

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

BARBARA MARIE FRANTZ,

Plaintiff,

v.

CASE NO. 21-3117-SAC

STATE OF KANSAS, et al.,

Defendants.

**MEMORANDUM AND ORDER
AND ORDER TO SHOW CAUSE**

Plaintiff Barbara Marie Frantz is hereby required to show good cause, in writing, to the Honorable Sam A. Crow, United States District Judge, why this action should not be dismissed due to the deficiencies in Plaintiff's Complaint that are discussed herein. Plaintiff is also given an opportunity to file an amended complaint on Court-approved forms.

I. Nature of the Matter before the Court

Plaintiff brings this pro se action under 42 U.S.C. § 1983. Plaintiff is incarcerated at the Topeka Correctional Facility ("TCF") and has paid the filing fee. Plaintiff alleges that she has suffered "severe and substantial civil rights violations 1st degree attempt of murder and the conspiracy to commit pre-meditation 1st degree murder by Defendants." (Doc. 1, at 2.) Plaintiff asks the Court to "[p]lace Plaintiff in Federal Protective Custody for life saving medical care and treatment and to safe-guard her protection as witness against defendant." *Id.* Plaintiff names the State of Kansas and Warden Gloria Geither as Defendants.

Plaintiff's 82-page Complaint uses the Court's form but attaches a handwritten complaint along with multiple attachments. Plaintiff has also filed a 436-page document that includes exhibits in support of her Complaint and a request for an emergency hearing to place her in Federal Protective Custody. (Doc. 4.)

Plaintiff appears to allege that the State of Kansas is conspiring to murder her through multiple misdiagnoses of her medical condition regarding tumors on her liver. Plaintiff alleges that the conspiracy began prior to her arrest on January 28, 2017, and has continued by the concealment of her medical conditions from a medical error in October 2013 by KU Medical Hospital. (Doc. 1–2, at 2.) Although Plaintiff’s claims are hard to follow, she appears to argue that she was wrongfully and maliciously pursued in her criminal case in order to “shut down [her] multi-million dollar lawsuit and [her] major complaints against KU Hospital.” (Doc. 1–2, at 14.) Plaintiff claims that the Larned State Hospital and the Leavenworth County Sheriff’s Office are “affiliated with KU Medical Center Hospital.” *Id.* at 13. Plaintiff names the State of Kansas and Gloria Geither, Warden at TCF, as defendants.

II. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised claims that are legally frivolous or malicious, that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1)–(2).

“To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.” *West v. Atkins*, 487 U.S. 42, 48 (1988) (citations omitted); *Northington v. Jackson*, 973 F.2d 1518, 1523 (10th Cir. 1992). A court liberally construes a pro se complaint and applies “less stringent standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). In addition, the court accepts

all well-pleaded allegations in the complaint as true. *Anderson v. Blake*, 469 F.3d 910, 913 (10th Cir. 2006). On the other hand, “when the allegations in a complaint, however true, could not raise a claim of entitlement to relief,” dismissal is appropriate. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007).

A pro se litigant’s “conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555 (citations omitted). The complaint’s “factual allegations must be enough to raise a right to relief above the speculative level” and “to state a claim to relief that is plausible on its face.” *Id.* at 555, 570.

The Tenth Circuit Court of Appeals has explained “that, to state a claim in federal court, a complaint must explain what each defendant did to [the pro se plaintiff]; when the defendant did it; how the defendant’s action harmed [the plaintiff]; and, what specific legal right the plaintiff believes the defendant violated.” *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1163 (10th Cir. 2007). The court “will not supply additional factual allegations to round out a plaintiff’s complaint or construct a legal theory on a plaintiff’s behalf.” *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997) (citation omitted).

The Tenth Circuit has pointed out that the Supreme Court’s decisions in *Twombly* and *Erickson* gave rise to a new standard of review for § 1915(e)(2)(B)(ii) dismissals. *See Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007) (citations omitted); *see also Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). As a result, courts “look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief.” *Kay*, 500 F.3d at

1218 (citation omitted). Under this new standard, “a plaintiff must ‘nudge his claims across the line from conceivable to plausible.’” *Smith*, 561 F.3d at 1098 (citation omitted). “Plausible” in this context does not mean “likely to be true,” but rather 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 plaintiff has not “nudged [his] claims across the line from conceivable to plausible.” *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (citing *Twombly*, 127 S. Ct. at 1974).

III. DISCUSSION

Plaintiff names the State of Kansas and the Warden at TCF as the only defendants. Plaintiff has not alleged how either defendant is responsible for her alleged misdiagnoses. “Moreover, the Supreme Court has held that neither states nor state officers sued in their official capacities are ‘persons’ within the meaning of 42 U.S.C. § 1983.” *Franklin v. Kansas Dep’t of Corr.*, 160 F. App’x 730, 734 (10th Cir. 2005) (unpublished) (citing *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989)).

