No. 21-1371

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JABARI J. JOHNSON,
Plaintiff-Appellant,
v.
REYNA; WARGO; KORIN,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado
No. 1:20-cv-00459-PAB-MEH
The Honorable Philip A. Brimmer

PLAINTIFF-APPELLANT'S OPENING BRIEF

Easha Anand
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
2443 Fillmore St., Suite 380-15875
San Francisco, CA 94115
easha.anand@macarthurjustice.org
(510) 588-1274

David F. Oyer*
Elizabeth A. Bixby*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H St. NE, Suite 275
Washington, DC 20002
lisa.bixby@macarthurjustice.org
david.oyer@macarthurjustice.org
(202) 869-3449

Counsel for Plaintiff-Appellant Jabari Johnson

**Admitted only in California; not admitted in D.C. Practicing under the supervision of the Roderick & Solange MacArthur Justice Center.*

ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

Plaintiff-Appellant Jabari Johnson, proceeding *pro se*, previously filed a notice of appeal after the district court dismissed his claims against defendant Wargo, but before the district court dismissed his claims against defendants Reyna and Corbin and entered final judgment. *See* ECF 54.[1] This Court dismissed that premature appeal on May 20, 2021. ECF 57.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. Final judgment was entered on September 23, 2021. A.111. Mr. Johnson timely filed a notice of appeal on October 20, 2021, which was received by the district court and docketed on October 25, 2021.[2] A.112. This Court has jurisdiction under 28 U.S.C. § 1291.

[1] Citations to the Appendix are in the style of A.#. If a document from the district court docket is not in the Appendix, it is cited to by the district court docket number as ECF #.

[2] Mr. Johnson's October 20, 2021, declaration makes his filing timely under Federal Rule of Appellate Procedure 4(c)(1)(a)(i).

STATEMENT OF ISSUES

While incarcerated at the Limon Correctional Facility, Mr. Johnson was assaulted by Defendants-Appellees Sergeant Reyna, Sergeant Wargo, and Correctional Officer Corbin,[3] who "slammed" his previously fractured jaw and repeatedly stepped on his previously injured foot. The assault resulted in serious injuries—Mr. Johnson needed surgery for his jaw and physical therapy for his foot—and "excruciating pain." The district court dismissed Mr. Johnson's complaint because it held that he had failed to allege a "more than *de minimis*" physical injury, which it believed that 42 U.S.C. § 1997e(e)—a provision of the Prison Litigation Reform Act—requires. The issues on appeal are:

A. Does 42 U.S.C. § 1997e(e), which requires only that a prisoner plead a "physical injury" to recover compensatory damages for "mental or emotional injury," incorporate an atextual requirement that the physical injury be more than *de minimis*?

[3] Mr. Johnson's complaint spelled Corbin's name "Korin"; the correct spelling was supplied by defendants and used by the district court. *See* A.55 n.1.

B. If so, are Mr. Johnson's injuries—a "slammed" fractured jaw requiring surgery and a foot injury necessitating physical therapy, both of which caused him "excruciating pain"—more than *de minimis*?

C. Regardless, did the district court err in dismissing Mr. Johnson's complaint in its entirety, when this Court's precedent makes clear that 42 U.S.C. § 1997e(e) does not foreclose recovery of punitive damages, nominal damages, or compensatory damages for Mr. Johnson's physical injuries?

D. Did the district court err in dismissing Mr. Johnson's *pro se* complaint with prejudice when amendment would not have been futile?

E. Should this Court exercise its discretion to excuse Mr. Johnson's failure to file objections to the second of two identical recommendations by the magistrate judge, where the policy goals underlying the waiver rule are fully satisfied and it would be in the interests of justice to allow his appeal to proceed against defendant Wargo?

STATEMENT OF THE CASE

I. Factual Background

In May 2018, while he was incarcerated at Limon Correctional Facility, Mr. Johnson was told by his case manager that he needed to

come to his office to "retrieve [his] prior grievances." A.13. When Mr. Johnson came to the office as requested, his case manager peppered him with questions about lawsuits Mr. Johnson had filed. *Id.* Mr. Johnson declined to speak about the lawsuits, instead asking his case manager about the next steps in the grievance process. *Id.* His case manager became "irate" at this request and at Mr. Johnson's refusal to answer questions about pending litigation. *Id.* The case manager then told him that if he wouldn't answer questions about his lawsuits, he should leave, and Mr. Johnson agreed to leave. *Id.* His case manager instructed that he should be "cuff[ed] up," even though Mr. Johnson did not pose a threat and had broken no rules, and called in the defendants—Sergeant Reyna, Sergeant Wargo, and Correctional Officer Corbin—to escort Mr. Johnson back to his cell. *Id.*

After the three defendants had begun escorting Mr. Johnson back to his unit, they stopped and placed leg restraints on him. *Id.* As the restraints were being applied, Mr. Johnson expressed his opinion that his constitutional rights were being violated. A.14. At that moment, Reyna intentionally stepped on Mr. Johnson's right foot. *Id.* At the time, Mr. Johnson was suffering from a previously fractured jaw and previously

injured right foot, both of which had gone untreated. *Id.* Mr. Johnson asked Reyna to remove his foot, explaining that because of his untreated prior injury, Reyna was causing Mr. Johnson extreme pain. *Id.* Instead of stopping, Reyna simply "smile[d]" and continued to "knowingly inflict[] pain" on Mr. Johnson with a "sadistic and malicious intent." *Id.*

Matters worsened from there. After Mr. Johnson said that he believed he was being retaliated against for filing lawsuits and grievances, defendants pushed Mr. Johnson, forcing him to move "faster than [he] is able to walk." *Id.* As Mr. Johnson approached the stairs, he attempted to carefully step onto the staircase using his left foot first, given the painful injury to his right foot. *Id.* The defendants apparently had no patience for this, as Reyna then "slamm[ed]" Mr. Johnson "on his untreated fractured jaw"—despite Mr. Johnson posing no threat. *Id.* Mr. Johnson told the defendants that he was in "excruciating pain" and needed medical treatment. *Id.* The defendants ignored his pleas, instead "dragging" him "15 to 20 feet" away from the staircase. And despite Mr. Johnson telling defendants about his injured foot and the excruciating pain he was experiencing from Reyna stepping on his foot earlier, Wargo

again stepped on Mr. Johnson's injured foot—even though Mr. Johnson begged her not to because of his injury. A.14, 16.

When Mr. Johnson complained, Wargo told him to "shut the fuck up" and to stop "running his mouth." A.14. Mr. Johnson accused the defendants of assaulting him because of his protected speech, which Wargo did not deny. *Id.*

Mr. Johnson's injuries were so severe that they necessitated medical intervention. To treat his fractured and "concaved" jaw, prison medical staff recommended surgery by a facial and oral surgeon. A.16. His injured right foot required physical therapy. *Id.*

II. Procedural Background

Mr. Johnson filed suit *pro se*. A.10. He alleged that defendants used "unnecessary force with the malicious intent to cause bodily injury" and "excessive force which was not needed with the intent to cause/inflict bodily harm due to protected speech."[4] A.16-17. He also pled that he

[4] Mr. Johnson alleged that defendants' use of force violated the Eighth Amendment. *See* A.16. And although he did not specifically mention the First Amendment, his reference to "protected speech" clearly raises a claim that defendants violated that constitutional provision by retaliating against him because of his request to escalate his grievances

suffered "injuries to [his] jaw and right foot which require further treatment" as a result of defendants' "willful [and] wanton infliction of pain and injury." *Id.* Mr. Johnson further alleged that in addition to his physical injuries, the assault caused him depression and anxiety. *Id.* He requested "punitive and compensatory damages." *Id.*

The district court dismissed the case. As relevant here, the district court concluded that Mr. Johnson's claims against the defendants in their individual capacities were barred by 42 U.S.C. § 1997e(e).[5] A.104. That provision requires a "prior showing of physical injury" before a prisoner can request compensatory damages "for mental or emotional injury suffered while in custody." 42 U.S.C. § 1997e(e). Although the statute merely requires a "physical injury," period, not one of any particular severity, the district court concluded that the physical injuries Mr. Johnson alleged were "*de minimis*" and therefore did not qualify under § 1997e(e). A.104.

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and his involvement in litigation. A.13-14; *see Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (court required to review *pro se* pleadings for existence of valid claims, "despite plaintiff's failure to cite proper legal authority [or] his confusion of various legal theories"); *Doe v. Univ. of Denver*, 952 F.3d 1182, 1187 n.2 (10th Cir. 2020) (same).

[5] The district court also dismissed Mr. Johnson's official-capacity claims. A.103-04. Mr. Johnson does not contest that ruling on appeal.

The district court went on to dismiss Mr. Johnson's complaint. It purported to do so under § 1997e(e), though that section only limits compensatory damages for mental or emotional injury and does not provide a basis for dismissing a claim. A.104-07. And defendants did not argue—and the district court did not find—that Mr. Johnson failed to state a claim on which relief could be granted.

Finally, the district court denied Mr. Johnson leave to amend. A.107-09.

SUMMARY OF ARGUMENT

I. The district court erred in holding that 42 U.S.C. § 1997e(e), which bars incarcerated plaintiffs from seeking compensatory damages for mental or emotional injury suffered in custody without "a prior showing of a physical injury," warranted dismissal of Mr. Johnson's complaint. **A.** The district court held that § 1997e(e) incorporates an atextual "more-than-*de-minimis*" physical injury requirement. But imposing a "more-than-*de-minimis*" requirement is incompatible with basic principles of statutory interpretation; it finds no support in the statute's text, structure, or history. This Court has never adopted a more-than-*de-minimis* requirement and should not do so now. **B.** Even if a

more-than-*de-minimis* injury is required, Mr. Johnson's injuries were not *de minimis*. Mr. Johnson alleged three sets of injuries, all of which suffice to satisfy § 1997e(e). First, Mr. Johnson alleged that defendants' assault caused further injury to his previously fractured jaw and previously injured foot, necessitating surgery for his jaw and physical therapy for his foot. Second, Mr. Johnson experienced "excruciating pain" from his jaw and foot injuries, and this Court has explained that pain is a physical injury, *not* an emotional injury. Third, even Mr. Johnson's pre-existing foot and jaw injuries are "prior showings of physical injury" within the meaning of § 1997e(e).

II. Even if § 1997e(e) did bar his claims for compensatory damages for mental and emotional injury, Mr. Johnson would still be eligible for several forms of relief under this Court's precedent: compensatory damages for his physical injuries; nominal damages; and punitive damages. The district court therefore erred in dismissing his complaint in its entirety on § 1997e(e) grounds.

III. The district court also erred in denying the *pro se* Mr. Johnson leave to amend. This Court requires that dismissal be without prejudice if it is "at all possible" for the plaintiff to correct any defects, and here, it

was readily apparent that amendment would allow Mr. Johnson to address the district court's confusion about the nature of his injuries.

IV. This Court should allow Mr. Johnson to appeal his claims against defendant Wargo, despite his lack of timely objection. Mr. Johnson *did* timely object to the magistrate judge's virtually identical recommendation to grant defendants Reyna and Corbin's identical motion to dismiss, and that first set of objections fully accomplished the goals behind this Court's waiver rule.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's Rule 12(b)(6) dismissal. *Nat. Res. Def. Council v. McCarthy*, 993 F.3d 1243, 1250 (10th Cir. 2021). Because Mr. Johnson proceeded *pro se* in the district court, this Court liberally construes his pleadings, accepts the factual allegations in the complaint as true, and resolves all reasonable inferences in Mr. Johnson's favor. *Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir. 2013).

This Court also reviews *de novo* questions of statutory interpretation, including of the Prison Litigation Reform Act. *May v. Segovia*, 929 F.3d 1223, 1227 (10th Cir. 2019).

ARGUMENT

I. Section 1997e(e) does not bar Mr. Johnson's claims.

The district court erred in holding that 42 U.S.C. § 1997e(e), a provision of the Prison Litigation Reform Act (PLRA), barred Mr. Johnson's claims. Section 1997e(e) provides that:

> No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).

