APPENDIX

A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17527
Non-Argument Calendar

D.C. Docket No. 1:13-cv-23077-WJZ

SEAN P. REILLY,

Plaintiff - Appellant,

versus

GUELSY M. HERRERA,
individual capacity,
ERIC ABRAHAMSEN,
individual capacity,
JENNIFER CHRISTINE DAVIS,
JIM H. DAVIS,
CARMEN I. GONZALEZ, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

(April 3, 2018)

Before MARCUS, JORDAN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Sean P. Reilly, proceeding *pro se*, appeals from the district court's denial of three post-judgment motions—a Rule 60(b) motion, a Rule 59(e) motion, and a motion for reconsideration—in his 42 U.S.C. § 1983 action, alleging, in part, that the defendants violated his Fourth and Fourteenth Amendment rights by conspiring to unlawfully seize him and send him to jail for a supervised release violation. Because Mr. Reilly's post-judgment motions essentially challenge our ruling in his previous appeal, his claim is barred by the law-of-the-case doctrine. Accordingly, we affirm.

I

Mr. Reilly originally filed his civil rights complaint in 2013. The district court dismissed the claim *sua sponte*, ruling (as relevant here) that the favorable-termination requirement of *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), barred the complaint because it challenged the revocation of Mr. Reilly's supervised release. Mr. Reilly appealed the dismissal, arguing that a concurring opinion in *Spencer v. Kemna*, 523 U.S. 1, 18–21 (1998) (Souter, J., concurring), provides an exception to *Heck* that allows him to challenge his supervised release revocation under § 1983 because he is no longer in custody pursuant to the challenged conviction. We affirmed the dismissal of his complaint, concluding that Mr.

Reilly's claim falls squarely within the purview of *Heck*. *See Reilly v. Herrera*, 622 F. App'x 832, 834–35 (11th Cir. 2015) ("*Reilly I*").

Mr. Reilly filed a petition for rehearing *en banc*, arguing that the panel erred in finding that he did nothing to challenge his supervised release revocation while he was in custody. He asserted—for the first time—that he had appealed his revocation in state court. Mr. Reilly also claimed that the panel's decision conflicted with the "authoritative decisions of other United States Courts of Appeal" that have addressed *Heck*'s favorable-termination bar. We denied his petition in September of 2015.

In 2016, Mr. Reilly filed the first two motions at issue in the present appeal—a Rule 60(b) motion in May and a self-styled Rule 59(e) motion in July—challenging our rulings in *Reilly I*. Mr. Reilly argued that relief under Rule 60(b) was appropriate because he could show sufficiently extraordinary circumstances to justify relief. He further asserted that we erred in declining to apply Justice Souter's proposed *Heck* exception (as set out in his *Spencer* concurrence) to his claim because he had appealed his supervised release revocation in state court and had sought state post-conviction relief—the same arguments he raised in petitioning for rehearing *en banc*. Mr. Reilly also argued that our decision in *Reilly I* created a "*de facto* exhaustion requirement" for § 1983 plaintiffs with no clear standard or guidance for how the requirement should be applied.

The district court denied Mr. Reilly's motions because they were untimely and did not state a cognizable basis upon which relief could be granted from our rulings. Mr. Reilly then moved for a certificate of appealability, which the district court construed as a notice of appeal. He also moved for reconsideration of the denial of his motions – the third motion at issue in this appeal. The district court denied his motion for reconsideration because the notice of appeal divested it of jurisdiction over matters involved on appeal. Thereafter, Mr. Reilly filed a formal notice of appeal.

On appeal, Mr. Reilly reasserts the arguments he raised in *Reilly I* and in his petition for rehearing *en banc*. He also argues that his post-judgment motions were not untimely because they were filed within a reasonable time after the Supreme Court denied his petition for certiorari. He further contends that the district court abused its discretion in denying the post-judgment motions because he established that we relied on erroneous facts when we decided *Reilly I*. Finally, he argues that the district court erred when it failed to consider his motion for reconsideration because it misconstrued his application for a certificate of appealability as a notice of appeal.

In addition, Mr. Reilly has moved for us to certify a question of law to the United States Supreme Court pursuant to 28 U.S.C. § 1254(2). He essentially

requests that we "certify" a condensed version of the arguments he raises on appeal directly to the Supreme Court.

