IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

C.D., Jr., a minor, by his mother and next friend, AMBER REEL,	:	
Plaintiff,	:	
v.	:	Case No. 1:22-cv-01325-AJT-WEF
STEVE T. DESCANO, in his individual capacity, as Attorney for the Commonwealth for Fairfax County, Virginia,	:	
Defendant.	:	

DEFENDANT, STEVE DESCANO'S, MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF, C.D., JR., BY NEXT FRIEND AMBER REEL'S, COMPLAINT

COMES NOW, Defendant, Commonwealth's Attorney Steve Descano ("CA Descano"), by and through undersigned counsel, and states the following in support of his Motion to Dismiss Plaintiff, C.D., Jr., by next friend, Amber Reel's ("Plaintiff"), Complaint against him.

FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

Plaintiff is a minor child who is alleged to have suffered sexual assault at the hands of Mr. Ronnie Reel, his biological uncle. ECF[1] 1, ¶¶ 5 and ECF 1-4, Ex F. Reel was arrested and charged with Object Sexual Penetration, Forcible Sodomy, and Aggravated Sexual Battery on July 13, 2021. Id. at ¶ 8. Prior to his preliminary hearing and indictment, and at his Counsel's request, Reel had a competency evaluation performed, and was deemed incompetent from November 9, 2021 to December 13, 2021. ECF 1-4, Ex. F. After doctors deemed Reel

[1] Throughout this Memorandum, Defendant refers to documents filed electronically by using their document numbers as noted in the electronic document, i.e. ECF X.

competent to stand trial, he was then indicted for Sodomy and Aggravated Sexual Battery on February 22, 2022. Id. at ¶ 9. At term day on February 24, 2022, a trial was set for September 12 and 13, 2022. Id. at ¶ 10.

CA Descano's office was responsible for the prosecution of Reel for the alleged offenses. ECF 1 at ¶ 6. In the course of this prosecution, a discovery due date of April 29, 2022 was missed by the Assistant Commonwealth's Attorney to whom Reel's case was assigned. Id. at ¶ 12, ECF 1-4 Ex. F, and ECF 1-5 Ex. G. This led the Court to limit the Commonwealth's evidence at trial to that which was provided prior to the due date of April 29, 2022. Id. at ¶ 14. Plaintiff contends that because of this ruling, Reel entered a guilty plea on September 13, 2022 to an amended Assault and Battery charge, and the Sodomy charge was dismissed. Id. at ¶ 16. Plaintiff argues that had the due date not been missed and the evidence been allowed, Reel "would have likely been convicted of sex-related offenses, faced life in prison, and had to register as a sex offender if ever released." Id. at ¶¶ 46 and 47.

Plaintiff contends that the missed discovery due date amounts to a Constitutional violation of Plaintiff's due process rights because Reel was not convicted of a sexual offense, and therefore, a "state created danger" existed 1) because Reel did not have to register as a sex offender, 2) because Plaintiff was not eligible for the Virginia witness protection program, 3) because Plaintiff was not consulted prior to accepting the guilty plea, and 4) because Plaintiff was deprived of assistance available to victims of sexual assault. ECF 1, Count I pp. 7-9. Plaintiff also contends that the missed due date amounts to a Constitutional violation because he was not given access to services available under 34 U.S. code § 20121. ECF 1, Count II, p. 9. Plaintiff finally complains that the missed due date amounts to a Constitutional violation because Reel was not required to register as a sex offender under 34 U.S. code §§ 20901, 20911, and

2032. ECF 1, Count III, pp. 9-10. Plaintiff advances his claims pursuant to 42 U.S.C. § 1983 under a supervisory liability theory and sues CA Descano in his individual capacity only. ECF 1, ¶¶ 7, and 34-43.

STANDARD OF LAW

A motion to dismiss is appropriate when a complaint fails to state a cause of action upon which relief can be granted. Fed R. Civ. P. 12(b)(6). Complaints are dismissed when they fail to assert a legal theory that is recognized by the law or to allege sufficient facts to support a cognizable legal theory. See Smile Care Dental Group v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996). All allegations and favorable inferences that can be drawn from those allegations must be viewed in a light most favorable to the non-moving party. Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 253 (4th Cir. 2009).

