursuant to 42 U.S.C. § 1983.[1] [#1] On April 13, 2017, Magistrate Judge Gordon P. Gallagher ordered Plaintiff to file an amended complaint that was legible and clarified the claims that Plaintiff was asserting. [#6] On May 10, 2017, Plaintiff filed an Amended Prisoner Complaint ("First Amended Complaint"). [#9]

Plaintiff's First Amended Complaint brought six claims for relief, each with numerous subparts. [*Id.* at 23-38] These claims stem primarily from his prosecution and conviction in Larimer County District Court, Case Number 15CR1466. [*Id.*; *see also id.* at 12] Plaintiff alleges that he was falsely convicted by a jury on one count of sexual assault on a helpless victim. [*Id.* at 23-28] The First Amended Complaint brought claims against three Defendants: (1) Defendant Cara Boxberger, the Larimer County deputy district attorney who prosecuted Plaintiff, (2) Defendant Jason Shutters, a police officer who investigated the case and testified against Plaintiff, and (3) Defendant Mark Delano, a jailhouse informant who testified against Plaintiff. [*Id.*; *see also id.* at 8]

On July 6, 2017, Senior United States District Judge Lewis T. Babcock issued an Order dismissing all but two of the claims as either legally frivolous or barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). [#17] In doing so, Judge Babcock dismissed all claims against Defendants Boxberger and Delano. [*Id.* at 11] Judge Babcock allowed two claims to proceed against Defendant Shutters. [*Id.* at 8] Specifically, Judge

[1] "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). "The *Haines* rule applies to all proceedings involving a pro se litigant." *Id.* at 1110 n.3. The Court, however, cannot be a pro se litigant's advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

Babcock did not address the merits of Plaintiff's excessive force claim or his claim that Defendant Shutters violated Plaintiff's Fourth Amendment rights by allowing a rape kit examination to be performed on Plaintiff in the presence of an unauthorized nurse. [*Id.*]

On September 13, 2017, Defendant Shutters filed his Motion to Dismiss. [#43] Defendant Shutters argues that Plaintiff's excessive force allegations are conclusory and should be dismissed for failure to state a claim. [*Id.* at 2-4] With respect to Plaintiff's Fourth Amendment claim, Defendant Shutters argues that he is entitled to qualified immunity. [*Id.* at 5-7]

On November 6, 2017, Plaintiff filed his Motion to Amend with a proposed Second Amended Complaint. [##50, 50-1] The proposed Second Amended Complaint again asserts six claims for relief. [#50-1 at 21-30]. Claims One and Two contain additional details with respect to the excessive force and Fourth Amendment rape kit examination claims—the two claims not previously dismissed by Judge Babcock. [*Compare* #50-1 at 21-24, *with* #9 at 26-28] In Claims Three and Four Plaintiff restates two claims that were previously dismissed by Judge Babock, alleging that: Defendants Shutters and Boxberger improperly disclosed Plaintiff's juvenile records to unauthorized parties [*id.* at 25-27; *see also* #9 at 30-31]; and Defendant Boxberger violated Plaintiff's due process and privacy rights by slandering and defaming him, this time alleging that Defendant Boxberger informed Plaintiff's parents that his child was a byproduct of stalking and rape [#50-1 at 28; *see also* #9 at 32]. Finally, in Claims Five and Six—both new claims—Plaintiff alleges that: Defendants Shutters and Boxberger violated his due process rights and committed the tort of intentional infliction of emotional distress because the state charges forced Plaintiff to relive his past when Plaintiff was a victim of

sexual assault [*id.* at 29]; and Defendant Boxberger violated Plaintiff's constitutional rights with respect to actions she took at a bond reduction hearing in the state case [*id.* at 30]. On November 20, 2017, Defendant Shutters filed his Response in Opposition to Plaintiff's Motion to Amend Complaint. [#56] Defendant Shutters argues that the amendments are futile and dilatory. [*Id.* at 2-3] On November 30, 2017, Plaintiff filed a Reply in Support of the Motion to Amend addressing Defendant Shutters' Opposition. [#57]

II. ANALYSIS

A. Motion to Amend

Through the Motion to Amend, Plaintiff seeks leave to file his proffered Second Amended Complaint. [##50, 50-1] Pursuant to Federal Rule of Civil Procedure 15(a)(2), the Court is to freely allow amendment of the pleadings "when justice so requires." The grant or denial of an opportunity to amend is within the discretion of the Court, but "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman v. Davis*, 371 U.S. 178, 182 (1962). "Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." *Frank v. U.S. West, Inc.,* 3 F.3d 1357, 1365 (10th Cir. 1993).