This provision does not foreclose Mr. Johnson's claims because he made "a prior showing of physical injury." To wit, Mr. Johnson pled that defendants' assault caused further injury to his jaw and foot—to the point he required surgery for his jaw and physical therapy for his foot—when they stepped on his previously injured foot and slammed his previously fractured jaw. Yet the district court held that those injuries were *de minimis*, and thus did not qualify as physical injuries under the statute. A.104-05.

The district court's holding was wrong. Section 1997e(e) does not contain a more-than-*de-minimis* injury requirement; such a requirement is atextual and at odds with basic principles of statutory interpretation,

and this Court has never endorsed it. And even if such a requirement applies, Mr. Johnson adequately pled several sets of "more-than-*de-minimis*" physical injuries.

A. Section 1997e(e) requires only a physical injury, not a serious physical injury.

The district court only found that § 1997e(e) barred Mr. Johnson's claims because it grafted onto the statute an atextual requirement that a prisoner plead a "more than *de minimis*" physical injury as a predicate to recovering compensatory damages for mental or emotional injury. But this Court has never adopted such a requirement. And for good reason: the "more-than-*de-minimis*" requirement can be found absolutely nowhere in the text of § 1997e(e), nor can it find support in the statute's structure or from statutory interpretation principles. This Court should adopt the only interpretation of the statute that the text can bear and make clear that a prisoner's physical injury need not be "more than *de minimis*" for purposes of § 1997e(e).

1. Basic principles of statutory interpretation foreclose imposing a "more-than-*de-minimis*" physical injury requirement.

The text, structure, and history of § 1997e(e) make clear that the provision requires only a showing of physical harm or damage to one's body, not an injury that is "more than *de minimis*."

Start with the text. *See, e.g.*, *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) ("As in any statutory construction case, we start, of course, with the text.") (cleaned up). Where Congress has left terms undefined, this Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020); *see also Cloer*, 569 U.S. at 376. The ordinary meaning of "physical injury" in 1996, when the PLRA was passed, included bodily injury of *any* severity. Black's Law Dictionary defined "physical injury" as "[b]odily harm or hurt, excluding mental distress, fright, or emotional disturbance"—no particular level of severity necessary. BLACK'S LAW DICTIONARY 1147 (6th ed. 1990). "Injury," moreover, reads "[a]ny wrong or damage done to another, either in his

person, rights, reputation, or property." *Id.* at 785.[6] Non-legal dictionaries are similarly inclusive. In one, for instance, "injury" is defined in relevant part as "an act that damages or hurts." *Injury*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 602 (10th ed. 1993).[7]

If the plain text weren't enough, the structure of the PLRA confirms that § 1997e(e) imposes no "more-than-*de-minimis*" requirement. Courts should not infer a requirement outside a statute's text "when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. Imm. & Customs Enf't*, 543 U.S. 335, 341 (2005). And where Congress wanted to require an injury of a particular degree of severity in the PLRA, it knew how to do so: in a separate portion of the PLRA, Congress required a showing of a "*serious* physical injury" to exempt a litigant from the PLRA's "three strikes" rule.

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[6] *See also Bodily Injuries*, BALLENTINE'S LAW DICTIONARY (William S. Anderson ed., 3d ed.) (encompasses "various degrees of harm").

[7] *See also Injury*, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("Hurt or loss caused to or sustained by a person or thing."); *Injury*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d unabridged ed. 1987) ("[H]arm or damage that is done or sustained.").

Public L. 104–134, April 26, 1996, 110 Stat. 1321 § 804(d) (codified as 28 U.S.C. § 1915(g)) (emphasis added).

This argument is bolstered by Congress's 2013 amendment to § 1997e(e), which added "or the commission of a sexual act (as defined in section 2246 of Title 18)" to the end of the provision. Defining "sexual act" by reference to 18 U.S.C. § 2246 made the definition relatively narrow, excluding most non-penetrative contact. *Id.* If Congress had wanted to similarly narrow the "physical injury" language, it could have done so. Indeed, the very provision that Congress looked to when it incorporated the "sexual act" definition—§ 2246—has a subsection defining the term "*serious* bodily injury." 18 U.S.C. § 2246(4) (emphasis added). Congress could easily have incorporated this definition into § 1997e(e) when it added the reference to the definition of "sexual act," but it chose not to. That evinces "a deliberate congressional choice"—one that should be respected. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994).

This understanding of the PLRA is also consistent with the way the phrase "physical injury" is used in other settings. Under common-law tort principles, an "injury" is "the invasion of any legally protected interest."

Restatement (Second) of Torts § 7(1). In that context, the term "injury" is specifically distinguished from the term "harm": an injury can occur with *no* showing of any harm, let alone more-than-*de-minimis* harm. *Id.* § 7 cmt. a. Similarly, the Model Penal Code defines "bodily injury"—synonymous, per Black's Law Dictionary, with "physical injury," *see* BLACK'S LAW DICTIONARY 175, 1147—as "physical pain, illness or any impairment of physical condition," and does not require any particular severity. Model Penal Code § 210.0. And the term "bodily injury" is defined in various federal statutes to include such minor injuries as "a cut, abrasion, bruise" or "any other injury to the body, no matter how temporary." *See, e.g.*, 18 U.S.C. §§ 831(g)(5); 1365(h)(4); 1515(a)(5); 1864(d)(2). In other settings, too, drafters routinely distinguish between "physical injury"—read capaciously to include any bodily harm, however minor—and "serious" or "significant" physical injuries.[8]

[8] *See, e.g.*, Model Penal Code § 210.0 (distinguishing between "bodily injury" and "serious bodily injury"); Colo. Rev. Stat. § 18-1-901(3) (separately defining "bodily injury" and "serious bodily injury"); *cf. United States v. Singleton*, 917 F.2d 411, 413-14 (9th Cir. 1990) ("[I]t is clear that a 'significant' physical injury . . . must mean something more than 'physical injury' standing alone. Surely, not just any damage or hurt of a physical kind can satisfy the [Sentencing] Guidelines, for that would encompass every physical injury.").

2. This Court should not adopt other circuits' "more-than-*de-minimis*" requirement because it is atextual and incompatible with Supreme Court precedent.

Notwithstanding the plain text of the statute, the district court concluded that "physical injury" in § 1997e(e) means "more than *de minimis* physical injury." A.104. The district court did not cite to any decisions of this Court, but instead to a district court case collecting out-of-circuit authorities. *Id.* (citing *Clifton v. Eubanks*, 418 F. Supp. 2d 1243, 1245-46 (D. Colo. 2006)). Those out-of-circuit authorities were wrong at the time they were decided—most around two decades ago—and are doubly wrong in light of intervening Supreme Court precedent.

Consider the first published decision to graft a more-than-*de-minimis* requirement onto the statute: the Fifth Circuit's decision in *Siglar v. Hightower*, 112 F.3d 191 (5th Cir. 1997). *Siglar* announced that "Eighth Amendment standards guide our analysis." 112 F.3d at 193. It made no reference to the text of the statute, and gave no explanation for why Congress would incorporate the Eighth Amendment test for "cruel and unusual punishment" into § 1997e(e) by using the term "physical injury." *Id. Siglar* then made a second inexplicable announcement: it declared that "Eighth Amendment standards" require an injury that is

"more than *de minimus* [sic]." *Id.* For that proposition, *Siglar* cited *Hudson v. McMillian*, 503 U.S. 1 (1992). But the Supreme Court in *Hudson* noted only that "*de minimis* uses of physical *force*" are not actionable, and made clear that "[t]he absence of serious injury is . . . relevant to the Eighth Amendment inquiry, but does not end it." 503 U.S. at 7, 10 (emphasis added). Indeed, a concurrence in that case lauded the Court for "put[ting] to rest a seriously misguided view that pain inflicted by an excessive use of force is actionable under the Eighth Amendment only when coupled with 'significant injury.'" *Id.* at 13 (Blackmun, J., concurring).

So *Siglar* was untenable the day it was decided. And in the decades since, *Siglar* has only become less defensible, as the Supreme Court has made even more clear that *Siglar*'s understanding of "Eighth Amendment standards" was dead wrong. In *Wilkins v. Gaddy*, 559 U.S. 35, 39 (2010), the Supreme Court held that an injury viewed as *de minimis* by the lower court could still support a claim of excessive force under the Eighth Amendment. *Wilkins* did not mince words, describing the court of appeals' imposition of a more-than-*de-minimis* requirement as "not defensible" and "strained." *Id.* Notably, even the Fifth Circuit

itself recently indicated that its "more-than-*de-minimis*" physical-injury requirement was incompatible with *Wilkins*. *Buchanan v. Harris*, No. 20-20408, 2021 WL 4514694, at *2 (5th Cir. Oct. 1, 2021).

Most other circuits to adopt a more-than-*de-minimis* requirement under § 1997e(e) largely adopted *Siglar*'s reasoning wholesale. *See, e.g.*, *Harris v. Garner*, 190 F.3d 1279, 1286-87 (11th Cir. 1999), *vacated in part on other grounds*, 216 F.3d 970 (11th Cir. 2000) (en banc); *Corsetti v. Tessmer*, 41 F. App'x 753, 755 (6th Cir. 2002); *McAdoo v. Martin*, 899 F.3d 521, 525 (8th Cir. 2018); *cf. Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (citing *Siglar* in considering, but not adopting, more-than-*de-minimis* requirement).

Those circuits that did not blindly follow *Siglar* nonetheless did little to tether their analysis to the text of the statute. In *Mitchell v. Horn*, for instance, the Third Circuit acknowledged that the plain text of the statute could not support a "more-than-*de-minimis*" requirement. 318 F.3d 523, 535-36 (3d Cir. 2003). But it held that the plain text should be ignored because taking the statute at its word would "produce an unintended (indeed absurd) result"—allowing emotional injury claims where a prisoner "received a paper cut, for example." *Mitchell*, 318 F.3d

at 535. As a practical matter, though, a prisoner filing suit over a paper cut would be hard-pressed to state a claim under the Eighth Amendment or, indeed, any other constitutional or statutory provision. Substantive law, not § 1997e(e), should be the basis for dismissing the "paper cut" claims; indeed, were § 1997e(e) the basis for dismissing such claims, the plaintiff with a superficial flesh wound could still proceed with requests for injunctive relief, punitive damages, or nominal damages, none of which are affected by § 1997e(e). *See infra* at 28-31. And even if the Third Circuit's concerns were founded, courts are not "free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019). The Ninth Circuit made a similar mistake in interpreting § 1997e(e), immediately turning to legislative intent without ever grappling with the text of the statute. *See Oliver v. Keller*, 289 F.3d 623, 627-28 (9th Cir. 2002) (adopting a "more-than-*de-minimis*" injury requirement as consistent with legislative history and Congressional intent, with no discussion of ordinary meaning or other textual clues).

In sum, though some of this Court's sister circuits have added a "more-than-*de-minimis*" requirement to the plain text of § 1997e(e),

they've done so without reference to the text of the statute and in contravention of the Supreme Court's exhortation that courts should first "exhaust all the textual and structural clues" bearing on the "ordinary meaning" of the statute's terms before turning to any other considerations, like legislative intent or policy concerns. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021). This Court should not follow suit.

* * *

Though this Court has never adopted a "more-than-*de-minimis*" requirement, the district court in this case is far from the first in this Circuit to dismiss a prisoner-plaintiff's complaint on that basis. And the atextual requirement is used to foreclose damages for injuries far more serious than a paper cut. *See, e.g.*, *Jordanoff v. Lester*, No. CIV-15-939-R, 2018 WL 1352184, at *1, *1 n.2 (W.D. Okla. Mar. 15, 2018) (dismissing claim for compensatory damages where plaintiff alleged that he was kneed in the face); *Folts v. Grady Cnty. Bd. of Cnty. Comm'rs*, 2016 WL 7116184, at *2 (W.D. Okla. Nov. 2, 2016) (holding that "numbness, pain, and open cuts on [the plaintiff's] wrists" and a suicide attempt were not more than *de minimis*). This Court should use this opportunity to make

clear that the term "physical injury" in § 1997e(e) means just what it says: "physical injury."