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The United States Supreme Court initially elucidated a plausibility pleading standard in Bell Atl. Corp. v. Twombly stating that a complaint must contain sufficient factual matter that if accepted as true, would "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (1955). Later, in Ashcroft v. Iqbal, the Supreme Court reaffirmed its stance on the plausibility standard, holding that it requires a plaintiff to demonstrate more than "a sheer possibility that a defendant has acted unlawfully," and instead requires a plaintiff to articulate facts that, if true, show that the plaintiff has stated a claim entitling him or her to relief. Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (citing Twombly, 550 U.S. at 557).

"The plausibility standard is not akin to a 'probability requirement' but it asks for more than a sheer possibility that a Defendant has acted unlawfully… Where a Complaint pleads facts

that are 'merely consistent with' a Defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" Iqbal, 556 U.S. at 678, (quoting Twombly, 550 U.S. at 557). The plausibility standard requires that a complaint contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009) (citing Twombly, 550 U.S. at 555).

ARGUMENT

As almost every litigator can attest, there is no such thing as a perfect case. CA Descano and his assistants undoubtedly perform their jobs in the public service realm in an effort to see that justice is served in Fairfax County. Because this prosecutorial function is so unique, CA Descano enjoys immunity from liability in the scope of his duties. This prosecutorial immunity is longstanding and absolute.

Even if CA Descano did not enjoy absolute immunity, Plaintiff has failed to state a claim under 42 U.S.C. § 1983. First, Plaintiff has alleged no damages, instead claiming entitlement to certain types of victim's aid which is entirely speculative. Plaintiff has also failed to make out a claim for a "state created danger" or for supervisory liability. Finally, the state statutes alleged to have been violated do not give rise to a cause of action under § 1983. Furthermore, Plaintiff lacks Article III standing to advance this Complaint. The alleged 'injury' is conjectural, is not fairly traceable to the challenged conduct, and will not be redressed by a favorable decision.

Because CA Descano is immune from liability, because Plaintiff lacks standing, and because Plaintiff has failed to state a claim, the Complaint must be dismissed. Further, since CA

Descano's absolute immunity cannot be remedied by amending the Complaint, the dismissal should be with prejudice.

I. Prosecutors enjoy absolute immunity.

"A prosecutor enjoys absolute immunity for prosecutorial functions intimately associated with the judicial phase of the criminal process… when acting within the advocate's role." Dababnah v. Keller-Burnside, 208 F.3d 467, 470 (4th Cir. 2000) (citations omitted). The rationale for the absolute immunity of prosecutors has been explained as follows: "A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court." Imbler v. Pachtman, 424 U.S. 409, 424 (1976). If a prosecutor was always subject to civil liability every time he or she moved to dismiss a case, "the apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of his office." Id. In coming to this conclusion, the Court recognized that the "genuinely wronged" civil plaintiff would be left without redress, but the alternative of "qualifying a prosecutor's immunity would disserve the broader public interest." Id. at 427.

To determine whether the prosecutor was acting as an officer of the court, and consequently, whether absolute immunity applies, functional considerations must be examined. Van de Kamp v. Goldstein, 555 U.S. 335, 342 (2009). In other words, a court must examine whether the offending action or omission was integral to the criminal process. For instance, when a prosecutor is engaged in investigative or administrative tasks, absolute immunity may not apply. Id.

In a case directly on point, Van de Kamp v. Goldstein, the Supreme Court of the United States addressed whether a prosecutor could be liable for his assistant's failure to provide a

defendant's attorney with impeachment-related information under the theory that the District Attorney failed to adequately train, supervise, or create any system that would catch such a mistake. Id. at 344. The plaintiff in that case argued that such a failure was administrative and therefore the omission was outside of the scope of prosecutorial immunity. The Court held that this failure was not the type of "administrative task" that would prevent the application of absolute immunity. Van de Kamp, 555 U.S. at 342.

The Court reasoned that although the plaintiff was technically attacking the office's administrative procedures, "prosecutors involved in such supervision or training or information-system management enjoy absolute immunity from the kind of legal claims… [that] focus upon a certain kind of administrative obligation—a kind that itself is directly connected with the conduct of a trial." Id. It held that administrative duties with respect to moving a trial forward are different from administrative duties of the office, such as hiring, payroll, maintaining facilities, etc. Id. Therefore, absolute immunity applies even to administrative duties directly connected with the conduct of a trial, as are alleged in the case at bar.