II

We review the denial of post-judgment motions under Rules 60(b) and 59(e) for an abuse of discretion. *See Bender v. Mazda Motor Corp.*, 657 F.3d 1200, 1202 (11th Cir. 2011); *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1317 (11th Cir. 2013). We likewise review a district court's ruling on a motion for reconsideration for abuse of discretion. *See Richardson v. Johnson*, 598 F.3d 734, 740 (11th Cir. 2010). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1309 (11th Cir. 2001). As a general matter, we may affirm on any ground supported by the record. *See LeCroy v. United States*, 739 F.3d 1297, 1312 (11th Cir. 2014).

III

To the extent that Mr. Reilly seeks to challenge our decision in *Reilly I*, his contention is barred by the law-of-the-case doctrine. *See Mega Life & Health Ins. Co.*, 585 F. 3d at 1405. Under this doctrine, findings of fact and conclusions of law by an appellate court generally are binding in all later proceedings in the same case in the trial court or on a later appeal. *See Mega Life & Health Ins. Co. v.*

Pieniozek, 585 F.3d 1399, 1405 (11th Cir. 2009). The doctrine, however, does not bar reconsideration of an issue if (1) a later trial produces substantially different evidence; (2) controlling authority has since made a contrary decision of law applicable to that issue; or (3) the prior decision was clearly erroneous and would work a manifest injustice. *Id.*

Mr. Reilly does not allege that a later trial produced substantially different evidence or that any new controlling authority applies to his claim. As such, neither exception to the doctrine applies. Instead, the thrust of Mr. Reilly's current argument is that he would have been entitled to relief under *Spencer* but for our erroneous finding that he failed to pursue state court remedies.

Under § 1983, a person acting under color of state law may be held liable for causing the deprivation of "any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. A § 1983 suit for damages must be dismissed, however, if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487. In a concurring opinion in *Spencer*, Justice Souter discussed the implications of *Heck* and opined that a "former prisoner, no longer 'in custody'" should be allowed to "bring a § 1983 claim establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Spencer*, 523 U.S. at 21 (Souter,

J., concurring). To date, however, neither the Supreme Court nor this Court has applied the exception described in Justice Souter's concurrence in a published opinion.

Justice Souter's concurring opinion in *Spencer* did not overturn *Heck*'s bar on § 1983 actions challenging the validity of the claimant's conviction or sentence. *See Heck*, 512 U.S. at 487. Therefore, even if we erred in finding that Mr. Reilly had not pursued his state court remedies, our ruling was not clearly erroneous and did not result in manifest injustice because *Heck* is still controlling law. *See Mega Life & Health Ins. Co.*, 585 F.3d at 1405. Mr. Reilly, therefore, does not satisfy the third exception to the law-of-the-case doctrine.

In addition, Mr. Reilly's argument that he diligently pursued and exhausted state court remedies challenging his revocation of supervised release fails because he did not assert it in the initial brief in *Reilly I*. In fact, he did not raise this argument until he filed a petition for rehearing *en banc* in *Reilly I*. We have repeatedly declined to consider issues raised for the first time in a petition for rehearing. *See, e.g., United States v. Levy*, 416 F.3d 1273, 1275 (11th Cir. 2005); *United States v. Martinez*, 96 F.3d 473, 475 (11th Cir. 1996); *Scott v. Singletary*, 38 F.3d 1547, 1552 (11th Cir. 1994); *Dunkins v. Thigpen*, 854 F.2d 394, 399 (11th Cir. 1988); *Holley v. Seminole County Sch. Dist.*, 763 F.2d 399, 400–01 (11th Cir. 1985). Mr. Reilly cannot now seek to press an issue that he failed to properly

present in his first appeal, and which we have already declined to hear in his petition for rehearing *en banc*.

Taking each of Mr. Reilly's remaining arguments in turn, the district court did not abuse its discretion when it concluded that the post-judgment motions were untimely. Rule 59(e) allows a party to move to alter or amend judgment in a civil case no later than 28 days after entry of the judgment. *See* Fed. R. Civ. P. 59(e). "A court must not extend the time to act under Rule [59(e)]." Fed. R. Civ. P. 6(b)(2). *See also Green v. DEA*, 606 F.3d 1296, 1300 (11th Cir. 2010) (finding that Rule 6(b)(2) prohibits extending the time to file a Rule 59(e) motion, even where the district court erroneously grants a defendant an extension of time to file a motion for reconsideration). However, when a Rule 59(e) motion is filed more than 28 days after the entry of judgment and the grounds stated would be a basis for Rule 60(b) relief, the district court may treat it as a motion for relief from judgment under Rule 60(b). *See Nisson v. Lundy*, 975 F. 2d 802, 806 (11th Cir. 1992).