Plaintiff names Warden Geither as a defendant, but has failed to allege how the Warden personally participated in the deprivation of her constitutional rights, and appears to rely on the supervisory status of the Warden. An essential element of a civil rights claim against an individual is that person’s direct personal participation in the acts or inactions upon which the complaint is based. *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985); *Trujillo v. Williams*, 465 F.3d 1210, 1227 (10th Cir. 2006); *Foote v. Spiegel*, 118 F.3d 1416, 1423–24 (10th Cir. 1997). Conclusory allegations of involvement are not sufficient. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (“Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has

violated the Constitution.”). As a result, a plaintiff is required to name each defendant not only in the caption of the complaint, but again in the body of the complaint and to include in the body a description of the acts taken by each defendant that violated plaintiff’s federal constitutional rights.

Mere supervisory status is insufficient to create personal liability. *Duffield v. Jackson*, 545 F.3d 1234, 1239 (10th Cir. 2008) (supervisor status is not sufficient to create § 1983 liability). An official’s liability may not be predicated solely upon a theory of respondeat superior. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976); *Gagan v. Norton*, 35 F.3d 1473, 1476 FN4 (10th Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995). A plaintiff alleging supervisory liability must show “(1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.” *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010), *cert. denied*, 563 U.S. 960 (2011). “[T]he factors necessary to establish a [supervisor’s] § 1983 violation depend upon the constitutional provision at issue, including the state of mind required to establish a violation of that provision.” *Id.* at 1204 (citing *Iqbal*, 129 S. Ct. at 1949). Plaintiff’s claims against Warden Geither are subject to dismissal.

If Plaintiff is relying on the Wardens’ participation in her confinement, she must allege a “misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” *Callaway v. Werholtz*, No. 12-2527-EFM, 2013 WL 2297139, at *3 (D. Kan. May 24, 2013) (defining “acting under color of state law” as required by § 1983). Plaintiff has not alleged a misuse of power by the Warden. Furthermore, “[o]fficials who act pursuant to a ‘facially valid court order’ enjoy quasi-judicial immunity from

suit under § 1983.” *Callaway*, 2013 WL 2297139, at *4 (citing *Turney v. O’Toole*, 898 F.2d 1470, 1472 (10th Cir. 1990) (holding that state officials were absolutely immune from § 1983 liability for confining the plaintiff in a state hospital pursuant to a judicial order)). Plaintiff does not allege a failure to follow court orders.

Plaintiff’s only request for relief is release from imprisonment and placement into the Federal Witness Protection Program. “[A] § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, *but not to the fact or length of his custody.*” *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) (emphasis added). When the legality of a confinement is challenged so that the remedy would be release or a speedier release, the case must be filed as a habeas corpus proceeding rather than under 42 U.S.C. § 1983, and the plaintiff must comply with the exhaustion of state court remedies requirement. *Heck v. Humphrey*, 512 U.S. 477, 482 (1994); *see also Montez v. McKinna*, 208 F.3d 862, 866 (10th Cir. 2000) (exhaustion of state court remedies is required by prisoner seeking habeas corpus relief). “Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *see Woodford v. Ngo*, 548 U.S. 81, 92 (2006); *Rose v. Lundy*, 455 U.S. 509, 518–19 (1982). Therefore, any claim seeking release from imprisonment is not cognizable in a § 1983 action.

Plaintiff’s claims seem to center on her medical care and alleged misdiagnoses. Plaintiff has not named any medical providers as defendants and has failed to allege how her named defendants can provide her relief. “Whether a witness will be protected under the witness protection program is entirely within the Attorney General’s discretion.” *Boyd v. T’Kach*, 26 F.

App'x 792, 794 (10th Cir. 2001) (unpublished) (citation omitted). “One cannot receive protection simply on demand.” *Id.* (quoting *Garcia v. United States*, 666 F.2d 960, 962 (5th Cir. 1982)). The district court lacks jurisdiction to grant injunctive relief seeking continuation in, or return to, the witness protection program. *Id.*; see also *Ruston v. Bush*, No. 3:01-CV-1818-H, 2002 WL 108414, at *3 (N.D. Tex. Jan. 23, 2002) (finding that the requested injunctive relief is not available in the civil action as “federal courts do not have any control on who is admitted to the Federal Witness Protection Program” and “a criminal investigation is simply not available through a civil action”).

