Case No. 17-55107

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAFAEL BENITEZ,

Plaintiff/Appellant,

vs.

SANDRA HUTCHENS,

Defendant/Appellee.

Appeal From The United States District Court
For The Central District of California, Southern Division
Honorable Andrew J. Guilford
Lower Court Docket No. SACV 12-00550 AG (JC)

APPELLEE'S REPLACEMENT ANSWERING BRIEF

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INTRODUCTION

Plaintiff-Appellant Rafael Benitez ("Benitez") is an adjudged Sexually Violent Predator ("SVP") under Welfare & Institutions Code § 6600 ("SVPA") and brings this Appeal regarding the conditions of his confinement in the Orange County Jail.

After the District Court repeatedly dismissed Benitez's Complaint against Defendant-Appellee former Sheriff Sandra Hutchens ("Sheriff Hutchens") for failing to state a cause of action, Benitez requested that the Court grant him one last chance to amend. Benitez represented to the Court that he *had in his possession* specific policies taken from the County's Jail Operations Manual which caused him to be improperly housed together with criminal inmates while he was an SVPA detainee. Due to Benitez's status as a *pro se* litigant, and taking him at his word, the Court granted Benitez leave to file a Third Amended Complaint ("TAC"). However, it immediately became clear that Benitez had no such policies and could not identify any. Rather, the policies referenced within the TAC expressly forbid the type of co-mingling of SVPA detainees and criminal inmates that form the gravamen of Benitez's allegations. The District Court once again granted Defendant Sheriff Hutchens's Motion to Dismiss, this time with prejudice.

Benitez appealed and filed a First Opening Brief. Sheriff Hutchens responded. Subsequently, this Court assigned *pro bono* counsel to Benitez and invited a new round of briefing.

ISSUES PRESENTED

A. Did the District Court properly dismiss Benitez's official capacity claim against Sheriff Hutchens given that the only policies identified in the TAC expressly forbade the type of co-mingling of SVPA detainees and criminal inmates alleged?

B. Does this Court have personal jurisdiction over Sheriff Hutchens in her individual capacity when Sheriff Hutchens has never been served in her individual capacity and never appeared in her individual capacity?

C. Apart from lacking jurisdiction over former Sheriff Hutchens in her individual capacity, did the District Court correctly dismiss Benitez's individual capacity claim against Sheriff Hutchens as the TAC failed to allege any specific facts which plausibly establish Sheriff Hutchens's personal involvement in Benitez's alleged constitutional violations?

STANDARD OF REVIEW

A dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed *de novo*. *Buckey v. Cnty. of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). All well-pleaded allegations of material fact are accepted

as true and construed in the light most favorable to the non-moving party. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031–32 (9th Cir.2008). The Court, however, is not required to accept as true any allegations that are merely conclusory, unwarranted deductions of fact or unreasonable inferences. *Id.*

While *pro se* pleadings are generally liberally construed, the Court may not "supply essential elements of the claim that were not initially pled." *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

SUMMARY OF ARGUMENT

Benitez's official capacity claim was correctly dismissed by the District Court. The only policies referenced in the TAC expressly contradict Benitez's allegations. Moreover, Sheriff Hutchens was never served in her individual capacity and the courts lack jurisdiction in that regard. Benitez's belated attempt to revive the personal capacity claim against Sheriff Hutchens is not well-founded and, even if the District Court had jurisdiction, Benitez's individual capacity claim against Sheriff Hutchens was properly dismissed as Benitez failed to allege facts which plausibly suggest any personal involvement by Sheriff Hutchens in the constitutional violations alleged within the TAC.

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STATEMENT OF FACTS

On December 18, 2002, Benitez was convicted of aggravated felonies in Orange County Superior Court. (Appellee's Supplemental Excerpts of Record "SER" 2.) Subsequently, the State of California instituted involuntary civil-commitment proceedings against Benitez pursuant to Sexually Violent Predators Act ("SVPA") (*Id.*) Under the SVPA, persons may be civilly committed to a secure mental health facility for treatment after the completion of the criminal sentence if they (a) have been convicted of sexually violent offenses, and (b) have been diagnosed with a mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior. (*Id.)* In March 2008, Benitez was transferred to the Orange County Jail ("OCJ") pending his SVPA proceedings. (SER 2.) The validity of Benitez's SVPA proceedings are not at issue in this appeal.