Under Rule 60(b), a court may relieve a party of a final order or judgment for (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that could not previously have been discovered with reasonable diligence; (3) fraud, misrepresentation, or misconduct by an opposing party; (4) a void judgment; (5) a judgment that has been satisfied, released, or discharged, that is

based on an earlier judgment that has been reversed or vacated, or that it would no longer be equitable to apply prospectively; or (6) any other reason that justifies relief. *See* Fed. R. Civ. P. 60(b). A motion under Rule 60(b) must be made "within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c).

Mr. Reilly's post-judgment motions were filed more than two years after the district court dismissed his § 1983 action—well beyond the 28-day limitation imposed under Rule 59(e) and the one-year time limit under Rule 60(b)(1), (2), and (3). Mr. Reilly also specifically invoked Rule 60(b)(6), a subsection which provides that the court may relieve a party from a final order based on "any other reason that justifies relief." Fed. R. Civ. P. 60(6)(6). Although this catch-all provision has no strict time limitation, it is intended "only for extraordinary circumstances." *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1288 (11th Cir. 2000). Thus, "[Mr. Reilly] must do more than show that a grant of [his] motion might have been warranted. [He] must demonstrate a justification for relief so compelling that the district court was *required* to grant [his] motion." *Rice v. Ford Motor Co.*, 88 F.3d 914, 919 (11th Cir. 1996).

Even assuming that Mr. Reilly filed his Rule 60(b)(6) motion within a "reasonable time," no extraordinary circumstances cause us to conclude that the

district court abused its discretion. In addition, Mr. Reilly's post-judgment motions challenged our factual findings and legal conclusions in *Reilly I*—but neither Rule 60(b) nor Rule 59(e) grants a district court the authority to alter, amend, or grant relief from an appellate court's rulings. The district court's denials of Mr. Reilly's post-judgment motions were not an abuse of discretion because it lacked the authority to grant Mr. Reilly the relief he sought. *See Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1309 (11th Cir. 2001).

Likewise, the district court did not err when it interpreted Mr. Reilly's mislabeled "application for a certificate of appealability" as a notice of appeal because the motion, in effect, was cognizable as a formal notice of his intent to request review of the district court's order. "*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Hughes v. Lott*, 350 F. 3d 1157, 1160 (11th Cir. 2003) (quotation omitted). Here, Mr. Reilly's application for a certificate of appealability clearly expressed an intent to "appeal issues in the . . . [district court's] denial of the Rule 60(b)(6) and Rule 59(e) motions." D.E. 51 at 1. Therefore, the district court properly construed the application as a notice of appealability and appropriately determined that it lacked jurisdiction to consider Mr. Reilly's subsequent motion for reconsideration.

Finally, as to Mr. Reilly's request that we certify a question to the Supreme Court of the United States, we decline to do so. Certification of questions pursuant to 28 U.S.C.A. § 1254 rests in the discretion of the Courts of Appeal and cannot be invoked by a party as a matter of right. *See* 28 U.S.C.A. § 1254. *See also Rutherford v. American Medical Ass'n*, 379 F.2d 641, 644–45 (7th Cir. 1967) (declining to certify plaintiffs' questions where the disposition of the appeal left plaintiffs with the right to seek review by petition to the Supreme Court for a writ of certiorari). Moreover, "the Supreme Court has discouraged the use of this certification procedure and has accepted certified questions only four times in the last 60 years." *In re Hill*, 777 F.3d 1214, 1225 (11th Cir. 2015). In fact, the Supreme Court has admonished that the certification procedure is proper only in "rare instances." *See id.* (citing to *Wisniewski v. United States,* 353 U.S. 901, 902 (1957)) (quotation omitted).

Although Mr. Reilly contends that his appeal raises questions of great public importance, the issues he requests that we certify amount to a slightly condensed version of the arguments we reject in this opinion. Therefore, certification is not appropriate.

IV

The district court did not abuse its discretion when it denied Mr. Reilly's post-judgment motions. Accordingly, we affirm.

AFFIRMED.

APPENDIX

B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-23077-CIV-ZLOCH

SEAN P. REILLY,

Plaintiff,

vs.