The Court will grant Plaintiff an opportunity to file an amended complaint in which she names proper defendants and seeks proper relief regarding her medical claims. In filing an amended complaint, Plaintiff must also comply with Fed. R. Civ. P. 8's pleading standards. Rule 8 of the Federal Rules of Civil Procedure requires “a short and plain statement of the claim showing the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Plaintiff's Complaint fails to comply with this rule. “It is sufficient, and indeed all that is permissible, if the complaint concisely states facts upon which relief can be granted upon any legally sustainable basis. Only a generalized statement of the facts from which the defendant may form a responsive pleading is necessary or permissible.” *Frazier v. Ortiz*, No. 06-1286, 2007 WL 10765, at *2 (10th Cir. Jan. 3, 2007) (emphasis omitted) (quoting *New Home Appliance Ctr., Inc. v. Thompson*, 250 F.2d 881, 883 (10th Cir. 1957)).

IV. Motion for Emergency Hearing and Motion to Appoint Counsel

Plaintiff has filed a motion for an emergency hearing and to appoint counsel (Doc. 2). The Court has considered Plaintiff's motion for appointment of counsel. There is no constitutional right to appointment of counsel in a civil case. *Durre v. Dempsey*, 869 F.2d 543,

547 (10th Cir. 1989); *Carper v. DeLand*, 54 F.3d 613, 616 (10th Cir. 1995). The decision whether to appoint counsel in a civil matter lies in the discretion of the district court. *Williams v. Meese*, 926 F.2d 994, 996 (10th Cir. 1991). “The burden is on the applicant to convince the court that there is sufficient merit to his claim to warrant the appointment of counsel.” *Steffey v. Orman*, 461 F.3d 1218, 1223 (10th Cir. 2006) (quoting *Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1115 (10th Cir. 2004)). It is not enough “that having counsel appointed would have assisted [the prisoner] in presenting his strongest possible case, [as] the same could be said in any case.” *Steffey*, 461 F.3d at 1223 (quoting *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995)).

In deciding whether to appoint counsel, courts must evaluate “the merits of a prisoner’s claims, the nature and complexity of the factual and legal issues, and the prisoner’s ability to investigate the facts and present his claims.” *Hill*, 393 F.3d at 1115 (citing *Rucks*, 57 F.3d at 979). The Court concludes in this case that (1) it is not clear at this juncture that Plaintiff has asserted a colorable claim against a named defendant; (2) the issues are not complex; and (3) Plaintiff appears capable of adequately presenting facts and arguments. The Court denies the motion without prejudice to refiling the motion if Plaintiff’s Complaint survives screening.

V. Response and/or Amended Complaint Required

Plaintiff is required to show good cause why her Complaint should not be dismissed for the reasons stated herein. Plaintiff is also given the opportunity to file a complete and proper amended complaint upon court-approved forms that cures all the deficiencies discussed herein.¹

¹ To add claims, significant factual allegations, or change defendants, a plaintiff must submit a complete amended complaint. *See* Fed. R. Civ. P. 15. An amended complaint is not simply an addendum to the original complaint, and instead completely supersedes it. Therefore, any claims or allegations not included in the amended complaint are no longer before the court. It follows that a plaintiff may not simply refer to an earlier pleading, and the amended complaint must contain all allegations and claims that a plaintiff intends to pursue in the action, including those to be retained from the original complaint. Plaintiff must write the number of this case (21-3117-SAC) at the top of the

Plaintiff is given time to file a complete and proper amended complaint in which she (1) raises only properly joined claims and defendants; (2) alleges sufficient facts to state a claim for a federal constitutional violation and show a cause of action in federal court; and (3) alleges sufficient facts to show personal participation by each named defendant. Plaintiff must also comply with Fed. R. Civ. P. 8.

If Plaintiff does not file an amended complaint within the prescribed time that cures all the deficiencies discussed herein, this matter will be decided based upon the current deficient Complaint and may be dismissed without further notice for failure to state a claim.

IT IS THEREFORE ORDERED THAT Plaintiff's motion for an emergency hearing and to appoint counsel (Doc. 2) is **denied without prejudice**.

IT IS FURTHER ORDERED that Plaintiff is granted until **July 14, 2021**, in which to show good cause, in writing, to the Honorable Sam A. Crow, United States District Judge, why Plaintiff's Complaint should not be dismissed for the reasons stated herein.

IT IS FURTHER ORDERED that Plaintiff is also granted until **July 14, 2021**, in which to file a complete and proper amended complaint to cure all the deficiencies discussed herein.

The clerk is directed to send § 1983 forms and instructions to Plaintiff.

IT IS SO ORDERED.

Dated June 14, 2021, in Topeka, Kansas.

s/ Sam A. Crow
Sam A. Crow
U.S. Senior District Judge

first page of her amended complaint and she must name every defendant in the caption of the amended complaint. *See* Fed. R. Civ. P. 10(a). Plaintiff should also refer to each defendant again in the body of the amended complaint, where she must allege facts describing the unconstitutional acts taken by each defendant including dates, locations, and circumstances. Plaintiff must allege sufficient additional facts to show a federal constitutional violation.