On May 11, 2012, Benitez filed his Complaint against Defendants Sheriff Hutchens, Tony Rackauckas, and Eric Holder in their individual and official capacities. (SER 1.) On May 21, 2012, the District Court dismissed Benitez's Complaint as to all Defendants with leave to amend. (SER 2.)

Benitez subsequently filed a First Amended Complaint against Sheriff Hutchens only. In the First Amended Complaint, Benitez alleges that Sheriff Hutchens subjected him to punitive conditions of confinement. Benitez listed

approximately 82 “restrictions” within the OCJ which Benitez alleges violated his 14th Amendment rights. (Appellant’s Excerpts of Record, “ER” 110-115.)

Following a Motion to Dismiss from Sheriff Hutchens and numerous rounds of opposition papers from Benitez, the Court adopted the Magistrate’s Report and Recommendation dismissing the First Amended Complaint on the grounds that Benitez had failed to allege the existence of a custom, policy or practice which caused the alleged constitutional harm. (SER 3-5.) Benitez objected to the ruling and attempted to file a Second Amended Complaint. (SER 3.) Subsequently, Benitez represented to the Court that, if given the chance, he would identify and provide ***specific policies*** which caused his alleged unconstitutional conditions of confinement. (SER 20.) Due to Benitez’s status as a *pro se* litigant and “in an abundance of caution”, the District Court granted leave to file a Third Amended Complaint so that Benitez could identify a custom, policy or practice. (SER 24.) Contrary to the prior representations of Benitez, the TAC failed to identify any policies leading to unconstitutional conditions of confinement; in fact, the only policies referenced in the TAC specifically contradict Benitez’s allegations, including his allegation that he was housed together with criminal inmates while an SVPA civil detainee. (*See e.g.,* ER 58.)

On October 26, 2015, Sheriff Hutchens filed a Motion to Dismiss the TAC. (ER 50.) The Magistrate issued a Report and Recommendation recommending

dismissal of the TAC without further leave to amend, finding that the TAC failed to state a viable claim against Sheriff Hutchens in her official and individual capacities, without discussing the lack of service on Sheriff Hutchens in her individual capacity. (ER 7.) Sheriff Hutchens was only served in her official capacity (ER 101) and never appeared in her individual capacity throughout the litigation. (*See e.g.* ER 41.)

With respect to the official capacity claim against Sheriff Hutchens, the Report and Recommendation found that the TAC "[does] not *plausibly* allege that [Sheriff Hutchens] committed a constitutional violation pursuant to a *specific, official* municipal policy, custom, or usage." (ER 28.) (Emphasis in the original.) With respect to the individual capacity claim, the Report and Recommendation found that the TAC does not plausibly show that Sheriff Hutchens had any personal involvement in the alleged constitutional violations; it did not discuss lack of service. (ER 22.) On December 26, 2016, Judge Guilford adopted the Report and Recommendation and entered Judgment in favor of Sheriff Hutchens. (ER 2.)

Benitez's court-appointed counsel filed Benitez's Replacement Opening Brief on October 25, 2019.

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ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT BENITEZ FAILED TO STATE AN OFFICIAL CAPACITY CLAIM AGAINST SHERIFF HUTCHENS.

As noted by the District Court, to state a valid official capacity claim, Benitez must plausibly allege not only that he suffered a constitutional injury, but that such injury was caused by actions taken pursuant to an official government policy or custom. *Connick v. Thompson,* 563 U.S. 51, 60 (2011)(citing *Monell v. Dep't of Soc. Servs. of City of New York,* 436 U.S. 658, 98 (1978).) Liberally construing Benitez's allegations in his favor, Benitez has failed to state such a claim.

A. Benitez's Official Capacity Claim Against Sheriff Hutchens Fails As The Policies Identified In The TAC Expressly Contradict Benitez's Allegations.