B. Even if this Court chooses to add an atextual "more-than-*de-minimis*" requirement to § 1997e(e), Mr. Johnson's allegations satisfy that requirement.

Even if a more-than-*de-minimis* physical injury requirement applies, the district court still erred in finding that § 1997e(e) foreclosed compensatory damages for mental or emotional injury. Mr. Johnson's complaint alleged that he incurred three sets of more-than-*de-minimis* physical injuries when defendants thrashed his already injured foot and already fractured jaw. *First*, he alleged that Defendants' blows to his foot and jaw further injured both, ultimately necessitating physical therapy and surgery. A.16. *Second*, he alleged that Defendants' assault caused him "excruciating pain." A.14, 16. *Third*, he alleged that even before the incident in question, he had suffered an incapacitating injury to his right foot and a fracture to his jaw. A.14. Any one of those sets of allegations would be sufficient to satisfy § 1997e(e)'s "prior showing of a physical injury" requirement.

1. *First*, Mr. Johnson alleged that defendants' conduct exacerbated his preexisting foot and jaw injuries. Because § 1997e(e) does not, on its

face, contain a more-than-*de-minimis* requirement, there is no standard to guide this Court's analysis. But the circuits that have adopted the "more-than-*de-minimis*" requirement have held that an injury necessitating medical treatment suffices. *See Stallworth v. Wilkins*, 802 F. App'x 435, 441 (11th Cir. 2020); *Gomez v. Chandler*, 163 F.3d 921, 924-25 (5th Cir. 1999). Here, Mr. Johnson alleged that defendants' conduct worsened his foot injury to the point where he required "physical therapy" to recover. A.14, 16. So, too, with Mr. Johnson's jaw injury: Mr. Johnson pled that after defendant Reyna "slamm[ed] [his] untreated fractured jaw," he was referred for oral surgery. *Id.*

The district court concluded otherwise because it believed "Mr. Johnson does not allege that he suffered any new injury or exacerbation of his prior conditions." A.105. But Mr. Johnson's complaint alleged that defendants' needless use of force on his untreated jaw and foot caused him "pain *and injury*"—indeed, injury so serious it required "further treatment," including surgery and physical therapy. *See* A.16, 17 (emphasis added). The district court's failure to heed the plain words of Mr. Johnson's complaint is all the more perplexing in light of Mr. Johnson's response to the motion to dismiss, which stated explicitly that

he "*did suffer further injury* to [his] right foot and jaw." A.53 (emphasis added). Mr. Johnson again reiterated that he had suffered additional injury in his objections to the magistrate judge's recommendation, explaining that defendants caused him "*further* injury to [his] right foot and fractured jaw." A.66 (emphasis added). And those injuries don't become any less severe or serious simply because they were exacerbations of his pre-existing injuries.[9]

Particularly because the district court was required to resolve all reasonable inferences in Mr. Johnson's favor and liberally construe his pleadings, *Diversey*, 738 F.3d at 1199, the district court's failure to view the significant exacerbation of Mr. Johnson's foot and jaw injuries—to

[9] The effect of Mr. Johnson's pre-existing injuries might be likened to the "eggshell plaintiff" or "thin skull" doctrine in the common law of torts. *Cf. Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986) (damages under § 1983 are normally determined by common law tort principles). That doctrine provides that a "tortfeasor takes his victim as it finds him," and cannot escape liability "even if the victim had a pre-existing condition that made the consequences of the wrongful act more severe for him than they would have been for a person without the condition." *O'Neal v. Bd. of Cnty. Comm'rs of Cnty. of Fremont*, No. 16-CV-01005-TMT-KLM, 2020 WL 2526782, at *10 (D. Colo. May 18, 2020) (Tymkovich, C.J.). That is, just because Mr. Johnson's previous injuries made him especially susceptible to experiencing further injury and excruciating pain from defendants' malicious use of force doesn't mean the defendants are any less liable for the injuries he suffered. *See* Restatement (Third) of Torts § 31 (Am. Law Inst. 2021).

the point where he needed physical therapy and surgery to treat them—as more than *de minimis* requires reversal.

2. *Second,* Mr. Johnson alleged that he experienced "excruciating pain" as a result of defendants' assault. As this Court has previously indicated, physical pain is not an "emotional injury," but rather a physical one. *Mata v. Saiz*, 427 F.3d 745, 754 n.4 (10th Cir. 2005). In *Mata*, this Court had "no doubt" that a prisoner who suffered delay of care for chest pain (ultimately culminating in a heart attack) had suffered "physical injury from her chest *pains*" and that she was "suing for the *pain* she endured, *not* for emotional injury." *Id.* (emphasis added).

Mata's separation of physical pain from emotional injury is consistent with principles of statutory interpretation. When the PLRA was enacted in 1996, Black's Law Dictionary defined "physical injury" as bodily harm or injury, *Physical Injury*, BLACK'S LAW DICTIONARY 1147 (6th ed. 1990), which, in turn, was defined to include "[p]hysical *pain*." *Bodily Injury*, BLACK'S LAW DICTIONARY 786 (6th ed. 1990) (emphasis added). Similarly, throughout the U.S. Code, Congress has defined physical or bodily injury to include physical pain. *See, e.g.*, 42 U.S.C. § 1397j (defining "[s]erious bodily injury" as "an injury involving extreme

physical pain"); 18 U.S.C. § 831(g)(5)(B) (defining bodily injury to mean "physical pain").

In short, physical pain is a widely recognized type of physical injury and is distinct from "mental or emotional injury." Because Mr. Johnson suffered "excruciating pain" from defendants repeatedly stomping on his untreated foot and slamming his fractured jaw, he suffered a more-than-*de-minimis* physical injury.

3. *Third*, Mr. Johnson alleged that he had severe pre-existing injuries at the time he encountered defendants Reyna, Corbin, and Wargo. His jaw was fractured, and his right foot was sufficiently injured that it required medical treatment. A.13-14 (describing "untreated fractured jaw" and "untreated" right foot). Each of those constitutes a "prior showing of a physical injury" within the terms of § 1997e(e), even if the "physical injury" must be "more than *de minimis*." *See, e.g.*, *McAdoo*, 899 F.3d at 525-26 (fractured shoulder more than *de minimis*); *Hubbard v. Taylor*, 399 F.3d 150, 154, 167 n.24 (3d Cir. 2005) (broken leg more than *de minimis*).

To be clear, Mr. Johnson does not allege that defendants *caused* the preexisting injury to his right foot or fractured his jaw. But § 1997e(e)

does not require a "prior showing of physical injury *caused by defendants*"; it simply requires a "prior showing of physical injury," period. In *Sealock v. Colorado*, for instance, this Court considered a case where the plaintiff suffered from a heart attack that defendants failed to promptly treat. 218 F.3d 1205, 1210-11 (10th Cir. 2000). *Sealock* held that the plaintiff's heart attack constituted a "prior showing of physical injury," even though defendants obviously did not cause the plaintiff's heart attack. *See also McAdoo*, 899 F.3d at 526-27 (rejecting proposition that "§ 1997e(e) requires that the unconstitutional conduct must cause the physical injury" and holding that fractured shoulder constituted "prior showing of physical injury," even where plaintiff sought damages only for delay in treating fractured shoulder, not for events that led to fractured shoulder).

So too here. As in *Sealock*, the defendants' conduct was unconstitutional in part *because* of the preexisting injury: in *Sealock*, a delay in taking the plaintiff to the hospital would not have been unconstitutional but for the heart attack, and in Mr. Johnson's case, a stomp on the foot or even a slam to the face might not as clearly violate the Constitution were it not for Mr. Johnson's pre-existing foot and jaw

injuries. And as in *Sealock*, the preexisting injuries are inextricably intertwined with the injuries caused by defendants—there, the worsening of the plaintiff's condition due to delays, and here, the additional damage to Mr. Johnson's foot and jaw caused by defendants' use of unnecessary force. Mr. Johnson's preexisting injuries—his untreated right foot and fractured jaw—thus also constitute a "prior showing of a physical injury" under § 1997e(e).

* * *

Even if § 1997e(e) requires proof not only of a "physical injury" but a "more-than-*de-minimis*" physical injury, then, Mr. Johnson alleged at least three categories of injuries—the further damage to his jaw and foot, the excruciating pain he suffered, and his preexisting jaw and foot injuries—that satisfy that requirement.

II. Even if § 1997e(e) foreclosed compensatory damages for Mr. Johnson's mental injury, dismissal of his complaint was improper because Mr. Johnson was entitled to multiple other forms of relief unaffected by § 1997e(e)'s strictures.

Section 1997e(e) only limits plaintiffs' compensatory damages for "mental or emotional injury." *Searles v. Van Bebber*, 251 F.3d 869, 878 (10th Cir. 2001). It does not foreclose other kinds of damages, *id.*, and it

certainly does not require dismissing a claim—let alone a complaint—in its entirety. Defendants did not argue (and the district court did not find) that Mr. Johnson's allegations failed to state a claim—only that § 1997e(e) limited his entitlement to compensatory damages. *See* A.39-42; A.73-76. The district court thus erred in dismissing Mr. Johnson's case, because Mr. Johnson can recover at least three categories of damages even if § 1997e(e) forecloses compensation for his mental and emotional injuries.

First, compensatory damages for *physical* injury. Nothing in § 1997e(e) bars recovery of compensatory damages for physical injury; rather, the statute only limits compensatory damages for "mental or emotional injury." As detailed above, Mr. Johnson pled that defendants' attack significantly exacerbated his preexisting foot and jaw injuries. *Supra* at 22-24. Because those injuries were physical—not "mental or emotional"—they are themselves compensable, even if they are found *de minimis* and deemed to bar Mr. Johnson's access to compensatory damages for "mental or emotional injury." He also pled that he suffered "excruciating pain," and, as this Court has made clear, pain is not a "mental or emotional injury" subject to the strictures of § 1997e(e). *Mata*,

427 F.3d at 754 n.4; *supra* at 25-26. Mr. Johnson is thus eligible for compensatory damages for his injuries and pain, whether or not those injuries and pain constitute a "prior showing of physical injury" under § 1997e(e).

Second, punitive damages. This Court has squarely held that a plaintiff whose compensatory damages are barred under § 1997e(e) can still recover punitive damages. *Searles*, 251 F.3d at 880-81. Mr. Johnson expressly sought punitive damages. A.17. He thus has a viable claim for recovering punitive damages irrespective of whether he pled a physical injury within the meaning of § 1997e(e).

Finally, nominal damages. As with punitive damages, this Court has expressly held that a plaintiff whose compensatory damages are barred under § 1997e(e) can still recover nominal damages. *Searles*, 251 F.3d at 878-79. Although Mr. Johnson did not expressly seek nominal damages, this Court has stated that "an award of nominal damages is mandatory upon a finding of a constitutional violation," and Mr. Johnson alleges a constitutional violation here. *Id.* at 879; *see also Allah v. Al-Hafeez*, 226 F.3d 247, 251 (3d Cir. 2000) ("Although [the plaintiff] does not expressly seek nominal damages in his complaint, this court has held

that it is not necessary to allege nominal damages.") (cleaned up). Mr. Johnson can therefore recover nominal damages without regard to § 1997e(e)'s strictures.

III. The district court erred in dismissing Mr. Johnson's *pro se* complaint with prejudice.

Even if this Court were to determine that § 1997e(e) requires a more-than-*de-minimis* injury, that none of Mr. Johnson's injuries clear that bar, *and* that Mr. Johnson had no other types of damages available, the district court still warrants reversal because it denied the *pro se* Mr. Johnson leave to amend. This Court has long held that "if it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief, the court should dismiss with leave to amend." *Reynoldson v. Shillinger*, 907 F.2d 124, 126 (10th Cir. 1990) (cleaned up). This is especially true for *pro se* litigants, given this Court's admonition that *pro se* prisoner complaints must be construed liberally—that is, if a court "can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, [it] should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence

construction, or his unfamiliarity with pleading requirements." *Diversey*, 738 F.3d at 1199.