ORDER

GUELSY M. HERRERA, et al.,

Defendants.
_____/

THIS MATTER is before the Court upon Plaintiff's Motion For Relief From Judgment Pursuant To Federal Rule Of Civil Procedure, Rule 60(b)(6) (DE 41), Motion To Alter Or Amend Judgment Pursuant To Fed. R. Civ. P. 59(e) (DE 45), Motion To Hear And Rule (DE 46), and Motion Requesting Magistrate To Hold An Evidentiary Hearing On Pending Motions (DE 48). The Court has carefully reviewed said Motions, the entire court file and is otherwise fully advised in the premises.

In the above-styled cause, by its Order (DE 26), the Court approved, adopted, and ratified the Report Of Magistrate Judge Patrick A. White (DE 17). Magistrate Judge White recommended that Plaintiff's Complaint (DE 1) pursuant to 42 U.S.C. § 1983 be dismissed for failure to state a claim. Consistent with that recommendation, the Court dismissed Plaintiff's Complaint (DE 1). See DE 26. Plaintiff then filed a Notice Of Appeal (DE 30). The United States Court of Appeals for the Eleventh Circuit affirmed this Court's Order (DE 26) dismissing Plaintiff's Complaint (DE 1). See DE 39. Plaintiff then sought certiorari review with the United States Supreme Court, which that Court denied. See DE 40.

In his current series of Motions, Plaintiff contends that the

Eleventh Circuit's Mandate (DE 39) is incorrect, and that this Court should vacate its prior Order (DE 26) dismissing Plaintiff's Complaint (DE 1). Plaintiff has not stated a cognizable basis upon which this Court could grant the relief sought. None of the series of instant Motions, essentially seeking additional review of issues already determined by this Court and the Eleventh Circuit, is timely or in any other way appropriate at this juncture.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED that Plaintiff's Motion For Relief From Judgment Pursuant To Federal Rule Of Civil Procedure, Rule 60(b)(6) (DE 41), Motion To Alter Or Amend Judgment Pursuant To Fed. R. Civ. P. 59(e) (DE 45), Motion To Hear And Rule (DE 46), and Motion Requesting Magistrate To Hold An Evidentiary Hearing On Pending Motions (DE 48) be and the same are hereby **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 29th day of November, 2016.

WILLIAM J. ZLOCH
United States District Judge

Copies Furnished:

All Counsel of Record

Sean P. Reilly, PRO SE
N21886
South Bay Correctional Facility
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P.O. Box 7171
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APPENDIX

C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17527-FF

SEAN P. REILLY,

Plaintiff - Appellant,

versus

GUELSY M. HERRERA,
individual capacity,
ERIC ABRAHAMSEN,
individual capacity,
JENNIFER CHRISTINE DAVIS,
JIM H. DAVIS,
CARMEN I. GONZALEZ, et al.,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before MARCUS, JORDAN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42

APPENDIX

D

SEAN P. REILLY, Plaintiff - Appellant, versus GUELSY HERRERA, individual capacity, ERIC ABRAHAMSEN, individual capacity, JENNIFER CHRISTINE DAVIS, JIM H. DAVIS, CARMEN I. GONZALEZ, et. al., Defendants - Appellees.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
622 Fed. Appx. 832; 2015 U.S. App. LEXIS 12912
No. 14-11360-DD Non-Argument Calendar
July 27, 2015, Decided

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Subsequent History

US Supreme Court certiorari denied by Reilly v. Herrera, 136 S. Ct. 1464, 194 L. Ed. 2d 563, 2016 U.S. LEXIS 2129 (U.S., 2016)

Editorial Information: Prior History

Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 1:13-cv-23077-WJZ.Reilly v. Herrera, 2014 U.S. Dist. LEXIS 186668 (S.D. Fla., Feb. 26, 2014)

Disposition:
AFFIRMED.

Counsel Sean P. Reilly, Plaintiff - Appellant, Pro se, Bethesda, MD.
For Sean P. Reilly, Plaintiff - Appellant: Leon County Jail Warden, Leon County Jail - Inmate Trust Fund, Tallahassee, FL.
For GUELSY M. HERRERA, individual capacity, ERIC ABRAHAMSEN, individual capacity, Jennifer Christine Davis, Jim H. Davis, Carmen I. Gonzalez, Defendants - Appellees: Pam Bondi, Attorney General's Office, Miami, FL.

Judges: Before TJOFLAT, JORDAN and JULIE CARNES, Circuit Judges.