The District Court correctly dismissed Benitez's official capacity claim against Sheriff Hutchens after determining that the TAC failed to plausibly allege that any constitutional violation was caused by an official policy or custom of the County. (ER 28.) In order to attack that analysis, Benitez's Opening Brief argues that the District Court's conclusion was incorrect, but resorts to

mischaracterizations of the TAC and relies on completely new allegations not found within the TAC. [1]

For example, the Opening Brief argues that Benitez stated a viable official capacity claim because he alleged that "the jail's policy [regarding holding SVPA detainees together with criminal inmates] was a *written* policy," and that the link between constitutional injury and official policy was "straightforward." (AOB 22.) This assertion completely ignores the crucial fact that the policies identified by Benitez within his TAC ***specifically prohibit*** housing SVPA detainees together with criminal inmates. (*See* ER 58.) The District Court properly took judicial notice of the existence of the policies referred to in the TAC and correctly noted that such policies expressly contradict allegations within the TAC. *See Branch v. Tunnell,* 14 F.3d 449, 453 (9th Cir. 1994) *overruled on other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002)(court may consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading" without converting a 12(b)(6) motion into a motion for summary judgment). Benitez's

[1] The Opening Brief argues that the "Orange County is notorious for systematically violating its inmates' rights" (AOB at 5) and references a Report by the ACLU and various state court cases regarding the OCJ's program of jailhouse informants. (AOB at 5 fn. 2.) However, such references are completely irrelevant to the present litigation as Benitez does not claim that his rights were violated by jail informants. Furthermore, the cited California Court of Appeal cases are neither binding nor persuasive authority and the ACLU Report is not part of the record.

allegations of unconstitutional conditions of confinement due to an official policy or practice were correctly discarded by the District Court as mere legal conclusions not entitled to the presumption of truth.[2] *Ashcroft v. Iqbal,* 556 U.S. 662 (2009); *see also Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981), *cert. denied*, 454 U.S. 1031 (1981) (the Court does not "necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations").

B. The Opening Brief's Alternative Argument That Benitez Was Subject To Unconstitutional Unwritten Policies Must Be Rejected As It Was Raised For the First Time On Appeal And Is Unsupported By The Allegations Within The TAC.

Perhaps recognizing that he identified no unconstitutional policies in the TAC, Benitez alternatively argues ***for the first time on appeal*** that the TAC should have survived dismissal because "Benitez plausibly alleged that he was held [in unconstitutional conditions] according to an unwritten custom or practice." (AOB at 15.) The Court should reject this argument because it was not raised with the

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[2]While Benitez does allege that other "similarly situated" SVPA detainees were housed in a similar manner, the TAC contains no facts establishing how Benitez knew this to be true. The TAC does allege that another detainee awaiting SVPA adjudication (Douglas Mackenzie) was housed with criminal inmates. (See ER 71, ¶ 16.) However, the TAC does not indicate whether Mackenzie had completed his criminal sentence at the time, i.e., whether Mackenzie was still serving his criminal sentence when he was housed with criminal inmates. *Id.*

District Court. In the words of the Opening Brief, arguments not raised in the District Court will not be considered for the first time on appeal. *In re Mortg. Elec. Registration Sys., Inc.,* 754 F.3d 772, 780 (9th Cir. 2014) (AOB at 18.)

Moreover, the TAC expressly contradicts Benitez's argument that there existed any unwritten policies governing SVP housing. In the TAC, Benitez alleges that he was housed "in accordance with Defendant's polices as outlined within the JOM [Jails Operations Manual]." (ER 71 ¶ 8.) Again, the only JOM policies in the record expressly ***prohibited*** Benitez from being housed with the criminal population, and further establish that, due to his status as an SVPA detainee, Benitez was given additional privileges not afforded to criminal inmates. (ER 58-62.)