Here, there was no indication that granting Mr. Johnson leave to amend would be futile; indeed, even the district court did not actually find that the defects it identified were irremediable. Instead, it denied leave to amend for three reasons, none of which withstand review.

First, the district court accepted the magistrate judge's reasoning that because Mr. Johnson was an "experienced" *pro se* litigant who had filed a number of other complaints, he effectively should not receive the same kind of leniency otherwise granted to *pro se* plaintiffs. A.107-08. But just because Mr. Johnson has filed other complaints does not mean that he was familiar with the intricacies of § 1997e(e)'s physical injury requirement (especially since the more-than-*de-minimis* requirement imposed by the district court is found nowhere in the text of the statute and has never been required by this Court), let alone that he somehow had knowledge approaching that of a lawyer and therefore did not warrant the leniency owed to *pro se* litigants.

Second, the magistrate judge interpreted Mr. Johnson's complaint as not alleging any further injury or exacerbation of his existing injuries,

a finding the district court appeared to accept. *See* A.105. That finding was wrong, for the reasons explained previously. *See supra* at 22-24. But even if the district court found the allegations in Mr. Johnson's complaint ambiguous as to whether he suffered further injury to his previously injured jaw and foot, both Mr. Johnson's objections to the magistrate's recommendations and his briefing on the motions to dismiss made exceedingly clear that he did, in fact, suffer *additional* injury above and beyond his existing injuries. A.53 ("*did suffer further* injury") (emphasis added); A.66, 80. It was thus more than "possible" that Mr. Johnson could "correct the defect in the pleading" by amending his complaint to further clarify his injuries and satisfy the district court's conception of § 1997e(e). *See Reynoldson*, 907 F.2d at 125.

Finally, the district court apparently placed a great deal of weight on Mr. Johnson's statements about amendment—that he had "no need to amend"—in his objections to the magistrate judge's recommendation to dismiss his complaint. *See* A.108-09 (citing A.67). As this Court's sister circuits have held, "a district court should grant leave to amend *even if* no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts."

Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (emphasis added); *Phillips v. County of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008) ("It does not matter whether or not a plaintiff seeks leave to amend . . . if a complaint is vulnerable to 12(b)(6) dismissal, a district court must permit a curative amendment, unless an amendment would be inequitable or futile."). Thus, even if the district court interpreted Mr. Johnson's statement to mean he was not currently seeking leave to amend, the court *still* should have granted him leave because amendment would not have been futile.

In any event, read in context and liberally construed, Mr. Johnson's statement that he had no need to amend was simply a statement that he believed his complaint as originally filed satisfied the strictures of § 1997e(e); it should not be taken as a waiver of his right to amend. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 n.3 (10th Cir. 1991) (the rule to liberally construe *pro se* pleadings applies to *all* filings, not just complaint).

Moreover, at the time he filed his objections to the magistrate's recommendation to dismiss his complaint against defendants Reyna and Corbin in December 2020, Mr. Johnson already had a motion for leave to

file a supplemental complaint pending. *Compare* ECF 30 (November 23, 2020, motion for leave to file supplemental pleading under Rule 15(d)) *with* A.66 (December 14, 2020, objections), *and* ECF 48 (January 25, 2021, magistrate judge's recommendation denying leave to file supplemental pleading). Given his *pro se* status, Mr. Johnson may well have not understood that it was even possible for him to seek leave to file an amended complaint while his prior motion to file a supplemental complaint was still pending.

And though the district court denied Mr. Johnson leave to file that supplemental complaint (a decision Mr. Johnson does not challenge on appeal), that decision does not mean that leave to amend would have been futile. Mr. Johnson's proposed supplemental pleading *predated* the magistrate judge's recommendation to dismiss his complaint. *Compare* ECF 30 (proposed supplemental complaint, dated November 17, 2020, and filed on the docket November 23, 2020) *with* A.66 (magistrate judge's recommendation to dismiss complaint, dated November 23, 2020). This means Mr. Johnson never had an opportunity to amend his complaint in response to the magistrate judge's findings and recommendations. *See Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987), *superseded by statute*

on other grounds as stated in Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) (en banc) (a "pro se litigant who amends his complaint at his own instance without any guidance from the court [and] . . . without an understanding of underlying deficiencies" is "likely to repeat previous errors"); *Hall*, 935 F.2d at 1110 ("The plaintiff whose factual allegations are close to stating a claim but are missing some important element that may not have occurred to him should be allowed to amend his complaint.") (cleaned up).

In short, because it was clear that the *pro se* Mr. Johnson could have amended his complaint to satisfy the district court's interpretation of § 1997e(e), the district court abused its discretion in dismissing his complaint with prejudice.

IV. Mr. Johnson should be allowed to proceed against defendant Wargo.

Although this Court generally requires "timely objections to the magistrate's findings or recommendations" as a prerequisite to appellate review, that rule "need not be applied where the interests of justice so dictate." *Wirsching v. Colorado*, 360 F.3d 1191, 1197 (10th Cir. 2004).

Here, Mr. Johnson filed timely objections to the magistrate judge's report and recommendation to grant the motion to dismiss filed by

defendants Reyna and Corbin. A.67-68 (arguing that magistrate judge erred in finding no "physical injury" under § 1997e(e)); A.100-01 (objection was timely filed). Then, defendant Wargo filed a motion to dismiss that was virtually identical to the motion filed by defendants Reyna and Corbin. *Compare* A.35-44 (Reyna and Corbin motion) *with* A.69-78 (Wargo motion). The magistrate judge filed the same report and recommendation—virtually verbatim—to grant Wargo's motion as he had filed in recommending the grant of Reyna's and Corbin's motion. *Compare* A.82-92 (report and recommendation as to Wargo motion) *with* A.55-65 (report and recommendation as to Reyna and Corbin motion).

Although Mr. Johnson did not timely object to this second report and recommendation, this Court should nonetheless review the dismissal of claims as to defendant Wargo because "the interests of justice so dictate" and because all of the policy considerations underlying the rule are satisfied. *Wirsching*, 360 F.3d at 1197. The timely objection rule is motivated by a desire to "enable[] the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." *United States v. One Parcel of Real Prop., With Buildings, Appurtenances, Improvements, & Contents, Known as: 2121 E. 30th St.,*

Tulsa, Oklahoma, 73 F.3d 1057, 1059 (10th Cir. 1996) (quoting *Thomas v. Arn*, 474 U.S. 140, 147 (1985)). Because the two reports and recommendations were virtually identical, Mr. Johnson's objections to the first recommendation fully "enable[d] the district judge to focus attention on . . . the heart of the parties' dispute." *Thomas*, 474 U.S. at 147.

The timely objection rule is also animated by concerns about "judicial efficiency" and allowing the district court to "correct any errors immediately." *One Parcel of Real. Prop.*, 73 F.3d at 1059. Here, too, the district judge was just as able to "correct any errors immediately," *id.*, with the benefit of the first set of objections as it would've been with an identical second set of objections. And it is certainly no loss for judicial efficiency that Mr. Johnson only objected to the first recommendation, rather than filing an identical second set of objections. *See id.*

Moreover, Mr. Johnson, a *pro se* litigant, could hardly have been expected to understand that when the magistrate judge filed two *identical* reports and recommendations, he was required to file two identical sets of objections, one responding to each. *Cf. Wirsching*, 360 F.3d at 1198 (excusing failure to object because *pro se* plaintiff's

explanation that he had not received the recommendation was plausible in light of plaintiff's record of otherwise being a "fairly tenacious litigant").

Because Mr. Johnson's failure to file a second copy of his objection to the first report and recommendation is understandable and because the policy interests animating the waiver rule are satisfied here, this Court should exercise its discretion and excuse the lack of a second set of objections. *See Davis v. Fernandez*, 798 F.3d 290, 293-94 (5th Cir. 2015) ("[W]here the law affords courts discretion as to how a particular rule is to be applied, courts must exercise such discretion with leniency toward unrepresented parties.").

CONCLUSION

For these reasons, this Court should reverse the district court's order dismissing Mr. Johnson's complaint and remand for further proceedings.

Dated: February 17, 2022

Respectfully submitted,

/s/ David F. Oyer
David F. Oyer*
Elizabeth A. Bixby*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington DC 20002
(202) 869-3434
david.oyer@macarthurjustice.org

Easha Anand
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
2443 Fillmore St., Suite 380
San Francisco, CA 94115

Counsel for Plaintiff-Appellant Jabari J. Johnson
**Admitted only in California; not admitted in D.C. Practicing under the supervision of the Roderick & Solange MacArthur Justice Center.*

STATEMENT REGARDING ORAL ARGUMENT

Mr. Johnson, through *pro bono* counsel, respectfully requests oral argument because this case raises an important issue of first impression in this Circuit: does 42 U.S.C. § 1997e(e), a provision of the Prison Litigation Reform Act, require that a prisoner plead a "more than *de minimis*" physical injury to recover damages for mental or emotional injury? District courts apply this rule against prisoner-plaintiffs regularly in this Circuit, yet this Court has never ruled on the question.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This Brief complies with type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because, according to the word count function of Microsoft Word 2019, the Brief contains 7,564 words excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

2. This Brief complies with the typeface and type style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Century Schoolbook font for the main text and 14-point Century Schoolbook font for footnotes.

Dated: February 17, 2022

/s/ David F. Oyer
David F. Oyer

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2022, I electronically filed the foregoing document through the court's electronic filing system, and that it has been served on all counsel of record through the court's electronic filing system.

Dated: February 17, 2022

/s/ David F. Oyer
David F. Oyer

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Sophos Endpoint Advanced 10.8.11.4, last updated on Wednesday, February 16, 2022, and according to the program are free of viruses.

Dated: February 17, 2022

/s/ David F. Oyer
David F. Oyer

10th CIR. R. 28.2(A) ATTACHMENT TO BRIEF

- Recommendation of the Magistrate Judge to Grant Dismissal of Defendants Reyna and Korin, Dkt. No. 29 (docketed Nov. 23, 2020)

- Recommendation of the Magistrate Judge to Grant Dismissal of Defendant Wargo, Dkt. No. 49 (docketed Jan. 25, 2021)

- Order Dismissing Wargo as Defendant, Dkt. No. 53 (docketed Mar. 4, 2021)

- Order Dismissing Case, Dkt. No. 59 (docketed Sept. 22, 2021)

- Final Judgment, Dkt. No. 60 (docketed Sept. 23, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00459-PAB-MEH

JABARI J. JOHNSON,

Plaintiff,

v.

REYNA,
WARGO, and
KORIN,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Michael E. Hegarty, United States Magistrate Judge.

Plaintiff Jabari J. Johnson ("Plaintiff") brings an Eighth Amendment claim in his Prisoner Complaint ("Complaint"). ECF 1 at 4. Defendants Joaquin Reyna ("Reyna") and Brett Corbin[1] ("Corbin") (collectively, "Moving Defendants") have filed the present motion to dismiss ("Motion") pursuant to Fed. R. Civ. P. 12(b)(1) and (6).[2] ECF 64. Plaintiff filed a response ("Response") to the Motion, ECF 28, and the Court finds the further briefing would not materially

[1] Plaintiff's Complaint misspells Corbin's name, but this Recommendation will use the correct spelling.

[2] The Court notes that Defendant Wargo is not a moving party because service has not been accomplished. Pursuant to Fed. R. Civ. P. 4(m), "[i]f a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time." The Court will subsequently issue an order to show cause why Defendant Wargo should not be dismissed for failure to serve. *See Dona't v. Amazon.com/Kindle*, - F. Supp. 3d. -, 2020 WL 5105171, *5 (D. Colo. Aug. 31, 2020) ("[E]ven though Plaintiff is a *pro se* inmate, proceeding *in forma pauperis*, he must still comply with the same rules of procedure governing other litigants, including Rule 4.").

assist it in adjudicating the Motion. D.C. Colo. LCivR 7.1(d). The Motion has been referred by Chief Judge Philip A. Brimmer for a recommendation. ECF 26. As set forth below, this Court respectfully recommends granting the Moving Defendants' Motion.