The Supreme Court has also squarely addressed the question of "whether § 1983 permits damages recoveries from judges, prosecutors, and other persons acting 'under color of law' who perform official functions in the judicial process," as opposed to immunity only applying to common law allegations. Briscoe v. LaHue, 460 U.S. 325, 334 (1983). It has repeatedly stated, "in light of common law immunity principles, § 1983 d[oes] not impose liability on these officials." Brisco, 460 U.S. at 334. It has explained:

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public

> duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

Imbler, 424 U.S. at 422–23. The Supreme Court has also remarked that:

> A prosecutor… inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.

Van de Kamp, 555 U.S. 335, 342 (2009) (quotations omitted) (citing Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

The Complaint is completely devoid of allegations suggesting that CA Descano's 'actions' were not intimately associated with the judicial phase of the criminal process. To the contrary, the allegations show exactly that. The Complaint discusses two actions/omissions: a missed deadline in the discovery process, and the determination of whether to prosecute certain charges with respect to the plea deal. Both of these instances are intimately associated with the judicial phase of the criminal process, and therefore prosecutorial immunity applies. Van de Kamp, 555 U.S. at 342; Smith v. McCarthy, 349 F. App'x 851, 859 (4th Cir. 2009). Thus, even if it is assumed that Plaintiff states a valid claim or claims in his Complaint, which CA Descano disputes, the claims fail as a matter of law due to CA Descano's absolute immunity.

Plaintiff also seems to blur the pleading distinction between individual and official capacity suits. Plaintiff sues CA Descano "in his individual capacity only," ECF 1, ¶ 7, however, he then uses language attendant to official capacity suits.[2] Whereas "personal capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law…[o]fficial capacity suits, in contrast, 'generally represent only another way of pleading an

[2] See ECF 1, ¶¶ 11, 12, 20, 21, 26, 31, 37, 39, 40, and 56 which repeatedly reference "Defendant's office."

action against an entity of which an officer is an agent.'" Kentucky v. Graham, 473 U.S. 159, 166 (1985) (citing Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690, n. 55 (1978)). This distinction will be discussed in more detail infra, but to the extent that the Court finds that Plaintiff actually drafted his Complaint to accuse CA Descano in his official capacity, Eleventh Amendment Immunity applies to Commonwealth's Attorneys,[3] and it must similarly be dismissed. See Bonds v. Virginia, No. 7:21-CV-00363, 2021 WL 2827301, at *3 (W.D. Va. July 7, 2021), aff'd, No. 21-7146, 2021 WL 6067259 (4th Cir. Dec. 20, 2021).

II. Plaintiff has failed to state a claim under 42 U.S.C. § 1983.

"The Fourteenth Amendment's Due Process Clause provides that no state shall 'deprive any person of life, liberty, or property, without due process of law.' U.S. Const. amend. XIV, § 1." Holloway ex rel. Est. of Holloway v. The City of Suffolk, VA, 660 F. Supp. 2d 693, 697 (E.D. Va. 2009). To state a claim under § 1983, Plaintiff must have plausibly alleged that CA Descano's acts or omissions have resulted in some sort of damage or deprivation. Plaintiff has not and cannot show such damage or deprivation.

Additionally, "[f]or a due process challenge... to succeed, the general rule is that the action must have been 'intended to injure in some way unjustifiable by any government interest.'" Holloway ex rel. Est. of Holloway, 660 F. Supp. 2d at 697. In this circumstance, the "action" of missing a discovery deadline is not an action at all, but an omission, which was not intended at all, let alone intended to injure. Similarly, the offering of the plea deal, was also not intended to injure Plaintiff. Moreover, Plaintiff cannot make out that there was a "state created

[3]"[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." Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945), (overruled on other grounds by Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613, (2002)).

danger," or successfully plead a supervisory liability claim. Nor can the allegedly violated state statutes provide Plaintiff with a federal cause of action. Thus, Plaintiff has failed to state a § 1983 claim for a number of reasons.

A. Plaintiff fails to allege that he has suffered damage at the hands of Descano.

At the onset, Plaintiff's allegations as to damages are entirely speculative and stop well short of the line between possibility and plausibility. All the damages that Plaintiff claims he is suffering hinge on the assumption that Reel would have been convicted of a sex offense had the discovery due date not been missed. An obvious fact that Plaintiff's assumption ignores is that even if discovery had gone to plan, that would not have been an assurance that Reel would have been convicted of a sex offense. Perfect compliance with discovery orders does not equal a certain conviction for each of the prosecution's chosen crimes. Plaintiff takes this for granted in his argument, but experienced trial lawyers know that trials are unpredictable, and no outcome is guaranteed. Further, many considerations go into the offering of plea deals. Plaintiff's assertion that because a discovery deadline was missed an inappropriate plea was offered is, again, not more than speculation.