Benitez argues that the policies he identified were "completely new" and do not disprove the existence of a previous unwritten unconstitutional policy. (AOB at 23.) This is unsupported and irrelevant. In order to survive a Motion to Dismiss, Benitez carries the burden to identify specific policies or customs which caused the alleged constitutional injury. *Connick v. Thompson,* 563 U.S. 51, 60 (2011). Benitez repeatedly failed to do so and the District Court correctly dismissed the TAC because Benitez identified polices which undisputedly forbade the conditions of confinement he alleged. (*See* ER 64.) Benitez now argues for the first time on appeal that there must have been a prior unwritten policy which

contradicted the written policy in the record and mandated the unconstitutional conditions alleged in the TAC. (AOB at 23.) In essence, Benitez asks this Court to infer unconstitutional conduct from policies which explicitly forbid it. Such an argument is an affront to well established case law and flips the pleading standard on its head.

Benitez also argues that he was entitled to be housed separately from criminal inmates. However, Benitez's belated argument on appeal that there must have been unwritten policies which caused his alleged unconstitutional co-mingling with criminal inmates is without merit and must be rejected; such an argument expressly contradict Benitez's TAC, which alleges that his treatment at the OCJ was due to a ***written policy.*** (Compare AOB 23, arguing that the Benitez had alleged that he was "held according to an unwritten custom or practice" with ER 71 ¶ 8, the actual TAC, which alleges that Benitez was housed pursuant to "policies outlined in the JOM.")

C. Benitez Was Not Subject To Unconstitutional Conditions Of Confinement Merely Because Conditions At The Jail Differed From Conditions At Coalinga Hospital.

In general, restrictions or conditions on an SVPA detainee's confinement do not violate due process so long as they are "reasonably related to a legitimate governmental objective. . . ." *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)

(footnote omitted); *see also Jones v. Blanas*, 393 F.3d at 931 ("[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.")(quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)) (quotation marks omitted). Civil detainees may be confined to County jails while awaiting SVPA adjudication (California Penal Code § 4000) so long as they are not subjected to conditions of confinement which amount to punishment. *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004). The United States Supreme Court has also upheld the constitutionality of housing individuals who have been adjudicated SVPs within prison facilities, in segregated housing. *Seling v. Young*, 531 U.S. 250, 261 (2001).

Benitez alleges unconstitutional conditions of confinement because he was subject to approximately 82 "restrictions" within the Jail which were "more restrictive" than the conditions at Coalinga State Hospital. (AOB at 17.) These "restrictions" include such things as failure of the Jail to provide a large-screen TV for sports and movies (ER 74), Benitez being called an "inmate" by staff (*id.*), and a lack of access to video game consoles (ER 72).

Benitez also incorrectly argues that ***any difference*** between conditions at Coalinga State Hospital and the Jail is *per se* punitive and, therefore, evidence of unconstitutional conditions of confinement. As Sheriff Hutchens argued in her

Motion to Dismiss the TAC (ER 40), restrictions upon an SVPA detainee in a County jail are incidental to the confinement and not "punitive" in nature. [3]

Benitez's argument has already been rejected by a number of Courts. In *Jones v. Blanas*, *supra*, the Court held that SVPA detainees may be constitutionally detained within a county jail. *Jones*, *supra,* 393 F.3d at 932 (rejecting *Lynch v. Baxley*, 744 F.2d 1452 (11th Cir.1984), an Eleventh Circuit case that held civil detainees may not be confined in jail at all). S*ee also, Rainwater v. McGinniss*, 2012 WL 3308894 (E.D. Cal. 2012)(holding that "a jail cannot cease to become a jail when SVP detainees are housed therein, and plaintiff does not assert a viable claim by demanding better and differentiated treatment in every respect of his housing.") Moreover, in *Munoz v. Kolender*, 208 F.Supp.2d 1125, 1147 (S.D. Cal. 2002), the Court noted that none of the conditions of confinement listed by plaintiff (which are similar to the ones listed by Benitez) are enough to state a claim under the 14th Amendment. The *Munoz* Court noted that purpose of court-ordered transfers to County Jail was to permit participation in the judicial process, not to punish. *Id.* As in *Munoz*, each of the 82 restrictions listed by Benitez unquestionably serve the legitimate penological interests implicated by the housing

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[3] The Opening Brief incorrectly states that "Sheriff Hutchens made no attempt at such a showing and thus waived this argument on appeal. (AOB at 18.) However, Defendant Hutchens raised this argument in her Motion to Dismiss Third Amended Complaint. *See* ER 49:6-18.

of SVPs in a county jail environment and therefore do not amount to punishment. *See also, Hallstrom v. Garden City*, 991 F.2d 1473, 1484–85 (9th Cir.1993)(citing maintenance of jail security and "the effective management of the detention facility" as legitimate, non-punitive governmental interests). Put simply, none of Benitez's 82 cited "restrictions" rise to the level of a constitutional violation.