BACKGROUND

The following are material, factual allegations (as opposed to legal conclusions, bare assertions, or merely conclusory allegations) made by Plaintiff in his Complaint, which are taken as true for analysis under Fed. R. Civ. P. 12(b)(1) pursuant to *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995) and under Fed. R. Civ. P. 12(b)(6) pursuant to *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Plaintiff alleges that while incarcerated at the Limon Correctional Facility, his case manager, "Humphrey," called Plaintiff into his office on May 3, 2018. Compl. at 4. Plaintiff told Humphrey that he wished to discuss taking the next steps with his grievances, causing Humphrey to become irate. *Id*. Humphrey then ordered that Plaintiff "cuff up," to which Plaintiff complied. *Id.*

Defendants arrived at Humphrey's office to escort Plaintiff to his cell. *Id.* At some point en route to his cell, Defendants decided to place Plaintiff in leg restraints. *Id.* While applying the leg restraints, Reyna "placed his foot on . . . Plaintiff[']s untreated right foot[,]" causing pain. *Id.* at 5. Plaintiff requested Reyna remove his foot, but Reyna persisted until the leg restraints were applied. *Id.*

Having applied the restraints, Defendants proceeded to escort Plaintiff to his cell. *Id.* On the way, the parties reached a staircase that Plaintiff attempted to ascend. *Id.* As Plaintiff took his second step up the stairs, Defendants slammed him "on his untreated fractured jaw[,]" causing "excruciating pain." *Id.* Plaintiff indicates that he is suing Defendants in both their individual and

official capacities, *id.* at 3, and demands $750,000 in punitive and compensatory damages from each Defendant, *id.* at 25.

LEGAL STANDARDS

I. Dismissal Pursuant to Fed. R. Civ. P. 12(b)(1)

Rule 12(b)(1) empowers a court to dismiss a complaint for "lack of subject matter jurisdiction." Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case, but only a determination that the court lacks authority to adjudicate the matter. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). A court lacking jurisdiction "must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere [conclusory] allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *See Basso*, 495 F.2d at 909. Accordingly, Plaintiff in this case bears the burden of establishing that this Court has jurisdiction to hear his claims.

Generally, Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction take two forms. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995).

> First, a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true.
>
> Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide

> discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). In such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion.

Id. at 1002–03 (citations omitted). The present Motion is a facial attack on subject matter jurisdiction; therefore, the Court will accept the truthfulness of the Complaint's factual allegations.

II. Dismissal Pursuant to Fed. R. Civ. P. 12(b)(6)

The purpose of a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is to test the sufficiency of the plaintiff's complaint. *Sutton v. Utah State Sch. For the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 2008). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pled facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* *Twombly* requires a two-prong analysis. First, a court must identify "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id.* at 680. Second, the Court must consider the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id.* at 679.

Plausibility refers "'to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (quoting *Robbins v. Okla.*, 519 F.3d 1242, 1247 (10th Cir. 2008)). "The nature and specificity of the allegations required to state a plausible claim will vary based on context." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011).

Thus, while the Rule 12(b)(6) standard does not require that a plaintiff establish a prima facie case in a complaint, the elements of each alleged cause of action may help to determine whether the plaintiff has set forth a plausible claim. *Khalik*, 671 F.3d at 1192. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. The complaint must provide "more than labels and conclusions" or merely "a formulaic recitation of the elements of a cause of action," so that "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has made an allegation, "but it has not shown that the pleader is entitled to relief." *Id.* (quotation marks and citation omitted).

III. Treatment of a Pro Se Plaintiff's Complaint

A pro se plaintiff's "pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)). "Th[e] court, however, will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on plaintiff's behalf." *Smith v. United States*, 561 F.3d 1090, 1096 (10th Cir. 2009) (quoting *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997)). The Tenth Circuit interpreted this rule to mean, if a court "can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, [it] should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor

syntax and sentence construction, or his unfamiliarity with pleading requirements." *Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir. 2013) (quoting *Hall*, 935 F.2d at 1110). However, this interpretation is qualified in that it is not "the proper function of the district court to assume the role of advocate for the pro se litigant." *Garrett*, 425 F.3d at 840 (quoting *Hall*, 935 F.2d at 1110).

ANALYSIS

Plaintiff asserts an Eighth Amendment claim against Defendants pursuant to 28 U.S.C. § 1983. The Moving Defendants raise two arguments for dismissal. First, this Court lacks subject matter jurisdiction over Plaintiff's claims for damages against them in their official capacities based on the Eleventh Amendment. Second, the Prison Litigation Reform Act ("PLRA") bars Plaintiff's remaining damages claims. For the reasons set forth below, the Court respectfully recommends dismissal without prejudice of the damages claims against the Moving Defendants in their official capacities and dismissal with prejudice of the remaining individual capacity claims for failure to state a claim.

I. Sovereign Immunity

The Moving Defendants assert that Plaintiff's damages claims against them in their official capacities are barred by the Eleventh Amendment. Mot. at 8. Plaintiff responds that this Court must take his factual allegations as true. Resp. at 1. Plaintiff also states that he is suing the Moving Defendants "for monetary damages in their individual capacit[ies]." *Id.*

Pursuant to the Eleventh Amendment, the Supreme Court has "consistently held that a[] [non-]consenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Edelman v. Jordan*, 415 U.S. 651, 662–663 (1974); *see Kentucky v. Graham*, 473 U.S. 159, 169 (1985) ("[A]bsent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court.").

"[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 281, 277 (1997) (quoting *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459 (1945)). "Thus, the Eleventh Amendment bars a suit brought in federal court by the citizens of a state against the state or its agencies." *Johns v. Stewart*, 57 F.3d 1544, 1552 (10th Cir. 1995) (internal citation omitted). This immunity applies to Section 1983 suits. *Quern v. Jordan*, 440 U.S. 332, 335 (1979) ("[Section] 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States.").

In this case, Plaintiff seeks monetary compensation from all Defendants. Compl. at 25 (requesting $750,000 in compensatory and punitive damages from each Defendant). Plaintiff also indicates that he is suing Defendants in both their individual and official capacities. *Id.* at 3. The Moving Defendants are state officials; accordingly, the Court must treat a suit against them in their official capacities as a suit against the state itself. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity . . . should be treated as suits against the State."). Based on the Eleventh Amendment and as undisputed by Plaintiff, the state is immune from such suits, and the Court lacks subject matter jurisdiction over Plaintiff's official capacity damages claims. *Fent v. Okla. Water Res. Bd.*, 235 F.3d 553, 559 (10th Cir. 2000) (Eleventh Amendment "immunity constitutes a bar to the exercise of federal subject matter jurisdiction."). This Court respectfully recommends that the Motion be granted with respect to the damages claims against the Moving Defendants in their official capacities.

II. PLRA

A. Physical Injury Requirement

The Moving Defendants contend that the PLRA bars Plaintiff's remaining claims against them in their individual capacities, because Plaintiff does not allege an injury. Mot. at 5. Plaintiff responds, in part, by providing additional factual allegations. Resp. at 1. "Generally, the sufficiency of a complaint must rest on its contents alone." *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). There are limited exceptions to this general rule by which a court may consider materials beyond the four corners of the complaint. *Id.* These three exceptions are: "(1) documents that the complaint incorporates by reference; (2) documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity; and (3) matters of which a court may take judicial notice." *Id.* (internal citations and quotations omitted). Plaintiff's Response (and the new allegations therein) do not fall under any of these exceptions; accordingly, the Court will not consider them in the adjudication of the Motion.[3] *See Erickson v. BP Expl. & Prod. Inc.*, 567 F. App'x 637, 639 (10th Cir. 2014) (finding that the district court did not err in "failing to consider the materials" a pro se litigant "attached to his response in opposition" to a motion to dismiss).

The PLRA provides that no action "may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). While the PLRA does not define "physical injury," appeals courts "have held that although a de minimis showing of physical injury

[3] Nor will the Court construe the addition of these allegations as a request to amend Plaintiff's Complaint. *See* Fed. R. Civ. P. 15(a)(2); *Fleming v. Coulter*, 573 F. App'x 765, 769 (10th Cir. 2014) ("[C]ourts have no obligation to permit a pleading amendment when a litigant does not file a formal motion for leave to amend.").

does not satisfy the PLRA's physical injury requirement, an injury need not be significant to satisfy the statutory requirement." *Clifton v. Eubank*, 418 F. Supp. 2d 1243, 1245–46 (D. Colo. 2006) (collecting cases). "[T]he Tenth Circuit has suggested that although allegations of physical pain alone may be insufficient to overcome the PLRA bar, when paired with allegations of more tangible physical effects, they state a valid claim." *Id.* at 1246 (citing *Sealock v. Colorado*, 218 F.3d 1205, 1210 n.6 (10th Cir. 2000). Hence, "[p]hysical pain, standing alone, is a de minimis injury that may be characterized as a mental or emotional injury and, accordingly, fails to overcome the PLRA's bar." *Id.*

In this case, Plaintiff alleges that he experienced pain from Reyna stepping on his "untreated right foot." Compl. at 5. The fact that Plaintiff's foot was "untreated" implies that his condition was preexisting. Plaintiff does not allege that he suffered any new physical injury (or even exacerbation of his prior condition) from this incident. Likewise, Plaintiff asserts that he felt "excruciating pain" when slammed on the staircase. *Id.* Similar to his foot, Plaintiff had a preexisting condition to his jaw, but Plaintiff does not allege that the Moving Defendants' actions caused or exacerbated any physical injury. Taking Plaintiff's allegations as true, and giving them a liberal construction, the Court finds that Plaintiff only alleges pain from the incidents at issue. That is the type of claim the PLRA prohibits. 42 U.S.C. § 1997e(e); *see Jones v. Cowens*, No. 09-cv-01274-MSK-MJW, 2010 WL 3239286, at *2–3 (D. Colo. Aug. 12, 2010) (finding the PLRA barred plaintiff's claims for lack of physical injury even when plaintiff had "deep red grooves" on his wrist). Accordingly, the Court respectfully recommends the Motion be granted with respect to the damages claims against the Moving Defendants in their individual capacities.

B. Leave to Amend

Having found Plaintiff failed to state a claim against the Moving Defendants, the Court now turns to the issue of whether dismissal of the individual capacity claims should be with or without prejudice. Usually, in a case involving a pro se litigant, the Tenth Circuit has held that if "it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief, the court should dismiss with leave to amend." *Reynoldson v. Shillinger*, 907 F.2d 124, 126 (10th Cir. 1990). "Particularly where deficiencies in a complaint are attributable to oversights likely the result of an untutored pro se litigant's ignorance of special pleading requirements, dismissal of the complaint without prejudice is preferable." *Id.* However, "[c]omplaints drafted by pro se litigants . . . are not insulated from the rule that dismissal with prejudice is proper for failure to state a claim when 'it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him the opportunity to amend.'" *Fleming*, 573 F. App'x at 769 (quoting *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 806 (10th Cir. 1999)).

In this case, Plaintiff is not an "untutored" litigant; he readily admits to being a "well educated, experienced . . . pro se litigant." *See, e.g.*, ECF 19 at 1; Resp. at 1 (describing himself as "perspicuous"). In fact, from August 2017 to January 2020, Plaintiff filed forty prisoner complaints in this District. *See* 20-cv-00037-RM-MEH, ECF 3 at 1. Plaintiff demonstrated in his Complaint his familiarity with how to plead a claim under the Eighth Amendment; for example, he alleged that Defendants "knowingly acted with the state of mind required to establish the 8th Amendment Violation." Compl. at 7. Plaintiff's failure to plead additional, supporting facts does not indicate to the Court that Plaintiff's "deficiencies . . . are attributable to oversights [in] . . . [Plaintiff's] ignorance of special pleading requirements." *Reynoldson*, 907 F.2d at 126.

Therefore, this Court respectfully recommends that Plaintiff's individual capacity claims be dismissed with prejudice for his failure to state a claim.

CONCLUSION

The Court respectfully recommends **GRANTING** the Moving Defendants' Motion [filed October 16, 2020; ECF 25] as follows: dismiss without prejudice the official capacity claims for damages pursuant to Fed. R. Civ. P. 12(b)(1) and dismiss with prejudice the individual capacity claims pursuant to Fed. R. Civ. P. 12(b)(6).[4]

Respectfully submitted this 23rd day of November, 2020, at Denver, Colorado.