Plaintiff claims he was denied certain 'benefits' that Reel's conviction of a sex offense would have provided such as Virginia witness protection, sex offender notifications, and assistance available to victims of sexual assault. ECF 1, ¶¶ 51, 55, 59, 63, 64, 65, and 66. "The procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit': 'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 756 (2005) (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577

(1972)). Plaintiff had a unilateral hope for such 'benefits,' not "more than an abstract need or desire" as required. Id. Thus, without a legitimate claim of entitlement, such Due Process claims are inappropriate.

Further, Plaintiff does not identify the 'process' in which he was denied the ability to take part, as victims do not have a right to insist upon the criminal prosecution of another. See infra § II, D. Plaintiff also states that Reel could potentially "return[] to assault him or retaliate against his family members," but acknowledges that this is "in the Plaintiff's mind." ECF 1, ¶ 54. Tort law does not permit recovery from a prosecutor for hypothetical recidivism "in the Plaintiff's mind" of an individual that the prosecutor's office has, in fact, convicted of a lesser crime than Plaintiff would have preferred. Plaintiff has not claimed that Reel has committed any further offenses against him. Instead, Plaintiff complains of hypothetical future offenses Plaintiff imagines Reel might commit and 'benefits' he will not receive. Plaintiff simply has not alleged any damages already suffered or even that he is certain to suffer at the hands of CA Descano. Although if true as pled, the abuse Plaintiff suffered at the hands of Reel was horrific, the anger misdirected at Descano does not provide Plaintiff with a cause of action.

B. Plaintiff has failed to sufficiently allege that there was a "state created danger."

Plaintiff claims that CA Descano deprived him of his Constitutional Due Process rights under the Fourteenth Amendment through a "state created danger." ECF 1, Count I, p. 7. "[T]he state-created danger doctrine is a 'narrow' exception to the general rule that state actors are not liable for harm caused by third parties."[4] Graves v. Lioi, 930 F.3d 307, 319 (4th Cir. 2019).

[4] The doctrine was born out of a traditional "custodial context" where the state had an affirmative duty to protect individuals whom it took into custody because they were no longer able to protect themselves from third parties in any meaningful way. Pinder, 54 F.3d at 1176-1177 (4th Cir. 1995); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 198 (1989).

"Liability under the state-created danger exception means that the state has to take some affirmative step to create the danger from the third party." Holloway ex rel. Est. of Holloway, 660 F. Supp. 2d at 698. The Fourth Circuit as recently as 2019 has stated that since the state created danger doctrine is so narrow, "we have never issued a published opinion recognizing a successful state-created danger claim." Turner v. Thomas, 930 F.3d 640, 646 (4th Cir. 2019).

Generally, "the Due Process Clause of the Fourteenth Amendment does not require governmental actors to affirmatively protect life, liberty, or property against intrusion by private third parties." Pinder v. Johnson, 54 F.3d 1169, 1174 (4th Cir. 1995). The Due Process Clause instead "works only as a negative prohibition on state action"—it "protects the people from the State," but does not "ensure that the State protects [the people] from each other." Id. Therefore, "to establish § 1983 liability based on a state-created danger theory, a plaintiff must show that the state actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omissions." Turner, 930 F.3d at 645 (citing Doe v. Rosa, 795 F.3d 429, 439 (4th Cir. 2015)).

"The doctrine's conception of an 'affirmative act' is also quite limited: '[i]t cannot be that the state commits an affirmative act or creates a danger every time it does anything that makes injury at the hands of a third party more likely. If so, the state would be liable for every crime committed by the prisoners it released.'" Graves, 930 F.3d at 319–20 (citing Pinder, 54 F.3d at 1177)). The standard to make out such a claim is a high one; the act must be "akin to [the state] actor itself directly causing harm to the plaintiff." Id. "The concept of 'affirmative acts' should

not extend beyond the context of immediate interactions between the [state actor] and the plaintiff." Doe, 795 F.3d at 441 (citations omitted).