II. BENITEZ'S CLAIM AGAINST HUTCHENS IN HER PERSONAL CAPACITY IS NOT PROPERLY BEFORE THIS COURT BECAUSE DEFENDANT HUTCHENS WAS NEVER SERVED IN HER INDIVIDUAL CAPACITY AND THEREFORE THE COURTS HAVE NO JURISDICTION.

There is no procedural requirement as important as service of process; without it, there is no jurisdiction. It is that simple. Sheriff Hutchens was never served in her personal capacity and, throughout this litigation, has never appeared in her personal capacity. The Opening Brief acknowledges that Sheriff Hutchens explicitly and repeatedly made it clear that she was responding to the TAC in her official capacity only and *not* in her individual capacity. (*See* AOB at 37.)

The District Court overlooked the lack of jurisdiction and, *assuming jurisdiction arguendo,* dismissed Benitez's personal capacity claim for failure to state a viable claim. On appeal, Benitez claims that Sheriff Hutchens was properly served in her individual capacity, despite clear evidence in the record to the

contrary. (*See* AOB at 38; ER 101.) In the alternative, Benitez implores the Court to ignore lack of service simply because Benitez was a *pro se* litigant and Sheriff Hutchens had notice of the lawsuit once she was served in her official capacity. (AOB 38-39.) In effect, Benitez asks that the Court ignore the distinction between an individual capacity claim and an official capacity claim. Benitez's argument is without merit and advocates a dangerous precedent.

A. **Service Of The TAC On Sheriff Hutchens In Her Official Capacity Is Insufficient To Establish Jurisdiction Over Sheriff Hutchens In Her Individual Capacity.**

Regarding service on Sheriff Hutchens in her individual capacity, the Opening Brief first claims that that "[t]he U.S. Marshal served [Sheriff Hutchens] on behalf of Benitez in accordance with state law." (AOB 38.) This contention is blatantly false as Benitez's own the citation to the record expressly shows that Sheriff Hutchens was served in her "Official Capacity" only. (*See* ER 101.)

It is well settled that although an official capacity and individual capacity claims may name the same person, they are actually claims against different Defendants. The real party in interest in an official capacity suit is the governmental entity and not the named official; an individual capacity suit is against the individual herself. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Benitez is well aware of this distinction, as his Opening Brief now names current

Sheriff Don Barnes as a Defendant in his official capacity because "Barnes succeeded Sheriff Hutchens while this appeal was pending." (AOB at 18 fn. 10.)

Despite acknowledging the important legal and practical difference between individual and official capacity claims, the Opening Brief attempts to conflate the two and asserts that failure to serve Sheriff Hutchens in her individual capacity was nothing more than a "technical defect" because "Hutchens is in the end only one natural person." (AOB at 39.) To the extent that Benitez is arguing that serving Sheriff Hutchens in her official capacity confers jurisdiction over her in her individual capacity, such an argument has been roundly rejected by the Courts. *See, e.g., Hutchinson v. United States*, 677 F.2d 1322, 1328 (9th Cir. 1982)(holding that unless an official is served as an individual under Rule 4, the court is without jurisdiction to render personal judgment against the official); *see also, Micklus v. Carlson*, 632 F.2d 227, 240 (3d Cir. 1980)(rejecting plaintiff's argument that "once [the official] was properly served in his official capacity, he was properly before the court in both individual and official capacities").

B. Benitez's Total Failure To Serve Sheriff Hutchens In Her Individual Capacity Is Not A Mere "Technical Defect".

The Opening Brief argues that the Court should overlook any "defects" and construe FRCP Rule 4 liberally and uphold service due to Benitez's status as a p*ro se* litigant. (AOB 39.) However, *pro se* litigants are required to abide by the rules

of the court in which the litigation proceeds, including the Federal Rules of Civil Procedure. *See e.g. King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir.1987); *Carter v. Comm'r of Internal Revenue*, 784 F.2d 1006, 1008 (9th Cir.1986).