BY THE COURT:

Michael E. Hegarty
United States Magistrate Judge

[4] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a *de novo* determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (quoting *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991)).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00459-PAB-MEH

JABARI J. JOHNSON,

Plaintiff,

v.

REYNA,
WARGO, and
KORIN,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Michael E. Hegarty, United States Magistrate Judge.

Plaintiff Jabari J. Johnson ("Plaintiff") brings an Eighth Amendment claim in his Prisoner Complaint ("Complaint"). ECF 1 at 4. Defendant Jessica Wargo[1] ("Defendant") has filed the present motion to dismiss ("Motion") pursuant to Fed. R. Civ. P. 12(b)(1) and (6). ECF 64. Plaintiff filed a response ("Response") to the Motion, ECF 47, and the Court finds that further briefing would not materially assist it in adjudicating the Motion. D.C. Colo. LCivR 7.1(d). The Motion has been referred by Chief Judge Philip A. Brimmer for a recommendation. ECF 45. As set forth below, this Court respectfully recommends granting Defendant's Motion.

BACKGROUND

The following are material, factual allegations (as opposed to legal conclusions, bare assertions, or conclusory allegations) made by Plaintiff in his Complaint, which are taken as true

[1] Defendants Reyna and Korin have already moved to dismiss Plaintiff's Complaint. The Court issued a recommendation granting their motion on November 23, 2020. ECF 29.

for analysis under Fed. R. Civ. P. 12(b)(1) pursuant to *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995) and under Fed. R. Civ. P. 12(b)(6) pursuant to *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Plaintiff alleges that while incarcerated at the Limon Correctional Facility, his case manager, "Humphrey," called Plaintiff into his office on May 3, 2018. Compl. at 4. Plaintiff told Humphrey that he wished to discuss taking the next steps with his grievances, causing Humphrey to become irate. *Id*. Humphrey then ordered that Plaintiff "cuff up," to which Plaintiff complied. *Id.*

Defendants arrived at Humphrey's office to escort Plaintiff to his cell. *Id.* At some point en route to his cell, Defendants decided to place Plaintiff in leg restraints. *Id.* While applying the leg restraints, Reyna "placed his foot on . . . Plaintiff[']s untreated right foot[,]" causing pain. *Id.* at 5. Plaintiff requested Reyna remove his foot, but Reyna persisted until the leg restraints were applied. *Id.*

Having applied the restraints, Defendants proceeded to escort Plaintiff to his cell. *Id.* On the way, the parties reached a staircase that Plaintiff attempted to ascend. *Id.* As Plaintiff took his second step up the stairs, Defendants slammed him "on his untreated fractured jaw[,]" causing "excruciating pain." *Id.* Plaintiff indicates that he is suing Defendants in both their individual and official capacities, *id.* at 3, and demands $750,000 in punitive and compensatory damages from each Defendant, *id.* at 25.

LEGAL STANDARDS

I. Dismissal Pursuant to Fed. R. Civ. P. 12(b)(1)

Rule 12(b)(1) empowers a court to dismiss a complaint for "lack of subject matter jurisdiction." Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the

merits of a plaintiff's case, but only a determination that the court lacks authority to adjudicate the matter. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). A court lacking jurisdiction "must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere [conclusory] allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *See Basso*, 495 F.2d at 909. Accordingly, Plaintiff in this case bears the burden of establishing that this Court has jurisdiction to hear his claims.

Generally, Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction take two forms. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995).

> First, a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true.
>
> Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). In such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion.

Id. at 1002–03 (citations omitted). The present Motion is a facial attack on subject matter jurisdiction; therefore, the Court will accept the truthfulness of the Complaint's factual allegations.

II. Dismissal Pursuant to Fed. R. Civ. P. 12(b)(6)

The purpose of a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is to test the sufficiency of the plaintiff's complaint. *Sutton v. Utah State Sch. For the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 2008). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pled facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. Twombly* requires a two-prong analysis. First, a court must identify "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id.* at 680. Second, the Court must consider the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id.* at 679.

Plausibility refers "'to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (quoting *Robbins v. Okla.*, 519 F.3d 1242, 1247 (10th Cir. 2008)). "The nature and specificity of the allegations required to state a plausible claim will vary based on context." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011). Thus, while the Rule 12(b)(6) standard does not require that a plaintiff establish a prima facie case in a complaint, the elements of each alleged cause of action may help to determine whether the plaintiff has set forth a plausible claim. *Khalik*, 671 F.3d at 1192. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not

suffice." *Iqbal*, 556 U.S. at 678. The complaint must provide "more than labels and conclusions" or merely "a formulaic recitation of the elements of a cause of action," so that "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has made an allegation, "but it has not shown that the pleader is entitled to relief." *Id.* (quotation marks and citation omitted).

III. Treatment of a Pro Se Plaintiff's Complaint

A pro se plaintiff's "pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)). "Th[e] court, however, will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on plaintiff's behalf." *Smith v. United States*, 561 F.3d 1090, 1096 (10th Cir. 2009) (quoting *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997)). The Tenth Circuit interpreted this rule to mean, if a court "can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, [it] should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir. 2013) (quoting *Hall*, 935 F.2d at 1110). However, this interpretation is qualified in that it is not "the proper function of the district court to assume the role of advocate for the pro se litigant." *Garrett*, 425 F.3d at 840 (quoting *Hall*, 935 F.2d at 1110).

ANALYSIS

Plaintiff asserts an Eighth Amendment claim against Defendant pursuant to 28 U.S.C. § 1983. Defendant raises two arguments for dismissal. First, this Court lacks subject matter jurisdiction over Plaintiff's claim for damages against Defendant in her official capacity based on the Eleventh Amendment. Second, the Prison Litigation Reform Act ("PLRA") bars Plaintiff's remaining damages claim. For the reasons set forth below, the Court respectfully recommends dismissal without prejudice of the damages claim against Defendant in her official capacity and dismissal with prejudice of the remaining individual capacity claim for failure to state a claim.

I. Sovereign Immunity

Defendant asserts that Plaintiff's damages claim against her in her official capacity is barred by the Eleventh Amendment. Mot. at 8. Plaintiff responds that this Court must presume the truthfulness of the allegations in the Complaint. Resp. at 1. Plaintiff also states that he is suing Defendant "for monetary damages in [her] individual capacity." *Id.*

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In this case, Plaintiff seeks monetary compensation from all Defendants. Compl. at 25 (requesting $750,000 in compensatory and punitive damages from each Defendant). Plaintiff also indicates that he is suing all Defendants in their individual and official capacities. *Id.* at 3. Defendant is a state official; accordingly, the Court must treat a suit against her in her official capacity as a suit against the state itself. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity . . . should be treated as suits against the State."). Based on the Eleventh Amendment and as undisputed by Plaintiff, the state is immune from such suits, and the Court lacks subject matter jurisdiction over Plaintiff's official capacity damages claim. *Fent v. Okla. Water Res. Bd.*, 235 F.3d 553, 559 (10th Cir. 2000) (Eleventh Amendment "immunity constitutes a bar to the exercise of federal subject matter jurisdiction."). This Court respectfully recommends that the Motion be granted with respect to the damages claim against Defendant in her official capacity.

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Defendant also contends that the PLRA bars Plaintiff's remaining claim against her in her individual capacity, because Plaintiff does not allege an injury. Mot. at 5–6. Plaintiff responds, in part, by providing additional factual allegations. Resp. at 1. "Generally, the sufficiency of a complaint must rest on its contents alone." *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). There are limited exceptions to this general rule by which a court may consider materials

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injury that may be characterized as a mental or emotional injury and, accordingly, fails to overcome the PLRA's bar." *Id.*

In this case, Plaintiff alleges that he experienced pain from Defendant Reyna stepping on his "untreated right foot." Compl. at 5. The fact that Plaintiff's foot was "untreated" implies that his condition was preexisting. Plaintiff does not allege that he suffered any new physical injury (or even exacerbation of his prior condition) from this incident. Likewise, Plaintiff asserts that he felt "excruciating pain" when slammed on the staircase. *Id.* Similar to his foot, Plaintiff had a preexisting condition to his jaw, but Plaintiff does not allege that Defendant's actions caused or exacerbated any physical injury. Taking Plaintiff's allegations as true, and giving them a liberal construction, the Court finds that Plaintiff only alleges pain from the incidents at issue. That is the type of claim the PLRA prohibits. 42 U.S.C. § 1997e(e); *see Jones v. Cowens*, No. 09-cv-01274-MSK-MJW, 2010 WL 3239286, at *2–3 (D. Colo. Aug. 12, 2010) (finding the PLRA barred plaintiff's claims for lack of physical injury even when plaintiff had "deep red grooves" on his wrist). Accordingly, the Court respectfully recommends the Motion be granted with respect to the damages claim against Defendant in her individual capacity.

B. Leave to Amend

Having found Plaintiff failed to state a claim against Defendant, the Court now turns to the issue of whether dismissal of the individual capacity claim should be with or without prejudice. Usually, in a case involving a pro se litigant, the Tenth Circuit has held that if "it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief, the court should dismiss with leave to amend." *Reynoldson v. Shillinger*, 907 F.2d 124, 126 (10th Cir. 1990). "Particularly where deficiencies in a complaint are attributable to oversights likely the result of an untutored pro se litigant's ignorance of special pleading

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In this case, Plaintiff is not an "untutored" litigant; he readily admits to being a "well educated, experienced . . . pro se litigant." *See, e.g.*, ECF 19 at 1; ECF 28 at 1 (describing himself as "perspicuous"). In fact, from August 2017 to January 2020, Plaintiff filed forty prisoner complaints in this District (and has filed dozens more since then). *See* 20-cv-00037-RM-MEH, ECF 3 at 1. Plaintiff demonstrated in his Complaint his familiarity with how to plead a claim under the Eighth Amendment; for example, he alleged that Defendants "knowingly acted with the state of mind required to establish the 8th Amendment Violation." Compl. at 7. Plaintiff's failure to plead additional, supporting facts does not indicate to the Court that Plaintiff's "deficiencies . . . are attributable to oversights [in] . . . [Plaintiff's] ignorance of special pleading requirements." *Reynoldson*, 907 F.2d at 126. Therefore, this Court respectfully recommends that Plaintiff's individual capacity claims be dismissed with prejudice for his failure to state a claim.

CONCLUSION

The Court respectfully recommends **GRANTING** Defendant's Motion [filed December 28, 2020; ECF 44] as follows: dismiss without prejudice the official capacity claim for damages pursuant to Fed. R. Civ. P. 12(b)(1) and dismiss with prejudice the individual capacity claim pursuant to Fed. R. Civ. P. 12(b)(6).[3]

[3] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those

Respectfully submitted this 25th day of January, 2021, at Denver, Colorado.

BY THE COURT:

Michael E. Hegarty
United States Magistrate Judge

findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a *de novo* determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (quoting *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991)).

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Chief Judge Philip A. Brimmer

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JABARI J. JOHSON,

Plaintiff,

v.

REYNA,
WARGO, and
KORIN,

Defendants.

ORDER ACCEPTING MAGISTRATE JUDGE'S RECOMMENDATION

This matter is before the Court on the Recommendation of United States Magistrate Judge Michael E. Hegarty filed on January 25, 2021 [Docket No. 49]. The Recommendation states that objections to the Recommendation must be filed within fourteen days after its service on the parties. Docket No. 49 at 10; see 28 U.S.C. § 636(b)(1)(C). The Recommendation was served on January 25, 2021. Docket No. 49. Plaintiff requested an extension of time to object to the Recommendation. Docket No. 50. The Court granted plaintiff's request and provided plaintiff until February 22, 2021. Docket No. 51. No party has objected to the Recommendation.