Opinion

{622 Fed. Appx. 832} PER CURIAM:

Mr. Sean P. Reilly, proceeding *pro se*, appeals the district court's *sua sponte* dismissal of his civil rights complaint for failure **{622 Fed. Appx. 833}** to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). Because we agree that *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), bars Mr. Reilly's claims, we affirm.

I

On August 26, 2013, Mr. Reilly filed an action under 42 U.S.C. § 1983 against probation officers

Guelsy Herrera and Carmen Gonzalez, private citizens Jim and Jennifer Davis, State Attorney William Meggs, and Assistant State Attorney Eric Abrahamsen. He alleged that Ms. Davis harbored animosity toward him due to a prior failed relationship between them, and Ms. Davis and her father conspired with the other named defendants to send him to jail for a supervised release violation. Mr. Reilly claimed that the defendants' unlawful actions led to the revocation of his supervised release and a sentence of imprisonment of 60 months, in violation of his Fourth Amendment rights. Mr. Reilly was released from prison on the supervised release violation on December 1, 2013, after serving three years, and is currently serving a new sentence for an unrelated crime in the Leon County Jail.

Pursuant to § 1915(e)(2)(B)(ii), the district court dismissed Mr. Reilly's complaint, ruling that *Heck's* favorable-termination requirement barred the complaint because it challenged the revocation of supervised release. The district court also ruled that the defendants either acted within the scope of their authority and were entitled to absolute immunity, or did not act under color of state law. Further, the district court concluded that Mr. Reilly did not raise a cognizable conspiracy claim because he failed to show the existence of an agreement between the defendants and improperly brought a § 1983 action for state tort claims.

On appeal, Mr. Reilly asserts that the district court erred in its determination that *Heck* barred his § 1983 action because an alleged Fourth Amendment violation would not necessarily impugn the validity of his conviction. Mr. Reilly also argues that *Spencer v. Kemna*, 523 U.S. 1, 18-21, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998), provides an exception to *Heck* that allows him to challenge his supervised release revocation under § 1983 without satisfying the favorable-termination requirement because he is no longer "in custody," and therefore not entitled to seek habeas relief. Finally, Mr. Reilly raises several other arguments regarding the merits of the district court's order.

II

A district court may dismiss a case filed *in forma pauperis* at any time if it "fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the prisoner can prove no set of facts in support of his claim which would entitle him to relief." *Harmon v. Berry*, 728 F.2d 1407, 1409 (11th Cir. 1984) (citations omitted). "Pro se pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam) (citations omitted). "We review a district court's *sua sponte* dismissal of a suit for failure to state a claim for relief under [§ 1915] *de novo.*" *Harden v. Pataki*, 320 F.3d 1289, 1292 (11th Cir. 2003) (citations omitted).

III

Heck generally bars any challenges to a previous conviction unless the conviction "has been reversed on direct appeal, expunged **{622 Fed. Appx. 834}** by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 487. This is known as the "favorable-termination" requirement.

In a concurring opinion in *Spencer*, Justice Souter, joined by three other Justices, suggested an exception to *Heck*'s general rule. The exception would allow plaintiffs who are no longer "in custody" to bring actions under § 1983 without having to satisfy the favorable-termination requirement. *See Spencer*, 523 U.S. at 20-21. As he had earlier explained in his *Heck* concurrence:

> If [those] individuals (people who were merely fined, for example, or who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences), like state prisoners, were required to

> show the prior invalidation of their convictions or sentences in order to obtain § 1983 damages for unconstitutional conviction or imprisonment, the result would be to deny any federal forum for claiming a deprivation of federal rights to those who cannot first obtain a favorable state ruling. The reason, of course, is that individuals not "in custody" cannot invoke federal habeas jurisdiction, the only statutory mechanism besides § 1983 by which individuals may sue state officials in federal court for violating federal rights. That would be an untoward result.*Heck*, 512 U.S. at 500 (Souter, J., concurring).

Drawing from Justice Souter's concurrence in *Spencer*, Mr. Reilly argues that *Heck* does not apply to his case because he has been released from custody and cannot pursue post-conviction relief, thereby making *Heck*'s favorable-termination requirement irrelevant. *See Spencer*, 523 U.S. at 21 (Souter, J., concurring) ("[A] former prisoner, no longer "in custody," may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy.").