Rule 4 of the Federal Rules of Civil Procedure requires personal service of the summons and complaint upon each individual defendant. Without personal service in accordance with Rule 4, the district court is without jurisdiction to render a personal judgment against a defendant. *Royal Lace Paper Works v. Pest-Guard Products*, *Inc*., 240 F.2d 814, 816 (5th Cir. 1957). As stated clearly in *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982):

> ***Neither actual notice***, nor simply naming the person in the caption of the complaint, will subject defendants to personal jurisdiction if service was not made in substantial compliance with Rule 4. Serving an entity…will not automatically confer personal jurisdiction over individual defendants in any capacity. (Internal citations omitted, emphasis added.)

Benitez's citation to *Borzeka v. Heckler*, 739 F.2d 444, 447 (9th Cir. 1984) is inapposite because this is not a case where service was attempted but incomplete due to some defect. Rather, the record is clear that Hutchens was only ever served in her official capacity and that Benitez was repeatedly advised of that fact. In *Borzeka,* the appellant was "verbally advised by the lower court that he could not

deliver the summons and complaint himself and that United States Marshal Service would not deliver the documents." *Id.* at 446. Appellant then attempted service via certified mail. *Id.* In contrast, here, Benitez sued Sheriff Hutchens in her official and individual capacities. While being repeatedly reminded that service had only been effected on Sheriff Hutchens in her official capacity, Benitez chose to do nothing at all. Now, years afterwards on appeal, Benitez cannot argue that there was a "technical defect" in service because no service was ever attempted on Sheriff Hutchens in her individual capacity.

Moreover, contrary to Benitez's assertion that he meets all elements for upholding defective service listed in *Borzeka*, it is obvious that even if *Borzeka,* was applicable (and it is not), service should not be upheld in this case. First, Sheriff Hutchens would face substantial prejudice if she is now dragged into the litigation in her personal capacity at this late date, more than seven years after Benitez's TAC was filed. Moreover, Benitez had no justifiable excuse for failing to serve Sheriff Hutchens in her individual capacity, as it is undisputed that Sheriff Hutchens disclaimed individual service, including on her Motion to Dismiss (AOB at 39). At any time during the seven years of litigation in this case, Benitez could have, but did not request that the U.S. Marshal's Office serve Sheriff Hutchens in her individual capacity. Finally, Benitez would suffer no prejudice if the

individual capacity claim was dismissed as the individual capacity claim is functionally identical to his official capacity claim (and both are without merit.)

The law and the record are clear: Because Sheriff Hutchens was never served in her individual capacity, this Court is without jurisdiction to hear Benitez's arguments regarding his individual capacity claim against her.

III. THE DISTRICT COURT CORRECTLY DISMISSED BENITEZ'S PERSONAL CAPACITY CLAIM.

Even if it can be argued that the District Court should not have ignored the failure to serve Sheriff Hutchens, its analysis that the TAC failed to state a viable personal capacity claim against Sheriff Hutchens was correct.

A. Benitez Fails To Allege Any Facts Which Suggest That Sheriff Hutchens Was Personally Involved In The Alleged Constitutional Violations.

A county official sued in her individual capacity may be held liable as a supervisor under § 1983 if there exists either (1) personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. 42 U.S.C.A. § 1983; *King v. Cty. of Los Angeles*, 885 F.3d 548 (9th Cir. 2018). Government officials may not be held liable for the unconstitutional conduct of their

subordinates under a theory of *respondeat superior*. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

Here, it is undisputed that the TAC contains no allegations which plausibly suggest that Sheriff Hutchens personally participated in any of the conduct that Benitez alleges was a violation of his constitutional rights. Instead, Benitez argues on appeal that Sheriff Hutchens may be held liable in her individual capacity because she was "in charge of the policies that governed the conditions in which Benitez was held." (AOB 31.) There is an obvious problem with this assertion. As stated above, the only policies identified in the TAC ***expressly contradict*** Benitez's allegations of unconstitutional conditions of confinement. (*See* ER 64-68.) Simply put, Benitez has failed to plausibly allege that Sheriff Hutchens "created, promulgated, advanced, implemented, managed" or was in some other way responsible for an unconstitutional policy or practice (AOB 30) because Benitez did not identify such a policy or practice.