In the absence of an objection, the district court may review a magistrate judge's recommendation under any standard it deems appropriate. *See Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991); *see also Thomas v. Arn*, 474 U.S. 140, 150 (1985) ("It does not appear that Congress intended to require district court review of a magistrate's

factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."). In this matter, the Court has reviewed the Recommendation to satisfy itself that there is "no clear error on the face of the record."[1] Fed. R. Civ. P. 72(b), Advisory Committee Notes. Based on this review, the Court has concluded that the Recommendation is a correct application of the facts and the law. Accordingly, it is

ORDERED as follows:

1. The Recommendation of United States Magistrate Judge Michael E. Hegarty [Docket No. 49] is **ACCEPTED**;

2. Defendant Wargo's Motion to Dismiss [Docket No. 44] is **GRANTED**;

3. Plaintiff's official-capacity claim for damages against defendant Wargo is **DISMISSED WITHOUT PREJUDICE**; and

4. Plaintiff's individual-capacity claim against defendant Wargo is **DISMISSED WITH PREJUDICE**.

DATED March 4, 2021.

BY THE COURT:

PHILIP A. BRIMMER
Chief United States District Judge

[1] This standard of review is something less than a "clearly erroneous or contrary to law" standard of review, Fed. R. Civ. P. 72(a), which in turn is less than a de novo review. Fed. R. Civ. P. 72(b).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Action No. 20-cv-00459-PAB-MEH

JABARI J. JOHNSON,

Plaintiff,

v.

REYNA, and
KORIN,

Defendants.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge [Docket No. 29]. The recommendation addresses plaintiff Jabari J. Johnson's ("Johnson") complaint, Docket No. 1, and the motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6) filed by defendants Joaquin Reyna ("Reyna") and Brett Corbin ("Corbin").[1] Docket No. 25. Because Mr. Johnson is *pro se*, the Court construes his filings liberally without serving as his advocate. See *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). The Court has jurisdiction pursuant to 28 U.S.C. § 1331.

I. BACKGROUND[2]

On May 3, 2018, between approximately 9:30 a.m. and 10:30 a.m., Mr. Johnson,

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[1] The magistrate judge noted that Mr. Johnson has misspelled Corbin's name; however, the recommendation used the correct spelling. Docket No. 29 at 1 n.1.

[2] The Court assumes that the allegations in the complaint are true in considering the motion to dismiss.

a prisoner at the Limon Correctional Facility of the Colorado Department of Corrections, was asked by his case manager, "Humphrey" to "retrieve" prior grievances from Humphrey's office. Docket No. 1 at 4. Staff escorted Mr. Johnson to Humphrey's office, and Humphrey began questioning Mr. Johnson about his lawsuits. *Id.* Mr. Johnson indicated that he wished to discuss the "next step grievances," at which point Humphrey became irate. *Id.* Humphrey stated that, if Mr. Johnson would not answer his questions, Mr. Johnson could leave. *Id.* When Mr. Johnson indicated that he would leave, Humphrey ordered him to "cuff up," at which point Mr. Johnson was detained, even though he posed no threat and had not committed a "COPD violation." *Id.*

Defendants arrived at Humphrey's office to escort Mr. Johnson back to his cell; however, while en route, Mr. Johnson was placed on the "outer area of the glass," and staff decided to apply leg restraints. *Id.* As the restraints were being applied, Sergeant Reyna placed his foot on Mr. Johnson's "untreated right foot," causing pain. *Id.* at 5. Mr. Johnson asked Sergeant Reyna to remove his foot, but Sergeant Reyna refused until Mr. Johnson was shackled. *Id.* Staff then pushed Mr. Johnson faster than he was able to walk due to his shackles and injured right foot. *Id.* As Mr. Johnson was attempting to walk up the staircase, Sergeant Reyna and staff "slam[med]" Mr. Johnson on his "untreated fractured jaw," causing "excruciating pain." *Id.* Staff, however, ignored Mr. Johnson's pleas for medical attention and dragged him 15 to 20 feet away from the staircase. *Id.* As a result of Mr. Johnson's treatment, he suffers "major depression/anxiety." *Id.* at 8.

Mr. Johnson brings this Eighth Amendment claim against defendants in their

individual and official capacities, *id.* at 3, and seeks $750,000 in both compensatory and punitive damages from both defendants. *Id.* at 25. Defendants moved to dismiss Mr. Johnson's lawsuit under Federal Rules of Civil Procedure 12(b)(1) and (b)(6). Docket No. 25. Defendants argue that Mr. Johnson's requests for money damages are barred by the Prison Litigation Reform Act's ("PLRA") physical injury requirement. *Id.* at 5–8. Defendants also argue that Mr. Johnson's official-capacity claims against defendants are barred by the Eleventh Amendment. *Id.* at 8–10.

Magistrate Judge Michael E. Hegarty issued a recommendation on the motion to dismiss on November 23, 2020. Docket No. 29. The magistrate judge recommends granting defendants' motion, dismissing Mr. Johnson's official-capacity claims for damages without prejudice under Rule 12(b)(1) and dismissing his individual-capacity claims with prejudice under Rule 12(b)(6). Docket No. 29 at 11. Mr. Johnson filed objections on December 14, 2020. Docket No. 35.

II. LEGAL STANDARD

The Court must "determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). An objection is "proper" if it is both timely and specific. *United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1059 (10th Cir. 1996). A specific objection "enables the district judge to focus attention on those issues – factual and legal – that are at the heart of the parties' dispute." *Id.*

In the absence of an objection, the district court may review a magistrate judge's recommendation under any standard it deems appropriate. *See Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991); *see also Thomas v. Arn*, 474 U.S. 140, 150 (1985)

("It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a de novo or any other standard, when neither party objects to those findings."). The Court therefore reviews the non-objected to portions of the recommendation to confirm that there is "no clear error on the face of the record." Fed. R. Civ. P. 72(b), Advisory Committee Notes. This standard of review is something less than a "clearly erroneous or contrary to law" standard of review, Fed. R. Civ. P. 72(a), which in turn is less than a de novo review. Fed. R. Civ. P. 72(b).

A. Lack of Subject Matter Jurisdiction

Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) is appropriate if the Court lacks subject matter jurisdiction over claims for relief asserted in the complaint. Rule 12(b)(1) challenges are generally presented in one of two forms: "[t]he moving party may (1) facially attack the complaint's allegations as to the existence of subject matter jurisdiction, or (2) go beyond allegations contained in the complaint by presenting evidence to challenge the factual basis upon which subject matter jurisdiction rests." *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 363 F.3d 1072, 1074 (10th Cir. 2004) (quoting *Maestas v. Lujan*, 351 F.3d 1001, 1013 (10th Cir. 2003)). When resolving a facial attack on the allegations of subject matter jurisdiction, the court "must accept the allegations in the complaint as true." *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). To the extent a defendant attacks the factual basis for subject matter jurisdiction, the court "may not presume the truthfulness of the factual allegations in the complaint, but may consider evidence to resolve disputed jurisdictional facts." *SK Finance SA v. La Plata Cnty.*, 126 F.3d 1272, 1275 (10th Cir.

1997). "Reference to evidence outside the pleadings does not convert the motion to dismiss into a motion for summary judgment in such circumstances." *Id.* Ultimately, and in either case, plaintiff has "[t]he burden of establishing subject matter jurisdiction" because she is "the party asserting jurisdiction." *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1189 (10th Cir. 2008).

B. Failure to State a Claim

To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must allege enough factual matter that, taken as true, makes the plaintiff's "claim to relief . . . plausible on its face." *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The 'plausibility' standard requires that relief must plausibly follow from the facts alleged, not that the facts themselves be plausible." *RE/MAX, LLC v. Quicken Loans Inc.*, 295 F. Supp. 3d 1163, 1168 (D. Colo. 2018) (citing *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008)). Generally, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (quoting *Twombly*, 550 U.S. at 555) (alterations omitted). However, a plaintiff still must provide "supporting factual averments" with his allegations. *Cory v. Allstate Ins.*, 584 F.3d 1240, 1244 (10th Cir. 2009) ("[C]onclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." (citation omitted)); *see also Moffet v. Halliburton Energy Servs., Inc.*, 291 F.3d 1227, 1231 (10th Cir. 2002) (stating that a court "need not accept [] conclusory allegations"). "[W]here

the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (quotations and alterations omitted); *see also Khalik*, 671 F.3d at 1190 ("A plaintiff must nudge [his] claims across the line from conceivable to plausible in order to survive a motion to dismiss." (quoting *Twombly*, 550 U.S. at 570)). If a complaint's allegations are "so general that they encompass a wide swath of conduct, much of it innocent," then plaintiff has not stated a plausible claim. *Khalik*, 671 F.3d at 1191 (quotations omitted). Thus, even though modern rules of pleading are somewhat forgiving, "a complaint still must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Bryson*, 534 F.3d at 1286 (alterations omitted).

III. ANALYSIS

A. Timeliness

The Tenth Circuit has held that "objections to [a] magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court." *2121 East 30th St.*, 73 F.3d at 1060. The magistrate judge's recommendation was dated November 23, 2020, making any objection due on December 10, 2020.[3] Docket No. 285 at 11. Mr. Johnson's objections were docketed December 14, 2020, Docket No. 35, and are thus untimely unless they were mailed in

[3] Under Fed. R. Civ. P. 5(b)(2)(C), when service of a paper is by mail, service is completed upon mailing. When a party must act within a specified time after being served and service is made by mail, three days are added after the period would otherwise expire. Fed. R. Civ. P. 6(d).

compliance with the prison mailbox rule. The prison mailbox rule states that a document is considered timely if given to prison officials prior to the filing deadline, regardless of when the Court receives the documents. *Price v. Philpot*, 420 F.3d 1158, 1164-67 (10th Cir. 2005)*; see also Green v. Snyder*, 525 F. App'x. 726, 729 (10th Cir. 2013) (unpublished) (finding objections untimely where the prisoner's certificate of mailing did not comply with the prison mailbox rule). To gain the benefit of the prison mailbox rule, a party must either (1) use the legal mail system or (2) attach a notarized statement or a declaration compliant with 28 U.S.C. § 1746 stating the date the filing was given to prison officials and stating that the filing had pre-paid, first-class postage. *Philpot*, 420 F.3d at 1166. The envelope is marked as being sent December 9, 2020; however, Mr. Johnson's objections are dated December 6, 2020, and the Department of Corrections's stamp indicates that it was received by prison officials on that date. Docket No. 35 at 3. Therefore, because Mr. Johnson used the prison legal mail system and gave the objections to officials before December 7, 2020, his objections were timely.

B. Subject Matter Jurisdiction

Magistrate Judge Hegarty recommends dismissing Mr. Johnson's official capacity claims without prejudice. Docket No. 29 at 6. Specifically, the magistrate judge concluded that Mr. Johnson seeks monetary compensation from both of the defendants and is suing them in their official and individual capacities. *Id.* at 7 (citing Docket No. 1 at 25, 3). The magistrate judge also found that, because the defendants are state officials, the Court must treat a suit against them as a suit against the state

itself. *Id.* (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity . . . should be treated as suits against the State.")). Because the Eleventh Amendment bars suits against the state for damages, the magistrate judge concluded that Eleventh Amendment immunity "constitutes a bar to the exercise of federal subject matter jurisdiction." *Id.* (quoting *Fent v. Okla. Water Res. Bd.*, 235 F.3d 553, 559 (10th Cir. 2000)).

In response, Mr. Johnson argues that the Court is to accept as true all allegations in his complaint at the motion to dismiss stage and that the Court has discretion to consider affidavits and other documents and hold an evidentiary hearing. Docket No. 35 at 1. Because the Court has not done so, Mr. Johnson states that his case cannot be dismissed. *Id.* To begin, the Court notes that Mr. Johnson's objection does not contradict the magistrate judge's conclusion that subject matter jurisdiction must be determined "from the allegations of fact in the complaint, without regard to mere [conclusory] allegations of jurisdiction," Docket No. 29 at 3 (quoting *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971)); *see also Erikson v. BP Expl. & Prod. Inc.*, 567 F. App'x 637, 639 (10th Cir. 2014) (unpublished) (holding that the district court did not err in "failing to consider the materials" that a pro se litigant "attached to his response in opposition" to a motion to dismiss).