Here, as stated supra, there is no properly alleged harm to Plaintiff that has occurred at the hands of CA Descano. Nor is there an affirmative act alleged for the purposes of the state created danger doctrine. Nothing stated in the Complaint comes close to the standard required to successfully plead a Due Process violation under this doctrine. CA Descano's assistant missing a discovery deadline is decidedly not an affirmative act on the part of CA Descano, but an omission. The Fourth Circuit has remarked, "[g]iven the 'narrow limits ... to establish § 1983 liability based on a state-created danger theory,' it is unsurprising that plaintiffs often attempt to recharacterize inactions and omissions as affirmative acts to satisfy their pleading and proof obligations. What is more, we have previously cautioned that 'courts should resist the temptation' to accept plaintiffs' attempts to 'artfully recharacterize[ ]' inaction as action." Graves, 930 F.3d at 327.

Further, none of the "acts" alleged are akin to CA Descano directly harming Plaintiff, nor are they in the context of immediate interactions between CA Descano and the Plaintiff, as required. Graves, 930 F.3d at 319–20; Doe, 795 F.3d at 441. The Fourth Circuit has been very clear that a defendant "could not have created a danger that already existed," and that "allowing continued exposure to an existing danger by failing to intervene is not the equivalent of creating or increasing that danger." Doe, 795 F.3d at 439. To the extent that the offer of a plea deal which was less severe than Plaintiff hoped is characterized as an 'action,' it extends beyond the context of immediate interactions between CA Descano and Plaintiff.

Indeed none of CA Descano's assistant's actions or omissions in the course of the prosecution to which Plaintiff was not a party are in the context of immediate interactions

between CA Descano and Plaintiff. Nor do they increase the danger of a hypothetical crime being committed against Plaintiff. Nor does an unsuccessful prosecution of another create a danger to Plaintiff which, as alleged, already existed. At best, assuming *arguendo* that Reel continued to commit crimes against Plaintiff after being released on time served, the assistant's 'actions' might be classified as "allowing continued exposure to an existing danger by failing to intervene," which is still not enough. Plaintiff has not alleged any such continuing abuse by Reel.

Finally, a plaintiff must also plead the "requisite causal link between the [] purported 'affirmative acts' and the harm." Graves, 930 F.3d at 321; see also Kaucher v. Cnty. of Bucks, 455 F.3d 418, 432 (3d Cir. 2006) ("There must be a direct causal relationship between the affirmative act of the state and plaintiff's harm. Only then will the affirmative act render the plaintiff more vulnerable to danger than had the state not acted at all.") The state-created danger theory is inapplicable when "[1)] there is no evidence that a third party harmed [the plaintiff], [2)] that the actions of the defendants caused a third party to harm [the plaintiff], or [3)] that the actions of the defendants substantially enhanced the risk that a third party would hurt [the plaintiff]." Holloway ex rel. Est. of Holloway, 660 F. Supp. 2d at 698. As repeatedly stated, there is no allegation that after the discovery deadline was missed or the plea deal was offered that, 1) Plaintiff has been harmed by Reel, 2) CA Descano caused Reel to harm Plaintiff, or 3) CA Descano substantially enhanced the risk that Reel would harm Plaintiff.

As the Fourth Circuit so eloquently put, "hard cases can make bad law," and although the abuse that Plaintiff allegedly suffered at the hands of Reel was terrible, it cannot unravel the law underpinning the pleading requirements for cases under § 1983. Pinder, 54 F.3d at 1179. "[T]here simply is 'no constitutional right to be protected by the state against ... criminals or

madmen,' and a state actor's 'failure to do so is not actionable under section 1983.'" Doe, 795 F.3d at 440 (citing Fox v. Custis, 712 F.2d 84, 88 (4th Cir.1983)). The missed deadline is regrettable, but not actionable, and therefore, Plaintiff's Complaint must be dismissed with prejudice.

C. Plaintiff has failed to successfully allege a supervisory liability claim.

Although not expressly stated in the Complaint, it is important to note that CA Descano was not the individual attorney prosecuting Reel's case. Instead, it was his assistant, which can be gleaned from the Exhibits to the Complaint, ECF 1-1 to 1-16, which contain the assistant's signatures and appearances as well as the constant references to the "Defendant's office." This is important when analyzing the viability of the Complaint, as Plaintiff sues CA Descano only in his individual or personal capacity.

"Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law." Pratt-Miller v. Arthur, 701 F. App'x 191, 193 (4th Cir. 2017) (citing Kentucky v. Graham, 473 U.S. 159, 165 (1985)). Because CA Descano is not alleged to have personally dealt with Reel's prosecution, but to have supervised it in his official role as Commonwealth's Attorney for Fairfax County, Plaintiff premises his theory of recovery on a supervisory liability. "A court may also hold a public official liable for the acts of h[is] subordinates under § 1983 if the plaintiff demonstrates supervisory liability, which is based on a supervisor's indifference or tacit authorization of a subordinate's misconduct." Id. (citing Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir. 1994)). Plaintiff has failed to plead such a theory.

Where the "claims are against a public official in h[is] individual capacity, to hold the official liable for h[is] subordinate's conduct, that conduct must meet the test for supervisory

liability." Pratt-Miller, 701 F. App'x at 193 (citation omitted). The Fourth Circuit has set forth three elements of this test. To prove supervisory liability under § 1983 a Plaintiff must establish:

> (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices,"; and (3) that there was an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

Shaw, 13 F.3d at 799. To satisfy the first element, a plaintiff has to show "(1) the supervisor's knowledge of (2) conduct engaged in by a subordinate (3) where the conduct poses a pervasive and unreasonable risk of constitutional injury to the plaintiff." Id. For the risk to be pervasive and unreasonable, there must be "evidence that the conduct is widespread, or at least has been used on several different occasions and that the conduct engaged in by the subordinate poses an unreasonable risk of harm of constitutional injury." Id.

Although Plaintiff conclusorily states that "Defendant knew about it," ECF 1, ¶¶ 29, 37, and 39, he has provided no facts to support this contention. Indeed, the facts elucidated and the exhibits attached to his Complaint show the opposite. The facts alleged show that CA Descano was not the individual actively prosecuting Reel's case, his assistant was. No facts allege that CA Descano had anything directly to do with Reel's case. The exhibits attached to the Complaint show the same. The exhibits which are media articles also distance CA Descano from the case and instead contain language provided by a spokesperson for "his office." ECF 1-12, Ex. N and 1-13, Ex. O.

Plaintiff also concerningly offers this Court a blatant mischaracterization that "[i]n a media statement, [CA Descano] acknowledged but still defended…the practice of non-compliance with court ordered discovery," citing to ECF 1-13. In fact, the statement came from

CA Descano's office, from spokesman Ben Shnider, who stated that most of the discovery had already been provided when the case was still in juvenile and domestic court, but that the policy had been reiterated to all the assistants to provide the discovery again. ECF 1-12 and 1-13. Both articles that Plaintiff offers clearly state that CA Descano declined to speak about the case. ECF 1-12 and 1-13. Neither this nor any of the other facts alleged show knowledge on the part of CA Descano of pervasive and unreasonable, or widespread, conduct which would jeopardize the constitutional rights of victims.[5] The allegation of two missed due dates is not widespread conduct—indeed, two isolated incidents does not even amount to "several" occasions as the language of the precedent at minimum requires.

The second element, deliberate indifference, may be established by "demonstrating a supervisor's continued inaction in the face of documented widespread abuses." Id. The burden to establish deliberate indifference is a heavy one. The Fourth Circuit has stated:

> [o]rdinarily, [the plaintiff] cannot satisfy his burden of proof by pointing to a single incident or isolated incidents, for a supervisor cannot be expected to promulgate rules and procedures covering every conceivable occurrence within the area of his responsibilities. Nor can he reasonably be expected to guard against the deliberate criminal acts of his properly trained employees when he has no basis upon which to anticipate the misconduct. A supervisor's continued inaction in the face of documented widespread abuses, however, provides an independent basis for finding he either was deliberately indifferent or acquiesced in the constitutionally offensive conduct of his subordinates.

Slakan v. Porter, 737 F.2d 368, 372-73 (4th Cir.1984), cert. denied, 470 U.S. 1035 (1985). Again, Plaintiff conclusorily states that with respect to discovery violations, CA Descano

[5] This is especially true in light of the arguments advanced supra and infra, where it is explained that in the circumstances set forth by Plaintiff, there are no rights to benefits or victim's rights protected by the Constitution as alleged in this Complaint.

"continued to condone the same practice and maintained a position of deliberate indifference." ECF 1, ¶ 30.