Moreover, Benitez failed to show that Sheriff Hutchens personally caused or directed the alleged constitutional violations. Benitez's reliance on *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1077 (9th Cir. 2012) is misplaced and, in fact, shows why individual liability does not exist here. In *OSU Student Alliance,* the court specifically found the defendant official liable in his individual capacity because he enforced an unconstitutional policy and "did so directly, ***not through***

subordinates, and therefore violated the First Amendment….through his own individual actions." *Id. at 1069-1070* (Emphasis added.) The *OSU Student Alliance* defendant further "related the existence of the [unconstitutional] policy" directly to the plaintiff and explained its application. *Id. at* 1077. The plaintiffs in *OSU Student Alliance* alleged not only the existence of specific policy, but also that the defendant personally and purposefully enforced the policy against them in an unconstitutional manner. *Id.* In contrast, here, Benitez's TAC identified ***no unconstitutional policy*** (the allegation that an unwritten policy existed was made for the first time on appeal). Moreover, according to Benitez, each alleged unconstitutional act was done by either unidentified agents of Sheriff Hutchens or people alleged to have been in contact with agents of Sheriff Hutchens; there is no allegation of direct participation by Sheriff Hutchens herself. (*See e.g.,* ER 76 ¶¶ 18, 19.)

The Opening Brief states that Sheriff Hutchens's "name and letterhead grace the only jail housing policies in the record." (AOB at 2.) This statement is true but conveniently ignores the fact that the only policies on record ***expressly forbid*** the type of conditions of confinement that are the basis of Benitez's TAC. Benitez cannot plead Sheriff Hutchens' individual liability using allegations of impropriety by employees or references to a so-called "unwritten policy" which is never mentioned in the TAC.

Notwithstanding the lack of jurisdiction over Sheriff Hutchens in her individual capacity, the District Court correctly dismissed Benitez's individual capacity claim with prejudice.

IV. **CONCLUSION.**

The District Court granted Benitez many opportunities to state a valid claim against Defendant Hutchens. Despite obtaining leave to amend by explicitly representing to the Court that he would identify specific unconstitutional policies if given the opportunity, Benitez's TAC failed to do so. Instead, the only policies referenced within the TAC expressly contradict Benitez's allegations that he was housed with the criminal population while awaiting SVPA adjudication. Benitez has thus failed to plausibly allege that his conditions of confinement were the result of a policy or practice by the County of Orange. Benitez has further failed to serve Defendant Hutchens in her individual capacity and has not alleged any basis for his individual capacity claims against Sheriff Hutchens.

For the reasons set forth above, the judgment of the District Court is correct and should be affirmed in its entirety.

Respectfully submitted,

Dated: December 26, 2019 LAWRENCE BEACH ALLEN & CHOI, PC

/s/ Haiyang Allen Li
Haiyang Allen Li

STATEMENT OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(a)(7)(B), I certify that the Defendants-Appellees' Answering Brief is double spaced, proportionately spaced (Times New Roman), has a type face of 14 points and contains approximately 4,875 words.

Respectfully submitted,

Dated: December 26, 2019 LAWRENCE BEACH ALLEN & CHOI, PC

/s/ Haiyang Allen Li
Haiyang Allen Li

STATEMENT OF RELATED CASES

(9th Circuit Rule 28-2.6)

In accordance with Ninth Circuit Rule 28-2.6, Defendants-Appellees hereby state there are no related cases pending before this Court.

Respectfully submitted,

Dated: December 26, 2019 LAWRENCE BEACH ALLEN & CHOI, PC

/s/ Haiyang Allen Li
Haiyang Allen Li

ADDENDUM OF PERTINENT STATUTE AND RULES

(9th Circuit Rule 28-2.7)

Pursuant to Ninth Circuit Rule 28-2.7, Defendants-Appellee sets forth the following addendum to the Replacement Answering Brief.