We have not explicitly ruled on whether a plaintiff may bring a § 1983 action in the event that habeas relief is unavailable, even if success on the merits would call into question the validity of a conviction. We decline to do so here because Mr. Reilly's case does not fit within the framework of scenarios mentioned in Justice Souter's *Spencer* concurrence.

During his three-year term of imprisonment, Mr. Reilly had ample time to pursue an appeal or other post-conviction remedies on the supervised release revocation, yet he did not avail himself of any of them. We doubt that Justice Souter intended to propose a broad exception to include prisoners who had the opportunity to challenge their underlying convictions but failed to do so. *See Guerrero v. Gates*, 442 F.3d 697, 705 (9th Cir. 2003) (ruling that a defendant "cannot now use his 'failure timely to pursue habeas remedies' as a shield against the implications of *Heck*."). Consequently, we conclude that Justice Souter's proposed *Heck* exception in *Spencer*, even if adopted, does not apply to Mr. Reilly's case.

Additionally, Mr. Reilly's claim that the allegations in the complaint did not necessarily impugn the validity of his revocation fails. Mr. Reilly alleged that he never violated the conditions of his supervised release, and that the defendants engaged in a conspiracy to fabricate an arrest warrant and unlawfully seize him out of spite. If the defendants did engage in such actions, **{622 Fed. Appx. 835}** then the arrest would be unlawful and the revocation itself would be invalid. Such a claim falls squarely within the purview of *Heck*. Therefore, we affirm the district court's dismissal of Mr. Reilly's complaint.

IV

For the foregoing reasons, we affirm the district court's dismissal of Mr. Reilly's complaint.

AFFIRMED.

APPENDIX

E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-23077-CIV-ZLOCH

SEAN REILLY,

Plaintiff,

vs.

FINAL ORDER OF DISMISSAL

GUELSY HERRERA et al.,

Defendants.
_____/

THIS MATTER is before the Court upon the Report On Memorandum For TRO Or Preliminary Injunction (DE 11) and the Report of Magistrate Judge (DE 17) filed herein by United States Magistrate Judge Patrick A. White. The Court has conducted a de novo review of the entire record herein and is otherwise fully advised in the premises.

In his Report On Memorandum For TRO Or Preliminary Injunction (DE 11), Magistrate Judge White recommends that Plaintiff's Motion For A Preliminary Injunction & A Temporary Restraining Order (DE 7) be denied. Further, by his subsequent Report of Magistrate Judge (DE 17), Magistrate Judge White recommends that the above styled cause be dismissed pursuant to 28 U.S.C. § 1915 (e)(2)(B)(ii) for failure to state a claim. The Court adopts Magistrate Judge White's reasoning and conclusions.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Objections (DE 13 & 25) to Magistrate Judge White's Reports be and the same are hereby **OVERRULED**;

2. The Report On Memorandum For TRO Or Preliminary Injunction (DE 11) and the Report of Magistrate Judge (DE 17) filed herein by United States Magistrate Judge Patrick A. White be and the same are hereby approved, adopted and ratified by the Court;

3. Plaintiff's Motion For A Preliminary Injunction & A Temporary Restraining Order (DE 7) be and the same is hereby **DENIED**;

4. The above-styled cause be and the same is hereby **DISMISSED** pursuant to 28 U.S.C. § 1915 (e)(2)(B)(ii) for failure to state a claim; and

5. To the extent not otherwise disposed of herein, all pending Motions be and the same are hereby **DENIED** as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 26th day of February, 2014.

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

The Honorable Patrick A. White
United States Magistrate Judge

Sean P. Reilly, PRO SE
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APPENDIX

F

SEAN REILLY, Plaintiff, v. GUELSY HERRERA, et al., Defendants.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
2014 U.S. Dist. LEXIS 186692
CASE NO.13-23077-CIV-ZLOCH
January 14, 2014, Decided
January 14, 2014, Entered on Docket

Editorial Information: Subsequent History

Adopted by, Dismissed by **Reilly** v. **Herrera**, 2014 U.S. Dist. LEXIS 186668 (S.D. Fla., Feb. 26, 2014)

Editorial Information: Prior History

Reilly v. **Herrera**, 2013 U.S. Dist. LEXIS 190770 (S.D. Fla., Sept. 17, 2013)

Counsel Sean P. **Reilly**, Plaintiff, Pro se, Crawfordville, FL USA.
Judges: Patrick A. White, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: Patrick A. White

Opinion

REPORT OF MAGISTRATE JUDGE

I. Introduction

Sean **Reilly** filed a pro se civil rights complaint on September 11, 2013, (DE#1) while confined at the Apalachee Correctional Institution.1

This Cause is before the Court for screening of the complaint (DE#1) pursuant to § 1915.