Plaintiff has alleged nothing more than bald accusations of CA Descano 'condoning' such behavior or allowing his assistants to ignore court orders. ECF 1, ¶¶ 30 and 39. In fact, the exhibits attached to the Complaint by Plaintiff provide the contrary viewpoint. When asked about the missed discovery due dates, the representative from CA Descano's office stated, "[w]e acted immediately in response to this novel ruling, and notified all prosecutors that discovery must now be submitted again in Circuit Court—even if it was already conveyed in a lower court." ECF 1-12. This shows that CA Descano took immediate action to ensure that his assistants were following the court orders at issue. It shows that CA Descano was absolutely not condoning such behavior, but was instead swiftly reinforcing a policy to correct any shortcomings in terms of discovery.

Finally, Plaintiff needed to plead the last element, that there was a causal link between CA Descano's "inaction" and Plaintiff's constitutional injury. As stated supra, not only did CA Descano act to reaffirm the policy to provide discovery after the missed discovery deadline, but also Plaintiff has not suffered any constitutional injury. As the first two supervisory liability elements failed, so has the third. Plaintiff has offered no facts in support of such a theory, which borders on frivolous, and does not provide Plaintiff the means to assert claims against CA Descano under § 1983. Consequently, the Complaint must be dismissed with prejudice.

D. Section 1983 does not provide a federal cause of action for the alleged violation of state statutes in Counts I and III or the alleged violation of federal statutes in Counts II and III.

In Counts I and III, Plaintiff cites to various state statutes claiming that his Constitutional rights were violated because had the discovery deadline not been missed, Reel would have likely

been convicted of a sex offense which would entitle Plaintiff to the Virginia statute's benefits. ECF 1, ¶¶ 49, 50, 51, and 64. The incurably speculative nature of this assertion has already been discussed supra. See supra § II, A. A § 1983 action, however, may not rest on a violation of state law, nor does it provide a remedy for common law torts. Clark v. Link, 855 F.2d 156, 161 (4th Cir. 1988) ("If there is no violation of a federal right, there is no basis for a section 1983 action…") The Fourth circuit has not looked kindly on plaintiffs attempting to give their actions accusing defendants of state law violations "federal gloss," calling such attempts "specious." Id. at 163.

Further, Courts have held, in the specific context of victim's rights, that "a violation of state law cannot give rise to a claim under § 1983." Bonds, 2021 WL 2827301, at *3 (citing Love v. Pepersack, 47 F.3d 120, 124 n.5 (4th Cir. 1995)). This logically follows from the fact that victims and alleged victims "ha[ve] no constitutional right to insist upon a [] criminal prosecution." Id. (citing Lopez v. Robinson, 914 F.2d 486, 494 (4th Cir. 1990)); Sattler v. Johnson, 857 F.2d 224, 227 (4th Cir. 1988) ("There is, of course, no such constitutional right…" discussing a § 1983 plaintiff's argument that he has a right as a victim to have others criminally prosecuted.)

"In fact, a citizen does not have any judicially cognizable interest in the prosecution or non-prosecution of another person." Id. (citing Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973)); see also Hart v. City of Santee, No. 5:16-CV-03338-JMC, 2017 WL 3158779, at *4 (D.S.C. July 25, 2017) (a plaintiff does not have a cognizable federal right for the purposes of a Due Process claim under § 1983 for the state to investigate a potential crime). The Fourth Circuit has also held that state victim's rights such as the enforcement of a restraining order "would not necessarily constitute a property interest for purposes of the Due Process Clause,"

cautioning that "the Fourteenth Amendment should not be treated as a font of tort law." Graves, 930 F.3d at 328.

Even if the court were to find that Plaintiff has some sort of a property interest in the victim's rights statutes at issue without Reel's conviction of a sex crime, "to hold that a state violates the Due Process Clause every time it violates a state-created rule regulating the deprivation of a property interest would contravene the well recognized need for flexibility in the application of due process doctrine." Riccio v. Cnty. of Fairfax, Va., 907 F.2d 1459, 1469 (4th Cir. July 12, 1990).