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Welfare & Institutions Code § 6600

As used in this article, the following terms have the following meanings:

(a)(1) "Sexually violent predator" means a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.

(2) For purposes of this subdivision any of the following shall be considered a conviction for a sexually violent offense:

(A) A prior or current conviction that resulted in a determinate prison sentence for an offense described in subdivision (b).

(B) A conviction for an offense described in subdivision (b) that was committed prior to July 1, 1977, and that resulted in an indeterminate prison sentence.

(C) A prior conviction in another jurisdiction for an offense that includes all of the elements of an offense described in subdivision (b).

(D) A conviction for an offense under a predecessor statute that includes all of the elements of an offense described in subdivision (b).

(E) A prior conviction for which the inmate received a grant of probation for an offense described in subdivision (b).

(F) A prior finding of not guilty by reason of insanity for an offense

described in subdivision (b).

(G) A conviction resulting in a finding that the person was a mentally disordered sex offender.

(H) A prior conviction for an offense described in subdivision (b) for which the person was committed to the Division of Juvenile Facilities, Department of Corrections and Rehabilitation pursuant to Section 1731.5.

(I) A prior conviction for an offense described in subdivision (b) that resulted in an indeterminate prison sentence.

(3) Conviction of one or more of the crimes enumerated in this section shall constitute evidence that may support a court or jury determination that a person is a sexually violent predator, but shall not be the sole basis for the determination. The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals. Jurors shall be admonished that they may not find a person a sexually violent predator based on prior offenses absent relevant evidence of a currently diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually

violent criminal behavior.

(4) The provisions of this section shall apply to any person against whom proceedings were initiated for commitment as a sexually violent predator on or after January 1, 1996.

(b) "Sexually violent offense" means the following acts when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as defined in subdivision (a): a felony violation of Section 261, 262, 264.1, 269, 286, 287, 288, 288.5, or 289 of, or former Section 288a of, the Penal Code, or any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to commit a violation of Section 261, 262, 264.1, 286, 287, 288, or 289 of, or former Section 288a of, the Penal Code.

(c) "Diagnosed mental disorder" includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.

(d) "Danger to the health and safety of others" does not require proof of a recent overt act while the offender is in custody.

(e) “Predatory” means an act is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization.

(f) “Recent overt act” means any criminal act that manifests a likelihood that the actor may engage in sexually violent predatory criminal behavior.

(g) Notwithstanding any other provision of law and for purposes of this section, a prior juvenile adjudication of a sexually violent offense may constitute a prior conviction for which the person received a determinate term if all of the following apply:

(1) The juvenile was 16 years of age or older at the time he or she committed the prior offense.

(2) The prior offense is a sexually violent offense as specified in subdivision (b).

(3) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 because of the person's commission of the offense giving rise to the juvenile court adjudication.

(4) The juvenile was committed to the Division of Juvenile Facilities, Department of Corrections and Rehabilitation for the sexually violent offense.

(h) A minor adjudged a ward of the court for commission of an offense that

is defined as a sexually violent offense shall be entitled to specific treatment as a sexual offender. The failure of a minor to receive that treatment shall not constitute a defense or bar to a determination that any person is a sexually violent predator within the meaning of this article.

Fed. R. Civ. P. 4(e)

(e) Serving an Individual Within a Judicial District of the United States.

Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Cal. Penal Code § 4000

The common jails in the several counties of this state are kept by the sheriffs of the counties in which they are respectively situated, and are used as follows:

1. For the detention of persons committed in order to secure their attendance as witnesses in criminal cases;

2. For the detention of persons charged with crime and committed for trial;

3. For the confinement of persons committed for contempt, or upon civil process, or by other authority of law;

4. For the confinement of persons sentenced to imprisonment therein upon a conviction for crime.

5. For the confinement of persons pursuant to subdivision (b) of Section 3454 for a violation of the terms and conditions of their postrelease community supervision.

CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2019, I electronically filed the foregoing **APPELLEE'S REPLACEMENT ANSWERING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case will be served by the appellate CM/ECF system.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 26, 2019 at Santa Ana, California.

/s/ Haiyang Allen Li

Haiyang Allen Li