While Mr. Johnson is mostly correct that, "[i]n reviewing a facial attack on the complaint[,] the Court must accept the allegations in the complaint as true," Docket No. 35 at 1, a plaintiff's complaint must still allege sufficient facts that, if taken as true, would establish subject matter jurisdiction. This is because the "sufficiency of a

complaint must rest on its contents alone." *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). Moreover, the Court need not accept as true any conclusory allegations. *See Cory*, 584 F.3d at 1244 ("[C]onclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." (citation omitted)); *see also Moffet*, 291 F.3d at 1231 (stating that a court "need not accept [] conclusory allegations"). The Court therefore overrules this objection.

Mr. Johnson's second objection is that defendants are not entitled to sovereign immunity because "defendants are being sued in their individual capacity for monetary damages and for injunctive relief the defendants are being sued in their individual capacity." Docket No. 35 at 1. Mr. Johnson, however, demands damages from the defendants, Docket No. 1 at 25, and is suing defendants in both capacities. *Id.* at 3. Mr. Johnson does not appear to dispute this in his objection. *See* Docket No. 29. This objection – that a plaintiff, in one suit, may seek an injunction for the official-capacity claims and damages for the individual-capacity claims – also does not contradict the magistrate judge's conclusion that the court does not have subject matter jurisdiction to consider Mr. Johnson's official-capacity claims for damages. "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 277 (1977).

The Court has reviewed the non-objected portions of the recommendation to satisfy itself that there is "no clear error on the face of the record." Fed. R. Civ. P.

72(b), Advisory Committee Notes. Based on this review, the Court has concluded that this portion of the recommendation is a correct application of the facts and the law. Therefore, because Mr. Johnson has not objected to the magistrate judge's conclusion that the Court does not have subject matter jurisdiction to consider official-capacity damages claims, the Court accepts the magistrate judge's recommendation that Mr. Johnson's official-capacity damages claims against be dismissed without prejudice.

C. Failure to State a Claim

Magistrate Judge Hegarty further recommends dismissing with prejudice Mr. Johnson's remaining damages claims under the PLRA, Docket No. 29 at 6, which states, in relevant part, that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act." 42 U.S.C. § 1997e(e). The magistrate judge noted that appeals courts have held that, "although a de minimis showing of physical injury does not satisfy the PLRA's physical injury requirement, an injury need not be significant to satisfy the statutory requirement." Docket No. 29 at 8–9 (quoting *Clifton v. Eubank*, 418 F. Supp. 2d 1243, 1245–46 (D. Colo. 2006)). "[T]he Tenth Circuit has suggested that although allegations of physical pain alone may be insufficient to overcome the PLRA bar, when paired with allegations of more tangible physical effects, they state a valid claim." *Id.* at 9 (quoting *Clifton*, 418 F. Supp. 2d at 1246 (citation omitted)). Hence, "[p]hysical pain, standing alone, is a *de minimis* injury that may be characterized as a mental or emotional injury and, accordingly, fails to overcome the PLRA's bar." *Id.* (quoting

Clifton, 418 F. Supp. 2d at 1246).

Mr. Johnson alleges that Sergeant Reyna inflicted pain when he stepped on his "untreated right foot." Docket No. 1 at 5. He also alleges that he experienced "excruciating pain" in his "untreated fractured jaw" when he was slammed on the staircase. *Id.* The magistrate judge reasoned that the fact that Mr. Johnson's foot and jaw were "untreated" indicates that he had pre-existing injuries. Docket No. 29 at 9. The magistrate judge also determined that Mr. Johnson does not allege that he suffered any new injury or exacerbation of his prior conditions. *Id.* The magistrate judge thus concluded that, even under a liberal construction of Mr. Johnson's complaint, Mr. Johnson "only alleges pain from the incidents at issue," which is the "type of claim the PLRA prohibits." *Id.* (citing *Jones v. Cowens*, No. 09-cv-01274-MSK-MJW, 2010 WL 3239286, at *2–3 (D. Colo. Aug. 12, 2010) (finding the PLRA barred plaintiff's claims for lack of physical injury even when plaintiff had "deep red grooves" on his wrist)).

Mr. Johnson objects that the magistrate judge's conclusions are "wrong" because defendants assaulted him, causing him pain and injury to his right foot and fractured jaw. Docket No. 35 at 1. This is not a "specific" objection. *2121 E. 30th St.*, 73 F.3d at 1059–61 (a specific objection enables the district court to focus "attention on the factual and legal issues that are truly in dispute") (citing *Lockert v. Faulkner*, 843 F.2d at 1019 ("Just as a complaint stating only 'I complain' states no claim, an objection stating only 'I object' preserves no issue for review."). However, Mr. Johnson also argues that defendants' actions caused him to suffer "major depression," Docket No. 35 at 2, which he mentioned in his complaint. Docket No. 1 at 8. The magistrate judge did

not address this argument; however, the Court finds that these allegations are insufficient to overcome the PLRA's physical injury requirement. *Cf. Hughes v. Colo. Dep't of Corrs.*, 594 F. Supp. 2d 1226, 1238–39 (D. Colo. 2009) (finding that physical manifestations of mental and emotional injuries were "insufficient to withstand the 'physical injury' requirement" of the PLRA). "A straightforward reading of Section 1997e(e) requires that a prisoner cite a physical injury that is separate from mental and emotional injuries he may have suffered." *Id.* at 1239; *see also Pearson v. Welborn*, 471 F.3d 732, 744 (7th Cir. 2006) (prisoner alleged that a disciplinary report was false, retaliatory, and resulted in his remaining in a high security facility for an additional year, which caused him to be "mentally and physically depressed" and lose 50 pounds; court held that this was insufficient to state a claim for physical injury); *Geiger v. Jowers*, 404 F.3d 371, 374 (5th Cir. 2005) (mental anguish, emotional distress, psychological harm, and insomnia do not constitute physical injury for purposes of PLRA); *Davis v. District of Columbia*, 158 F.3d 1342, 1349 (D.C. Cir. 1998) (affirming *sua sponte* dismissal with prejudice despite prisoner's affidavit stating that he suffered weight loss, appetite loss, and insomnia after disclosure of his medical status because the language and purpose of Section 1997e(e) "preclude reliance on the somatic manifestations of emotional distress"); *Cooksey v. Hennessey*, 2007 WL 2790365, *1 (N.D. Cal. Sept. 20, 2007) ("Physical symptoms that are not sufficiently distinct from a plaintiff's allegations of emotional distress do not qualify as 'a prior showing of physical injury.'"); *Minifield v. Butikofer*, 298 F. Supp. 2d 900, 905 (N.D. Cal. 2004) (same); *Cannon v. Burkybile*, 2000 WL 1409852, *6 (N.D. Ill. Sept. 25, 2000) (allegations of headaches, insomnia,

stress, and stomach anxiety insufficient to meet the physical injury requirement under Section 1997e(e)); *Cain v. Virginia*, 982 F. Supp. 1132, 1135 & n. 3 (E.D. Va. 1997) (depression and severe headaches caused by emotional distress were not a "physical injury" under the PLRA). The Court therefore overrules this objection.

Mr. Johnson next argues that the PLRA does not apply to plaintiff "due to staff using force w[h]ere force was not needed[,] causing pain and injuring failing to provide safety and medical care." Docket No. 35 at 1. Mr. Johnson, however, provides no authority for this statement. Rather, he relies on *Tafoya v. Salazar*, 516 F.3d 912, 916 (10th Cir. 2008), for the proposition that the Eighth Amendment requires prison officials to provide "humane conditions of confinement," including "adequate food, clothing, shelter, recreation, medical care, and reasonable safety from serious bodily harm." Docket No. 35 at 1. This statement from *Tafoya*, however, does not contradict the magistrate judge's conclusion, and *Tafoya* did not discuss the PLRA at all, let alone a plaintiff's burden under the PLRA's physical injury requirement. The Court will therefore overrule the objection.

D. Leave to Amend

The magistrate judge recommends denying Mr. Johnson's individual-capacity claims with prejudice for his failure to state a claim. Docket No. 29 at 10–11. The general rule in this circuit is that, if "it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief, the court should dismiss with leave to amend." *Reynoldson v. Shillinger*, 907 F.2d 124, 126 (10th Cir. 1990). This is particularly the case where "deficiencies in a

complaint are attributable to oversights likely the result of an untutored *pro se* litigant's ignorance of special pleading requirements." *Id.* While the magistrate judge noted this general rule, he concluded that Mr. Johnson's claims should be dismissed with prejudice because the deficiencies in Mr. Johnson's complaint are not because he "is not an 'untutored' litigant." Docket No. 29 at 10. Rather, the magistrate judge found that Mr. Johnson admits to being a "well educated, experienced . . . pro se litigant." *Id.* (citing Docket No. 19 at 1; Docket No. 28 at 1 (describing himself as "perspicacious")). The magistrate judge also noted that Mr. Johnson has filed 40 complaints between August 2017 and January 2020, *see* Case No. 20-cv-00037-RM-MEH, Docket No. 3 at 1, and has indicated his familiarity with how to plead Eighth Amendment claims. *Id.* Thus, the magistrate judge concluded that Mr. Johnson's failure to plead sufficient supporting facts is not because he is "ignoran[t] of special pleading requirements" and could "correct the defect" in a future complaint. *Id.* (quoting *Reynoldson*, 907 F.2d at 126).

Mr. Johnson objects that the magistrate judge's conclusion was "wrong," yet states that he "has no need to amend." Docket No. 35 at 2. Mr. Johnson further states that he filed a supplemental complaint adding "all the incidents that have occurred after this suit was filed." *Id.*[4] As the Court has already explained, a statement that the magistrate judge was "wrong" is not a specific objection. *See 2121 E. 30th St.*, 73 F.3d at 1059. Moreover, Mr. Johnson's indication that he does not need to amend his

[4] Mr. Johnson appears to be referring to his motion for leave to amend. Docket No. 31. He did not, however, respond to the magistrate judge's recommendation that this motion be denied, Docket No. 48, and the Court accepted the recommendation. Docket No. 52.

complaint supports the magistrate judge's recommendation that amendment would be futile. The Court has finds "no clear error on the face of the record," Fed. R. Civ. P. 72(b), Advisory Committee Notes, and concludes that this portion of the recommendation is a correct application of the facts and the law.

IV. CONCLUSION

It is therefore

ORDERED that the Recommendation of United States Magistrate Judge [Docket No. 29] is **ACCEPTED**. It is further

ORDERED that CDOC Defendants' Motion to Dismiss Pursuant to F.R.C.P. 12(b)(1) & 12(b)(6) [Docket No. 25] is **GRANTED**.

ORDERED that the plaintiff's official-capacity claims for damages are **DISMISSED without prejudice**. It is further

ORDERED that the plaintiff's individual-capacity claims are **DISMISSED with prejudice**. It is further

ORDERED that this case is closed.

DATED September 22, 2021.

BY THE COURT:

PHILIP A. BRIMMER
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00459-PAB-MEH

JABARI J. JOHNSON,

Plaintiff,

v.

REYNA, and
KORIN,

Defendants.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order [Docket No. 59] of Chief United States District Judge Philip A. Brimmer, entered on September 22, 2021, it is

ORDERED that the Recommendation of United States Magistrate Judge [Docket No. 29] is ACCEPTED. It is further

ORDERED that CDOC Defendants' Motion to Dismiss Pursuant to F.R.C.P. 12(b)(1) & 12(b)(6) [Docket No. 25] is GRANTED. It is further

ORDERED that the plaintiff's official-capacity claims for damages are DISMISSED without prejudice. It is further

ORDERED that the plaintiff's individual-capacity claims are DISMISSED with prejudice. It is further

ORDERED that judgment shall enter in favor of defendants and against plaintiff. It is further

ORDERED that defendants are awarded their costs, to be taxed by the Clerk of the Court, pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1. It is further

ORDERED that this case is closed.

Dated: September 23, 2021.

FOR THE COURT:

Jeffrey P. Colwell, Clerk

By s/ S. Grimm
Deputy Clerk