Defendant Shutters argues that the Motion to Amend would be futile. [#56 at 2-3] "An amendment is futile only if it would not survive a motion to dismiss." *Bituminous Cas. Corp. v. Hartford Cas. Ins. Co.*, Civil Action No. 12-cv-00043-WYD-KLM, 2013 WL

6676157, at *2 (D. Colo. Dec. 18, 2013) (*citing Bradley v. Val-Mejias*, 379 F.3d 892, 901 (10th Cir. 2004)). Here, the Second Amended Complaint contains additional allegations with respect to the excessive force and Fourth Amendment claims that were not previously dismissed. [*Compare* #50-1 at 21-24, *with* #9 at 26-28] The Court finds such an amendment particularly appropriate where, as here, the defendant argues that the plaintiff's allegations in the complaint were conclusory and should be dismissed. Through the Second Amended Complaint, Plaintiff, who proceeds pro se, is attempting to cure the deficiencies raised in the Motion to Dismiss.

To the extent Defendant Shutters believes the allegations against him remain deficient, the Court finds that such arguments would be better and more efficiently addressed after Plaintiff's Second Amended Complaint is entered and Defendant has had an opportunity to revise his Motion to Dismiss to address the revised allegations, if he chooses to file such a motion. *Stender v. Cardwell*, Civil Action No. 07-cv-02503-WJM-MJW, 2011 WL 1235414, at *3 (D. Colo. Apr. 1, 2011); *see also Gen. Steel Domestic Sales, LLC v. Steelwise, LLC*, Civil Action No. 07–cv–01145–DME–KMT, 2008 WL 2520423, at *4 (D. Colo. June 20, 2008) (noting that defendant's futility argument "seems to place the cart before the horse"). "Accordingly, the Court—preserving its scarce resources—will not at this time consider the question whether the amendments should be denied on grounds of futility because they fail to state plausible claims for relief. The Court will consider that question if and when Defendant[] file[s] a motion to dismiss on those grounds." *Stender*, 2011 WL 1235414, at *3.

Defendant Shutters also argues that, to the extent Plaintiff seeks to reassert claims previously dismissed, Plaintiff should have sought "proper review of the

dismissal." [#56 at 3] Initially, it is not entirely clear what review of Judge Babcock's Order Plaintiff could have sought—any appeal would have been interlocutory. In any event, the Court is recommending dismissal of the claims previously dismissed by Judge Babcock. Additionally, the Court does not believe that the Motion to Amend should be denied because of any delay in seeking to file the Second Amended Complaint. Indeed, this case remains at the early stages and the Court has yet to conduct a scheduling conference or issue a scheduling order.

The Court's conclusion is bolstered by an analysis of prejudice. Prejudice is the most important factor in considering whether a plaintiff should be permitted to amend a complaint. *See Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1207 (10th Cir. 2006). "Courts typically find prejudice only when the amendment unfairly affects the defendants 'in terms of preparing their defense to the amendment.'" *Id.* at 1208 (*quoting Patton v. Guyer*, 443 F.2d 79, 86 (10th Cir. 1971)). "Most often, this occurs when the amended claims arise out of a subject matter different from what was set forth in the complaint and raise significant new factual issues." *Id.* Here, Defendant Shutters has not argued that he would be prejudiced by an amendment, nor is any prejudice apparent, especially given the early stage of the litigation. *See Stender*, 2011 WL 1235414, at *3 (noting defendants' "glaring omission" of a prejudice argument in their opposition to a motion to amend, and thus declining to address whether amendment would be futile under Fed. R. Civ. P. 12(b)(6)).

For these reasons, Plaintiff's Motion to Amend is **GRANTED**. The filing of the Second Amended Complaint moots Defendant Shutter's Motion to Dismiss the First Amended Complaint [#43]. Accordingly, the Motion to Dismiss [#43] is **DENIED** as

moot, without prejudice, and Defendant Shutters may file a renewed motion to dismiss the Second Amended Complaint.

B. Review Pursuant to 28 U.S.C. § 1915(e)(2)

Plaintiff has been granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. [#5] Section 1915(e)(2) requires a court to dismiss *sua sponte* an action at any time if the action is frivolous, fails to state a claim for relief, or if the plaintiff seeks monetary relief from a defendant who is immune from such relief. "A legally frivolous claim is one in which the plaintiff asserts the violation of a legal interest that clearly does not exist or asserts facts that do not support an arguable claim." [#17 at 2 (citing *Neitzke v. Williams*, 490 U.S. 319, 324 (1989))]

Claim Three of the Second Amended Complaint alleges that Defendants Shutters and Boxberger improperly disclosed Plaintiff's juvenile records to unauthorized parties. [#50-1 at 25-27] Judge Babcock previously dismissed this claim as legally frivolous because the statute cited by Plaintiff, 18 U.S.C. § 5038, did not provide a private right of action. [#17 at 9 (*citing Andrews v. Heaton*, 483 F.3d 1070, 1076 (10th Cir. 2007))] Plaintiff again references this statute in the Second Amended Complaint. [#50-1 at 9, 25] To the extent Plaintiff argues that Colorado's juvenile sealing laws give Plaintiff a protected liberty interest [#50-1 at 9], courts have rejected that argument. *See United States v. Carney*, 106 F.3d 315, 317 (10th Cir. 1997); *United States v. Jiles*, 658 F.2d 194, 199-200 (3d Cir. 1981); *Hester v. West Virginia*, Civil Action No. 5:07-cv-00401, 2008 WL 4298471, at *15-18 (S.D. W. Va. Sept. 18, 2008). Accordingly, the Court **RECOMMENDS** that Claim Three be **DISMISSED**.