II. Analysis

A. Law for Screening

As amended, 28 U.S.C. § 1915 reads in pertinent part as follows:

> Sec. 1915 Proceedings in Forma Pauperis
>
> * * *
>
> (e)(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that -
>
> * * *
>
> (B) the action or appeal -

* * *

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief from a defendant who is immune from such relief.

A complaint is "frivolous under section 1915(e) "where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); Bilal v. Driver, 251 F.3d 1346, 1349 (11 Cir.), cert. denied, 534 U.S. 1044, 122 S. Ct. 624, 151 L. Ed. 2d 545 (2001). Dismissals on this ground should only be ordered when the legal theories are "indisputably meritless," id., 490 U.S. at 327, or when the claims rely on factual allegations that are "clearly baseless." Denton v. Hernandez, 504 U.S. 25, 31, 112 S. Ct. 1728, 118 L. Ed. 2d 340 (1992). Dismissals for failure to state a claim are governed by the same standard as Federal Rule of Civil Procedure 12(b)(6). Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). In order to state a claim, a plaintiff must show that conduct under color of state law, complained of in the civil rights suit, violated the plaintiff's rights, privileges, or immunities under the Constitution or laws of the United States. Arrington v. Cobb County, 139 F.3d 865, 872 (11 Cir. 1998).

Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1979) (quoting Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972)). The allegations of the complaint are taken as true and are construed in the light most favorable to Plaintiff. Davis v. Monroe County Bd. Of Educ., 120 F.3d 1390, 1393 (11 Cir. 1997).

To determine whether a complaint fails to state a claim upon which relief can be granted, the Court must engage in a two-step inquiry. First, the Court must identify the allegations in the complaint that are not entitled to the assumption of truth. Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)(citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). These include "legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action [that are] supported by mere conclusory statements." Id. Second, the Court must determine whether the complaint states a plausible claim for relief. Id. This is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. The plaintiff is required to plead facts that show more than the "mere possibility of misconduct." Id. The Court must review the factual allegations in the complaint "to determine if they plausibly suggest an entitlement to relief." Id. When faced with alternative explanations for the alleged misconduct, the Court may exercise its judgment in determining whether plaintiff's proffered conclusion is the most plausible or whether it is more likely that no misconduct occurred. Id.

B. Facts of the complaint

The plaintiff names **Herrera** and Gonzalez, Senior Probation Officers, William Meggs, Leon County State Attorney and Eric Abrahamsen, Assistant State Attorney for Leon County, Jennifer Davis, a private attorney in Miami, and Davis's father Jim, a private citizen in Tallahassee.

The plaintiff contends the above named defendants are liable for engaging in a conspiracy to have him sent to prison on a supervised release violation. He alleges **Herrera** fabricated an affidavit of violation of probation. He claims he was seized in Miami, Florida on September 14, 2010, with an arrest warrant issued by **Herrera** without reasonable suspicion he had violated his community control,

in violation of his right to be free from unlawful seizure.

C. Analysis

Many of the defendants are immune from suits for civil damages or do not act under color of state law.

The plaintiff's claim for damages for any acts that State Attorney Meggs and Assistant State Attorney Abrahamsen committed within the scope of their official duties is subject to dismissal, because the state prosecutor and his assistants are absolutely immune from a § 1983 suit for damages. Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).

Davis is a private attorney and does not act under color of state law and is entitled to immunity, as is Davis's father Jim, who is a private citizen. See: Polk County, supra.

Probation Officers **Herrera** and Gonzalez acting within the scope of their authority are entitled to immunity. A probation officer's actions intimately associated with the judicial phase of a criminal proceeding are immune from a suit for civil damages. See: Hughes v Chesser, 731 F.2d 1489, 1490 (11 Cir. 1984). The fact that the plaintiff attempts to say that the arrest warrant was false is a conclusory statement with no supporting facts, See: Twombly, supra, and does not invalidate the defendant's immunity.

Conspiracy

The plaintiff attempts to circumvent the immunity of these defendants by alleging they acted outside the scope of their authority and engaged in a conspiracy to see him imprisoned. This conspiracy allegedly resulted from a failed relationship between himself and Davis, a private attorney, who wished to retaliate against him. The conspiracy was then joined by the attorney's father, the Leon County State Attorney, Assistant State Attorney, and two probation officers.