Finally, Plaintiff also implies that federal statutes 34 U.S.C. §§ 20121, 20901, 20911, and 2032 were violated. First, 34 U.S.C. § 2032 does not seem to exist. Second, none of the other three cited statutes provide causes of action. Section 20121 is a statute which, although titled "legal assistance for victims," merely enables the Attorney General to award grants to other organizations who will provide such legal assistance, and does not in and of itself provide any assistance or include language entitling victims to assistance. Section 20901 declares the purpose of SORNA, the sex offender registration and notification act, including listing the names of the victims for whom the act was created. And § 20911 is the definitional section of SORNA, which, under its plain meaning, does not include Reel who was not convicted of a sex offense,[6] and consequently cannot be construed to include Plaintiff. Indeed, the SORNA statute later in § 20932 provides immunity for those involved in the execution of the statute.

Plaintiff simply has not, anywhere in his Complaint, even when construed liberally, stated a cognizable claim upon which relief can be granted. Where he has used language to

[6] Ironically, if the court were to determine this was applicable to Reel, it would be finding him guilty without due process.

allege potential claims under a certain set of assumptions, the facts as pled have been wholly insufficient to plausibly allege a cause of action. The buzzwords used to imply federal § 1983 liability are not enough to survive a Motion to Dismiss, especially in the face of CA Descano's absolute immunity.

III. Plaintiff lacks Article III standing.

As elucidated more completely by the arguments in previous sections of this brief, Plaintiff lacks Article III standing. "To have Article III standing, [a plaintiff] must be able to show that (1) []he suffered an actual or threatened injury that is concrete, particularized, and not conjectural; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable decision." Doe v. Virginia Dep't of State Police, 713 F.3d 745, 753 (4th Cir. 2013).

The 'injury' that CA Descano is alleged to have inflicted upon Plaintiff is conjectural and speculative. See supra § II, A. Without a conviction of a sex offense on the part of Reel, Plaintiff is not entitled to any 'benefits' to the victim that would attend such a conviction. Id.; Doe, 713 F.3d at 754. Further, hypothetical re-offenses by Reel which Plaintiff fears may occur are not concrete or particularized. Id.; Doe, 713 F.3d at 754. Therefore, the Complaint fails the first prong of the standing test.

The 'injury' is also not fairly traceable to the challenged conduct, the second prong. "Traceability is established if it is 'likely that the injury was caused by the conduct complained of and not by the independent action of some third party not before the court.'" Doe, 713 F.3d at 755 (citing Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 154 (4th Cir.2000.)) As discussed earlier, even if the entirety of the prosecution had gone to trial without any missed deadlines, such conduct would not have guaranteed Reel's conviction of a sex

offense. See supra § II, A. Therefore, pointing to a discrete point within the entirety of the prosecutorial process and proclaiming that it is the sole reason that Reel was not convicted of a sex offense, and that, therefore, Plaintiff has been deprived of benefits he never had, is both inappropriate and insufficient. Not to mention that any recidivism on the part of Reel would plainly be the independent action of a third party not before the Court (Reel). See supra § II, B.

Finally, the 'injury' cannot be redressed by a favorable decision. Damages paid by CA Descano will not change the fact that Reel was not convicted of a sex offense. As Reel will not be labeled a "sex offender" regardless of Plaintiff's success or failure in this action, Plaintiff will not be labeled a "victim of a sex offense" for the purposes of the statutes he names in his Complaint. See supra § II, D. This means that none of the attendant 'benefits' will be afforded to Plaintiff in the event of his highly unlikely success in the face of prosecutorial immunity. Nor would damages paid by CA Descano ensure that Reel does not commit further crimes against Plaintiff. See supra § II, B. Consequently, the Complaint also fails the third prong.

As the Fourth Circuit has noted, "[t]he traceability and redressability prongs become problematic when third persons not party to the litigation must act in order for an injury to arise or be cured. An injury sufficient to meet the causation and redressability elements of the standing inquiry must result from the actions of the respondent, not from the actions of a third party beyond the Court's control." Doe, 713 F.3d at 755 (citation omitted). Here, we have not one, but two third parties: Reel, and the assistant Commonwealth's attorney who prosecuted

Reel's case. Who we do not see directly implicated, is CA Descano. See supra § II, C. Because Plaintiff lacks standing against CA Descano, the Complaint must be dismissed.

CONCLUSION

For the reasons set forth above, Defendant, Commonwealth's Attorney, Steve Descano, respectfully requests that the Court grant his Motion to Dismiss Plaintiff, C.D., Jr., by next friend Amber Reel's, Complaint against him with prejudice.

Respectfully submitted,

_____/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2022, I served a copy of Defendant, CA Descano's, Memorandum in Support of his Motion to Dismiss upon the Plaintiff via ECF filing to:

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