Claim Four of the Second Amended Complaint alleges that Defendant Boxberger violated Plaintiff's due process and privacy rights when she slandered and defamed Plaintiff. [#50-1 at 28] Judge Babcock previously dismissed Plaintiff's defamation claim against Defendant Boxberger because she was protected by absolute immunity. [#17 at 9-10] Unlike the allegations in the First Amended Complaint, it is not entirely clear from the Second Amended Complaint that Defendant Boxberger made her statements in the role of an advocate for the State. [*See* #50-1 at 28 (Plaintiff alleging Defendant Boxberger "knowingly and intentionally slandered" him to his father and stepmother)] As a result, it is not clear that Defendant Boxberger would be absolutely immune from Claim Four. *See Rex v. Teeples*, 753 F.2d 840, 843 (10th Cir. 1985) ("A prosecutor is absolutely immune only for those activities intimately associated with initiating a prosecution [and] presenting the State's case." (quotations omitted)). Nonetheless, Claim Four fails for another reason. As Judge Babcock held when he dismissed Plaintiff's Section 1983 defamation claim against Officer Shutters, "defamation, by itself, is not actionable in a § 1983 claim." [#17 at 10 (*citing Siegert v. Gilley*, 500 U.S. 226, 233 (1991); *Angel v. Torrance Cty. Sheriff's Dep't*, 183 F. App'x 707, 708 (10th Cir. 2006))] For this same reason, Plaintiff's Section 1983 claim for slander and defamation fails. *Id.* Accordingly, the Court **RECOMMENDS** that Claim Four be **DISMISSED**.

Claim Five alleges that Defendants Shutters and Boxberger violated Plaintiff's due process rights and committed the tort of intentional infliction of emotional distress because the state charges forced Plaintiff to relive his past when Plaintiff was a victim of sexual assault. [#50-1 at 29] The Second Amended Complaint makes clear that Plaintiff is challenging the initiation and litigation of the state charges. [*Id.*] Because the

initiation and litigation of the state charges are intimately associated with Defendant Boxberger's prosecutorial function, Claim Five as asserted against Defendant Boxberger is barred by absolute immunity. *See Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) ("[I]n initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983."); *Rex*, 753 F.2d at 843. Accordingly, the Court **RECOMMENDS** that Claim Five be **DISMISSED** against Defendant Boxberger. The Court does not address and makes no recommendation as to the merits of Claim Five against Defendant Shutters.

Claim Six alleges that Defendant Boxberger violated Plaintiff's constitutional rights with respect to actions she took at a bond reduction hearing in the state case. [#50-1 at 30] Once again, this Claim relates directly to Defendant Boxberger's prosecutorial function and is barred by absolute immunity. *See Burns v. Reed*, 500 U.S. 478, 487-92 (1991) (prosecutor's actions at a probable cause hearing before a judge protected by absolute immunity). Accordingly, the Court **RECOMMENDS** that Claim Six be **DISMISSED**.

III. CONCLUSION

For the foregoing reasons:

(1) Plaintiff's Motion to Amend [#50] is **GRANTED**. The Clerk of Court is directed to enter Docket No. 50-1 as Plaintiff's Second Amended Complaint.

(2) The filing of the Second Amended Complaint moots Defendant Shutters' Motion to Dismiss. The Court therefore **DENIES** the Motion to Dismiss

[#43] as moot. Defendant Shutters may file a renewed Motion to Dismiss in response to the Second Amended Complaint.

(3) This Court respectfully **RECOMMENDS** that: (a) Claims Three, Four, and Six in the Second Amended Complaint be **DISMISSED**; (b) Claim Five, as asserted against Defendant Boxberger be **DISMISSED**; and (c) that Defendant Boxberger be dismissed as a party to this lawsuit.[2]

DATED: December 13, 2017

BY THE COURT:

s/Scott T. Varholak
United States Magistrate Judge

[2] Within fourteen days after service of a copy of this Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Griego v. Padilla (In re Griego)*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (holding that the district court's decision to review magistrate judge's recommendation *de novo* despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc*., 52 F.3d 901, 904 (10th Cir. 1995) (finding that cross-claimant waived right to appeal certain portions of magistrate judge's order by failing to object to those portions); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding that plaintiffs waived their right to appeal the magistrate judge's ruling by failing to file objections). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (holding that firm waiver rule does not apply when the interests of justice require review).