The plaintiff has failed to raise a cognizable constitutional conspiracy claim against these defendants. The Supreme Court has recognized that a conspiracy to violate constitutional rights states a claim in a federal civil rights action. Dennis v. Sparks, 449 U.S. 24, 29, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980); Adickes v. Kress & Co., 398 U.S. 144, 152, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). However, to establish a prima facie case of conspiracy to violate an inmate's constitutional rights, a plaintiff must demonstrate the defendants 'reached an understanding' to deny the plaintiff his or her rights [and] prove an actionable wrong to support the conspiracy.'" Bailey v. Board of County Commissioners, 956 F.2d 1112, 1122 (11 Cir.) (quoting Bendiburg v. Dempsey, 909 F.2d 463, 468 (11 Cir.), cert. denied, 500 U.S. 932, 111 S. Ct. 2053, 114 L. Ed. 2d 459 (1991)), cert. denied, 506 U.S. 832, 113 S. Ct. 98, 121 L. Ed. 2d 58 (1992). Further, a complaint raising only conclusory, vague, general allegations of conspiracy may be dismissed. Fullman v. Graddick, 739 F.2d 553, 556-57 (11 Cir. 1984)("In conspiracy cases, a defendant must be informed of the nature of the conspiracy which is alleged. It is not enough to simply aver in the complaint that a conspiracy existed.").

The plaintiff has failed to state a claim for relief with regard to his allegation of a conspiracy among the above-named defendants, because he fails to sufficiently allege the existence of an agreement or mutual understanding among these individuals, and because his complaint is only conclusory and unsupported by specific factual allegations to show the existence of any conspiracy.

Additionally, the plaintiff is essentially contesting the validity of the warrant and his probation violation. These claims, in essence, challenge aspects of his criminal proceedings, and are therefore not cognizable in a civil rights case. A habeas corpus action is the proper vehicle for raising claims that may affect the fact or duration of a criminal defendant's confinement. Preiser v. Rodriguez, 411 U.S. 475, 488-490, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973). If a prisoner brings such claims in a civil rights action, the complaint must be dismissed unless and until the reason for the confinement has been

reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus. Heck v. Humphrey, 512 U.S. 477, 486-487, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). Heck applies both to actions for monetary damages and for injunctive relief. Wilkinson v Dotson 544 U.S. 74, 125 S. Ct. 1242, 161 L. Ed. 2d 253 (2005).

The plaintiff's claims of negligence and emotional distress are state tort claims and a § 1983 complaint is not the proper vehicle. Generally, if all federal claims are eliminated before trial, the pendent state claims should be dismissed. United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). When all federal claims are resolved, it is neither unfair nor inconvenient to the parties to require the plaintiff to pursue his state law claims in state court. Fiscus v. City of Roswell, 832 F. Supp. 1558, 1564-65 (N.D.Ga. 1993)(court declined to retain supplemental jurisdiction over state law claims of intentional infliction of emotional distress, false imprisonment and false arrest after summary judgment for defendants on federal claims of Fourth, Eighth and Fourteenth Amendment violations). See also Brown v. Masonry Products, Inc., 874 F.2d 1476 (11 Cir. 1989), cert. denied, 493 U.S. 1087, 110 S. Ct. 1153, 107 L. Ed. 2d 1057 (1990) (after summary judgment for defendants on all federal claims, the district court was well within its discretion to dismiss state claims because of lack of pendent jurisdiction). These alleged state tort claims should therefore be dismissed.

Lastly, the plaintiff attempts to name Probation Officers Gonzalez and Meggs in their official capacity for promulgating inadequate training policy. Meggs is a policy maker for Leon County, outside the jurisdiction of the Southern District. Further both officers should be dismissed as the plaintiff has failed to demonstrate inadequate training policies.

It is therefore recommended that this complaint be dismissed for failure to state a claim.

III. Recommendation

It is recommended as follows:

1. The complaint be dismissed for failure to state a claim pursuant to 28 U.S.C. 1915(e)(2)(B)(ii).
2. This case should be closed.

Objections to this Report shall be filed within fourteen days following receipt.

Dated this 14th day of January, 2014.

/s/ Patrick A. White

UNITED STATES MAGISTRATE JUDGE

Footnotes

1

He has since been transferred to the Leon County Jail